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VIA E-MAIL

The ABA Commission on the Future of Legal Services
American Bar Association
Office of the President
321 N. Clark Street
Chicago, IL 60610
IPcomments@americanbar.org

Re: The ABA Commission on the Future of Legal Services: Issues Paper Regarding Alternative Business Structures

Dear Commission Members:

I write to respond to the request of the ABA Commission on the Future of Legal Services (the "Commission") for comments on its Issues Paper Regarding Alternative Business Structures (the "Issues Paper"). Zuckerman Spaeder LLP has a substantial practice representing clients in legal ethics matters. The legal ethics practice includes providing advice to clients on the subject of Alternative Business Structures ("ABS") under Rule 5.4(b) of the D.C. Rules of Professional Conduct (the "D.C. Rules"), as well as on other arrangements by which legal, law-related and non-legal services may be provided by the same or related firms. Our practice in this area has given us direct experience with ABS and related structures for providing law, law-related and non-legal services to clients, and structuring financial support for professional service firms. In the course of our practice, we have also become familiar with the issues related to Multidisciplinary Practice ("MDP"). I have been a part of the legal ethics practice at Zuckerman Spaeder for over 15 years and had extensive experience representing lawyers and law firms in ethics and litigation matters at my prior firm. This letter is not an in-depth commentary on the issues raised in the Issues Paper, but instead, makes some more general observations, which may provide a different, experience-based perspective on these issues.

One overall observation concerns the traditional objection from the established bar that ABS and MDP threaten harm to the legal profession and degradation of adherence to ethical standards. Our experience with D.C. Rule 5.4 as well as ABS and MDP in other jurisdictions suggests that these risks are overstated. To be sure, some lawyers will engage in ethically challenged conduct under an ABS model, just as some lawyers who practice under the traditional

model engage in such conduct. But the evidence simply does not support the proposition that they will do so more frequently under an ABS model or in an MDP. We are not aware of any disciplinary proceeding arising out of a firm organized under D.C. Rule 5.4 or any other form of ABS in D.C. that is attributable to the fact that lawyers and nonlawyers jointly own a law firm or other legal services provider. Our experience is consistent with the experience in countries that have adopted ABS (demonstrating a lower complaint rate against lawyers practicing in an ABS compared to in traditional structures for legal services, *Alternative Business Structures: Frequently Asked Questions,* Nat'l Org. of Bar Counsel at 7 http://www.nobc.org/docs/Global%20Resources/Alternate.Business.Structures.FAQ.Final.pdf).

Further, the opposition to ABS and MDP in this country significantly and unjustifiably discounts the degree to which relaxing restrictions on ABS and MDP would provide benefits to clients, and not only to those clients captured under the rubric of "increasing access to justice," who are less able to afford traditional legal services. Our firm has advised many parties who historically have or currently are exploring ways to take advantage of the flexibility provided by D.C. Rule 5.4 to provide combined legal and non-legal services and significant benefits to clients through integrated service offerings, efficiency and cost savings.

I. ABS Have Been Allowed for Decades in D.C., Without Any Evidence of Harm.

As the Issues Paper notes, D.C. is one of only two jurisdictions in the United States that permits ABS. On the spectrum of ABS models described in the Issues Paper, D.C.'s model falls into the second category: "Entities that deliver only legal services and in which individuals who are not licensed lawyers are permitted to actively participate in the entities' operations and . . . where there is no limitation on the percentage of nonlawyer ownership." Issues Paper at 3; *see also* D.C. Rule 5.4(b) ("[a] lawyer may practice law in a partnership or other form of organization in which a financial interest is held or managerial authority is exercised by an individual nonlawyer who performs professional services which assist the organization in providing legal services to clients . . . ."). While allowing ABS, D.C. Rule 5.4(b) prohibits a broad scope of MDP by requiring that an ABS firm have "as its sole purpose providing legal services to clients." The Rule also requires that all nonlawyer owners in an ABS firm abide by the D.C. Rules and that all lawyer owners be responsible for their conduct.

D.C. Rule 5.4(b) is not a recent phenomenon – it has been in effect since January 1, 1991. Prior to that time, lawyers in D.C. were prohibited from practicing law in a partnership with nonlawyers. *See* DR 3-103 ("A lawyer shall not form a partnership with a non-lawyer if any of the activities of the partnership consist of the practice of law."). D.C. was the first jurisdiction in the United States to allow ABS. The only other jurisdiction, Washington State, amended its Rules of Professional Conduct in 2015 to allow a very limited version of ABS. D.C. also was a

pioneer on ABS when compared to jurisdictions outside of the United States. Of the three international jurisdictions on which the Issues Paper focuses, Australia, England and Wales, none allowed ABS until 2001 and 2007.

We regularly advise lawyers and nonlawyers about the requirements for ABS under D.C. Rule 5.4(b) and have done so since the Rule was enacted. In addition to ethics counseling, we also provide business law services related to D.C. Rule 5.4(b), such as structuring law firms with lawyers and nonlawyers. We have formed law firms on behalf of clients who were drawn to D.C. solely because they were able to partner with nonlawyers under D.C. Rule 5.4(b). The Issues Paper states that "very few ABS firms have organized" in D.C. Issues Paper at 3. There is no requirement that a firm relying on D.C. Rule 5.4(b) register or otherwise report on its formation or operations, so there is no centralized source for determining the extent to which ABS firms have been organized in D.C. We do know that a number of firms in D.C. have senior non-legal personnel who play significant roles in providing a suite of legal and law-related services to clients. A limited survey of D.C. firms that we conducted in response to the Issues Paper revealed that many D.C. firms continue to list nonlawyer professionals such as lobbyists, economists, and financial consultants on their websites and to provide such services in conjunction with (and at times separately from) legal services. We know that we are regularly retained by clients to evaluate and if appropriate establish ABS firms in D.C., and the frequency with which we are approached by such clients only has increased in recent years. Based on our experience, and the nonpublic nature of ABS firms in D.C., we believe that "very few" may well understate the number of ABS firms in D.C.[1]

The Issues Paper, by focusing on firms that have organized under D.C. Rule 5.4(b), may take too narrow a view to assess the impact of ABS. As some commentators have observed, it is possible to employ non-legal professionals, compensate them in ways that are similar to compensation of owners of the firm (including bonuses based on the firm's performance), and to give them a significant say in the management of the firm, without actually giving them an equity stake in the firm. Indeed, these kinds of workarounds are sometimes pursued because of the constraints identified in the Issues Paper that limit the utility of D.C. Rule 5.4(b). These alternatives have the potential to raise many of the same concerns expressed about ABS, however, and provide another experience point to evaluate whether ABS and its cognates threaten the "core values" of the legal profession.

[1] Whatever the extent to which firms are formed under D.C. Rule 5.4(b), there are impediments to reliance on the Rule, including those summarized in the Issues Paper. One such impediment is that a lawyer who is a member of the D.C. Bar may not be able to participate with non-lawyer owners under D.C. Rule 5.4 if he is also a member of the bar of another state that does not permit non-lawyer ownership. It should be noted, however, that a lawyer who is a member of another bar may in some circumstances be a member of a D.C. ABS firm if he primarily practices in D.C. and not in the other jurisdiction. ABA Formal Opinion 91-360.

D.C. Rule 5.4(b) has been in effect for over two decades. In our practice advising clients on ABS and related structures, we have not observed any ethics violations among those lawyers who have elected to practice in ABS. To the contrary, our ABS clients, whether seeking counsel on the requirements of D.C. Rule 5.4(b) or their other ethical obligations, strive to follow the Rules and comport with their ethical obligations. As the Issues Paper acknowledges (at 13), lawyers in traditional law firms are subject to many pressures – including the pressure to make a profit – that could lead them to ethical misconduct. Opponents of ABS envision a parade of horribles that is purely hypothetical and not based on the facts. Indeed, we are not aware of any disciplinary action ever being taken in D.C. against a nonlawyer or lawyer because he was pressured into ethics violations by his nonlawyer partners in an ABS firm operating under D.C. Rule 5.4(b). In short, the apparent belief expressed by those opposing ABS – that lawyers will be disproportionately prone to violate their ethical obligations if they have a non-lawyer partner – is unfounded.

II. There Is No Evidence of Harm from ABS in Jurisdictions Outside of the United States.

The Commission reviewed studies analyzing ABS in Australia, England and Wales and concluded: "There is currently no evidence that ABS has caused harm." Issues Paper at 12. Indeed, "the Commission found no studies indicating the erosion of core values or harm to clients in jurisdictions that permit ABS." *Id.* The Committee's conclusion is entirely consistent with our experience advising clients regarding ABS under Rule 5.4(b).

All three of these international jurisdictions allow MDP. The ABS models in these jurisdictions fall into the third and fourth ABS categories described in the Issues Paper. *See* Issues Paper at 3. These jurisdictions differ from D.C. in that they permit MDP, a more expansive ABS model that allows for the provision of other services in addition to legal services. Examples of MDP in the United Kingdom include a firm that provides commercial and corporate legal services, wealth management services for individuals, town planning and real estate services. *See* "Does the UK know something we don't about alternative business structures?" ABA Journal (Jan. 1, 2015) at 7. Yet another example is a strategic consulting firm whose management team includes lawyers, as well as economists and communications professionals. *Id.* Despite the varied professionals who practice together in MDP firms, there is no evidence that the lawyers in these firms adhere to their ethical obligations with any less rigor than lawyers in traditional law firms. *See* Issues Paper at 12.

There are of course many regulated industries where ethical and legal obligations must be observed even in the face of the profit motive and outside ownership; it is not clear why lawyers would be uniquely unable to harmonize these potentially conflicting forces. The experience with ABS and MDP in Australia, England and Wales demonstrates that both forms can be

implemented in a manner that prioritizes compliance with ethical duties. As described in the Issues Paper, jurisdictions in Australia require that a "legal practitioner director" be responsible for the management of legal services and that all ABS and MDP firms maintain "'appropriate management systems,' to enable the provision of legal services in accordance with the professional and other obligations of lawyers.'" *Id.* at 5. England and Wales have required similar controls and procedures for ABS and MDP firms. *Id.* D.C. did the same by requiring all nonlawyers to comply with the D.C. Rules of Professional Conduct. *See* D.C. Rule 5.4(b).

III. Allowing ABS Can Create Significant Benefits for Clients

The discussion of the benefits of ABS typically focuses on access to justice, making the point that outside investment funds from nonlawyers may enable the provision of more efficient and less costly legal services to a broader consumer client base. Many of the alternative legal service providers and law firms that have navigated their way around ABS restrictions in this country – like Legal Zoom or Jacoby & Meyers – have focused on this segment of the market. One should not, however, ignore the many ways in which larger and more sophisticated consumers of legal services could benefit from ABS.

Currently, outside the United States, professional services and consulting firms offer a broad array of legal and non-legal services to large global clients. The ability to practice together allows lawyers and nonlawyers to offer combined services throughout the world on matters that can be handled and managed in a systematic way that is often not provided by the typical global law firm. These services include, for example, global corporate secretarial services to multinational companies that include advising on filing and managing corporate formalities, adhering to fiduciary duties and complying with other regulatory obligations. Because of U.S. restrictions on ABS and MDP, these services typically stop at the border, which is a significant detriment to clients. Likewise corporate compliance services under the FCPA or other international regulatory and ethical regimes can be provided very efficiently by integrated legal and consulting practices in ways that the typical U.S. law firm does not provide. Immigration and human resources needs of large businesses are often handled by integrated legal and non-legal practices. Because of ABS and MDP restrictions, clients in the U.S. (or the U.S. parts of global clients) are denied the opportunity to receive these services.

Zuckerman Spaeder has worked with an MDP firm in the United Kingdom that provides legal services along with risk consulting and cybersecurity services and has witnessed first-hand the comprehensive services that it is able to provide to its clients. As Alex Roy, the head of development and research of the Legal Services Board of England and Wales has said about the United Kingdom's shift to MDP: "The U.K. reforms are about putting the customer at the heart of the relationship, and about prioritizing the needs of the customer. The reforms allow for people who have different skills and expertise to be brought together—people who typically

aren't brought together—in order to meet customer needs, and in order to improve access to justice and to legal services." *See* "Does the UK know something we don't about alternative business structures?" ABA Journal (Jan. 1, 2015) at 7. Just like in the United Kingdom, allowing MDP in the United States would help to better serve and prioritize clients' needs. It goes without saying that, in the absence of any evidence of harm to professional ethics, what is the best for clients should be the ultimate concern in deciding whether to allow lawyers to practice in ABS or MDP.

The narrative that association with non-legal business owners is a one way street to disregard of client interests also ignores the possibility that lawyers may learn something from their nonlawyer partners. Many global non-legal professional firms have robust quality and risk management systems that ensure compliance with professional norms and the delivery of a consistent high standard of professional service. While the quality and risk management systems of such firms may differ from those commonly used in the legal profession, in our experience, the systems in many other non-legal professional firms are far more robust than those typically found in law firms. Lawyers who practice in a MDP with such non-lawyer professionals may have much to learn about quality and risk management that will benefit their clients. The bias against MDP actually may prevent an enhancement of the way in which lawyers in an MDP firm monitor and manage compliance with their ethical obligations, as well as the quality of their legal services.

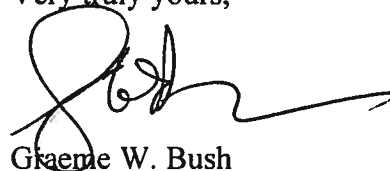
IV. The Forms of ABS

The Issue Paper asks for comment on five forms of ABS. Our experience leads to the conclusion that forms that permit MDP and maximize the availability of capital afford the most promising vehicles for delivering the significant benefits of ABS to clients. Some form of regulation that creates a structure to ensure compliance with legal ethical obligations is necessary. The regulatory regime in Australia, which requires ABS firms to implement "appropriate management systems" to ensure compliance with professional ethical norms is one way to achieve this result. With such systems in place, it is not necessary to restrict ABS firms to the provision of legal services or to restrict non-lawyer ownership to a minority position, as outlined in Option 1. Although one can imagine less involvement in the delivery of legal services from outside passive investors, active non-lawyer owners are more likely to provide the kinds of benefits to clients that come from fertilizing the traditional legal model with structured and robust quality and risk management systems that are designed to ensure the delivery of legal services to clients that meet a consistent and high standard. Limiting ABS solely to the provision of legal services is less likely to deliver the maximum benefit to clients that comes from an MDP firm that can provide integrated legal and non-legal services to clients. Accordingly, Options 3, 4 and 5 are preferable to Options 1 and 2.

V. Conclusion

The Commission's decision to revisit the question of ABS on behalf of the ABA is timely and welcome. Degradation of the core values of the legal profession from ABS has not occurred in the years since it has been available on a widespread basis in other countries, and it has not occurred under the more limited approach reflected in D.C. Rule 5.4(b). It is time to move beyond the unsupported fears and implement an ABS and MDP alternative that enables U.S. lawyers to deliver significant benefits to clients – including corporate and business clients – from quality controlled, efficient and less expensive legal services integrated with non-legal professional services.

Very truly yours,



Graeme W. Bush