



Alternative Business Structures and the Legal Profession in Ontario

Submitted to: The Law Society of Upper Canada

Submitted by: The Ontario Bar Association



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BAR ASSOCIATION
A Branch of the
Canadian Bar Association

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Introduction

The Ontario Bar Association (“OBA”) is pleased to provide this update on our consideration of the issues raised by the Law Society of Upper Canada in “Alternative Business Structures and the Legal Profession in Ontario: A Discussion Paper” (the “Discussion Paper”).

OBA members across Ontario share a fundamental interest in promoting a strong and relevant bar that allows lawyers to best serve our clients and the public. Lawyers recognize the commercial realities of their clients and are motivated to provide service responsive to those realities. Engaging on issues about the ability of lawyers to deliver high quality, cost-effective legal services through the structures in which we practice is one way we are bringing the broad experiences of our membership to improve challenges facing the profession.

The Law Society has indicated that it is engaged in a process to fully consider alternative business structures (“ABS”), and that its Discussion Paper constitutes a step in that process. The OBA looks forward to continuing to contribute to the Law Society’s consideration of these issues, and more broadly to assisting the profession innovate and adapt to the needs of clients and the public.

The OBA

Established in 1907, the OBA is the largest voluntary legal association in Ontario and represents 16,000 lawyers, judges, law professors and law students. OBA members are on the frontlines of our justice system in virtually every area of law and in every type of practice, and provide legal services to a broad range of clients in every region of the province. In addition to providing legal education for its members, the OBA is pleased to assist government, the Law Society, and other decision-makers with dozens of policy initiatives each year – in the interests of the public, the profession, and the administration of justice.

Background

The Law Society Discussion Paper

In September 2012, a Law Society ABS Working Group began reviewing regulatory models in other jurisdictions with a focus on business structures and alternative means of legal services delivery. The focus of the Law Society ABS Working Group was whether emerging regulatory models could improve the delivery of legal services in Ontario while protecting clients and the public interest.



In February 2014, Convocation approved a consultation with the profession and other interested stakeholders on the delivery of legal services through four possible options for alternative business structures reform.

In September 2014, the Law Society issued the Discussion Paper outlining the four options to illustrate and initiate discussions about how ABS could be set up and encourage comments about the appropriateness of the ABS model in general for Ontario.

The Discussion Paper indicates that the Law Society is interested in determining whether ABS can:

- facilitate greater flexibility in the delivery of legal services;
- foster innovation in the area; and
- improve access to legal services for consumers.

In terms of understanding why ABS models might be an effective solution to these challenges, the Discussion Paper suggests that Ontario lawyers have had their attempts to innovate hampered or prevented by specific requirements of the current regulatory framework. For example:

- The ability to access new capital for technology is limited by restrictions on ownership of legal services firms, as they cannot bring technology experts in as partners, or raise funds through the capital markets.
- The ability to offer legal services together with other related services is limited by the restrictions on referral fees and fee-sharing, and the requirement to provide legal services through a professional corporation and not any other type of corporation.
- The ability to reward long-serving employees or to retain high-level managers who are not licensed lawyers or paralegals through partnership or ownership is limited by the restrictions on ownership.

The Law Society identifies access, technological, economic and business, professional and ethical, and implementation considerations as helpful to framing the discussion.

The Law Society has indicated it has not yet decided whether ABS should be permitted in Ontario and that it is committed to consulting with the profession before making any such determination.

The OBA Working Group – Composition & Mandate

On a daily basis, OBA members across the province interact directly with members of the public seeking assistance with virtually every kind of legal issue. Many of the issues raised directly or indirectly in the Discussion Paper are of perennial interest to lawyers because they are factors in the fundamental issue of our ability to deliver high quality, cost-effective legal services to the public.



In the fall of 2014, the OBA formed an ABS Working Group (the “Working Group”) in order to provide the considerable expertise of our membership to the Law Society ABS considerations. Although the Discussion Paper referred to only four options, the Working Group included in its discussions an exploration of means to improve access to justice without changing the historical ownership and independence of the legal profession.

The 23 men and women on the working group themselves represent a critical cross-section of the bar. The Working Group is comprised of senior and junior lawyers from managing partners to new calls, practicing as solicitors and barristers in solo, small, medium and large firms, in all 8 judicial regions of the province. More than half of the working group members also sit on OBA section executives in civil litigation, insurance, real property, trusts and estates, corporate counsel, sole small firm and general practice, and family law, as well as the OBA Women’s Law Forum, Equality Committee, and the Pro Bono Subcommittee.

The mandate of the Working Group is to coordinate and conduct outreach to the OBA membership on issues raised by ABS in order to access the broad experiences and views of our membership. The discussion of ABS issues is instructive in delving into the innovations that are already occurring, and those that must be sought in order to meet client needs in timely and cost effective ways. The aim is to facilitate a broad member engagement on ABS and related issues impacting the ways lawyers can address the needs of clients now and in the future.

The OBA Working Group – Approach to Consultations

Based on the Law Society’s definition, the Working Group has considered ABS as alternatives to currently permitted law firm structures. In this regard, the term ABS can refer to both ownership and the services to be provided. An ABS can include non-licensee ownership in an entity providing legal services and/or the provision of non-legal services together with legal services in the same firm or entity.

The above definition suggests that the implementation of ABS would require broad changes to the existing regulatory framework in Ontario in terms of non-lawyer ownership and non-legal services provided. However, at the outset the Working Group raised the possibility that alternative business structures might also be permitted through more targeted changes in the regulatory framework. The Working Group also noted that the above definition excludes new and innovative, non-traditional structures for delivering legal services that are already permitted under the existing framework. Consideration of the latter two categories of innovations raised the comment from some members that ABS seemed to be a solution in search of a problem – at least to the extent that it is viewed at the outset as a necessitating fundamental changes to the existing regulatory framework.

Consequently, the approach adopted by the Working Group was to begin discussions by seeking to clearly identify specific barriers and challenges in the existing regulatory framework for lawyers.



The group has also focused on identifying challenges and opportunities for the future delivery of legal services, and fundamental elements of the lawyer/client relationship that need to be preserved regardless of the structures in which we practice. In short, the Working Group has asked what would be helpful in achieving the goal of better serving our clients and the public, and to facilitate a determination of what changes, if any, are required in the existing regulatory framework. Focusing on these preliminary questions helps avoid assessing potential solutions that are either non-responsive or over-broad in terms of responding to limitations.

Members noted that focusing on the specific barriers and identifying innovative solutions that lawyers can pursue might also be beneficial from a non-regulatory standpoint, in terms of assisting the profession to identify, observe, assess, accept and eventually implement these breakthroughs. This would allow the bar to establish and nurture a collective culture of innovation.

The specific questions the Working Group considered in this initial stage are:

1. What, if anything, in Ontario's current regulatory framework for lawyers is preventing you from practicing law the way you want to, or from addressing unmet legal needs?
2. What changes present, or will present, challenges or opportunities for the future delivery of legal services in your practice area?
3. What are the fundamental elements of the lawyer/client relationship that need to be preserved regardless of the structures through which we practice?

Consideration of these three questions has involved discussions about access to justice, technology, economics, business, professionalism, ethics, and implementation issues.

Key Themes Emerging from Discussions

The OBA recognizes the continuous need for the profession to assess and improve our efforts to serve the public. As the largest voluntary association of lawyers in the province, we are ever seeking to improve the ability of our members to innovate and adapt now and for the future. Among other things, this includes being responsive to evolving client needs, addressing barriers facing those who cannot obtain legal services, and ensuring the public understands the full value lawyers provide so that they can make informed decisions about when to seek assistance from lawyers.



The purpose of this submission is to update the Law Society on the key themes that have emerged at this stage from discussions with a representative cross-section of Ontario lawyers, including the OBA Working Group and a roundtable discussion of OBA Council at the December 2014 meeting.¹

This summary is not intended to constitute a final position or the end of discussions, and accordingly the views expressed have not been formatted into the structure of a final report.

While the Working Group intends to continue engaging our membership on ABS related issues, the feedback from the discussions to date reflect preliminary views from our broad-based decision making council and our most engaged members, and suggests a number of key themes relevant to ABS considerations as they go forward.

Identifying Barriers in the Current Regulatory Framework

During the consultations, members were specifically asked about any challenges they had perceived under the current regulatory framework, or as noted in the Discussion Paper – including limitations on new equity capital for technology, non-lawyer partners, referral fees, and offering legal services with non-legal services.

In the discussions to date, members have not generally reported experiencing barriers as a result of the existing regulatory framework that would prevent them from practicing law in the optimal way or from addressing unmet legal needs (except as noted below with respect to non-voting shares for family members in professional corporations.).

Some members were aware of the argument that an inability to offer an equity stake to non-lawyers in a law practice, especially for non-legal executive positions, could function as a barrier to obtaining the best people. However, members did not report that this feature of the current system had ever limited their firm's choice of non-lawyer employees, even at senior levels. Similarly, no members reported having ever experienced problems rewarding or retaining employees or high-level managers because of the restrictions on ownership.

Members generally expressed a view that the traditional means of financing through an operating line of credit backed by a personal guarantee of the partners functioned sufficiently for their financing needs. More specifically, members did not express any significant interest in raising funds by selling equity in their practice to non-lawyer private investors, either through partnership or capital markets, for technology innovations or otherwise.

¹ OBA Council is the association's governing body comprised of the OBA Board officers and regional directors, other persons elected by and from the OBA membership, chairs from each of the practice law sections and committees, law school faculty and student representatives, the Law Society, local law associations and other legal organizations.



A number of members believed that allowing family members to obtain non-voting shares would better allow lawyers in small and medium sized firms to operate financially viable practices while providing affordable legal services, particularly in smaller practice centres. Many members stated that this could have a very positive impact without engaging ABS related concerns.

Some members expressed the view that the barrier to referral fees was appropriate because it centered any referrals on considerations of competence. Other members were open to discussions within the bar about whether the rule functioned well. Neither group saw this as necessarily connected to ABS.

More broadly, members readily recognized that access to justice issues remain a fundamental concern for lawyers and the public. However, a number of respondents were concerned that the experience from ABS jurisdictions suggests that resulting changes have primarily been in practice areas not experiencing unmet demands for legal services e.g. real estate and personal injury litigation. Members had no reason to expect the interest would be different in Ontario, and were skeptical of claims that ABS would address the most obvious access to justice needs here, such as in family law.

In summary, while lawyers identified many challenges in delivering legal services as described in the next section, they did not generally attribute or associate these with barriers in the existing regulatory framework pertaining to non-lawyer ownership or the delivery of non-legal services.

Challenges or Opportunities for the Future Delivery of Legal Services

The theme of innovation has featured heavily in our members discussions to date. The question is not whether to innovate, but what innovations can and should be achieved, and whether those innovations would require regulatory changes. This includes everything from the sole practitioners who are improving experiences for individuals in their communities, to in-house counsel who are driving, and in some cases leading, changes in the legal services marketplace for outcomes-focused work, risk identification and related management issues for corporate clients. As both lawyers and consumers of legal services, in-house counsel specifically emphasized the urgency of innovation that allows lawyers to respond to corporations, as sophisticated purchasers, who require specialized legal services, flexible fee arrangements, and cost effectiveness in accessing expertise needed for risk mitigation.

Some members expressed the view that optically, ABS could be a symbolic recognition that things are changing and that we need to be flexible and modern in terms of business arrangements. However, many members questioned whether regulatory changes to permit ABS are required to facilitate innovation and modernization. Members noted that there has been increasing use of technology internally and for interacting with clients. Members also noted that non-traditional practices operating within the current regulatory framework are increasingly launching, such as cloud-based collaborative efforts between lawyers and delivery of legal advice alongside non-legal



retail services. In-house counsel advocated for the kinds of positive developments that were taking place in terms of new services, cost delivery models, and options for addressing legal problems in their component parts before effectively combining the products in a comprehensive solution.

Members widely recognized that the public increasingly demands confidence in the value of purchases, including the full value of services provided by lawyers. There were numerous relevant indicators cited, including a general interest in cost savings with cost certainty, services tailored to needs, and a need to better understand the importance of the services that lawyers provide in protecting clients' rights, helping them meet obligations and mitigating risk. Members found it obvious that lawyers should seek to better understand and respond to clients' needs on an ongoing basis.

To the extent that proponents of ABS predict benefits from economies of scale in the delivery of service, it is important to determine whether, and to what extent, these require changes to the regulatory framework. Concern was raised about the large scale delivery of services as limiting practice options for general practitioners in smaller communities. Members stated that general practitioners are often able to provide services that generate little or no profit as an access to justice benefit to their communities. Members are concerned about the disappearance of lawyers who provide complex, non-commoditizable services like criminal and family law with no solution for replacing access to justice in these areas, especially for low to middle income clients.

Members cautioned against any presumption that the more common solicitor services, such as estates or real estate, are simple and don't require the lawyer's expertise and judgment. Members noted that where such services are straight forward, they are already offered at a low cost.

Members recognized the increasing acceptance and use of the internet in obtaining legal services from a lawyer – for example, to gain comfort through a lawyer's website, reviews, or to gain a preliminary understanding of the issues that are relevant to the services that are or may be sought. While technology more broadly plays an important and evolving role in innovation, members expressed the view that it should not be seen as an effective substitute for other important kinds of interactions that clients sometimes rely on, such as being able to visit a local law office.

While members recognize the proliferation of on-line services that may constitute the unauthorized practice of law, there is a concern that this is not a justification for abandoning efforts to regulate the delivery of legal services in the public interest. There is recognition that lawyers need to constantly find ways to best meet client expectations, but that lawyers need to do so in a way that ensures professional standards are achieved.

Members also commented that any growth of unregulated legal services does not necessarily imply that existing regulatory restrictions are unduly constraining innovation, but could indicate instead that the public is being sold services with little or no value albeit at low costs.



Lastly, members noted that even innovation at its broadest, under ABS or the existing regulatory framework, cannot function as a substitute for other necessary elements of a well functioning legal system, such as adequate legal aid funding.

Given the risks identified in our preliminary discussions, members have generally expressed the advisability of identifying specific opportunities for innovation within the existing framework. Members felt that such a tailored approach would strike a better balance between fostering innovation and building upon protections for the public that have been developed over time.

Fundamental Elements of the Lawyer/Client Relationship

Members indicated that lawyers as a group tend to take professional responsibilities seriously for reasons of personal integrity in addition to any form of sanction for breach of the regulatory requirements. In the course of the discussions to date, the Working Group heard many examples of how professional responsibilities are advanced and protected under the current regulatory framework, and the importance of ensuring these are preserved regardless of the structures through which we practice.

Members were aware of competing views expressed by lawyers and legal commentators as to whether the fundamental elements of the lawyer/client relationship can be protected in an ABS permitting regulatory framework. At this time, we have not attempted to draw a conclusion as to whether protections can or cannot be designed, nor to delineate which particular measures should be taken if ABS are permitted. Instead, we review some of the overarching themes received in the comments to date, which point to areas of interest and concern that should be addressed as the consultation proceeds.

A central concern raised by members is the need to avoid conflicts of interest, regardless of the structure through which services are provided. Members believed lawyers as a group have significant experience identifying and avoiding conflicts. Members were aware of efforts in ABS jurisdictions to ensure compliance with professional responsibilities through dedicated compliance roles involving lawyers, but expressed a concern that conflict of interest might be very difficult to identify, particularly as an ABS entity's business operations and investments increase in scope.

Members also noted that if non-lawyer ownership occurs, the regulatory responsibility for compliance with professional standards would not be shared equally amongst lawyers and non-lawyer owners, since only lawyers are accountable to the regulator in terms of their practice license. This calls for caution in transplanting UK and Australian compliance experiences, where government may regulate many aspect of an ABS business, to the self regulated context in Ontario, where a business need have no broader relationship with the Law Society.

Members emphasized many ways in which a lawyer's independence contributed to the lawyer's ability to carry out professional duties to the client. There was a concern that non-lawyer



ownership in an entity could introduce profit incentives on both non-lawyers and lawyers that would put pressure on the ability to meet professional responsibilities. Concerns were also expressed about the potential for broader business interests, which may be permissible and more acute in ABS entities, to conflict with and limit the lawyer's ability to represent the client.

Having said that, members also recognized that in-house counsel across the province have been highly successful in maintaining their professional and ethical responsibilities and dealing with business imperatives as employees of the corporations to whom they provide advice. The Working Group will continue to seek the advice of our in-house counsel members about upholding professional responsibilities in the corporate environment.

Members indicated that a core element of the lawyer-client relationship is a holistic and detailed understanding of the client's needs and circumstances. Any practice structure needs to facilitate the lawyer's ability to thoroughly understand the client's circumstances that may be relevant to the service sought. A concern was raised about the challenges lawyers would face in fulfilling this responsibly if they practice in business models premised on limited time spent with the client.

Members believe that a fundamental element of the lawyer-client relationship is that the lawyer bears ultimate responsibility for ensuring that the client understands the nature of the services provided. Members are concerned about any model that would limit or restrict the ability for the client to understand the scope of advice, or to be responsible for risk of receiving advice or services that do not adequately address their needs.

Members expressed a belief that a significant strength of the current regulatory framework is that it allows a range of practice types to deliver services to the public. Concerns were expressed about the potential for significant reduction in the number of firms offering legal services and the impact on access to justice. In addition to potential conflicts, members are concerned about any reduction in the number service providers, which would result in a reduction of the number of lawyers or firms willing and able to accept unpopular, low-margin or otherwise "difficult" cases.

Members generally expressed concern about reliance on jurisdictions such as the UK and Australia that have had experiences with ABS models. Members felt that the timeframe under which these jurisdictions had experienced changes was too short to conclude that the measures taken to ensure professional responsibilities are protected. Members reiterated the concern that conflict of interest might prove particularly challenging to identify as the potential for conflict increases, and the opportunity for detection decreases. Moreover, although the Working Group's mandate was not to conduct extensive academic research on the experiences in those jurisdictions, there appear to be



at least some reports of concerns with new professionalism challenges which were largely unforeseen prior to adoption of the new framework.²

In summary, members were generally concerned that the risks identified in safeguarding professional responsibilities were significant, and that the protections proposed for an Ontario context were vague. Members were generally opposed to moving forward with the development of ABS alternatives on the mere assumption that professional responsibilities will somehow be safeguarded. The risk of professionalism concerns did not seem to be warranted at this time given that an ABS model did not appear to exclusively allow benefits for the profession or the public. This is especially so if there are unexplored opportunities to achieve the same objectives within the existing and tested regulatory framework. The risk of failing to identify and address challenges was thought to be significant given the perception that the regulatory changes proposed in an ABS model would be, for practical purposes, irreversible once undertaken.

Next Steps

OBA members across Ontario share a keen interest in promoting a strong and relevant bar that allows lawyers to best serve the public. Our members recognize that this necessitates a continuous and evolving process of identifying and responding to changing client needs, in a way that honours the best traditions of public service.

The purpose of this update is to provide the Law Society with a report of preliminary discussions with our members, and is not meant to provide our ultimate conclusions on the issue.

The OBA Working Group plans to explore and test the themes noted in this update further in terms of practical experiences and perceived solutions as the consultation proceeds across our membership.

² See generally Robinson, Nick, "When Lawyers Don't Get All the Profits: Non-Lawyer Ownership of Legal Services, Access, and Professionalism" (August 27, 2014). HLS Program on the Legal Profession Research Paper No. 2014-20. .Online: Social Science Research Network <http://ssrn.com/abstract=2487878>