Kenneth Standard
Remarks on Alternative Business Structures

Lisbon Conference

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Good morning. Thank you for the opportunity to talk with you today regarding alternative business structures from the U.S. perspective. I will first describe the history of "ABS" in the U.S., which goes beyond multidisciplinary practices, as well as the recent developments within the New York State Bar Association and the American Bar Association on this topic. I will also talk about some recent developments in the U.S. that bear watching.

Before I begin, I want to make one point. Whether to allow alternative business structures, the risks they pose to the independence of the legal profession, and the benefits they may be able to offer to clients is a topic about which there are very strong opinions, for and against. No matter how we may feel about allowing alternative business structures, it is important that we continue to learn and have a constructive dialogue about them. Why? Because the next decade plus will likely see greater change the practice of law than in the past. There are forces that affect our clients and the delivery of legal services over which we have little or no control. That includes rapidly advancing technology and the global economy. Ignoring these forces and changes like ABS that spring from them is not an option. We need to figure out how our profession can adapt in a way that preserves the shared values of the legal profession, which include the

competent, efficient and cost-effective delivery of legal services. We also cannot duck this puzzle because of the presence of lawyers and clients from our countries in nations that already do permit ABS. I look forward to partaking in that constructive dialogue with you today after the individual presentations.

History of ABS in the United States: The American Bar Association and New York State Bar Association (1983 through 2009).

Other than in the District of Columbia, non-lawyer ownership or management of law firms is prohibited in the United States and always has been. And even in the District of Columbia, the form of non-lawyer ownership of law firms that is allowed **excludes** multidisciplinary practices. In the District of Columbia, the firm in which the non-lawyer has an interest can only be engaged in the practice of law, and the non-lawyer partner cannot have independent clients—they can only provide their services in aid of the firm's lawyer's provision of legal services to the client.

The American Bar Association first considered permitting ABS in the early 1980's. The Kutak Commission carefully considered the issue of lawyers partnering with non-lawyers and initially proposed that such partnerships should be permitted under ABA Model Rule of Professional Conduct 5.4, as long as certain safeguards were employed. Model Rule 5.4, entitled Professional Independence of a Lawyer, is the place in the ABA Model Rules that specifically prohibits non-lawyers from having an ownership interest in a law firm. It also prohibits lawyers from sharing fees with non-lawyers.

When that proposal by the Kutak Commission was before the ABA House of Delegates (the ABA's policy making body) there was significant debate. Someone asked whether this proposal would allow Sears Roebuck (a large department store like Tesco) to practice law. The answer was yes. The proposal was soundly defeated.

In the late 1990s, the global legal profession took note of how consulting firms had become associated with the then-"Big-5" accounting firms. These consulting firms had begun to engage in work that was similar to the work being performed by law firms. Then-ABA President Philip S. Anderson appointed the Commission on Multidisciplinary Practice (MDP Commission) "to study and report on the extent to which and the manner in which professional service firms operated by accountants and others who are not lawyers are seeking to provide legal services to the public."

While large accounting firms were the driver for the MDP Commission's work, it heard testimony and received written comments that suggested that the Model Rules should be revised to permit multidisciplinary practices and that such changes would benefit both lawyers and clients.

At the same time that the ABA MDP Commission was doing its work, the New York State Bar Association established a Special Committee on the Law Governing Firm Structure and operations. This Special NYSBA Committee was

chaired by Robert McCrate. In 2000, while the ABA MDP Commission was finalizing its recommendations to the ABA House of Delegates, the McCrate Committee issued its Report. The Report was entitled "Preserving the Core Values of the American Legal Profession: The Place of Multidisciplinary Practice in the Law Governing Lawyers." Unlike the conclusion of the ABA MDP Commission, which proposed changes to Model Rule 5.4 to permit types of MDP's, the McCrate Report concluded that the prohibition on non-lawyer investment in and ownership of law firms should remain intact in New York, because the risks to professional independence and other core values was overwhelming. That Report was approved by the NYSBA House of Delegates and formed the basis of its objections to the ABA MDP Commission's ultimate proposal.

The ABA MDP Commission's proposal to permit lawyer controlled MDPs were, like those of the Kutak Commission, soundly rejected by the ABA House of Delegates. Instead, the House adopted a Resolution providing, in relevant part, that "[T]he sharing of legal fees with non-lawyers and the ownership and control of the practice of law by non-lawyers are inconsistent with the core values of the legal profession… The law governing lawyers, that prohibits lawyers from sharing legal fees with non-lawyers and from directly or indirectly transferring to non-lawyers ownership or control over entities practicing law, should not be revised."

The ABA Ethics 20/20 Commission and New York State Bar Association post 2009.

Not much on the subject of ABS happened between 2000 and 2009. In 2009, then ABA President Carolyn B. Lamm appointed the ABA Ethics 20/20 Commission. The Ethics 20/20 Commission was charged with examining the impact of globalization and technology on the legal profession and its ethics rules. The principles guiding the Commission's work were protection of the public; preservation of core professional values; and maintenance of a strong, independent and self-regulated profession.

The Commission's November 2009 Preliminary Issues Outline invited consideration of how "core principles of client and public protection [can] be satisfied while simultaneously permitting U.S. lawyers and law firms to participate on a level playing field in a global legal services marketplace that includes the increased use of one or more forms of alternative business structures." The Commission formed a Working Group to study the impact of domestic and international developments with regard to ABS, in particular in Canada, Australia and the U.K. In the U.K. in particular, there is a large population of U.S. licensed lawyers, and implementation of the U.K. Legal Services Act was underway. During its study of this issue there were also changes afoot in Ireland and Scotland.

As part of its work, the Commission looked carefully not only at the substance of the changes abroad that permitted forms of ABS, but the motivating factors

behind those changes. For example, in the U.K. certain changes to the regulation of the profession were made in response to consumer complaints and demands. This was not present in the U.S. In many instances change resulted from the involvement of the countries' competition authorities; it did not come from within the profession although, the profession may have later embraced the change. Australia is a good example. Again, this pressure to change was not present in the U.S. to a similar extent.

The Ethics 20/20 Commission engaged in significant outreach regarding its work on this subject. It released Issues Papers, held public hearings and invited input from the profession and the public. Of particular note, the Commission reached out to consumer groups that had, during the time of the MDP Commission, expressed great interest in change that would allow ABS. The Commission did not receive that type of response to its queries from these groups. In fact, the Commission received little response from this sector.

In June 2011, the Commission made its first decisions on the subject. The Commission decided that it would not recommend some forms of non-lawyer ownership that other countries permit. Specifically, it would not permit MDPs, publicly traded law firms (like those permitted in Australia and ultimately in the U.K), or passive outside non-lawyer investment or ownership in law firms. The Commission continued to study a more restrictive form of non-lawyer partnership and ownership in firms than that allowed in Washington, D.C. Unlike the D.C.

Rule, this contemplated model would set forth restrictions on the percentage of non-lawyer ownership and control via voting rights. The Commission again sought comments on this possible change to Model Rule 5.4, including testimony in February 2012 at the ABA Midyear Meeting.

At or about this time the President of the New York State Bar Association appointed a Task Force on Non-lawyer Ownership to consider the Ethics 20/20 Commission's work on the subject. The NYSBA President recognized that 10 years had passed since the issue was last examined by the NYSBA. The Task Force was to issue its report in September 2012 so that the Ethics 20/20 Commission would have the benefit of its work before finalizing any proposals on ABS to present to the ABA House of Delegates.

In April 2012, however, the Ethics 20/20 Commission decided not to propose any changes to ABA Model Rule 5.4's prohibition on non-lawyer ownership of law firms. The Commission found that, at this time there was not a sufficient basis for recommending such changes. The case had not yet been made, but it would continue to study the issue of how, given the multi-jurisidictional nature of law practice, to provide guidance on the choice of law issues relating to ABS. The choice of law issues focused on the division of fees between lawyers not in the same firm—with one lawyer being in a firm that is an ABS and the other lawyer being in a firm in a place that prohibits them. The Commission considered amending the Model Rules to permit such fee divisions. Ultimately, the

Commission decided that an Ethics Opinion would better address these concerns.

The NYSBA Task Force Report, approved by the NYSBA House of Delegates in November 2012, affirmed the New York Bar's opposition to non-lawyer ownership of law firms absent better and stronger evidence that it is in the best interest of clients and will not undermine the integrity of the profession. I have included the Task Force Report in the materials for this Conference.

Like the Ethics 20/20 Commission, the NYSBA found an absence of evidence supporting the need for such change at this time. Both the Commission and the NYSBA recognize that ABS should continue to be studied and analyzed. In particular, it will be interesting to see if and how ABS in the U.K fulfills the promise to lower the cost of legal services and increase access to justice.

Current Developments

In the context of the Ethics 20/20's decisions and the work of the NYSBA Task Force, there exist some additional developments in the U.S. that merit continued monitoring and study.

First, in three U.S. states (New Jersey, New York and Connecticut), the law firm of Jacoby and Meyers filed law suits trying to have Rule 5.4's prohibitions on ABS declared unconstitutional because it violates the First and Fourteenth Amendments of the U.S. Constitution and violates the Dormant Commerce

Clause. In the New York case, the defendant courts, that adopt the ethics rules, won their motion to dismiss the case because the firm lacked standing to bring the case. However, on appeal the district court's dismissal was reversed and the case was remanded back to allow the law firm to amend its complaint to name additional state defendants and challenge the other provisions of New York law that prohibit non-lawyer investment in law firms. The litigation is also still pending in New Jersey and Connecticut. In New Jersey the federal District Court denied the defendants' motion to dismiss and remanded the case to the New Jersey Supreme Court to determine whether ABS may exist under Rule 5.4 as adopted in that state.

Predating this litigation, there was a law proposed in the North Carolina legislature to allow non-lawyer equity owners of incorporated law firms. While that law never made it out of a legislative committee for a vote, the fact that it was proposed is of interest.

There are also other changes occurring in the manner in which legal services are delivered that show how marketplace realities and technology continue to allow innovation that bumps up against the prohibition on non-lawyer involvement.

Of particular interest is a relatively new company called Clearspire. Clearspire markets itself this way: "Led by a team of proven innovators from legal practice, business management and information technology, Clearspire has transformed

the way legal services are delivered… Our unique structure enables attorneys to focus on practicing law, while seasoned business leaders manage the infrastructure and delivery of legal services. Connecting the two, Clearspire's IT platform provides some of the industry's most advanced technologies and IT methodologies, enabling our lawyers to work more closely with clients and with each other, while simultaneously streamlining the management of the business.

In this way, Clearspire merges the best of legal and business practices. Clients receive the highest quality results, produced by AmLaw 200 trained senior-level attorneys often for about half the cost of an AmLaw 200 firm… The end result? A multidisciplinary practice, including full management and legal responsibility, that is competitive with the best of Big Law—delivered with unprecedented efficiency."

A violation of Rule 5.4? First, Clearspire is based in Washington, D.C., where a limited form of ABS is permitted. And I do not know enough about the actual structure of Clearspire.

But consider this press release from the company in February 2013:

"Clearspire Service Company, LLC, is pleased to announce the nationwide expansion of its physical presence in response to positive market reception and growth since the 2010 launch of its law firm, Clearspire Law Company, PLLC. Beginning with the 2013 opening of offices in the New York City, Los Angeles, and San Francisco areas—in addition to its existing Washington, DC

headquarters—Clearspire plans to open offices across the US and increase its attorney roster by 50 to 100 new attorneys annually to keep pace with market demand. Future Clearspire offices are planned for Atlanta, GA and Chicago, IL."

Another example is the LegalForce Bookflip store. Based in Palo Alto, California, it sells books, holds classes and allows customers to meet on-site with a lawyer. Customers can consult with U.S. licensed lawyers on site seven days a week. As the owner of the venture stated to Palo Atlo Online:

"We want people to realize that lawyers, like doctors, can provide help throughout various stages of life… Few people know where to turn for legal help. We solve this by letting the public walk into a major retail location for help. This makes obtaining legal assistance easy, convenient and affordable."

There already are plans to expand nationally by forming partnerships with existing bookstores across the country and attracting other law firms to join.

Again, much depends on how the venture is structured, but certainly you can see easily how this is pushing the boundaries.

I hope you have found this overview of what is happening in the U.S. on the subject of ABS helpful.