Certified Professional Guardianship Board

July 2014

Re: Stakeholder Communications Plan

Dear Stakeholder:

The Certified Professional Guardianship Board is establishing a new communication process to facilitate increased involvement in developing standards, rules and regulations to guide the guardianship profession. The process is evolving and will likely change as we move through the development phase. We'll keep you informed about changes as they occur.

The Certified Professional Guardianship Board is the regulatory authority for the practice of professional guardianship in Washington State. The Board is charged with establishing the standards and criteria for the certification of professional guardians, as defined by RCW 11.88.008.

The Board shall:

- Process applications for guardianship certification;
- Adopt and implement policies, regulations and standards of practice;
- Adopt and implement a professional guardian training program;
- Adopt and implement procedures to review any allegation that a professional guardian has violated an applicable statute, fiduciary duty, standard of practice, rule, regulation or other requirement governing the conduct of professional guardians;
- Hold meetings as necessary; and
- Establish and collect fees to support the duties and responsibilities of the Board.

The Board may:

- Investigate to determine if an applicant for certification meets the certification requirements;
- Recommend certification to the Supreme Court;
- Deny guardianship certification;
- Adopt and implement regulations for guardian continuing education;

- Investigate to determine whether a professional guardian has violated any statute, duty, standard of practice, rule, regulation or other requirement governing the conduct of professional guardians;
- Take disciplinary action and impose disciplinary sanctions based on findings that establish a violation of an applicable statute, duty, standard of practice, rule, regulation or other requirement governing the conduct of professional guardians; and
- Issue written ethics opinions.

To involve stakeholders in its work, the Board has developed an information sharing process. The details of the process are explained in the attached Communications Plan[1]. We are currently executing Section E of the plan - Initial Process. We have developed a list of stakeholders, which currently includes you. We would like to identify one contact person, for each organization, who will receive information from the Board and be responsible for providing a response, which was developed by the stakeholder organization. A contact person submission form[2] is attached. If you do not wish to receive information from the Board or be included on the stakeholder list, please send an e-mail to Kimberly Bzotte at kimberly.bzotte@courts.wa.gov and ask to be removed.

Anyone can sign up to receive future communication by submitting the attached contact form or sending an e-mail to Kimberly Bzotte at kimberly.bzotte@courts.wa.gov or requesting notification via the web. Please click on the following link to request notification via the web
http://www.courts.wa.gov/programs_orgs/Guardian/?fa=guardian.proposed
Please share this information with other organizations and individuals who may wish to be added to the Board's list of stakeholders and receive future communication.

The Board's first Request for Comments[3] utilizing the new process is attached along with a copy of its Public Comment Guidelines[4].

Thank you for your attention and collaboration. Should you have any questions about the process, Board procedures and/or regulations, the staff listed below are available to answer your questions.

Shirley Bondon, shirley.bondon@courts.wa.gov, 360-705-5302
Carla Montejo, carla.montejo@courts.wa.gov, 360-705-5320
Sally Rees, sally.rees@courts.wa.gov, 360-704-4062

[1] Attachment A – CPGB Stakeholder Communication Plan
[2] Attachment B – Contact Information Form
[3] Attachment C – Request For Public Comments
[4] Attachment D – Public Comment Guidelines

Attachment A

Certified Professional Guardianship Board Communication Plan

A. Purpose:

Stakeholders including family members of incapacitated persons, professional guardians, senior and disability advocates and others are seeking greater involvement in developing standards, rules and regulations to guide the guardianship profession. To continue effectively and efficiently performing its regulatory mission, the Certified Professional Guardianship Board developed this Communications Plan to facilitate the consideration of diverse perspectives in an environment that supports and respects differences and commitment to group initiatives.

B. Communication Objectives:

1. Develop understanding and appreciation for the shared goal of protecting the public.

2. Build understanding, trust and support for the rulemaking process.

3. Create a process that is transparent and helps stakeholders understand what the Certified Professional Guardianship Board does and hold it accountable.

C. Targeted Audiences:

	Stakeholder Name
1.	Board Members per General Rule 23
2.	Certified Professional Guardians
3.	Washington Association of Professional Guardians (WAPG)
4.	Incapacitated Persons
5.	Family Members and Friends of Incapacitated Persons
6.	WSBA – Elder Law Section Executive Committee
7.	County Bar Associations/Elder Law Sections
8.	Superior Court Judges' Association Guardianship and Probate Committee
9.	Guardians Ad Litem
10.	Alzheimer's Association
11.	WA Health Care Association & Leading Edge

	Stakeholder Name
12.	Traumatic Brain Injury (TBI) Council
13.	Long-term Care Ombudsman
14.	Lay/Family Guardians
15.	Guardianship Monitoring Programs
16.	AARP
17.	Disability Rights Washington (DRW)
18.	National Association of Mental Illness (NAMI)
19.	Association of Area Agency on Aging
20.	Department of Social and Health Services—APS, DDA, HCS, DBHR
21.	SCORE
22.	OPG Stakeholder Listserv
23.	Supreme Court
24.	Legislators
25.	Developmental Disabilities Council
26.	Washington State Residential Care Council of Adult Family Homes
27.	SEIU Healthcare
28.	Arc of Washington
29.	Superior Courts
30.	Columbia Legal Services
31.	Other Stakeholders that may be identified later.

D. Communication Strategy:

The Board plans to use five broad communications channels—board meetings/teleconferences, stakeholder engagement meetings, public comment periods during regular board meetings, the Web, and email to share information and seek input and feedback into the development of rules, regulations and Standards of Practice for the practice of professional guardianship.

Board Meetings/Teleconferences

Stakeholders are encouraged to attend Board meetings and teleconferences. The Board meets the second Monday of each month, except for February, July and December or when a holiday conflicts. Generally, the Board meets in person at the SeaTac Office Facility, 18000 International Blvd, SeaTac, WA in January, April, June and October. The April meeting is

usually the Board's annual planning meeting, in which stakeholders participate. Teleconferences are generally held in March, May, August, September and November. Teleconferences are conducted via Adobe® Connect™ a web conferencing platform for web meetings, eLearning, and webinars. Participation instructions are provided on the meeting agenda, which is posted on the Web approximately one week before each meeting. The Board's meeting calendar is also posted on the Web, to view see http://www.courts.wa.gov/programs_orgs/guardian/?fa=guardian.CPGBoard.

Public Comment Periods

Each in-person meeting includes a public comment period. Comment guidelines are provided below. Individuals who participate in the public comment period will be encouraged to provide staff a written copy of the comments made during the comment period, which staff will attach to meeting minutes.

Regulation 600, the procedure for adoption, amendment and repeal of regulation also provides an opportunity to provide written comments. The notice and comment portion of Regulation 600 is provided below.

Public Comment Guidelines

A public comment period shall be held at all regularly scheduled in-person meetings of the Certified Professional Guardianship Board. The public comment period shall be the first item on the agenda after the chair report, shall not exceed thirty minutes total and will be subject to the following general guidelines:

1. Speakers must sign in to speak and must list name and topic.
2. No speaking when others are speaking.
3. Only the Chair may interrupt.
4. No personal attacks or accusations.
5. Comments will be limited to three minutes per speaker.
6. No repetition of comments from previous meetings.
7. Written comments may be submitted in lieu of, or in addition to public comments.

600 Procedure for the Adoption Amendment and Repeal of Regulations

601 Intent.
The intent of the Certified Professional Guardian Board (Board) is to give notice and the opportunity for public comment whenever the Board intends to adopt, amend, or repeal its regulations, except as otherwise stated in these regulations.

602 Notice.

602.1 Except as otherwise stated in these regulations, the Board will give notice whenever it intends to adopt, amend, or repeal a regulation (regulation change). The Board must give notice at least thirty (30) calendar days before the meeting at which the Board intends to act on the proposed change. The notice will include the following information:

602.1.1 The text of the proposed change to the regulations. The notice may also include an explanation of the purpose of the proposed change.

602.1.2 The date, time and place of the meeting at which the Board intends to adopt the proposed change.

602.1.3 The name, address and telephone number of the person to whom written comments on the proposed change may be sent via U.S. mail. In the Board's discretion, the Board also may accept comments via electronic mail.

602.1.4 The date by which comments must be received by the Board.

602.2 To give notice of a proposed regulation change, the Board will do the following:

602.2.1 Publish the notice electronically on the Board's website.

602.2.2 Send the notice to the Washington Association of Professional Guardians.

602.2.3 Send an announcement via electronic mail to the state's certified professional guardians, stating that notice of a proposed regulation change is on the Board's website.

602.2.4 Give notice in any other manner that the Board deems appropriate.

Stakeholder Engagement Meetings

Stakeholder engagement meetings/teleconferences are defined as small group meetings with target audiences. A stakeholder group may host an engagement meeting and invite board members to participate or a Board member may host an engagement meeting and invite stakeholders to participate. The meeting host will be responsible for all meeting arrangements and cost, including reporting back to the Board.

Web

The Board will post request for comments on the Guardianship Program webpage and stakeholders are encouraged to email written comments, which will be posted on the Web for public viewing. Comments must adhere to posting guidelines.

See http://www.courts.wa.gov/programs_orgs/Guardian/?fa=guardian.display&fileName=rulesindex

Email

AOC staff will obtain email addresses for the stakeholders identified on the stakeholders' list and utilize the list to send the following:

a) News articles;
b) Stakeholder Engagement Meeting Announcements;
c) Informational emails; and
d) Requests for written comments.

E. Initial Process:

To initiate communication and inform stakeholders of the process, AOC staff will complete the following:

1. Develop a contact list for stakeholders, organizations and individuals;
2. Send the following to all contacts:
    i. A letter explaining the plan to seek input;
    ii. The Communications Plan;
    iii. The first request for comment and back up materials; and
    iv. Public comment posting guidelines.

The following tables describe key audiences, stakeholder types, involvement types and the communication mediums that will be used to communicate with each.

Table 1 – Stakeholder Communications

	Stakeholder Name/Contact	Stakeholder Types	Involvement Types	Communication Media
1.	Board Members per GR23	Decision-Makers	Representatives	All
2.	Certified Professional Guardians	Person Affected Subject Matter Experts	Consultants	All Email (listserv)
3.	Washington Association of Professional Guardians (WAPG)	Persons Affected Subject Matter Experts	Advisors	All
4.	Incapacitated Persons	Persons Affected Subject Matter Experts	Consultants	?
5.	Family Members and Friends of IPs	Persons Affected Subject Matter Experts	Consultants	All
6.	County Bar Associations/Elder Law Sections	Subject Matter Experts	Advisors	All
7.	WSBA – Elder Law Section Executive Committee	Subject Matter Experts	Advisors	All
8.	Superior Court Judges' Association Guardianship and Probate Committee	Subject Matter Experts	Advisors	Email (listserv)
9.	Guardians Ad Litem	Subject Matter Experts	Consultants	Stakeholder Meetings Web
10.	Alzheimer's Association	Subject Matter Experts	Advisors	All
11.	WA Health Care Association Leading Edge	Subject Matter Experts	Advisors	All
12.	TBI Council	Subject Matter Experts	Advisors	All
13.	Long-term Care Ombudsman	Subject Matter Experts	Advisors	All
14.	Lay/Family Guardians	Subject Matter Experts Persons Affected	Consultants	All Email (listserv)
15.	Guardianship Monitoring Programs	Subject Matter Experts Person Affected	Advisors	Web Email
16.	AARP	Subject Matter Experts	Advisors	All
17.	Disability Rights Washington	Subject Matter Experts	Advisors	All
18.	National Association of Mental Illness	Subject Matter Experts	Advisors	All
19.	Association of Area Agency on Aging	Subject Matter Experts	Advisors	All
20.	DSHS – APS, DDA, HCS, DBHR	Subject Matter Experts	Advisors	All
21.	SCORE	Subject Matter Experts	Advisors	All

	Stakeholder Name/Contact	Stakeholder Types	Involvement Types	Communication Media
22.	OPG Stakeholder Listserv	Persons Affected Subject Matter Experts	Persons to Inform	Email (listserv)
23.	Supreme Court	Decision-Makers Decision Blockers		Stakeholder Meeting Email
24.	Legislators	Decision-Makers Decision Blockers	Persons to Inform	Email
25.	Developmental Disabilities Council	Subject Matter Experts	Advisors	All
26.	Washington State Residential Care Council of Adult Family Homes	Subject Matter Experts	Advisors	All
27.	SEIU Healthcare	Subject Matter Experts	Advisors	All
28.	Arc of Washington	Subject Matter Experts	Advisors	All
29.	Superior Courts	Persons Affected	Persons to Inform	Web Email (listserv)
30.	Columbia Legal Services	Subject Matter Experts	Advisors	All

Table 2. - Stakeholder Types

Stakeholder Types	Description
Decision-Makers	Those with the formal power to make decisions.
Blockers	Those with the power to block decisions.
Persons Affected	Those affected by decisions.
Subject Matter Experts	Those with relevant information or expertise.

Table 3. - Stakeholder Involvement Types

Involvement Types	Description
Represent	Representatives of particular stakeholder groups might be members of the regulatory body. The assumption is that these individuals can effectively speak about the interest of the group community they represent.
Consultants	Individuals are consulted about their perspectives and concerns. Their views are considered by the decision-makers when making decisions. Comment coordinators may be assigned to consult with; forum discussions may be held or surveys administered.
Advisers	Group stakeholders form advisory panels, meet to discuss issues and share advice with the regulatory body. (Formal Group)
Inform	Some stakeholders need to be informed about issues and plans via listservs, the website etc., but not invited to play an active role.

Attachment B

Contact Information for Certified Professional Guardianship Board Stakeholder Communication

Individual Stakeholder Information

Name	
Mailing Address	
City ST ZIP Code	
Phone	
Email Address	

Organization Stakeholder Information

Organization Name	
Mailing Address	
City ST ZIP Code	
Phone	
Email Address	
Communication should be sent to the email address above.	☐ Yes ☐ No
# Members	

Organization Contact Person Information

Name	
Mailing Address	
City ST ZIP Code	
Phone	
Email Address	
Communication should be sent to the email address above.	☐ Yes ☐ No

Please email or mail this form to:

Certified Professional Guardian Board
P.O. Box 41170-1170
Olympia, WA 98504
or
guardianshipprogram@courts.wa.gov

If you have questions, please contact Kimberly Bzotte a kimberly.bzotte@courts.wa.gov

Attachment C

Certified Professional Guardianship Board
Request for Public Comments
Topic: Proposed SOP 413

The Certified Professional Guardianship Board seeks public comment on the attached question and Proposed Standard of Practice 413 regarding who should own a certified professional guardianship agency and who is responsible for the professional conduct of a certified professional guardianship agency and its employees. A copy of comment guidelines is attached.

The question and Proposed Standard of Practice will be posted for public comment July 21, 2014 through November 10, 2014.

Proposed revisions, additions and deletions are indicated by underlining and lining out respectively, except where the entire regulation or document is new.

In accordance with the Board's Communication Plan and Regulation 600, Procedure for the Adoption, Amendment and Repeal of Regulations on November 17, 2014, the Certified Professional Guardianship Board will discuss and may act on the question and Proposed Standard of Practice 413. November 17, 2014, the Board will meet by phone.

Comment Period:
All comments should be submitted to the Certified Professional Guardianship Board by either U.S. mail, or e-mail. Comments should be received no later than **November 10, 2014.** All comments adhering to comment guidelines will be posted at:
http://www.courts.wa.gov/programs_orgs/Guardian/?fa=guardian.proposed

Comments may be sent to one the following addresses:

Certified Professional Guardianship Board
P.O. Box 41170
Olympia, WA 98504-1170
or
guardianshipprogram@courts.wa.gov

Issues:

- Should individuals who have not been certified as professional guardians be allowed to own professional guardian agencies? If not, what should the Standard of Practice prohibiting ownership say? If yes, what mechanisms are needed to ensure adherence to guardian Standards of Practice?

- Who is responsible for the professional work of a certified professional guardian agency?

Background:

For 21 years, except for the District of Columbia, the only jurisdiction in the United States that allows law firms to share fees and profits with non-lawyers, bar associations have prohibited ownership in a law firm by a non-lawyer. In 2012, the ABA Commission on Ethics considered whether to urge the organization to endorse extending the D.C. rule to other states, but decided against removing its ban on non-lawyer ownership of law firms. Although not an exact comparison, the bar association ban on non-lawyer ownership in law firms can inform the discussion before the Board regarding non-professional guardian ownership of professional guardian agencies (see Attachment A[1]).

Guardian conduct, like attorney conduct is guided by standards of practice or rules of professional conduct and ethics which may not apply to non-guardians. Thus allowing non-guardians to own guardian agencies will allow individuals not bound by standards of practice to influence how guardians provide services to incapacitated persons. On the other hand, it is possible that bringing in non-guardian owners with business acumen could result in better run, more efficient and effective guardianship agencies.

To address the issue of who can own a professional guardian agency and who is responsible for the actions of the employees of a professional guardian agency, the Board is requesting comments.

Proposed Standard of Practice 413 and Proposed Revisions to Regulation 102.4 and 702.2

The Board believes that read together proposed SOP 413 and revised Regulations 102.4 and 702.2 address the question of who is responsible for the actions of employees of a professional guardian agency, but does not address whether a certified professional guardianship agency should be owned by certified professional guardians only. General Rule 23 would need to be amended to address the ownership issue.

[1] April 16, 2012 the ABA decided not to propose changes to its ban on non-lawyer ownership of law firms. http://www.abanow.org/2012/04/aba-commission-on-ethics-2020-will-not-propose-changes-to-aba-policy-prohibiting-nonlawyer-ownership-of-law-firms/

Revised Reg. 102.4

102.4 "Designated CPG" means the certified professional guardians within an agency ~~working for an agency~~ who have the final decision-making authority for incapacitated persons or their estate on behalf of the agency. ~~The designated CPG is responsible for the actions of the agency(ies) for which they serve as designated CPG (Adopted 1-9-12).~~

Revised Reg. 702.2

702.2 "Designated CPG" means the certified professional guardians within an agency ~~working for an agency~~ who have the final decision-making authority for incapacitated persons or their estate on behalf of the agency. ~~The designated CPG is responsible for the actions of the agency(ies) for which they serve as designated CPG (Adopted 1-9-12)~~

Proposed SOP 413

413 Responsibilities of Certified Professional Guardian Agencies

413.1 The designated Certified Professional Guardian (CPG) is responsible for the actions of the agency for which they serve as designated CPG.

413.2 A CPG is bound by the Standards of Practice not withstanding that the professional guardian acted at the direction of another person.

413.3 A designated CPG shall make reasonable efforts to ensure that the conduct of non-guardian agency employees is compatible with the professional obligations of the professional guardian.

General Rule (GR) 23

Click on the following link to view GR 23.

http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=ga&set=GR&ruleid=gagr23

AMERICAN BAR ASSOCIATION

ABA Commission on Ethics 20/20
321 N. Clark Street
Chicago, IL 60654-7598
Phone: (312) 988-5311
Fax: (312) 988-5280
Website: www.abanet.org/ethics2020

To: **ABA Entities, Courts, Bar Associations (state, local, specialty and international), Law Schools, and Individuals**

From: **ABA Commission on Ethics 20/20 Working Group on Alternative Business Structures**[1]

Re: **For Comment: Issues Paper Concerning Alternative Business Structures**

Date: **April 5, 2011**

I. Introduction and Questions Concerning Alternative Business Structures

The American Bar Association Commission on Ethics 20/20 is examining the impact of globalization and technology on the legal profession. The principles guiding the Commission's work are 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."[2] To address these challenges, the Commission formed a Working Group that has been studying the impact of domestic and international developments in this regard and is considering whether lawyers and law firms, in order to better serve their clients, should be able to structure themselves differently than is currently permitted under the Model Rules of Professional Conduct.

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[1] The members of the Working Group are George W. Jones (Co-Chair and Commissioner), Professor Theodore J. Schneyer (Co-Chair and Commissioner), Jeffrey B. Golden (Commissioner), Roberta Cooper Ramo (Commissioner), Professor Carole Silver (Commissioner), Chief Justice Gerald W. VandeWalle (Commissioner), Donald B. Hilliker (ABA Center for Professional Responsibility, Kathleen J. Hopkins (ABA General Practice, Solo and Small Firm Division), George Ripplinger (ABA Standing Committee on Ethics and Professional Responsibility), and Gene Shipp (National Organization of Bar Counsel), and Robert D. Welden (ABA Standing Committee on Professional Discipline). Paul D. Paton serves as Reporter. Ellyn S. Rosen, Commission Counsel, and Arthur Garwin, Deputy Director of the ABA Center for Professional Responsibility provided counsel to the Working Group.

[2] *See* ABA Commission on Ethics 20/20, Preliminary Issues Outline at 6, *available at* http://www.americanbar.org/content/dam/aba/migrated/2011_build/ethics_2020/preliminary_issues_outline.authcheckdam.pdf.

At present, only the District of Columbia permits nonlawyer ownership or management of law firms.[3] Except in very limited circumstances, there is a similar restriction on fee-sharing with nonlawyers. In March 2011, legislation to permit nonlawyer equity owners of incorporated law firms was introduced in North Carolina.[4]

The ABA has undertaken several previous efforts to examine alternative business structures (ABS), and the Working Group's efforts are necessarily informed by them. Since the House of Delegates last considered recommendations on multidisciplinary practice in July 2000, few jurisdictions within the United States have examined the issue of MDP or any other form of ABS. In the intervening period, however, other countries have implemented a wide range of approaches. Understanding how those models might be adapted or implemented domestically, as well as the challenges these approaches pose in the global legal services marketplace, is important given this Commission's charge. The economic challenges of the intervening period also invite reconsideration of whether ABS might serve to enhance access to legal services for those otherwise unable to afford them, and to provide new and varied opportunities for lawyers and firms domestically to better serve clients.

At its February 2011 meeting in Atlanta, the Commission decided that two options for alternative business structures -- passive equity investment in law firms and the public trading of shares in law firms -- would not be appropriate to recommend for implementation in the United States at this time, though both have been adopted elsewhere since July 2000. However, the Commission has invited the Working Group to continue analyzing previously unavailable data and information to determine whether and to what extent other structural reforms may now be desirable in the U.S. and, if so, how they might be implemented in our regulatory scheme in a manner consonant with the principles guiding the Commission's work.

This paper describes several issues and approaches that the Working Group has identified and is evaluating. The Working Group appreciates that, in many respects, the description of the current ABS landscape described below is very detailed. However, the Working Group believes that this level of detail will facilitate informed discussion and comments about these issues.

Apart from the February 2011 decisions about passive equity investment and the public trading of shares in law firms noted above, the Commission has taken no positions about the matters addressed in this paper. To assist the Commission in determining what, if any, other

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[3] District of Columbia Rule of Professional Conduct 5.4 provides in relevant part that: (a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that: . . . . (4) Sharing of fees is permitted in a partnership or other form of organization which meets the requirements of paragraph (b) . . . (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, but only if: (1) The partnership or organization has as its sole purpose providing legal services to clients; (2) All persons having such managerial authority or holding a financial interest undertake to abide by these Rules of Professional Conduct; (3) The lawyers who have a financial interest or managerial authority in the partnership or organization undertake to be responsible for the nonlawyer participants to the same extent as if nonlawyer participants were lawyers under Rule 5.1; (4) The foregoing conditions are set forth in writing. (c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

[4] *See* An Act to Allow Nonattorney Ownership of Professional Corporation Law Firms, Subject to Certain Requirements, *available at* http://www.ncleg.net/Sessions/2011/Bills/Senate/HTML/S254v0.html.

recommendations should be made regarding whether to permit U.S. law firms to structure themselves in a manner not currently permitted under the Model Rules of Professional Conduct, the Commission seeks input regarding the following questions by **June 1, 2011**:

1. Are there client services that U.S. lawyers and law firms should be permitted to offer, but that they currently are not permitted to offer due to restrictions set forth in Rule of Professional Conduct 5.4, including the prohibitions on sharing fees with nonlawyers?

2. Would maintaining the present restrictions contained in the Rules of Professional Conduct impede U.S. lawyers and law firms from participating 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 (e.g., including but not limited, to the cost of services or the ability to recruit lawyers and nonalwyers)? If so, in what ways?

    a. What guidance is required for U.S. lawyers and law firms practicing in countries that currently permit forms of ABS?

3. What types of nonlawyer service providers (other than administrative assistants, paralegals, receptionists and other support staff) currently assist you in serving your clients?

    a. Are they employees of the firm, independent contractors, or do they have some other status?

    b. If you employ these nonlawyers directly, why do you choose to do so rather than through a separately organized business structure, such as a law-related business as defined under Rule 5.7 of the ABA Model Rules of Professional Conduct?

    c. If you were permitted to have nonlawyer partners in your firm would you do so?

4. The District of Columbia's version of Model Rule of Professional Conduct 5.4 permits (with certain restrictions set forth in footnote 3) a lawyer to practice law in a partnership or other form of organization in which nonlawyers hold a financial interest or have managerial authority.

    a. Do you believe that the District of Columbia Rule provides adequate protections to clients?

    b. If not, do you believe that District of Columbia Rule 5.4, along with limitations on the percentage of nonlawyer participation, would adequately protect clients?

II. A Brief History of the ABA's Consideration of ABS

As noted above, the ABA has previously studied ABS. In doing so, it has recognized that there is a relationship between those efforts, advances in technology, and increases in the globalization of legal practice. In 1999, a background paper made the following observation:

> The delivery of legal services in the United States faces unprecedented challenges. Revolutionary advances in technology and information sharing, the globalization of the capital and financial services markets, and more expansive government regulation of commercial and private activities have reshaped client demands for legal advice and advocacy. [5]

These same challenges are equally apparent today and are arguably even greater. As this Commission's Preliminary Issues Outline noted, "already the profession is encountering the competitive and ethical implications of U.S. lawyers and law firms seeking to represent American and foreign clients abroad and foreign lawyers seeking access to the U.S. legal market."[6]

A. Pre-Model Rules Treatment of ABS

Prior to 1969, Canon 33 of the ABA Canons of Professional Ethics provided that "[p]artnerships between lawyers and members of other professions or nonprofessional persons should not be formed or permitted where any part of the partnership's employment consists of the practice of law."

In 1969, this prohibition was carried forward in the ABA Model Code of Professional Responsibility. DR 3-103(A) prohibited a lawyer from forming "a partnership with a non-lawyer if any of the activities of the partnership consist of the practice of law." Moreover, under DR 3-102(A), lawyers could not "share legal fees with a non-lawyer" except under narrow circumstances.

B. The Kutak Commission – Model Rule 5.4

Between 1977 and 1983, the Commission on Evaluation of Professional Standards (Kutak Commission) developed the Model Rules of Professional Conduct. The Kutak Commission carefully considered the issue of lawyers partnering with nonlawyers and initially proposed that such partnerships should be permitted as long as certain safeguards were employed. The 1982 draft of Model Rule 5.4 provided as follows:

> *Professional Independence of a Firm*
>
> A lawyer may be employed by an organization in which a financial interest is held or managerial authority is exercised by a nonlawyer, or by a lawyer acting in a capacity other than that of representing clients, such as a business corporation, insurance company, legal services organization or government agency, but only if the terms of the relationship provide in writing that:

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[5] Commission on Multidisciplinary Practice, *Background Paper on Multidisciplinary Practice: Issues and Development*, at 1 (January 1999), *available at* http://www.americanbar.org/groups/professional_responsibility/commission_multidisciplinary_practice/multicomreport0199.html.

[6] Preliminary Issues Outline, *supra* note 2, at 1.

(a) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship;

(b) information relating to representation of a client is protected as required by Rule 1.6;

(c) the arrangement does not involve advertising or personal contract with prospective clients prohibited by Rules 7.2 and 7.3; and

(d) the arrangement does not result in charging a fee that violates Rule 1.5.

The House of Delegates rejected this proposed version of Model Rule 5.4. A revised version of Model Rule 5.4 was subsequently adopted in 1983 and has remained largely intact, except for relatively minor subsequent amendments that have not affected the basic prohibition on lawyer/nonlawyer partnerships and sharing of fees.

C. The Commission on Multidisciplinary Practice

In the late 1990s, the legal profession took note of the extent to which consulting firms had become associated with the then-"Big-5" accounting firms. In particular, these consulting firms had begun to engage in work that was similar to the work being performed by law firms.[7]

In August 1998, 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."[8] The Commission was asked to analyze:

•The experience of clients, foreign and domestic, who had received legal services from professional service firms, and report on international trade developments relevant to the issue;

•Existing state and federal legislative frameworks within which professional service firms were providing legal services, and recommend any modifications or additions to that framework that would be in the public interest;

•The impact of receiving legal services from professional service firms on a client's ability to protect privileged communications and to have the benefit of advice free from conflicts of interest; and

• The application of current ethical rules and principles to the provision of legal services by professional service firms, and to recommend any modifications or additions that would serve the public interest.[9]

Though large accounting firms were the impetus 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

[7] *Supra* note 5, at 2.
[8] *See* The Commission on Multidisciplinary Practice, About The Commission, at http://www.americanbar.org/groups/professional_responsibility/commission_multidisciplinary_practice.html.
[9] *Id.*

and the public.[10] Accordingly, the MDP Commission's August 1999 Report to the House of Delegates contained a Recommendation that the Model Rules of Professional Conduct be amended to permit multidisciplinary practices, but with certain safeguards in place to ensure that the core values of the legal profession were maintained.[11] The recommendation was accompanied by illustrations of possible amendments to the Model Rules of Professional Conduct that would have been considered at a later time if the underlying recommendation were adopted.[12]

In response to the MDP Commission's recommendation, the House adopted the following resolution:

> That the American Bar Association make no change, addition or amendment to the Model Rules of Professional Conduct which permits a lawyer to offer legal services through a multidisciplinary practice unless and until additional study demonstrates that such changes will further the public interest without sacrificing or compromising lawyer independence and the legal profession's tradition of loyalty to clients.[13]

The MDP Commission proceeded to take more testimony and receive additional comments. It returned to the House of Delegates with a new Report in July 2000, which once again recommended changes to the Model Rules of Professional Conduct, but with less detail than in 1999 and in a manner that imposed more restrictions on proposed multidisciplinary practices.[14] The key change from the prior recommendation was that only lawyer-controlled MDPs would be permitted under the new recommendation. The House again rejected the Commission's recommendation, and this time adopted a recommendation that included the following language:

> The sharing of legal fees with nonlawyers and the ownership and control of the practice of law by nonlawyers are inconsistent with the core values of the legal profession.
>
> The law governing lawyers, that prohibits lawyers from sharing legal fees with nonlawyers and from directly or indirectly transferring to nonlawyers ownership or control over entities practicing law, should not be revised.
>
> * * * *
>
> FURTHER RESOLVED that the American Bar Association recommends that in jurisdictions that permit lawyers and law firms to own and operate nonlegal businesses, no nonlawyer or nonlegal entity involved in the provision of such services should own or control the practice of law by a lawyer or law firm or

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[10] *See* Report to the House of Delegates 109 (August 1999) at C9-10, *available at* http://www.americanbar.org/groups/professional_responsibility/commission_multidisciplinary_practice/mdpfinalreport.html.

[11] *Id*.

[12] *Id*.

[13] Report to the House of Delegates 10B (as revised) (August 1999).

[14] Report to the House of Delegates 117 (July 2000), *available at* http://www.americanbar.org/groups/professional_responsibility/commission_multidisciplinary_practice/mdpfinalrep2000.html.

> otherwise be permitted to direct or regulate the professional judgment of the lawyer or law firm in rendering legal services to any person.[15]

During the time that the MDP Commission was in existence, forty-four states and the District of Columbia formed committees to study the multidisciplinary practice issue.[16] A variety of recommendations followed.[17] When the Commission's work ended in July 2000, however, state initiatives in this area lost their impetus.

III. ABS Abroad

As noted in the Introduction, since July 2000, few jurisdictions within the United States have examined the issue of multidisciplinary practices or any other form of ABS. Other countries, however, have moved forward in this area, adopting a wide range of approaches. The competitive environment in which U.S. firms of all sizes now operate has changed, and at least one New York-based litigation firm with fewer than 40 lawyers converted its office in London, England to operate as a Legal Disciplinary Partnership (LDP), a form of ABS discussed below that permits up to 25% of a law firm's partnership to be formed by nonlawyers. Accordingly, while the regulatory environment elsewhere may not directly map the regulatory structures in place in the United States, U.S. firms and lawyers are already participating in ABS abroad. The discussion is no longer simply theoretical.

Further, the impact of the economic challenges of the intervening period also invites reconsideration of whether ABS might serve to enhance access to legal services for those otherwise unable to afford them, and to provide new and varied opportunities for lawyers and firms domestically to better serve the public. Though many of the issues and concerns present in the period leading up to the July 2000 resolution remain at the core of the assessment of ABS, the domestic and global context within which they are to be considered has changed.

A. Regulatory Reform in Australia

Australia has adopted an expansive approach to ABS. Australia is a Federation of six States, each with a plenary constitutional power to regulate the legal profession and the provision of legal services. Two self-governing Territories have primary regulatory power over the legal profession. In most jurisdictions it is a bifurcated profession (barristers and solicitors), with approximately 56,000 solicitors and 5,200 barristers as of December 2010. The profession is made up overwhelmingly of sole practitioners and small law firms, constituting approximately 80 percent of the total.[18]

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[15] *See* Revised Recommendation 10F, *available at* http://www.americanbar.org/groups/professional_responsibility/commission_multidisciplinary_practice/mdprecom10f.html.

[16] *See* charts at http://www.americanbar.org/groups/professional_responsibility/commission_multidisciplinary_practice/mdpstats.html and http://www.americanbar.org/groups/professional_responsibility/commission_multidisciplinary_practice/mdp_state_summ.html.

[17] *Id*.

[18] Murray Hawkins, Director, National Legal Profession Project, "Australian Models of Regulating the Legal Profession," Presentation to the Federation of Law Societies of Canada Semi-Annual Conference, 17-19 March 2011.

Australia's reforms began in 1994, when New South Wales became the first Australian jurisdiction (and the first of any common law jurisdiction) to permit multidisciplinary practices.[19] In that year, legislation authorized multidisciplinary partnerships, but required legal practitioners to retain at least 51% of the net partnership income in order to ensure that these firms retained the ethical practices of a law firm.[20] At that time, lawyers and firms did not express much interest in adopting these alternative business structures, in part because of prevailing attitudes that law should remain a profession and not be treated as a business.[21]

Subsequently, pressure from national competition authorities to reform regulatory structures to create greater accountability and enhance consumer interest and protection, and increased interest in innovation led to proposals to eliminate the 51% rule and to permit Incorporated Legal Practices [described below], including multidisciplinary practices and publicly traded law firms. These proposals raised concerns within the profession about conflicting duties and increased risks of unethical behavior. Regulators and the organized bar were able to overcome these reservations and to adopt these forms of alternative business structures.

As of December 2010, there were approximately 2,000 Incorporated Legal Practices in Australia, and this number is growing rapidly.[22] Most Incorporated Legal Practices are smaller firms, but mid-sized and large national firms also have incorporated. There are around 70 known multidisciplinary partnerships.[23] In New South Wales, the State with the largest number of firms and practitioners, as of August 2010, more than 20% of the legal profession was employed within non-traditional business structures (more than 1,000 of them operating as Incorporated Legal Practices).[24] Approximately 30 New South Wales firms operate as multidisciplinary practices. A primary reason for Australian lawyers taking advantage of these structures is the growing reality and perception that the traditional structure of law firms no longer meets the needs of many practitioners and clients.[25] A drive to promote competitiveness and participation in international markets for goods and services, the need to enhance consumer interests and protection, and the need for the national legal services market to complement and facilitate national competition have been consistent themes animating regulatory reform.[26]

1. Incorporated Legal Practices

Each Australian state or territory's Legal Profession Act sets forth the primary rules applicable to Incorporated Legal Practices (ILP).[27] Australian legal practitioners with valid

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[19] Steve Mark, Tahlia Gordon, Marlene Le Brun, and Gary Tamsitt, *Preserving the Ethics and Integrity of the Legal Profession in an Evolving Market: A Comparative Regulatory Response*, (2010) (hereafter "Mark & Gordon").

[20] *Id.*

[21] *Id.*

[22] Hawkins, *supra* note 18.

[23] *Id.*

[24] Steve Mark, Regulating for Professionalism, the New South Wales Approach, August 5, 2010. This paper was presented as part of the Ethics 20/20 Commission's Showcase CLE Presentation at the 2010 Annual Meeting in San Francisco and is attached. (hereinafter "Mark")

[25] Mark & Gordon, *supra* note 19.

[26] Hawkins, *supra* note 18.

[27] For purposes of illustration, reference is made in this part to the legislation and regulations for New South Wales.

practice certificates can provide legal services either alone or alongside other service providers who may, or may not, be lawyers.[28] An ILP may provide legal and any other lawful service, except it may not operate a "managed investment scheme" or provide other services prohibited by applicable regulations.[29] The ILP itself is not required to have an Australian legal practice certificate.[30]

The law relating to attorney-client privilege or applicable legal professional privileges continues to apply to legal practitioners who are officers or employees of ILPs.[31] The ILP and each lawyer who is a legal practitioner director, employee or officer must have professional liability insurance and comply with all other rules and regulations governing the profession.[32]

ILPs may have external investors and be listed on the Australian Stock Exchange. They also must operate in compliance with the Australian Federal Corporations Act, including registration with the Australian Securities & Investment Commission. In Australia, a lawyer's professional duty is owed first to the court and then to the client, whereas a corporation's primary duty is to its shareholders. As a result, the New South Wales' Legal Services Commissioner worked closely with Slater & Gordon, the world's first publicly listed law firm, to ensure that its prospectus, constituent documents and shareholder agreements provided that its duty to the court remained primary, that duties to its clients followed, and that the firm's obligations to shareholders were last.

Upon incorporation an ILP must appoint at least one Legal Practitioner Director responsible for the management of the legal services provided by the entity. If the ILP operates in more than one jurisdiction, it is not required to have a Legal Practitioner Director in each jurisdiction in which it operates. The Legal Practitioner Director must implement and maintain appropriate management systems that allow the entity to provide legal services in accordance with the professional obligations of legal practitioners. A failure to do so may constitute misconduct.[33]

In addition to self-assessment and audit requirements, Legal Practitioner Directors must report to the regulator the conduct of any director of their ILP (whether or not the Legal Practitioner Director) that has resulted in, or is likely to result in a violation of that person's professional obligations or other obligations imposed by or under the Act.[34] The Legal Practitioner Director also must report to the appropriate regulator any professional misconduct of a solicitor employed by the practice and take all reasonable action to address any professional misconduct or unsatisfactory professional conduct by a solicitor employed by the ILP. Finally, a Legal Practitioner Director has an obligation to disclose to clients the services to be provided by

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[28] Legal Profession Act 2004, http://www.austlii.edu.au/au/legis/nsw/consol_act/lpa2004179/; (hereinafter "LPA 2004") Legal Profession Regulation 2005, http://www.austlii.edu.au/au/legis/nsw/consol_reg/lpr2005270/.

[29] *Id.* at Section 112.

[30] *Id*. at Section 136.

[31] *Id.* at Section 112.

[32] *Id*. at Section 144.

[33] The New South Wales Office of the Legal Services Commissioner, the Law Society of New South Wales, the College of Law, and LawCover (the primary professional liability insurer in New South Wales) have developed key criteria designed to help the Legal Practitioner Director and ILPs demonstrate that they have developed and implemented these management systems. *See* Mark & Gordon *supra* note 19; Mark, *supra* note 24.

[34] *See* Mark & Gordon s*upra* note 19; Mark, *supra* note 24; LPA 2004 *supra* note 29.

the ILP, and whether or not the legal services to be provided will be provided by a legal practitioner.[35]

Sanctions for violations of the regulations governing ILPs can be taken against the entity as well as against the Legal Practitioner Director or other licensed legal practitioners for professional misconduct they commit.[36] Discipline can include canceling the practice certificate of the Legal Practitioner Director. Nonlawyers also may be prohibited from serving as officers or from acting as a manager of an ILP.[37] Upon application to the Supreme Court by the bar association or the Legal Services Commissioner, the Court can enter an order disqualifying the ILP from providing legal services; this means it must cease to be an ILP.[38]

Australia does not have a prerequisite "fit to own" test for nonlawyer managers/owners of alternative business structures like that described below for England, Wales, and Scotland. Also, the United Kingdom's "fit to own" test applies to all business structures permitted, not just incorporated practices.

2. Multidisciplinary Partnerships

Lawyers in Australia also may form multidisciplinary partnerships.[39] A multidisciplinary partnership is defined as "a partnership between one or more Australian legal practitioners and one or more other persons who are not Australian legal practitioners, where the business of the partnership includes the provision of legal services in this jurisdiction as well as other services."[40] Partnerships between Australian lawyers and Australian-registered foreign lawyers do not count as multidisciplinary partnerships.[41] Each lawyer partner is responsible for the management of the legal services provided by the partnership and must ensure that appropriate management systems are implemented and maintained as required by the rules and regulations governing the professional obligations of Australian legal practitioners.[42] Requirements for professional liability insurance apply and the Australian legal practitioner partners retain the attorney-client and other applicable legal professional privileges.

The legal practitioner partners of multidisciplinary partnerships may be found to have committed misconduct if any of the other legal practitioner partners commit professional misconduct, if the conduct of any nonlawyer partner adversely affects the provision of legal services by the partnership or if a nonlawyer partner is found to be unsuitable to serve in that capacity.[43] On application by the bar association or the Regulator, the Supreme Court can prohibit an Australian legal practitioner from being a partner with a nonlawyer in a firm that provides legal and other services if the Court finds that the nonlawyer is not a "fit and proper person" to be a partner or has committed conduct that, if committed by an Australian legal practitioner, would violate applicable professional conduct rules.[44]

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[35] *See* Mark & Gordon, *supra* note 19.
[36] *See* LPA 2004 *supra* note 29 at Section 153.
[37] *Id*. at Section 154.
[38] *"Without Prejudice" supra*.
[39] *See* LPA 2004, *supra* note 29 at Section 165.
[40] *Id.*
[41] *Id.*
[42] *Id.* at Section 168
[43] *Id*. at Section 169.
[44] *Id*. at Section 179.

B. Multidisciplinary Practices in Canada

Multidisciplinary practices are permitted in two Canadian common-law provinces, Ontario and British Columbia, and in Quebec, which is a civil law jurisdiction. MDPs have been permitted in Ontario since 1999 and in British Columbia since 2010. The Ontario and British Columbia MDP regime is permissive but with significant restrictions: the lawyers involved in the partnership must have effective control over the legal services the partnership provides, and nonlawyer partners are not permitted to provide services to the public unless they "support or supplement the practice of law by the MDP."[45] For example, By-Law 7 of the Law Society of Upper Canada, which regulates lawyers in the Province of Ontario, permits a lawyer ("licensee") to form a partnership or other association (but not a corporation) with a nonlawyer professional "for the purpose of permitting the licensee to provide to clients the services of the professional" if application is made and a series of conditions are satisfied.[46] The conditions include a good character requirement for the nonlawyer professional, that the nonlawyer professional is "qualified to practise a profession, trade or occupation that supports or supplements the practice of law or provision of legal services," and that the lawyer "shall have effective control" over the nonlawyer's professional practice of his or her profession.[47]

In addition, the Law Society of Upper Canada has had rules in place since 2001 to regulate "affiliated" law firms. The Law Society's Multi-Disciplinary Practice Task Force had been tasked in 1998 and 1999 with examining a "captive law firm model," the provision of legal services to the public through law practices affiliated with professional-service or accounting firms.[48] As a result of the Task Force's deliberations, there are now provisions that impose a notification requirement on a lawyer member or firm that "affiliates with an affiliated entity" as well as various restrictions on such arrangements. For purposes of the By-Law, a lawyer "affiliates with an affiliated entity when the [lawyer] on a regular basis joins with the affiliated entity in the delivery or promotion and delivery of the services of the licensee and the services of the affiliated entity."[49] The Task Force acknowledged at the time that "the definition of affiliation captures more than law firms and non-law firms who by design operate under comprehensive arrangements for the joint delivery of legal and non-legal services."[50]

The section further requires that the lawyer member or firm in such an arrangement shall:

(a) own the professional business through which the [lawyer] practises law or provides legal services […]

(b) maintain control over the professional business through which the [lawyer] practises law or provides legal services; and

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[45] Law Society of British Columbia, Law Society Rules, Multi-Disciplinary practice, Section 2-23.3(2)(a)(i), *available at* http://www.lawsociety.bc.ca/publications_forms/rules/rules_part02.html#2-23-3.
[46] Law Society of Upper Canada, By-Law 7, PART III, MULTI-DISCIPLINE PRACTICES (hereinafter By-Law 7), Section 18, *available at* http://www.lsuc.on.ca/media/bylaw7.pdf.
[47] *Id*.
[48] THE LAW SOC'Y OF UPPER CAN., MULTI-DISCIPLINARY PRACTICE TASK FORCE, IMPLEMENTATION PHASE: REPORT TO CONVOCATION 1 n.1 (Apr. 26, 2001) [hereinafter IMPLEMENTATION REPORT] (quoting The Law Society of Upper Canada Transcript of Convocation 218 (Sept. 25, 1998)), *available at* http://www.lsuc.on.ca/media/mdptaskforcereport.pdf.
[49] Law Society of Upper Canada, By-Law 7, PART IV, AFFILIATIONS, Section 31(2), *available at* http://www.lsuc.on.ca/media/bylaw7.pdf.
[50] IMPLEMENTATION REPORT, *supra* note 48 at 14.

(c) carry on the professional business through which the [lawyer] practises law or provides legal services, other than the practice of law or the provision of legal services that involves the delivery of the services of the [lawyer] jointly with the services of the affiliated entity, from premises that are not used by the affiliated entity for the delivery of its services, other than those that are delivered by the affiliated entity jointly with the delivery of the services of the [lawyer].[51]

The notification requirements include the following information:

1. The financial arrangements that exist between the [lawyer] and the affiliated entity.
2. The arrangements that exist between the [lawyer] and the affiliated entity with respect to
    i. the ownership, control and management of the professional business through which the licensee practises law or provides legal services,
    ii. the [lawyer's] compliance with the Society's rules, policies and guidelines on conflicts of interest in relation to clients of the licensee who are also clients of the affiliated entity, and
    iii. the [lawyer's] compliance with the Society's rules, policies and guidelines on confidentiality of information in relation to information provided to the [lawyer] by clients who are also clients of the affiliated entity.[52]

No fee-splitting or profit-sharing is permitted between the law firm and the affiliated entity, and the conflicts clearance requirements in essence treat the law firm and the affiliated entity "economically as if they were one firm."[53]

In contrast to the restrictive approach adopted in Ontario and British Columbia, amendments to regulations under the *Code des professions* (Professional Code) of Quebec in 2010 provide for a far more liberal multidisciplinary practice regime, requiring simple majority ownership by members of the Barreau du Quebec of the firm through which the professional services are provided.[54] Nonlawyer membership is restricted to those members of various other recognized professional bodies (including actuaries, patent agents, and members of the Chambre de l'assurance de dommages)[55] [damage insurance adjusters and brokers] or the Chambre de la securite financiere[56] [financial planners and insurance agents], but the regulation does not require that their activities "support or supplement the practice of law" in the manner of the Ontario and British Columbia MDP rules.

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[51] By-Law 7, Part IV, at Section 32.
[52] *Id.*, at Section 33(2).
[53] IMPLEMENTATION REPORT, *supra* note 48 at 3.
[54] Quebec, Reglement sur l'exercice de la profession d'avocat en societe et en multidisciplinarite, Loi sur le Barreau (L.R.Q., c. B-1, a.4), Code des professions (L.R.Q., c C-26, a. 93 et 94), [hereafter Quebec Regulation] Sections 1 and 5, *available at* http://www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=2&file=%2F%2FC_26%2FC26R19_1_2.htm.
[55] *See* http://www.chad.ca/en/index.html.
[56] *See* http://www.chambresf.com/en/chamber/.

The firm is required to provide an undertaking to the Barreau du Quebec that in essence ensures that all members of the partnership comply with rules of law so as to permit the lawyer members to carry on their professional activities, particularly as regards the following:

a) professional secrecy, the confidentiality of information contained in client files and the preservation thereof;
b) professional independence;
c) the prevention of situations of conflict of interests;
d) activities reserved for advocates;
e) liability insurance;
f) professional inspections;
g) advertising;
h) billing and trust accounts; and
i) access by the syndic of the Barreau to this undertaking and, if applicable, to every contract or agreement regarding a [member of the Barreau][57]

C. England and Wales: The Legal Services Act 2007

The approach in England and Wales is the result of passage of the Legal Services Act of 2007 (LSA). The LSA sets forth the following "regulatory objectives":

(a) protecting and promoting the public interest;

(b) supporting the constitutional principle of the rule of law;

(c) improving access to justice;

(d) protecting and promoting the interests of consumers;

(e) promoting competition in the provision of services within subsection (2);

(f) encouraging an independent, strong, diverse and effective legal profession;

(g) increasing public understanding of the citizen's legal rights and duties;

(h) promoting and maintaining adherence to the professional principles.[58]

Under the LSA, alternative business structures are defined as entities that have lawyer and nonlawyer management and/or ownership and that provide only legal services or legal services in combination with non-legal services.[59] The Legal Services Board (the overarching regulator) has designated the Solicitors Regulation Authority (SRA) as an approved regulator for these entities. There also may be other approved regulators. All entities with a nonlawyer manager and/or owner must be licensed, and all individual participants also must be authorized. As noted above, unlike the current Australian regulatory regime, the LSA takes a front-end approach by requiring nonlawyer owners and managers to pass a "fit to own" test.[60] Disciplinary

[57] Quebec Regulation, at Schedule B (s.3) [in translation, French version official].
[58] *See* Legal Services Act 2007, Part I, The Regulatory Objectives, *available at* http://www.sra.org.uk/lsa.
[59] *See* http://www.sra.org.uk/sra/legal-services-act/faqs/ABS-faqs.page*; and* http://www.sra.org.uk/sra/legal-services-act/lsa-glossary.page.
[60] *See, e.g.*, Solicitors Regulation Authority Recognized Bodies Regulations, Regulation 3, at http://www.sra.org.uk/solicitors/change-tracker/code-of-conduct/recognised-bodies-regulations.page#r3.

sanctions can be imposed against the entity as well as lawyer and nonlawyer managers and employees.

1. Legal Disciplinary Practices

Since March 31, 2009, firms have been able to become licensed as a Legal Disciplinary Practice (LDP). An LDP can engage only in the provision of legal services, but may have managers who are different types of lawyers (barristers and solicitors) and up to 25% nonlawyer managers.[61] External owners are not permitted.[62] As noted above, nonlawyer managers are subject to a fitness review and approval by the SRA.[63] The SRA imposes an approval fee of £250 plus the cost of the criminal background check for nonlawyer managers.[64] The SRA can withdraw approval of a nonlawyer manager. The SRA may direct an LDP to appoint a person analogous to a Head of Legal Practice under Part 5 of the LSA to ensure compliance with the LDP's obligations and duties under the LSA, the Solicitors Code or Conduct, and other applicable rules and regulations, including the disciplinary rules and procedures. LDPs are required to maintain professional liability insurance.[65]

At the ABA Commission on Ethics 20/20's August 2010 meeting, the Chief Executive of the Law Society of England and Wales reported that, as of June 2010, there existed 254 LDPs; 184 of them were firms of 10 members or fewer. Types of nonlawyer partners include accountants, financial planners, barristers, and teachers. To date, no disciplinary problems with LDPs have been reported.

2. Full Alternative Business Structures

The SRA has reported that implementation of the full range of alternative business structures (ABS) permitted under the LSA will occur in October 2011.[66] At that time, existing LDPs will be able to "passport" into other permitted forms of ABS. The regulations under which the SRA will oversee full ABS are still under development. The SRA is developing a Handbook that will set forth the regulatory framework for solicitors and ABS that includes a new form of "outcome-focused" or "risk-based" regulation as opposed to primarily rule-based regulation. The Handbook is the subject of numerous consultations within the U.K. legal profession.[67]

As noted above, an ABS can have external investment by nonlawyers and may be a multidisciplinary practice. Potential external investors who will own a 10% or greater interest in an ABS must also pass the "fit to own" test. The SRA does not plan to prohibit any particular model under which an approved and licensed entity can operate. Rather, it would require an ABS

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[61] *See* Legal Services Act: Legal disciplinary practices – practical issues *at* http://www.sra.org.uk/sra/legal-services-act/faqs/abs-faqs.page and Solicitors' Code of Conduct 2007, the Management and control requirement, para. 10-21, *available at* http://www.sra.org.uk/solicitors/code-of-conduct/rule14.page.
[62] *Id.*
[63] *See* SRA Recognised Bodies Regulations 2009 at 3.3, *available at* http://www.sra.org.uk/solicitors/change-tracker/code-of-conduct/recognised-bodies-regulations.page#r3.
[64] http://www.sra.org.uk/sra/legal-services-act/faqs/abs-faqs.page
[65] *See* Legal Services Act 2007, s*upra* note 58.

[66] *See* Solicitors Regulation Authority Guidance, Preparing for Alternative Business Structures, November 2010, *http://www.sra.org.uk/solicitors/code-of-conduct/guidance/abs/preparing-for-alternative-business-structures-info.page.*
[67] *See* http://www.sra.org.uk/solicitors/freedom-in-practice/new-handbook/new-handbook-overview.page.

to meet minimum requirements such as having at least one active nonlawyer and lawyer owner/manager, and using a "suitable regulatory model" to ensure necessary client protection.[68]

Full ABSs will be accountable to the SRA through a nominated Head of Legal Practice and Head of Finance and Administration. These individuals must ensure the maintenance of appropriate ethical and financial accounting standards. Nonlawyer owners are obligated not to cause a lawyer to breach his or her professional duties. The SRA will have the power to ban a nonlawyer owner from future involvement in an ABS, to revoke the ABS's license or to fine the firm.

On the issue of confidentiality, an MDP ABS will be subject to the same requirements as other firms under the Solicitors' Code of Conduct and other applicable rules and regulations. It will not be able to disclose confidential client information to, for example, other companies within the same group.[69] The SRA also considers it inappropriate for any firm to exploit sensitive client information for marketing purposes. With regard to protecting client funds when an entity operates as an MDP ABS, the SRA has amended the trust accounting rules to ensure that monies coming from legal activities of the firm are segregated from other forms of client funds.[70]

The Law Society of England and Wales has urged the SRA to ensure that access to justice not receive short shrift as the implementation of ABSs moves forward. The Law Society has acknowledged that these new entities could improve access to justice by reducing costs and providing more services. However, it warns that regulators should take care to ensure that ABSs do not simply lead to expansion in the most profitable areas of practice while unacceptably reducing access in other areas like family or immigration law. To address these concerns, the SRA has engaged in an Equality Impact Assessment and ongoing consultation.

D. Scotland: Alternative Business Structures

On October 6, 2010, the Scottish Parliament approved the Legal Services (Scotland) Act, which permits ABS. The Act received Royal assent on November 9, 2010. Like the LSA in England and Wales, Part 1 of the Act sets forth regulatory objectives.[71] A recent consultation paper states that the "primary aim of the Act is to remove the current restrictions in the Solicitors (Scotland) Act 1980 on how solicitors can organize their businesses. It will allow solicitors to form partnerships with non-solicitors, and to seek investment from outside the profession. However, the Act is enabling rather than prescriptive, so solicitor firms that do not want to operate under the new business arrangements will be under no obligation to do so."[72] Scottish solicitors will be able to provide legal services in partnership with nonlawyers, as MDPs, and with external ownership. Solicitors can remain in traditionally structured practices. Unlike ABS

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[68] *See* FAQs: Legal Services Act and ABSs, http://www.sra.org.uk/sra/legal-services-act/faqs/abs-faqs.page In a 2010 teleconference arranged by the State Bar of Georgia, the nonlawyer head of the SRA indicated that entities seeking to become a licensed ABS would likely be required to submit to the SRA for review and approval their business plans.

[69] Solicitors Regulation Authority, Consultations, The Architecture of Change Part 2 – the new SRA Handbook, para. 29, *available at* http://www.sra.org.uk/sra/consultations/OFR-handbook-October.page.

[70] *Id.* at para. 105.

[71] Legal Services (Scotland) Act (2010) at Part I, *available at* http://www.legislation.gov.uk/asp/2010/16/pdfs/asp 20100016 en.pdf [hereafter "Legal Services (Scotland) Act 2010"].

[72] The Scottish Government, "Ownership and control of firms providing legal services under the Legal Services (Scotland) Act 2010 – A consultation paper" (2011), *available at* http://www.scotland.gov.uk/Publications/2011/02/09105855/0.

in England and Wales, Scottish ABSs must have majority ownership by solicitors; nonlawyer external investors can only own up to a 49% percent stake in the entity.[73] As in England and Wales, nonlawyer investors must pass a "fitness for involvement" test.[74] The Scottish legislation does not create a Legal Services Board to oversee regulation like the LSA did in England and Wales. The Law Society of Scotland will retain its regulatory authority over solicitors and the Scottish Ministers in Parliament may approve other regulators.

A Scottish ABS must have a Head of Legal Services and also either a Head of Practice or a Practice Committee. The same licensed solicitor may serve as Head of Legal Services and Head of Practice. The Head of Legal Practice is required to see that licensed professionals in the entity adhere to their professional obligations.[75] The legal professional privilege applies to communications made to or by licensed providers in the course of providing legal services for any of their clients, as well as to or by others employed by the licensed entity who are acting in connection with the provision of legal services or who are working at the direction or under the supervision of a solicitor.[76]

E. Other Countries with ABS

MDPs also are permitted in Germany, the Netherlands (but not with accountants), and in Brussels (only with accountants but there must be separate billing). New Zealand permits incorporated law practices, but nonlawyers may only own non-voting shares. The definition of nonlawyer is restricted to relatives (spouse, civil union partner, de facto partner, parent, grandparent, child, brother or sister) of the actively involved lawyer. Only lawyers actively involved in providing the incorporated firm's regulated services can be directors.

F. Summary – Rationale for Regulatory Reform Abroad

Regulatory reforms in Australia and the U.K. were driven in large part by competition authorities and extreme consumer dissatisfaction with the lawyer disciplinary regime. In Australia, the 1998 Report by the New South Wales Attorney General's Department, entitled *National Competition Policy Review*, concluded that the partnership model for structuring and operating law firms was anticompetitive.[77] As noted above, this resulted in New South Wales passing legislation to permit Incorporated Legal Practices (ILP), including multidisciplinary practices.[78] Legislators believed these reforms would benefit consumers by enhancing competition and efficiency and lowering costs. Others believed that the changes would help Australia become a hub for the provision of legal services in the Asia-Pacific region.[79]

In the United Kingdom, the 2001 Report of the Office of Fair Trading, entitled *Competition in Professions*, concluded that certain rules governing the legal profession were unduly restrictive. In England and Wales, organized consumer groups voiced concerns that the

[73] Legal Services (Scotland) Act 2010. at Chapter 2, para. 49.
[74] *Id.*, at sections 62-67.
[75] *Id.* at Chapter 2, para. 52.

[76] *Id.* at Chapter 3, para. 75.
[77] National Competition Policy Review, *available at* http://www.lawlink.nsw.gov.au/.
[78] All Australian states and territories permit incorporation of law firms.
[79] *See, e.g., Legal Profession Amendment (Incorporated Legal Practices) Bill Second Reading*¸ New South Wales Legislative Council, Hansard, October 12, 2000.

discipline system operated by the Law Society was confusing, inconsistent, protective of lawyers, and unresponsive. The government solicited a study by Sir David Clementi to address these issues. The Legal Services Act 2007 incorporated many of Clementi's recommendations from his 2004 Report entitled *Report of the Review of the Regulatory Framework for Legal Services in England and Wales,*[80] including alternative business structures.

The Council of the Law Society of Scotland determined that further discussion about alternative business structures was necessary because of the cross-border impact of the Legal Services Act 2007 and changes to the legal services market driven by technology and globalization.[81] The Office of Fair Trading also supported consumer claims that the restrictive nature of the legal services market in Scotland harmed consumer interests.[82] On April 4, 2008, the Council adopted a policy paper, entitled *The Public Interest: Delivering Scottish Legal Services, Policy Paper on Alternative Business Structures*.[83] The report, which endorsed alternative business structures, stated: "The business structures in which solicitors practice now reflect society, the profession and market conditions of the mid-twentieth century. They are not the conditions pertaining in Scotland now, much less in the decades to come."[84]

IV. Possible Approaches for Consideration

As the above discussion makes clear, alternative business structures can take many different forms. While there are various approaches possible, the Working Group is seeking feedback only with respect to the first three options enumerated below.

A. Limited Lawyer/Nonlawyer Partnerships with a Cap on Nonlawyer Ownership

Consistent with the Kutak Commission proposal, lawyers could be permitted to become partners with (and share fees with) nonlawyers, such as economists, social workers, architects, consultants, and financial advisors, under narrowly defined circumstances. The most modest such approach would require that: (1) the firm engage only in the practice of law, (2) the nonlawyers own no more than a certain percentage (e.g., 25%) of the firm,[85] and (3) the nonlawyers pass a "fit to own" test (such as the test that exists in the United Kingdom for all ABS, including LDPs).

B. Lawyer/Nonlawyer Partnerships with No Cap on Nonlawyers Ownership (The D.C. Approach)

The District of Columbia currently permits lawyers to engage in partnerships of the sort described in Option A, but without a cap on the nonlawyer ownership percentage. It also does not require nonlawyers to pass a "fit to own" test.

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[80] Report of the Review of the Regulatory Framework for Legal Services in England and Wales, *available at* http://www.legal-services-review.org.uk/content/report/index.htm.

[81] *See* http://www.lawscot.org.uk/members/legal-reform-and-policy/law-reform/alternative-business-structures.

[82] *Id.*

[83] The Public Interest: Delivering Scottish Legal Services, Policy Paper on Alternative Business Structures, a*vailable at* http://www.lawscot.org.uk/members/legal-reform-and-policy/law-reform/alternative-business-structures/abs-news-archive.

[84] *Id.*at p.6.

[85] For example, LDPs in the United Kingdom have capped at 25% the ownership interest that nonlawyers can have in a law practice.

As noted above, Rule 5.4 of the District of Columbia Rules of Professional Conduct provides in relevant part that:

Rule 5.4—Professional Independence of a Lawyer

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that: . . . .

(4) Sharing of fees is permitted in a partnership or other form of organization which meets the requirements of paragraph (b) . . .

(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, but only if:

(1) The partnership or organization has as its sole purpose providing legal services to clients;

(2) All persons having such managerial authority or holding a financial interest undertake to abide by these Rules of Professional Conduct;

(3) The lawyers who have a financial interest or managerial authority in the partnership or organization undertake to be responsible for the nonlawyer participants to the same extent as if nonlawyer participants were lawyers under Rule 5.1;

(4) The foregoing conditions are set forth in writing.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

The Comment to this Rule elaborates as follows:

[4] This rule rejects an absolute prohibition against lawyers and nonlawyers joining together to provide collaborative services, but continues to impose traditional ethical requirements with respect to the organization thus created. Thus, a lawyer may practice law in an organization where nonlawyers hold a financial interest or exercise managerial authority, but only if the conditions set forth in subparagraphs (b)(1), (b)(2), and (b)(3) are satisfied, and pursuant to subparagraph (b)(4), satisfaction of these conditions is set forth in a written instrument. The requirement of a writing helps ensure that these important conditions are not overlooked in establishing the organizational structure of entities in which nonlawyers enjoy an ownership or managerial role equivalent to that of a partner in a traditional law firm.

[5] Nonlawyer participants under Rule 5.4 ought not be confused with nonlawyer assistants under Rule 5.3. Nonlawyer participants are persons having managerial authority or financial interests in organizations that provide legal services. Within such organizations, lawyers with financial interests or managerial authority are held responsible for ethical misconduct by nonlawyer participants about which the lawyers know or reasonably should know. This is the same standard of liability contemplated by Rule 5.1, regarding the responsibilities of lawyers with direct supervisory authority over other lawyers.

[6] Nonlawyer assistants under Rule 5.3 do not have managerial authority or financial interests in the organization. Lawyers having direct supervisory authority over nonlawyer assistants are held responsible only for ethical misconduct by assistants about which the lawyers actually know.

[7] As the introductory portion of paragraph (b) makes clear, the purpose of liberalizing the Rules regarding the possession of a financial interest or the exercise of management authority by

a nonlawyer is to permit nonlawyer professionals to work with lawyers in the delivery of legal services without being relegated to the role of an employee. For example, the rule permits economists to work in a firm with antitrust or public utility practitioners, psychologists or psychiatric social workers to work with family law practitioners to assist in counseling clients, nonlawyer lobbyists to work with lawyers who perform legislative services, certified public accountants to work in conjunction with tax lawyers or others who use accountants' services in performing legal services, and professional managers to serve as office managers, executive directors, or in similar positions. In all of these situations, the professionals may be given financial interests or managerial responsibility, so long as all of the requirements of paragraph (c) are met.

The Comment also makes clear that the Rule does not permit an individual or entity to acquire all or any part of the ownership of a law partnership or other form of law practice organization for investment or other purposes.

C. MDPs that Offer Non-Legal Services

A third option would be to permit firms of the sort described in option B and to allow those firms to offer both legal *and non-legal* services. In other words, this option would essentially be the D.C. Rule, but without the restriction contained in D.C. Rule 5.4(b)(1).

As noted above, the Commission has determined that the following two options are <u>not</u> appropriate to be recommended for the United States at this time. Both are in place in the global services marketplace in which U.S. lawyers and firms engage, however, so they may warrant additional monitoring and study.

D. Endorsing Outside Investment

The three options above assume that the nonlawyer is partnered with and is an active member of the firm. An alternative would be to permit nonlawyer passive investment in such entities, but to place caps on nonlawyer ownership in the context of passive investment.

E. The Australia Model

This approach would not only permit external passive investment and ownership in law firms, but also place no limits on the percentage of ownership that nonlawyers have in the entity.

V. Conclusion

In light of these issues and concerns, the Commission seeks input into whether amendments to the Model Rules of Professional Conduct or other action would be advisable. Any responses to the questions posed in this paper, as well as any comments on related issues, should be directed by **June 1, 2011** to:

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Natalia.Vera@americanbar.org

Comments received may be posted to the Commission's website.

Attachment D

Certified Professional Guardianship Board
Public Comment Guidelines

Oral Public Comments

A public comment period shall be held at all regularly scheduled in-person meetings of the Certified Professional Guardian Board. The public comment period shall be the first item on the agenda after the chair report, shall not exceed thirty (30) minutes total and will be subject to the following general rules:

1. Speakers must sign in to speak and must list name and topic.
2. No speaking when others are speaking.
3. Only the chair may interrupt.
4. No personal attacks or accusations.
5. Comments will be limited to three minutes per speaker.
6. No repetition of comments from previous meetings.
7. Written comments may be submitted in lieu of, or in addition to public comment.

Written Public Comments

Written public comments that are provided in response to a Request for Public Comment, which meet the following guidelines, will be posted by AOC staff on the Guardianship Program website at:
http://www.courts.wa.gov/programs_orgs/Guardian/?fa=guardian.proposed

Comments should:

1. Not exceed 1500 words.
2. Be double spaced in 12 point type.
3. Be on letter size paper (8 ½ x 11 inches).
4. Include no tabs or dividers, except that colored letter-size paper may be used for dividers between sections.
5. Clearly identify the Request for Comment topic being addressed. Each communication should include a subject line identifying the Request for

Comment topic being addressed; failure to do so could prevent posting of comments.

6. Include no personal attacks or accusations.
7. Include no profanity.
8. Be sent to one of the following addresses:

Certified Professional Guardian Board
P.O. Box 41170
Olympia, WA 98504-1170
or
guardianshipprogram@courts.wa.gov

Should you have any questions about the process, Board procedures and/or regulations, the staff listed below are available to answer your questions.

Shirley Bondon, shirley.bondon@courts.wa.gov, 360-705-5302
Carla Montejo, carla.montejo@courts.wa.gov, 360-705-5320
Sally Rees, sally.rees@courts.wa.gov, 360-704-4062