

alternative
BUSINESS STRUCTURES

The Future of Legal Services



Alternative Business Structures and the Legal Profession in Ontario:

A Discussion Paper

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1.0 Purpose

The Law Society of Upper Canada is seeking input from the public, the legal community and other interested parties on alternative business structures (ABS) as a means for delivering legal services in Ontario.

The Law Society is engaged in a process for full consideration of ABS, and this report constitutes a step in that process. The Law Society has not yet decided whether alternative business structures should be permitted in Ontario. This process will help it determine what actions to take, if any, on the issue. The Law Society is interested in hearing differing views on ABS, including challenging perspectives or approaches.

This document provides context and background to help people understand what alternative business structures are and what allowing them would entail. It also solicits feedback to help the Law Society gather input.

At present, Ontario lawyers and paralegals are subject to restrictions on how to structure their practices. In this discussion paper, the Law Society is seeking views on whether it would be desirable to permit more variety in the forms of ownership and greater latitude in the delivery of legal services, including in association with non-legal professionals and service providers.

The Law Society is considering the ABS model in light of several factors, including apparent gaps in the provision of legal services, the increasing globalization of the legal profession, and advances in technology and developments abroad, that significantly affect how legal services can be delivered.

The level of interest and activity on ABS led the Law Society to create a working group to examine and report on the issue. This discussion is being undertaken at the direction of Convocation, the Law Society's governing body,¹ based on a recommendation of the Working Group to consider different options for how the delivery of legal services might be structured in the future.

On February 27, 2014, the Law Society's Working Group on ABS presented a report that discussed four possible new models for the delivery of legal services in Ontario. Those models, which form the basis for this discussion paper, fall into two categories: On the one hand there are businesses that provide legal services only, and on the other are businesses offering both legal and non-legal services.

There could be no restrictions on ownership of those businesses by people who are not legal professionals, or their ownership could be limited to keep it under 50%.

Any of these models, if adopted, could form the basis for structures that would be regulated by the Law Society for the delivery of legal services. Interested parties are encouraged to review the models and provide comment or suggest alternate models.

We are seeking feedback from as many people as possible, both inside and outside the legal profession, with a view to beginning a dialogue on the issue.

Comments should be sent to the Law Society by December 31, 2014 and may be submitted by email to abs.discussion@lsuc.on.ca or by mail to:

ABS Discussion
Policy Secretariat
Law Society of Upper Canada
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2. The current state of affairs

2.1 The Law Society's mandate

In Ontario, the Law Society of Upper Canada regulates the provision of legal services.

In carrying out its functions, duties and powers, the Law Society is required to have regard to certain duties including:²

- a duty to maintain and advance the cause of justice and the rule of law.
- a duty to act to facilitate access to justice for the people of Ontario.
- a duty to protect the public interest.

The *Law Society Act* further requires the Law Society to have regard to the principle that:

restrictions on who may provide particular legal services should be proportionate to the significance of the regulatory objectives sought to be realized.³

Except as permitted by Law Society bylaws, only individuals licensed by the Law Society may provide legal services or practise law.⁴ Section 1(5) of the *Law Society Act* very broadly defines legal services as follows:

For the purposes of this Act, a person provides legal services if the person engages in conduct that involves the application of legal principles and legal judgment with regard to the circumstances or objectives of a person.

The Law Society determines the classes of licences that may be issued, the scope of authorized activities by class of licence, and the terms, conditions and restrictions imposed.⁵

2.2 Business structures now permitted for lawyers and paralegals

Only licensed lawyers and paralegals in sole practice or in firms owned and controlled by licensed legal professionals may provide legal services in Ontario⁶. These practices may only provide legal services and services that support or supplement legal services.

The Law Society currently permits lawyers and paralegals to provide legal services through the following business structures:

Business Structure	Legislative or Rule Reference
Sole proprietorship	<i>Rules of Professional Conduct</i> section 1.02, <i>Paralegal Rules of Conduct</i> , section 1.02
Partnership	<i>Rules of Professional Conduct</i> section 1.02, <i>Paralegal Rules of Conduct</i> , section 1.02
Limited liability partnership	<i>Partnerships Act</i> , section 44.2(a) <i>Law Society Act</i> , section 61.1
Professional corporation	<i>Business Corporations Act</i> , section 3.1(2)(a) <i>Law Society Act</i> , section 61.0.1
Multidisciplinary practice	<i>Law Society Act</i> , section 62(0.1)32, Law Society By-Law 7

The *Rules of Professional Conduct* prohibit direct or indirect fee-sharing with people who are not licensed legal professionals, other than in a multidisciplinary practice (MDP) and in inter-jurisdictional law firms. MDPs must be effectively controlled by licensed legal professionals and may only provide additional services that support or supplement the licensed activity. Fees may only be shared within an MDP with MDP partners who provide client services.

2.3 Challenges under the current system

In Ontario, clients seeking legal advice turn to practices and firms that are 100% owned by licensed lawyers and/or paralegals and that provide only legal services.

Anecdotally, Ontario lawyers and paralegals have said that their attempts to innovate have been hampered or prevented by the current requirements. For example:

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

2.4 Availability of unregulated legal services

The Internet has changed the game – and the public’s expectations – with regard to legal services.

There has been significant growth in unregulated legal service providers in Ontario and elsewhere. This growth provides evidence that there is a demand for services not being effectively supplied by traditional legal practices. That these innovations are happening outside traditional legal practices suggests that regulatory restrictions may be unduly constraining innovation. Allowing lawyers and paralegals to provide services directly with people outside the legal profession may stimulate innovation in the provision of legal services and result in a greater range of services for the public.

Permitting innovation must be balanced with appropriate regulatory oversight. Ontarians are not currently protected when they use unregulated services. From a consumer protection perspective, it is therefore preferable that new business structures providing legal services be regulated by the Law Society. This is not always feasible or possible. For example, some unregulated services are provided over the Internet from other jurisdictions.

3. Considering alternative business structures

3.1 What are alternative business structures?

An alternative business structure, or ABS, is a broad term that includes any form of traditional law firm business structure, as well as alternative means of delivering legal services. These may include, for example:

- non-lawyer or non-paralegal investment or ownership of law firms, including equity financing;
- firms offering legal services together with other professionals offering other types of services; and
- firms offering an expanded range of products and services, such as do-it-yourself automated legal forms, as well as more advanced applications of technology and business processes.

The ABS model has been in place in New South Wales, Australia, since 2001 and in England and Wales since 2012. Some examples of ABS enterprises in other jurisdictions include:

- businesses providing legal services only, with part ownership by a long-term employee or spouse or a business or technology expert;
- businesses providing fixed-fee legal services through retail stores that are easily accessible and convenient to consumers;
- businesses offering legal services together with services related to the area of legal practice, such as social workers, human resources professionals and accountants;
- law firms operating as franchises so they have centralized access to management systems, technology, marketing and other expertise; and
- law firms using equity financing to invest heavily in technology so they can offer new and innovative forms of delivering legal services.

3.2 Why the Law Society is considering the ABS model

The Law Society is interested in determining whether alternative business structures can:

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

The Law Society also wishes to identify regulatory issues that may arise from services now provided outside of regulatory scrutiny.

Consideration of ABS was identified as one of the priorities for the 2011-2015 term of the Law Society's governing body, and the ABS Working Group has been reviewing extensive research on ABS and communicating with key representatives of the professions and other experts since 2012.

As the Law Society considers alternative business structures – and as it seeks input on whether the ABS model is an option for Ontario – it has identified a series of considerations to help frame the discussion.

They are:

- I. Access considerations
- II. Technological considerations
- III. Economic and business considerations
- IV. Professional and ethical considerations
- V. Implementation considerations

I. Access considerations

Research shows that many individuals and small businesses in Ontario are now attempting to deal with their legal issues without the assistance of lawyers or paralegals.

- In Canada and elsewhere, in family law, most litigants do not use lawyers - recent studies show 70% are unrepresented;⁷
- In 2009, the federal Department of Justice published *The Legal Problems of Everyday Life* showing that legal advice was sought for less than 15% of justiciable problems in Canada;⁸
- People with legal problems commonly seek assistance from non-lawyers. The above-noted Department of Justice study (of almost 7,000 adults) found that 42.2% of respondents who experienced a personal injury problem consulted an unregulated source of assistance.⁹ Employment (35.8%) and housing (33.7%) were the next highest areas in which respondents resorted to non-legal sources of assistance.¹⁰
- In 2009, the *Ontario Civil Legal Needs Project* found that one-third of low- and middle-income Ontarians did not seek legal assistance for what they regarded as legal problems.¹¹
- A recent study of 259 self-represented litigants in family and civil law matters in Ontario, British Columbia and Alberta reported that the most consistently cited reason for self-representation was the inability to afford to retain, or continue to retain, a lawyer.¹²

This research highlights the fact that there are gaps in legal services for many Ontarians. Even middle-income individuals are in many cases not obtaining, or cannot afford, the services of a lawyer or paralegal.

There are two situations in which people tend to seek legal services. They are either looking for help with important but routine issues, such as the purchase of a house or the creation of a will or power of attorney, or they are facing a serious legal problem, such as a personal injury, a criminal charge, or a marriage breakdown.

People are always sensitive to cost. And the more serious the problem, the more legal services are likely to cost. In fact, serious legal problems often cost more than the average person can afford.

For that reason, members of the public may seek services from online service providers such as Legal Zoom, because of cost but also because of their hours, operations, location or client services. People who use online providers are, from

the perspective of the legal profession, lost clients. In other words, the existing business structures are not effectively serving the market.¹³

From the perspective of lawyers and paralegals, people who are currently not seeking their assistance represent a significant market opportunity. More options for ownership of legal practices, and greater association with other service providers, might encourage innovation that would reduce the cost of services and permit greater access.

From the Law Society's perspective, the question is whether existing restrictions can properly be liberalized to facilitate more effective and economical delivery of legal services, where services are not available or accessible at present.

II. Technological considerations

The practise of law is changing rapidly. In the last 25 to 30 years, technology has significantly changed the way in which legal services are being provided and accessed.

Technology has changed the way legal services are delivered. Lawyers and paralegals rely heavily on technology in day-to-day practise. For example, they communicate with clients and others electronically, and use technology to create, store and file documents.

Technology has changed the expectations of clients. A recent study by the American Bar Association found that the majority of Americans now look for legal services online.¹⁴ The public has access to far more information (both accurate and inaccurate) about legal issues and legal services. The offer of legal and other services over the Internet has resulted in an explosion of self-help legal remedies available to the public.

Technology has increased the risks to the public posed by unregulated service providers.

Large clients are reducing their use of traditional legal practices through expanded in-house practices, legal process outsourcing and non-traditional legal practices, all enabled at least in part by technology.

Access to new sources of capital by lawyers and paralegals may allow them to bring in technological innovations that would enhance services to clients.¹⁵ The

potential exists for lawyers and paralegals to use technology to better respond to consumer demands – for example, to develop new tools for interaction with clients, new options for online assistance combined with legal services, and new billing options such as fixed fees.

Technology may offer financial and other benefits to lawyers and paralegals, especially those who wish to explore flexible work arrangements or part-time work. It may also help lawyers and paralegals who are newly licensed or who are new to private practice by expanding the employment options available.

Lawyers in jurisdictions that permit ABS have used technology in some of the following ways:

- Establishing franchises that provide centralized infrastructure and assistance with marketing and branding strategies, buying power and practice support.
- Developing systems to better predict the cost of legal services and the suitability of new fixed-fee arrangements for clients in the areas of personal injury, family law and wills.
- Offering online one-stop-shopping for accident management services, including compensation, repairs, replacement vehicles and rehabilitation.
- Establishing large, virtual law firms with a roster of consultant lawyers who work from home on a wide variety of private client matters.

In England and Wales, a 2013 study conducted by the Legal Services Board observed that ABS firms appear to use technology to deliver services to a greater extent than do other firms.

Ninety-one percent of survey respondents indicated that they had a website to deliver information and other services to their customers. In contrast, 52% of other solicitor firms had a website, which they used for advertising. The business affairs, personal injury, employment and family market segments were associated with the highest levels of publicized innovations.¹⁶

III. Economic and business considerations

a. Economic theory

Professors Edward Iacobucci and Michael Trebilcock presented at the Law Society's ABS Symposium in October 2013. It was their view that the introduction of the ABS model should facilitate innovation, but would not cause dramatic change to the way in which legal services are provided in Ontario.

In a paper completed for the Law Society in 2013, Professors Iacobucci and Trebilcock applied the "theory of the firm" to the Ontario context to explain that expressly limiting what services may be supplied by legal practices can create economic inefficiencies, as can effectively limiting the nature of expertise available within the firm.¹⁷

Limiting equity investment can constrain firm development and innovation. If restricted only to debt financing, firm owners are limited by the security that they are willing and able to provide and by the personal risk that they are prepared to assume. Equity financing permits sharing of risk.

The theory also posits that ABS should lead to greater efficiency because there should be lower transaction costs for the provision of complementary services within the firm, rather than referral arrangements between firms. Further, lawyers may benefit from the professional management skills of a non-lawyer owner or manager.

b. Competition from new business entities

There is significant competition between existing legal practices for legal work. However, this competition is mostly by traditional firms and mostly for traditional legal work.

While permitting alternative business structures may provide opportunities for existing practices to innovate and serve new markets, it is also likely that existing practices will face competition from new kinds of firms.

This happened in both Australia and England, in the personal injury market. In Australia, nearly half of plaintiff's side personal injury work is now conducted by

five large personal-injury firms, two of which are publicly listed on the Australian Stock Exchange. In England, 30% of personal injury work is now conducted through firms using ABS arrangements. Half of those are new firms, and half are existing practices taking advantage of ABS liberalization.¹⁸

While the Australian and English markets have different market structures and incentives, it is clear that personal injury work has been attractive to firms using ABS models. This increases competition for existing practices, which could result in greater innovation by existing practices (including conversion to ABS models). It also means some firms might merge, lose clients or disappear.

Firms using ABS may have some competitive advantages. With greater capital and size may come a better ability to market services and create a brand. Economies of scale and business/technological innovation might allow for lower prices and/or fixed pricing, as well as better quality assurance.

On the other hand, experience elsewhere shows that legal services provided through the traditional firm model can succeed in providing legal services alongside ABS firms.¹⁹ Some legal services might be better provided under traditional models, and some consumers of legal services may prefer the more personal service that traditional models provide.

c. Challenges to sole practitioners and small firms

Most legal services are delivered to individuals and small businesses by sole practitioners and small firms.²⁰ The practitioners in these firms must run their own firms as well as assist clients. They may perform necessary non-legal work within their practices that could be done by others at a lower cost.

Practitioners serving individual clients and small businesses are typically in a highly competitive market.

The traditional solo and small practice model can have inherent limitations. Limited practice volume, business and technological expertise or capital can impair the ability to provide block fees or a wider or different range of services.²¹

The informal consultations undertaken by the ABS Working Group showed that many practitioners enjoy the freedom of being a sole practitioner or in a small firm, but consider the business and marketing aspects of their practice to be a burden. For them, practising, even as a sole practitioner, in a structure that facilitated access to business expertise and infrastructure was attractive.

Sole practitioners and practitioners in small firms may benefit from the advantages associated with participating in a larger entity or organization. These include –

- access to and investment in technology, technological innovations and infrastructure,
- the opportunity to share business costs,
- access to business and other expertise,
- ethical infrastructure,
- association with a known brand, and
- greater market power in dealing with suppliers and other market participants.

For some practitioners, existing private practice models are not attractive. Some would prefer simply to provide legal services rather than market their services to clients or participate in firm management and operations. Some practitioners would prefer to work part-time, including from their homes. ABS based services may provide additional options to respond to these preferences.

New sources of capital from non-lawyers or non-paralegals may permit a law firm to reorganize or expand (which may entail a merger with another firm, opening a new location, or beginning delivery of new types of services or in new practice areas). It may also permit a firm to invest in talent (hiring of new legal and non-legal staff).

All of this may lead to enhanced quality, and may enable a licensed legal professional to scale operations, thereby moving away from the billable hour to alternative fee arrangements.

In New South Wales, Australia and in England and Wales, many of the firms taking advantage of ABS were small or sole practices, and remained so within the ABS environment.

IV. Professional and ethical considerations

a. Reputation of the Profession

Discussion of the ABS model raises the concept of professionalism, and in particular that the liberalization that results from the introduction of alternative business structures may adversely affect the professional reputation of lawyers and paralegals.

For example, it could be argued that allowing legal services to be provided out of a big entity consisting of more than just lawyers and paralegals compromises client protection because professional values are not sufficiently protected. But whether the reputation of the legal professions would be compromised by permitting some legal services to be provided in non-traditional ways is an issue that should be considered, and it raises a number of questions.

It is worth discussing whether these questions stem from ABS or whether they are related to the changing nature of legal practice and consumer needs. Some changes are already occurring, without the adoption of ABS. For example, is the reputation of lawyers in traditional personal-injury litigation firms or real estate practices materially harmed by delivering legal services via the Internet or through a retail store, as they do now? Does it make a difference if the owners are not lawyers or paralegals? Would the involvement of non-lawyers in ownership of some law firms compromise the reputations of traditional law firms? Would such concerns be weighty enough to prohibit a lawyer or paralegal from operating from a shopping centre or over the Internet or to entirely prohibit investment by those who are not lawyers or paralegals?

b. Duties to clients and protecting the cause of justice, rule of law and administration of justice

Legal service regulation ensures that clients have competent, independent legal representation provided with candour and confidentiality. It also protects society by ensuring that legal services are provided with fidelity to the cause of justice, the rule of law and the administration of justice. These professional values would have to be safeguarded in any move to liberalize ownership or structure including ABS.

Many of those who are sceptical of ABS express particular concern about protection of these professional values.²² On the other hand, ABS proponents do not dismiss the importance of these professional values, but rather believe that these values can be properly protected in an ABS model.²³

c. Safeguarding solicitor-client privilege

Protection of solicitor-client privilege is essential to any consideration of the ABS model.

Communications covered by solicitor-client privilege are protected from disclosure and are inadmissible in court. Solicitor-client privilege has been part of the common law for over 500 years and plays a critical role in the operation of the legal system.²⁴ It is now a constitutional right protected under the *Canadian Charter of Rights and Freedoms*.²⁵ The concept of solicitor-client privilege is complex and continues to evolve.

The ABS model broadens the scope of the traditional solicitor-client relationship, which could negatively impact solicitor-client privilege if steps are not taken to protect it.

Determining whether communications are protected by solicitor-client privilege can be more complicated in an alternative business structure, for both lawyers and clients. For example, only communications for the purpose of seeking or giving legal advice are protected by solicitor-client privilege. Privilege does not attach to non-legal advice such as business advice. Privilege only attaches to communications that are intended to be confidential.

When lawyers provide legal services jointly with other types of services, or own law firms jointly with non-lawyers, additional steps would be required to ensure that privileged communications continued to be protected.

Jurisdictions that have adopted ABS reforms have considered the protection of solicitor-client privilege.

In New South Wales, Australia and in England and Wales, the issue of solicitor-client privilege in an ABS setting was addressed through legislation. Australia's *Legal Profession Act, 2004*, section 143(3) expressly provides that the law relating to client legal privilege (or other professional privilege) is not excluded or

otherwise affected because an Australian legal practitioner is acting in the capacity of an officer or employee of an incorporated legal practice.

In England and Wales, under section 190 of the *Legal Services Act 2007*, privilege applies to communications made by an ABS, provided that the communications are made through, or under the supervision of, a relevant lawyer.

If the Law Society were to take steps to permit changes to current business structures, the issue of privilege would need to be addressed. Legislative amendments may be required to expressly provide that the law on solicitor-client privilege is not affected by the introduction of new business structures. Other measures that might assist in protecting privilege could include:

- requiring an ABS to disclose in writing which services are legal services and which are non-legal services, and declaring that privilege applies only to those communications whose purpose is to seek or give legal advice;
- creating a prohibition against causing or inducing a lawyer or paralegal to contravene his or her professional obligations, the *Rules of Professional Conduct* or any other relevant legislative or regulatory enactments; and
- recognizing that a lawyer's professional obligations would prevail over any other legislative provisions in case of a conflict.

V. Implementation considerations

a. Business entity regulation and subordination of business interests

The experience of other jurisdictions that have implemented ABS is an important source of information for the Law Society. Australia has 13 years of ABS experience. This provides valuable information as to how ABS could be implemented, and what might follow implementation.

Key to the Australian experience has been the requirement that legal practices, as well as lawyers, subordinate their interests (including those of their owners) to the interests of their clients and to the interests of the rule of law and the administration of justice.

As well as requiring subordination of interests, legal practices are regulated in Australia and England, in addition to regulation of legal practitioners. Professional liability insurance is mandatory for a business using the ABS model.

To encourage and support ethical infrastructures within ABS entities, Australia also initiated a firm regulation approach when ABS was introduced. Overall, reports of the Australian experience are positive.²⁶ They emphasize that the introduction of ABS has in fact helped enhance ethical culture in ABS firms.

b. Conflicting interests

Conflicts between owner interests and client interests are a concern.

The ABS Working Group suggested that the interests of all material ABS owners should be treated as interests of the ABS for conflicts purposes. As an example, an ABS could not accept material investment from an adverse party in litigation, as that would create a conflict with the interests of the ABS client. Similarly, a material interest in a legal practice by a lender, insurer or broker could be considered to be a conflicting ABS interest with respect to the interest of a real estate purchaser.

The ABS Working Group noted that professional independence must be maintained in both litigation and transactional matters. A question to be considered is whether banning all non-lawyer ownership is necessary to safeguard professional independence. On the other hand, it could be argued that this position is too broad and that focused conflicts rules and fiduciary law can effectively address these issues. It is worth examining whether some types of business structures raise risks to the public that cannot be adequately addressed through regulation and should not be permitted by the Law Society.

c. ABS approval and supervision

Alternative business structures have been adopted in England and Wales, as well as Australia. Each of those jurisdictions takes a different approach to approval and supervision.

In Australia²⁷, no prior approval is required for the establishment of an incorporated legal practice in which non-lawyer shareholding is permitted. There

is no prior evaluation of the suitability of the shareholders to have an ownership interest. However, the board of directors must include at least one director who is a lawyer, with the legal practice being under the management of the legal practitioner director.

The legal practitioner director must establish appropriate management systems for the legal practice. If the legal practitioner director ceases to be a director or is removed by the legal services regulator, a new legal services practitioner must be appointed within seven days. It is an offence to continue to provide legal services for more than seven days without a legal practitioner director. This approach has been effective in regulating ABS in Australia to date.

The English approach is different. An English ABS must receive prior approval from the regulator. The regulator²⁸ considers the suitability of the proposed owners of the ABS as well as its proposed activities and management. Rather than the legal practice being under the responsibility of a legal practitioner director, the English ABS is itself a regulated entity subject to regulatory obligations,²⁹ scrutiny and discipline.

A compliance officer for legal practice³⁰ must be appointed who is responsible for “creating a culture of compliance throughout a firm, becoming its focal point for the identification of risk, and the key point of contact for the SRA (Solicitors Regulation Authority)”.³¹ According to some observers, the English approach has also been effective in protecting the public, although the ABS model has only been permitted in England since 2012, while alternative business structures have been permitted in Australia since 2001.³² There has been some criticism of England’s SRA approach as being slow and expensive.³³

5. Specific ABS models for discussion

To help stimulate discussion, the following models illustrate how alternative business structures could be set up. Some of the possible benefits and concerns associated with each model have been listed, but these are by no means exhaustive and are provided only to initiate the discussions.

The Law Society has made no decision on ABS. In addition to feedback on these models, it welcomes comment on why people might prefer other ABS models, or the status quo.

Model #1

Business entities providing legal services only in which individuals and entities who are not licensed by the Law Society can have up to 49 per cent ownership.

Under this model, the lawyer or paralegal would maintain majority ownership of the business entity, and would be responsible for its provision of legal services.

Potential benefits

- This ownership structure might generate an increase in the equity capital available to the firm without compromising control of the business by licensed legal professionals.
- It could permit key employees to be rewarded by equity participation, the most common form of ABS in jurisdictions that have adopted it.
- The provision of legal services would remain under the control and supervision of lawyers and paralegals, minimizing concerns about professionalism.

Possible concerns

- Investors may not be interested in assuming minority ownership in a law firm without a commensurate degree of control over the decisions regarding the business. They may not perceive sufficient potential growth in the business to justify an equity investment in which the investor may only obtain a minority interest.

- Allowing an infusion of up to 49% more equity capital may not provide the resources necessary to achieve material innovation in the delivery of legal services.

Model #2:

Business entities providing legal services only with no restrictions on ownership by individuals and entities who are not licensed by the Law Society.

Under this model, the business would be free to seek capital in any way it sees fit, but it would only provide legal services. Though the business owners need not be legal professionals, the provision of legal services would remain under the control and supervision of licensed lawyers or paralegals.

Potential benefits

- Increased capitalization could be directed at enhancing the delivery of legal services.
- As the business would provide only legal services, the potential risks of conflicts, breach of confidentiality and loss of privilege that might exist in a multidisciplinary/service environment would be minimal.
- The requirement that legal professionals control and supervise the provision of legal services, together with entity regulation, should effectively ensure the proper delivery of legal services.
- The licensed legal professionals within the ABS and the provision of legal services by the entity would be clearly subject to Law Society rules and sanctions.

Possible concerns

- The importance of preserving solicitor-client privilege would require that owners who are not legal professionals not be permitted to access confidential information about the identity of clients and the work being done for them.

- These limitations may be more restrictive than is required to protect the public interest, an issue that the Law Society is required to consider under the *Law Society Act*.³⁴
- Continued restrictions on permissible services may continue to impede innovation by lawyers and paralegals. Innovation may emerge largely in the unregulated sphere, putting the public potentially at risk.

Model #3

Business entities providing both legal and non-legal services (except those identified as posing a regulatory risk) in which individuals and entities who are not licensed by the Law Society would be permitted up to 49 per cent ownership.

In this model, up to 49% non-licensee ownership in an entity is permitted, where the entity provides both legal services and non-legal services. Any type of services may be provided by the entity, except for those identified by the Law Society as posing a risk.³⁵

Potential benefits

- Liberalized ownership may permit increased capitalization of the entity to enhance the delivery of legal services.
- Given its mandate to protect the public interest, the Law Society would assess the risks involved in permitting any type of ABS and impose appropriate restrictions.
- Regulating the provision of legal services through the business entity rather than through direct supervision requirements could assist in encouraging further innovation.

Possible concerns

- The structure may not lead to the full range of innovation that might result from unrestricted ownership.
- This model will require attention to the avoidance of conflicts and the protection of confidentiality and privilege, as the services of both licensed

legal professionals and non-licensed people would be permitted to be delivered within the ABS.

Model #4

Business entities providing both legal and non-legal services (except those identified as posing a regulatory risk) in which individuals and entities who are not licensed by the Law Society would be permitted unlimited ownership.

In this model, the non-legal services would not be subject to restriction, except where the Law Society has identified a sufficient regulatory risk³⁶.

Potential benefits

- Unrestricted ownership by people who are not licensed legal professionals might increase the entity's access to capital.
- This could encourage innovation and the development of new ways to deliver legal services which otherwise would be more likely to emerge in the unregulated sphere.

Possible concerns

- This model would require attention to the avoidance of conflicts and the protection of confidentiality and privilege, as non-legal services would be permitted to be delivered within the ABS.
- Independence of the provision of the legal services might be affected, due to conflict between the business goals of the entity and the provision of professional services of lawyers and paralegals. Prioritizing the duties of a lawyer or paralegal to the client, the administration of justice and the Law Society would have to be specifically addressed.

6. Feedback

The Law Society would like to hear your views on alternative business structures.

We are seeking feedback from as many people as possible, both inside and outside the legal profession, with a view to beginning a dialogue on ABS.

Please provide your comments by December 31, 2014, as indicated earlier in this document, so that the Law Society can consider next steps.

We would appreciate you providing your name, contact information and your reason or reasons for being interested in the issue. We are interested in both general comments about the appropriateness of the ABS model for Ontario, as well as specific comments about particular considerations or issues, or about the four models presented in this paper.

Appendix 1

Developments in Canada

In Canada, 14 provincial and territorial law societies regulate their members in the public interest. Certain law societies restrict the delivery of legal services to sole practitioners and lawyers practising in partnership or through a professional corporation.

Quebec

The Barreau du Québec, aside from traditional forms of practice, permits an advocate to practise law in a limited-liability partnership, a professional corporation and a multidisciplinary practice. Regulations require law firms in these practices to provide a detailed undertaking, as follows:

- The business entity must ensure that members who engage in professional activities within the firm have a working environment that permits compliance with any law applicable to the carrying out of professional activities.
- The business entity must ensure that the partnership, corporation and all persons who comprise the partnership, corporation, or are employed there, are in compliance with legislation and regulations.

In Quebec, ownership of professional corporations practising law, for example, is open to members of other regulated professions and to others as long as at least 50% of the voting shares of the professional corporation are owned by lawyers or other regulated professionals.³⁷

Nova Scotia

Since 2005, the Nova Scotia Barristers' Society has had express statutory authority to regulate law firms.

- Complaints may be made to the regulator regarding a law firm for professional misconduct.

- Law firms must designate a lawyer to receive communications from the Barristers' Society and assist with investigations.
- A firm found guilty of professional misconduct may be fined, and if a Law Society discipline panel makes an adverse finding against a law firm, the panel may order any other condition as is appropriate; and
- An inter-jurisdictional law firm must comply with all law firm regulations, and a practising lawyer may only practise law as a member of an inter-jurisdictional law firm if the firm complies with the Nova Scotia Barristers' Society regulations.³⁸

The Nova Scotia Barristers' Society is in the midst of a large-scale consultation on ABS, based on a 2013 strategic framework. The Society wants to develop a proactive, risk-focused and principles-based regulatory regime that focuses on results rather than rules. The Society is conducting a survey of the profession as well as holding a workshop and engaging in extensive discussions with stakeholders.

British Columbia

The Law Society of British Columbia permits multidisciplinary practices (MDPs). In June 2012, the Law Society approved rules changes to allow paralegals (supervised by lawyers) to perform additional duties. The Law Society, B.C. Supreme Court and B.C. Provincial Court have also embarked on a two-year pilot project to permit designated paralegals to appear in court.³⁹

British Columbia has also given preliminary consideration to alternative business structures. In October 2011, its Independence and Self-Governance Advisory Committee presented a report entitled *Alternative Business Structures in the Legal Profession: Preliminary Discussion and Recommendations*. That committee concluded that:

- The current practice model does not seem to be working in a way that allows people who need to access legal advice to obtain it in an affordable way;
- While the regulator must be prepared to give alternative structures serious consideration, core values of the legal profession and important rights that

clients who need legal advice are entitled to expect must not be lost in a rush to adopt new ideas;

- Where benefits to the consumer can be attained with proper regulation to ensure that professional values are not lost, the regulator must develop proper regulation to allow for changes to the profession through which improved access to legal services can be attained.⁴⁰

Since the release of the report, statutory amendments have been made that confer new powers on the Law Society of B.C. to regulate law firms, similar to those available to the regulator in Nova Scotia. The *Legal Profession Amendment Act, 2012* provides that the Law Society of B.C. may:

- receive complaints against law firms;
- investigate law firms;
- commence a discipline hearing against a law firm; and
- if a Law Society discipline panel makes an adverse finding against a law firm, discipline the firm by reprimand, fine, or other order or condition as is appropriate.⁴¹

Saskatchewan

On July 1, 2014, amendments to the *Legal Profession Act* came into force allowing the Law Society of Saskatchewan to regulate law firms where appropriate.⁴²

Appendix II

Developments abroad

Australia and New South Wales

Australia was an early adopter of ABS regulation. Since 2000, New South Wales has permitted full incorporation of law practices. Other Australian states and territories have implemented similar reforms. Legal practices may incorporate under ordinary company law without any restrictions on who may own shares or on what type of business may be carried on.⁴³ In May 2007, Australia was the first jurisdiction in the world to permit the public listing of a law firm. Slater & Gordon, a national firm, was listed on the Australian Stock Exchange.⁴⁴ The firm now employs 1,350 people in 69 locations with a focus on personal injury and class action litigation on the plaintiff side.⁴⁵

The New South Wales regulatory system is based in part on entity regulation. The Office of the Legal Services Commissioner (OLSC) in New South Wales may audit incorporated legal practices (ILPs) for their compliance pursuant to the *Legal Profession Act 2004* and the *Legal Profession Regulations 2005*. ILPs are encouraged to complete annual voluntary self-assessments regarding the entity's ethical and management infrastructures. Each ILP must have a legal practitioner director responsible for implementing "appropriate management systems". This term is not defined in the legislation, although the OLSC has developed 10 objectives of a sound legal practice with which ILPs must comply.⁴⁶ Failure by the legal practitioner to implement appropriate management systems could be the basis of a finding of professional misconduct.⁴⁷

The approach taken by New South Wales is outcomes-based. Rather than requiring ILPs to adhere to proscriptive regulations and requirements, regulation is based on their own systems. ILPs have the freedom to structure their practices in new and innovative ways that are suitable to them, as long as their systems comply with the 10 principles of appropriate management systems.

In addition, the approach in New South Wales is based on an assessment of the risk posed by each ILP. The requirement to implement and maintain "appropriate management systems" is complemented by a comprehensive risk-profiling program and audit, or practice review program that is conducted by the OLSC.⁴⁸

England and Wales

Rapid changes are taking place in England and Wales in how legal services are regulated and provided to the public. In July 2003, Sir David Clementi was appointed to carry out an independent review of the regulatory framework for legal services in England and Wales. Following his report, which recommended major reforms to the regulation of legal services in England and Wales, the *Legal Services Act 2007* (LSA) was enacted. Under the LSA, the objectives of the regulation of legal services have been broadened. In addition to protecting the public interest and improving access to justice, the regulation of legal services also seeks to protect and promote consumer interests and competition. The LSA expressly permits the provision of legal services through ABS models in support of these objectives.

Under the LSA, legal activities are regulated by eight separate approved regulators. ABSs may be approved by certain approved regulators. The first ABS entities were approved by the Council of Licensed Conveyancers in October 2011, and by the Solicitors Regulatory Authority (SRA) in early 2012. As of June 2014, 308 ABSs have been approved.⁴⁹

As in Australia, ABSs in England and Wales are regulated in part through entity regulation. For example, in order to be approved by the SRA, ABS applicants need to provide the following information:

- the firm's regulatory history and the type of legal work to be conducted;
- business practices (including policies and procedures, the applicant's proposals to meet the regulatory objectives and proposed governance structure), details of personnel, indemnity insurance, client money (including how the applicant protects client money); and
- a suitability declaration.

The SRA assesses ABS applicants and maintains the authority to deny ABS licences.

ABSs approved to date have varied in size, structure and expertise. Some of the entities include:

- An insurance defence firm (Keoghs LLP), which became an ABS and obtained a 22.5% private investment from LDC, a part of Lloyds Banking Group;
- Russell Jones & Walker, a 425-person, 10-location firm with most of its revenue earned from personal injury matters, which was acquired by Australia's Slater & Gordon, and converted into an ABS;
- Natalie Gamble and Associates, a firm with expertise in fertility law offering related services such as donor conception and adoption;⁵⁰
- Winn Solicitors, an accident management firm whose services include compensation, repairs, replacement vehicles and rehabilitation;⁵¹

New business structures were introduced in England and Wales as part of regulatory reform that included entity and outcomes-based regulation. The overall objective was to permit greater latitude for regulated entities to organize their delivery of legal services and their business models to permit flexibility to enhance competition.

The United States

In the United States, only the District of Columbia permits limited non-lawyer ownership or management of law firms, similar to the Law Society's multidisciplinary partnership model.

In 2009, the American Bar Association (ABA) established the ABA Commission on Ethics 20/20 to review the ABA Model Rules of Professional Conduct and American models of lawyer regulation in the context of the globalization of legal services and technological advancements. In November 2009, the Commission's Preliminary Issues Outline noted that "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."⁵²

The Commission established a working group on alternative business structures to study this issue. By June 2011, the ABA decided against certain forms of ABSs, including MDPs, publicly traded law firms, and passive non-lawyer

investment or ownership of law firms. Although the ABA working group continued to consider a proposal to permit non-lawyer employees of a firm to have a minority financial interest in the firm and share in the firm's profits, in April 2012, the Commission announced that it would not propose changes to ABA policy prohibiting non-lawyer ownership of law firms. In 2014, the ABS announced that it would be establishing a Commission on the Future of Legal Services.

Despite the current regulatory restrictions in law firm ownership structures, more aggressive efforts are being taken by several U.S.-based companies seeking to reshape how certain legal products and legal services are delivered to consumers in the United States and globally. Such private corporate innovators include, for example:

- Rocket Lawyer and Legal Zoom, which have developed websites that combine do-it-yourself legal form services and traditional legal services to serve individuals and corporate clients.
- Axiom Law, which offers in-house counsel legal secondments, legal outsourcing services, and project management expertise, and which recently obtained a further \$28 million in funding from a growth equity firm.

There are also pressures by traditional law firms seeking to compete in broader legal services markets. For example, the New York law firm of Jacoby & Myers commenced litigation in 2011 to challenge regulations in New York, New Jersey and Connecticut prohibiting non-lawyer ownership in law firms. In October 2012, the firm began marketing online legal forms in addition to providing traditional legal services provided by an attorney.

¹ The Law Society of Upper Canada is governed by a board of directors, who are known as benchers. This board includes lawyers, paralegals and lay persons (non-lawyers and non-paralegals). Benchers gather most months in a meeting called Convocation to make policy decisions and to deal with other matters related to the governance of Ontario's paralegals and lawyers.

² *Law Society Act*, R.S.O. 1990, c. L.8, s. 4.2

³ *Law Society Act*, R.S.O. 1990, c. L.8, s. 4.2

⁴ *Law Society Act*, R.S.O. 1990, c. L.8, ss. 26.1(1) and 26.1(5)

⁵ *Law Society Act*, R.S.O. 1990, c. L.8, s. 27(1)

⁶ Multidisciplinary partnerships are a limited exception to this general statement.

⁷ See for example, Julie Macfarlane, "The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants", available at http://www.lsuc.on.ca/uploadedFiles/For_the_Public/About_the_Law_Society/Convocation_Decisions/2014/Self-represented_project.pdf, p. 33.

⁸ *Legal Problems of Everyday Life: The Nature, Extent and Consequences of Justiciable Problems Experienced by Canadians*, (Ottawa: Department of Justice, 2009), p. 56. Available at http://www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/rr07_la1-rr07_aj1/rr07_la1.pdf

⁹ *Ibid.*, p. 59.

¹⁰ *Ibid.*

¹¹ Available at http://www.lsuc.on.ca/media/may3110_oclnreport_final.pdf, p. 23.

¹² Julie Macfarlane, "The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants", p. 8.

¹³ Michael Trebilcock, Anthony Duggan and Lorne Sossin, eds. *Middle Income Access to Justice*, (Toronto/Buffalo/London: University of Toronto Press, 2012), Part 2: "Defining the Problem: What are the Unmet Legal Needs?"

¹⁴ http://www.abajournal.com/news/article/survey_finds_people_in_need_of_legal_representation_turn_to_the_internet/, <http://blog.larrybodine.com/2014/01/articles/tech/most-consumers-go-online-to-look-for-an-attorney/>

¹⁵ Frank H. Stephen, *Lawyers, Markets and Regulation* (Cheltenham, U.K./Northampton, Mass.: Edward Elgar), p. 131.

¹⁶ Legal Services Board, (*Evaluation: Changes in Competition in Different Legal Markets*), *supra* note 7, paragraph 3.14 and Part IV. (Overview).

¹⁷ Edward M. Iacobucci and Michael J. Trebilcock in "An Economic Analysis of Alternative Business Structures for the Practice of Law", p. 23, September 20, 2013.

¹⁸ Solicitors Regulation Authority, “Research on Alternative Business Structures (ABSs): Findings from surveys with ABSs and applicants that withdrew from the licensing process”, May 2014, p.12

¹⁹ In Australia, approximately 30% of solicitor firms are now ILPs although few are non-traditional practices. The number of firms and the number of practising solicitors have increased (information provided by the Office of the Legal Services Commissioner, New South Wales, Australia).

²⁰ LSUC Final Report of the Sole Practitioner and Small Firm Task Force, 2005, online at <http://www.lsuc.on.ca/media/convmar05solepractitioner.pdf> , particularly paragraphs 36 to 37 and 39 to 41. See also, Noel Semple, “Access to Justice: Is Legal Services Regulation Blocking the Path?” (2013).

²¹ This issue is described by Gillian K. Hadfield in “The Cost of Law: Promoting Access to Justice Through the (Uncorporate) Practice of Law”, *International Review of Law and Economics* 39 (2014).

²² Bruce Robinson, “When Lawyers Don’t Get All the Profits: Non-Lawyer Ownership of Legal Services, Access, and Professionalism”. Available at ssrn.com/abstract=2487878.

²³ Ted Schneyer, “Thoughts on the Compability of Recent Reforms with U.S. Traditions in Regulating Law Practice”, 2009, *J. Prof. Law.* 13.

²⁴ *Blank v. Canada (Minister of Justice)*, [2006] 2 S.C.R. 319, 26.

²⁵ *Lavallee, Rackel & Heintz v. Canada (Attorney General)*; *White, Ottenheimer & Baker v. Canada (Attorney General)*; *R. v. Fink* [2002] 3 S.C.R. 209.

²⁶ There have been numerous reports about the Australian experience, including studies indicating that the adoption of an outcomes focused approach has reduced complaints. See for example, Susan Fortney and Tahlia Gordon, “Adopting Law Firm Management Systems to Survive and Thrive: A Study of the Australian Approach to Management-Based Regulation”, Hofstra University School of Law Legal Studies Research Paper No. 13-02 (2013).

²⁷ www.olsc.nsw.gov.au/olsc/lsc_incorp.html

²⁸ The Solicitors Regulation Authority is the regulator for solicitors. The approach taken by the SRA is described in this section.

²⁹ The English Outcomes-Focused Regulation is analogous to the Australian Appropriate Management Systems.

³⁰ A compliance officer for finance and administration is also required by the SRA.

³¹ www.sra.org.uk/solicitors/colp-cofa.page

³² See for example, Solicitors Regulation Authority, “Research on Alternative Business Structures (ABSs): Findings from surveys with ABSs and applicants that withdrew from the licensing process”, May 2014 and Legal Services Board Report, October 2013, starting at page 63 – <https://research.legalservicesboard.org.uk/wp-content/media/Changes-in-competition-in-market-segments-REPORT.pdf>

³³ *Ibid.*

³⁴ *Law Society Act*, R.S.O. 1990, c.L.8, s 4.2

³⁵ The Law Society is mandated by section 4.2 of the *Law Society Act* to protect the public interest, but also to ensure that restrictions on who may provide particular legal services should be proportional to the significance of the regulatory objectives sought to be realized. The Working Group recognizes that there may be types of services or business that should be restricted due to risk. The Law Society would develop criteria governing the assessment of sufficient regulatory risk. This is the approach adopted in New South Wales, where the *Legal Profession Act 2004* (section 135) provides that an incorporated legal practice must not conduct a managed investment scheme and that the regulations may prohibit an incorporated legal practice from providing a service or conducting a business, of a kind specified by the regulation.

³⁶ Please see discussion in previous footnote.

³⁷ Regulation respecting the practise of the profession of advocate within a limited liability partnership or joint-stock company and in multidisciplinary, RRQ, c B-1, r 9.

³⁸ *Legal Profession Act*, S.N.S. 2004, c. 28.

³⁹ The term “designated paralegal” in this context refers to a paralegal who can perform additional duties under a lawyer’s supervision (see <http://www.lawsociety.bc.ca/newsroom/highlights.cfm#c2663>).

⁴⁰ Law Society of British Columbia, *Alternative Business Structures in the Legal Profession: Preliminary Discussion and Recommendations*, October 2011, pp. 21-22.

⁴¹ *Legal Profession Act*, S.B.C. 1998, c. 9.

⁴² *Legal Profession Act*, 1990, S.S., c. L.10.1, s. 10, online at <http://www.qp.gov.sk.ca/documents/English/Statutes/Statutes/L10-1.pdf>.

⁴³ Susan Fortney and Tahlia Gordon, “Adopting Law Firm Management Systems to Survive and Thrive: A Study of the Australian Approach to Management-Based Regulation”, supra note 23.

⁴⁴ Integrated Legal Holdings became the second listed firm on the ASX on August 17, 2008.

⁴⁵ Noel Semple, “Access to Justice: Is Legal Services Regulation Blocking the Path?” Since then, two other firms have been listed on the Australian Stock Exchange.

⁴⁶ The 10 areas are negligence, communication, delay, liens/file transfers, cost disclosure/billing practices/ termination of retainer, conflict of interests, records management, undertakings, supervision of practice and staff, and trust account regulations. Susan Fortney and Tahlia Gordon, “Adopting Law Firm Management Systems to Survive and Thrive: A Study of the Australian Approach to Management-Based Regulation”, supra note 23, p. 15.

⁴⁷ *Legal Profession Act 2004*, (NSW), s. 140(5).

⁴⁸ Susan Fortney and Tahlia Gordon, “Adopting Law Firm Management Systems to Survive and Thrive: A Study of the Australian Approach to Management-Based Regulation”, supra note 23 at 11.

⁴⁹ Dan Bindman, “ABSs top 300 mark with latest licensees demonstrating variety of new legal breed”, *Legal Futures*, April 16, 2014, <http://www.legalfutures.co.uk/latest-news/abs-top-300-mark-latest-licencees-demonstrating-variety-new-legal-breed>

⁵⁰ www.nataliegambleassociates.co.uk

⁵¹ <http://www.winnsolicitors.com/>.

⁵² ABA Commission on Ethics 20/20, *Issues Paper Concerning Alternative Business Structures* (April 5, 2011).