



# The State Bar of California

I.D. Staff Report  
02-19-21 Meeting  
Open Session

Closing the Justice Gap  
Working Group

To: Closing the Justice Gap Working Group  
From: State Bar Staff  
Date: February 12, 2021  
Re: Resource Sharing

Attached please find an op-ed piece on regulatory sandboxes for legal services. Micha Star Liberty and Toby Rothschild conveyed this to staff and it has been added to the working group's OneDrive resources [<http://bit.ly/CTJGOneDrive>] in the folder for Articles, Publications and Resources.

Staff welcomes the submission of any resources that might be helpful to CTJG's work. You may email links to, or copies of, items to [ctjg@calbar.ca.gov](mailto:ctjg@calbar.ca.gov) or you may upload them directly to the OneDrive folder. As materials are received, staff will periodically send reminders indicating that members should review the folder for new content.

If there is an item that is believed to be especially helpful, then you may also alert staff and that item can be distributed by staff via email and/or added to the agenda materials for an upcoming meeting of the full working group.

To avoid potential Bagley Keene issues, always send your messages to staff rather than emailing the members of the working group. Thank you.

Attachment

**PLEASE NOTE:** An op-ed piece was submitted to staff on February 17, 2021 by John Lund and Crispin Passmore and has been added as an attachment to this memorandum.

# UK Is Proof Nonlawyer Ownership Threatens Legal Profession

*By Austin Bersinger and Nicola Rossi*

Law360 (February 2, 2021, 2:19 PM EST) --

An invisible war is taking place that threatens the legal profession.

Behind closed doors, companies, insurers and private equity funds are strategizing ways to buy and own law firms. But we don't hear about that. We hear about "access to justice" and "low-cost legal services." That is a trojan horse.

Utah and Arizona have already opened the gate.

In August of last year, the Utah Supreme Court unanimously approved a two-year pilot program that allows "nontraditional legal service providers" to practice law in a regulated so-called sandbox.[1] By December of last year, Utah's Innovation Office had approved 20 nontraditional legal service providers to practice law, including Rocket Lawyer, [LegalZoom](#)'s [Google](#)-funded competitor.[2]

Similarly, the [Arizona Supreme Court](#) unanimously voted to repeal the ethics rule barring nonlawyer ownership beginning Jan. 1 this year.[3] Other states, such as California, are not far behind.

Just last month, the [State Bar of California](#)'s Closing the Justice Gap Working Group started developing recommendations regarding a regulatory sandbox, similar to the one in Utah.[4] [The Florida Bar](#) is also considering the issue.[5] These changes, and the [American Bar Association](#)'s waning resistance to them, is concerning.

Imagine for a moment that you are injured in an automobile accident. You call your auto insurance carrier after the accident and tell your insurer that the other driver is at fault.



Austin Bersinger



Nicola Rossi

Your insurer owns a law firm that represents injured claimants in personal injury actions. Your insurer refers you to its personal injury law firm and suggests that you work with its firm to file a personal injury action against the at-fault driver.

You hire your insurer's personal injury law firm to represent you. Now, here is where it gets interesting.

It is in your insurer's best interest to keep the overall cost of all insurance claims low. Thus, the insurer-owned law firm you hired recently promised other insurer-owned law firms to go easy on the opposing party's insurer in personal injury cases.

In essence, the insurance company has found a way to have its cake and eat it to — reap the short-term benefits of your attorney's fees while ensuring that it will not have to pay large sums to claimants like you in similar cases.

This win-win for insurance companies is a lose-lose for you. How do you know whether you have a meritorious claim when your insurer immediately benefits from telling you that you don't? And how do you know that you are receiving adequate representation when your insurer-owned lawyer is obligated to make sure that you don't recover too much?

This is not an imaginary scenario. It could easily be your reality if you lived in the U.K., where insurance companies, accounting firms, technology companies and retailers like [Walmart](#) can own and run law firms.

In the 2016 paper, "When Lawyers Don't Get All the Profits: Non-Lawyer Ownership, Access, and Professionalism," Nick Robinson, then a research fellow at Harvard Law School, provides one of the most comprehensive studies of the U.K. legal system since the U.K. started allowing alternative business structures, i.e., nonlawyer-owned law firms, to offer legal services.[6]

At the time of the study, alternative business structure, or ABS, firms in the U.K. were disproportionally concentrated in certain areas of the law, particularly personal injury.[7] Robinson describes this finding as "not particularly surprising" because "[t]he personal injury market is both historically large and, at least in recent years, disproportionately profitable, making it a clear target for outside investors." [8]

Today, many advocates have sprung up to champion nonlawyer ownership of firms in the U.S. by claiming that allowing nonlawyer ownership will increase access to legal services for poor to moderate-income Americans.[9] But the reality of nonlawyer ownership in the U.K. undermines that argument.

In particular, the U.K. reality unsurprisingly demonstrates that nonlawyer owners are drawn to areas of the law with the most potential for profit, such as the personal injury market. Are those really the areas with access issues for poor to moderate-income Americans?

Many personal injury lawyers work on contingency fees. Thus, allowing nonlawyers, such as insurance companies, to join the plaintiffs bar does not seem like a promising way to increase access to justice.[10]

Indeed, ABS firms' presence in the personal injury market in the U.K. did not create any apparent access benefits in that sector.[11] To the contrary, the ABS personal injury firms had little demonstrable benefit, while "rais[ing] a number of potentially serious conflicts of interest."[12]

More importantly, the conflicts of interest in the U.K. surpass the conflict frequently cited by nonlawyer ownership critics. Critics of nonlawyer ownership recognize that a lawyer's duty to clients and the courts may not always coincide with a duty to maximize shareholder profits.[13] But many fail to anticipate more nuanced conflicts like the insurance example above.

In the U.K., insurance companies have branched into law firm ownership. This has allowed insurers to essentially refer potential personal injury claimants to themselves.[14]

According to Robinson's study, "[c]onsumers who [were] directed to an ABS because their insurance company own[ed] it ... seem[ed] to be referred simply because of the monetary benefit to the insurance company and not because the referral [was] necessarily in the consumer's best interest."[15]

More troubling, however, is the idea that insurance companies could capture the personal injury market. While it may be in an insurers' short-term interest to have a claimant who is represented by its law firm succeed, insurers benefit most when the overall cost of claims is kept down.[16] This creates a conflict between an insurers' goal to keep the overall cost of

claims low and its law firm's duty to its personal injury plaintiff clients.

Insurer capture of the personal injury market also destroys the delicate balance between insurers and the plaintiffs bar.[17] Robinson notes that "insurance companies have traditionally lobbied for regulation to limit the amount of compensation paid in personal injury cases, while personal injury lawyers have lobbied for regulation that would allow for greater compensation." [18]

A world in which insurers both bring and defend personal injury actions threatens personal injury claimants' ability to receive full compensation for injuries.

It also threatens our profession. If an insurer can self-deal and cap exposure in serious personal injury matters, the value of insurance defense attorneys goes down dramatically. Anybody interested in partner rates of \$70 an hour? If a claimant's first call is to its insurance company and that insurer captures the personal injury claim, how many bankrupt personal injury firms will we see?

And the personal injury market is not the only legal sector subject to capture. The employment law sector provides another example.[19]

In the U.K., retailers have moved into the legal services industry.[20] And as Robinson's paper states, "Walmart is one of the largest employers in the United States and is frequently criticized for its employment practices." [21] What if Walmart offers legal services to individuals seeking to file employment law claims? [22]

And what if financial institutions owned law firms that represented consumers in financial protection lawsuits?

More importantly, did the state bar associations in Utah and Arizona adequately consider these conflicts of interest before opening the gate? And why has the ABA seemingly given up the fight against nonlawyer ownership? Are the other state bar associations that are moving toward nonlawyer ownership adequately considering the impact on the public or their dues-paying members?

Leveraging innovation and technology to increase access to legal services is a noble goal. But before we resolve to being put out of business by nonlawyers, we should demand

evidence that the sweeping changes to our profession will have a benefit. And we should demand that the ABA and our state bar associations support us in the fight. Our leadership must act to adequately protect our interests, our profession and our livelihoods.

**Law360 Opinion – February 16, 2021**

**US Legal System Can Benefit From Nonlawyer Ownership**

By Crispin Passmore, Member of Closing the Justice Gap Working Group  
and Zachariah DeMeola, Director of Legal Education and the Legal Profession at the Institute for  
the Advancement of the American Legal System

Let's leave the alarmism throughout Austin Bersinger and Nicola Rossi's recent Law360 guest article, "[UK Is Proof Nonlawyer Ownership Threatens Legal Profession](#)," behind and, instead, look to decades of facts, research and experience when discussing regulatory reform.

Let us start with the basics. Contrary to the assumption in Bersinger and Rossi's article, there is no U.K. legal or regulatory jurisdiction. Scotland and Northern Ireland, two of the constituent elements of the U.K., have not undertaken the same sorts of reforms as those in England and Wales, as cited in the article.

And in terms of evidence, Bersinger and Rossi's entire argument hinges on just a single report, ignoring the surfeit of independent evaluation that has consistently found regulatory reform in England and Wales to be delivering a number of incremental improvements over time: better complaints handling, more innovation, more legal service providers, and more opportunities for lawyers to offer their ethical expertise to the public.

Moreover, it is important to understand the context for regulatory reform across the pond to understand what those outcomes might mean for change in the U.S. So, let's back up, put hyperbole to one side, and make sure we get the facts straight.

Alternative business structures, or ABSs, were not introduced in England and Wales in a vacuum — the legal market was already liberal. There has never been an unauthorized practice of law regime in England and Wales; most legal services can be offered not only by lawyers in businesses owned by nonlawyers, but by anyone in any lawful business.

England and Wales have over 100 years of legal business outside of lawyer regulation. There is no significant evidence that there is greater harm to the public because of — or ethical problems that arise from — the involvement of nonlawyers in the delivery of legal services.

And when we look to quality of service, the evidence shows that nonlawyers deliver at least as good legal advice as lawyers.

A 2008 paper by professor Richard Moorhead[1] suggests that nonlawyers who specialize in a subject area were more likely to offer high-quality advice than solicitors.

And further research published in 2011[2] and commissioned by the Legal Services Board, the independent body responsible for overseeing the regulation of lawyers in England and Wales, demonstrated that nonlawyer will writers were as effective as solicitors — noting that solicitors

and nonlawyers met the same standard. Based on the evidence, keeping nonlawyers out of the market is the wrong focus.

Also, to suggest that these entities are mainly about insurance companies capturing law firms is, at best, crudely reductive. ABSs are entities in which regulated lawyers deliver regulated legal services in businesses owned by a mix of lawyers and other people. ABSs are now nearly 10 years old in England and Wales — the first opened in late 2011 — and around 10% of regulated law firms are now ABSs.[3]

ABSs in England and Wales cover the whole law firm market — from nonprofits serving the poorest and most vulnerable clients and solo practitioners that have taken a husband or wife into ownership (perhaps for tax reasons) to local and regional multidisciplinary practices, regional firms floated on the stock market, global multi-disciplinary practices, and even U.S. law firms with a presence in England and Wales.

The reason that ABSs have been an attractive model in the personal injury market is changes in the law covering referrals and costs. Insurers already received income for referring clients to law firms, but in 2012 that was outlawed in the U.K. through the Legal Aid, Sentencing and Punishment of Offenders Act; clever lawyers instead advised law firms and insurers to create joint ventures that were ABS, thereby avoiding the need for a referral fee altogether.

And while the personal injury market is significant, it is just one part of the legal market — and one part of the ABS picture. Included is everything from legal services for low-income people to will writing, corporate legal services, and law for small businesses, technology businesses and everything else. There are over 1,000 ABS firms working across the market, and personal injury is just one part of the ABS picture.[4]

If we do choose to focus on personal injury, the picture is resoundingly positive. There is no evidence that personal injury firms have become less ethical as a result of nonlawyer ownership.

A 2016 report[5] by the [Solicitors Regulation Authority](#) suggests that the ethical issues in the personal injury market are linked to solicitor behavior and traditional law firms rather than nonlawyer ownership. Furthermore, allegations made to the SRA about personal injury firms are investigated less than the rest of the market after initial screening.

If anyone has lingering doubts about ABSs, we urge them to trawl the disciplinary findings of the Solicitors Disciplinary Tribunal. There, they will find a steady stream of solicitors and traditional law firms found guilty of ethics breaches, but they will struggle to find much evidence of the same from nonlawyer owners of ABSs.

This is no surprise. Wider evaluation of England and Wales reforms suggests that ABSs improve consumer focus, complaints handling and innovation. The Centre for Strategy & Evaluation



Services carried out independent research[6] into the impact of reforms including ABS. Its findings, published in 2018, are unequivocal:

The impact of these reforms has been gradual and incremental. Early indications show that users of legal services are beginning to see benefits.

Introducing ABSs and MDPs, and removing restrictions on firm ownership, have allowed new entrants (including foreign law firms, firms owned by professional services firms, local authority owned firms and retail brands) into the market. This has resulted in improved access, choice and quality of service for legal service users and innovation in provision.

There was no evidence to suggest that these reforms have detrimentally impacted, or resulted in a greater risk to, users of legal services.

These findings are backed up by prior independent research. In 2015, Enterprise Research Centre conducted the largest ever survey of innovation in law firms[7] and found that:

[T]he adoption of ABS status has a positive effect on innovation. All else being equal, ABS Solicitors are 13-15 percent more likely to introduce new legal services. The implication is that the wider adoption of ABS status would be likely to increase the range of legal services on offer.

The truth is simple. ABSs in England and Wales is not a fly-by-night operation, conducted behind closed doors by rapacious capitalists, arriving in the legal market to strip profits and eviscerate ethics. Instead, since reforming its regulations, the England and Wales legal system has seen steady improvements in its legal market.

These include more choice for consumers, more technology to help increase access, and more opportunities for solicitors to offer their ethical expertise to clients. In addition, the number of solicitors has grown every year and the number of law firms remains steady[8] — with small and local firms continuing to thrive where they deliver what their customers want.

Perhaps this is why [U.S. Supreme Court](#) Justice Neil Gorsuch wrote in his 2019 book, "A Republic, If You Can Keep It" that "ABSs were indeed serving the needs of the poor and middle class, not just or even primarily the wealthy" and that "it's no surprise that some U.S. Jurisdictions have appointed committees to study reforms just along these lines." [9]

Bersinger and Rossi tell us to demand evidence that changes will result in benefit. What we do have is evidence that these reforms have been successful in England and Wales, and there is no reason — and certainly no evidence they provide — as to why these outcomes cannot also be achieved in the U.S.

Indeed, if we are to answer the clarion call for evidence, why is it that we don't also demand evidence that our current rules do what it is they purport to do?

There is no evidence that the business practices prohibited by the [American Bar Association's](#) Model Rule of Professional Conduct 5.4 compromise the independent judgment of lawyers. Absent the need for Rule 5.4 to protect the independent judgment of a lawyer — protection amply afforded elsewhere in the rules[10] — the lack of any real evidence behind Rule 5.4 is alarming, given that the rule's economic restrictions have had severe consequences for lawyers and for people in need of legal services.

For example, the rule has condemned law firms to systemic inefficiency. Lawyers are not allowed to bring in business partners with expertise in business, marketing or technology. Instead, many lawyers spend much — if not most — of their day-to-day time on administrative tasks and work related to marketing and earning new clients.[11]

To make matters worse, lawyers' ability to innovate or scale the services they provide is hampered by Rule 5.4's prohibition on taking capital investments from sources outside lawyer partnerships. Handicapped by structural inefficiency and unable to leverage modern tools for growth, lawyers are at a severe disadvantage to competitors in a tech-driven economy.

And the inefficiency of Rule 5.4's economic regulations has significantly contributed to an environment where lawyers must charge fees that most people in the U.S simply cannot afford.

Lawyers can look inward and kid themselves as much as they want, but consumers of all sorts — from low- and middle-income individuals to small-business owners and global companies — are turning to alternative providers.

According to the 2019 [Altman Weil](#) Law Firms in Transition study, 63% of lawyers indicated their firms were losing business to corporate law departments and 14% reported losing business to alternative legal providers.[12]

And unregulated companies such as [LegalZoom](#) or Rocket Lawyer are serving an enormous and previously untapped market for affordable legal services, and they have the ability to scale in a way lawyers do not. Unless things change, they are also not subject to the same ethical rules that lawyers must follow.

Utah, Arizona and the other jurisdictions exploring regulatory innovation understand these issues. Despite Bersinger and Rossi's speculative concerns, both Arizona and Utah's reforms retain restrictions against impermissible conflicts of interest in legal ethics rules based on the common law fiduciary duty of loyalty — including those based on personal interests of lawyers that are implicated in the nonlawyer ownership situation discussed by Bersinger and Rossi.

In both states, a lawyer participating in an ABS and the ABS entity together need to be able to ensure that the lawyer can participate within the ethical standards of the rules. Lawyers remain subject to the rules of professional conduct — including conflicts rules — within new entities permitted in Arizona and in Utah.

The entity itself is also responsible for compliance with conflicts rules in Arizona, and, in Utah, entities can only join its regulatory sandbox with lawyers if they are able to structure their businesses to conform to the rules.

Moreover, the Office of Legal Services Innovation, the regulator of new legal services in the Utah sandbox, closely monitors the potential for consumer harm by monthly or quarterly inputs of detailed data required from service providers — a proactive and preventative regulatory standard far more rigorous than the reactive, disciplinary standard applied to lawyers in the U.S.[13] No easing of these rules and principles is contemplated in any of the other jurisdictions now considering regulatory reform, either.

Ultimately, nontraditional entities will be regulated differently, and, unlike other jurisdictions, new alternative legal service providers in Utah and Arizona will actually be subject to ethical oversight. What Arizona and Utah are implementing, and what is being considered now elsewhere, is removal of absolute prohibitions against economic arrangements between lawyers and nonlawyers, which have the effect of discouraging multidisciplinary collaborations, holistic practice, and innovation in legal services delivery.

With all of this evidence before us, it's difficult not to see the arguments against regulatory reform stemming more from fears about competition than concerns about ethics or the potential for public harm.

In fact, Bersinger and Rossi tell us directly that what they're really worried about is "being put out of business by nonlawyers," noting that what needs protection is "our interests, our profession and our livelihoods," and demanding as "dues-paying members" that "our" bar associations and leadership support "us" in the fight.

They forget that, as the [New Jersey Supreme Court](#) wrote in 1995 in *In re: Opinion No. 26 of Committee on Unauthorized Practice of Law*, the "ultimate touchstone" for regulating legal services is "the public interest," and that "it is not a power given to us in order to protect lawyers, but in order to protect the public." [14]

The current drive for regulatory reform in multiple U.S. jurisdictions reflects a realization on the part of judges, bar leaders and legal practitioners that regulation can no longer be about lawyers protecting themselves. Rather, it must focus on the interests of consumers in obtaining affordable and high-quality legal services regardless of who provides them, with regulation that reasonably and appropriately protects the public from real rather than speculative risks and harms.