

FAQs Regarding 01/01/21 Rule Changes Impacting Law Practice

What is an Alternative Business Structure (ABS)?

An ABS is a nontraditional law firm in that it is licensed by the Court to include nonlawyer owners/stakeholders, who may be passive investors or more active policy or decisionmakers. Given nonlawyer ownership, an ABS may offer a variety of nonlaw services in addition to legal services. An ABS must employ at least one licensed Arizona lawyer who will be responsible for assuring that the ABS complies with all pertinent rules and ethics requirements (see compliance lawyer below). An ABS itself is not a member of the State Bar but is subject to the lawyer disciplinary system.

May an ABS practice law?

No, just like a traditional law firm may not. Entities don't practice law. Lawyers do.

May a nonlawyer in an ABS practice law?

Generally, no. Only someone otherwise authorized to practice law, for example as a Legal Paraprofessional or pursuant to one of the exceptions in Rule 31.3, may practice law.

What is an ABS Compliance Lawyer?

Due to nonlawyer involvement, an ABS has a requirement a traditional law firm does not – a designated Compliance Lawyer. This managerial lawyer supervises all aspects of law practice at the ABS, ensures that all ABS owners (both lawyers and nonlawyers) and employees comply with ABS regulations and the ethical rules (ERs), and report breaches. The Compliance Lawyer must implement controls, especially around lawyer independence, conflicts, and confidentiality. This is not a position for an inexperienced lawyer. However, any lawyer within an ABS is required to verify the ABS has a Compliance Lawyer.

What is a Legal Paraprofessional (LP)?

This is a new tier of legal service provider, akin to a nurse practitioner in the medical field. LPs are licensed by the Court to represent clients in limited practice areas and without supervision by a lawyer. They will be fee-paying affiliate members of the State Bar, subject to the ERs and the lawyer discipline system. LPs may work within a law firm or ABS or may set up their own practice and set their own fees.

Where might I encounter an LP and how will I know?

With a few exceptions, LPs will be able to represent clients in family law matters, limited jurisdiction courts, and administrative agencies. Check correspondence or pleadings for LP designation/license number or ask the perceived LP. The limited areas in which an LP may practice are set out in the Arizona Code of Judicial Conduct, section 7-210.

May a lawyer partner with a nonlawyer, in the provision of legal services, outside of an ABS? For example, may a lawyer and a Legal Paraprofessional partner?

No, although a lawyer could employ an LP without ABS licensing.

How are conflicts managed within an ABS? For example, may a nonlawyer owner who provides investment advice to ABS clients provide those services to an opposing party?

There will be added complexity to ABS conflicts checking, given the addition of nonlawyer owners and their various interests. The ABS's Compliance Attorney should oversee the firm's conflicts system and ensure the confidentiality of legal client's information. It may be that a nonlawyer partner may ethically provide to the opposing party services that are unrelated to the legal representation, in limited circumstances and with appropriate safeguards, although often this will be untenable from a business perspective, even if it passes a conflicts check.

A best practice/risk management strategy would be to avoid such a potential conflict, including a potential conflict based on the lawyer's duty of loyalty to the client and/or the lawyer's ER 1.7 duty to avoid conflicts due to their personal interests.

Are nonlawyers within an ABS bound by client confidentiality?

For client legal services, yes. For nonlegal services, not necessarily, absent other professional codes. A best practice will be to screen a client's confidential information related to legal services within an ABS, limiting access to ABS members/employees who provide legal services. This may include electronic access to information, the use or avoidance of shared physical spaces or shared support personnel.

What legal services may a suspended or disbarred lawyer provide?

This individual may not practice law. This includes practice pursuant to the Rule 31.3 exceptions, which otherwise allow nonlawyer practice in certain forums. The suspended or disbarred lawyer may provide paralegal/legal assistant services, if employed/supervised by an attorney in good standing but may not work as a legal document preparer or a Legal Paraprofessional without Supreme Court approval.

May a lawyer pay for referrals now?

Yes, a lawyer may pay anyone – lawyer or nonlawyer – a referral fee without disclosure to the client. However, if paying the referral fee involves disclosing that the referred client contacted or hired the lawyer, client consent to that disclosure will be required by ERs 1.6 and 1.18. Also, do not permit your referral sources to do anything you can't do, for instance, prohibited in-person solicitation.

Even though referral fees are now permitted, lawyers must still be certain that the payment of referral fees does not pose a significant risk that the representation of one or more clients will be materially limited by the lawyer's own personal interests (ER 1.7(a)(2)). The lawyer will have to assess this for themselves but should do so scrupulously.

Apart from referral fees, what about fee sharing?

If the lawyer compensates the referring lawyer with a share of the client fee, this is fee sharing, not a mere referral fee, and is governed by ER 1.5(e). However, ER 1.5(e) does not apply to a lawyer sharing a fee with a nonlawyer. Thus, a lawyer

may share the client fee with a nonlawyer without disclosure to the client. However, if sharing the client fee with a nonlawyer involves disclosing client information, client consent to that disclosure will be required by ERs 1.6 or 1.9.

Although not required, it is a best practice for the lawyer to be transparent about any fee-sharing. The ability to share fees is still subject to the requirement that legal fees be reasonable. The factors for reasonableness include, but are not limited to, those listed in ER 1.5(a).

OK, so I can now fee-share with nonlawyers. But if I do that with my nonlawyer staff, do I have to become an ABS? Isn't this "partnering?"

No. Nonlawyer involvement in a firm must rise to the level of executive-level policy or decision-making authority or economic interest before ABS licensure is required. Employee-based compensation is not considered an economic interest triggering ABS licensure.

May a lawyer refer a client to nonlegal services performed by a nonlawyer with whom the lawyer or lawyer's firm has a financial relationship? For example, may a PI attorney refer clients to a chiropractor from whom the attorney takes referral fees? Or referral by an ABS lawyer to a nonlawyer partner within the ABS?

Yes, but this is a business transaction with the client, subject to the requirements of ER 1.8(a). See ER 1.0(n)(1)(ii).

May I now solicit clients, or permit my referral sources to do so?

Generally, the ban on live solicitation remains intact. There are, however, some exceptions. Unless they've asked you not to, you may live-solicit - in person or by phone - a lawyer, a family member or close friend, a client, or a business individual/entity that regularly uses legal services. Remember, you can't do through a referral source what you can't do yourself. Note that real-time electronic contact, such as chat, comment, IM or text is no longer included in the definition of prohibited live person-to-person solicitation.

Do I still have to mark written solicitations as “advertising material” and send a copy to the State Bar?

No.

May I now refer to myself as a “specialist?”

Yes, if this does not mislead, meaning that you can substantiate your expertise. Although many of the advertising rules have been changed, the base requirement that advertising be truthful and accurate remains effective. The designation “certified specialist” is still reserved for those who are, in fact, certified by the Arizona Board of Legal Specialization.