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BY RONALD R. CARPENTER
CLERK

April 26, 2013

Washington Supreme Court
Clerk of the Supreme Court
P.O. Box 40929
Olympia, WA 98504-0929

Re: *Association of Corporate Counsel Comments on Proposed Amendments to Washington's Admission to Practice Rules for In-House Counsel*

To the Clerk:

On behalf of the Association of Corporate Counsel and our Washington Chapter, we are writing to express our deep concern about proposed amendments to Washington's Admission to Practice Rules (especially APR 8(f)) and Rules of Professional Conduct (especially RPC 5.5(d)).[1] The proposed changes would place unnecessary and unjustified burdens on Washington's in-house lawyers who are licensed to practice in other jurisdictions, by imposing a new registration process for no good reason. Given the multitude of multinational companies that either have headquarters in Washington or do business here, the proposal's potential harm will spread far and wide. Therefore, we strongly urge this Court instead to retain the current "show up and work" system.

But if this Court still decides to proceed with a registration requirement, the pending proposal contains several ambiguities and oversights regarding in-house counsel that require clarification or correction. Among other issues, we urge this Court to change Washington's rules to make it easier for in-house counsel whose law licenses come from elsewhere to provide critical pro bono assistance to clients in need.

The professional standing of many of Washington's in-house lawyers will hinge on the pending amendments. If this Court provides better guidance now, it will help to avoid potentially serious problems later.

I. About ACC and our Washington Chapter

ACC is a global bar association that promotes the common professional and business interests of in-house counsel. Since its founding in 1982, ACC has grown to become the world's largest organization serving the professional and business interests of lawyers who practice in private-sector legal departments. ACC has over 30,000 members

1 This Court's call for comments is available at http://www.courts.wa.gov/court_rules/?fa=court_rules.proposedDetails&proposedId=51.

employed by over 10,000 organizations in more than 75 countries. Our Washington Chapter has nearly 500 members, and provides opportunities for continuing legal education, networking, ethics awareness, and pro bono services. For years, ACC and our Washington Chapter have worked to remove obstacles that can make it difficult for in-house lawyers to practice law for their employers.

ACC has worked to reform rules governing right-to-practice and multi-jurisdictional practice since the Association's inception in 1982. ACC participated in the ABA Multijurisdictional Practice Task Force that drafted ABA Model Rule 5.5, which permits in-house counsel to work in various states without taking bar exams and without registering. We have in the past encouraged other authorities to refrain from implementing registration requirements for in-house counsel.

II. Washington should keep the "show up and work" system, and expand it to allow more pro bono work.

A. Washington's current "show up and work" rule works best for in-house counsel.

Today, in-house lawyers in Washington may simply report to work when their in-house employers hire them. This system works extremely well for in-house law departments. Companies can hire lawyers without worrying that a registration or bar requirement will cause any additional delay or expense. Significantly, neither ACC nor our Washington Chapter are aware of any ethics violations that the current rules have caused. In other words, since the system is not broken, there's no need to fix it.

B. The current rule closely tracks the ABA's Model Rules of Professional Conduct.

Washington's current system governing in-house lawyers closely follows ABA Model Rule 5.5, which requires no registration. *See* RPC 5.5(d)(1). That model rule offers the most concise system to govern in-house counsel whose law licenses come from elsewhere. Rather than imposing a registration requirement, it instead simply authorizes qualified in-house counsel to work for their employers. ACC helped to craft that model rule.

It states that in-house lawyers "may provide legal services . . . that . . . are provided to the lawyer's employer or its organizational affiliates." The ABA's comments to the rule make clear that the unique relationship between in-house counsel and their employers justify the "authorization" rule. As ABA Comment 16 states, Rule 5.5(d)(1) "serves the interests of the employer and does not create an unreasonable risk to the client and others because the employer is well situated to assess the lawyer's qualifications and the quality of the lawyer's work." That same reasoning applies to in-house lawyers in Washington.

Model Rule 5.5(d)(1) meets the needs of jurisdictions that seek to authorize the practice of in-house lawyers. ACC has always argued that additional registration rules are

unnecessary and onerous. Washington has been correct to follow Model Rule 5.5, and it should continue to do so.

C. Washington should expand its current system to include pro bono work.

Indeed, Washington's current system works so well that, rather than eliminating it, Washington should expand it so in-house counsel can provide broader pro bono services.

This Court is well aware of the crisis in access to justice, and the need for more lawyers to volunteer for pro bono work in Washington. It appointed the Washington State Access to Justice Board in 1994.[2] Later, a task force appointed by this Court wrote that "[m]any thousands of our state's most vulnerable residents have serious legal problems and cannot get any help in resolving them." *The Washington State Critical Needs Study* (Sept. 2003) at 5.[3] And just last year, in 2012, this Court wrote of the imperative to respond "to the unmet legal needs of low and moderate income people in Washington State and others who suffer disparate access barriers . . . ." *In the Matter of the Reauthorizing of the Access to Justice Board,* Order No. 25700-B-524 (Mar. 8, 2012), at A-1.[4]

The current and proposed practice rules in Washington do not go far enough to allow in-house counsel to help address this problem. *See* RPC 5.5(d)(1), (e); Proposed APR 8(f)(8). They require that in-house lawyers with out-of-state licenses provide pro bono legal services only through "qualified legal services providers." For staffing and budget reasons, many qualified legal service providers exclude a number of worthy and genuinely needy clients, such as non-profit organizations that often cannot afford to pay for legal work, and restrict the types of matters they support. Additionally, the practice rules restrict legal departments from working with the full range of organized programs that support services to needy clients. This limits precious legal talent.

In-house lawyers are experienced, smart, and sophisticated – that's why their employers hire them. It makes little sense to restrict these lawyers from using their talent to help people and organizations in need. In-house lawyers who show up and work for their employers in Washington should also have full flexibility to show up to help as many needy people and organizations as possible.

In-house legal departments are already making strong contributions toward meeting this need. Hundreds of in-house legal departments have formalized efforts to provide pro bono legal services. According to Corporate Pro Bono, a joint venture of the Pro Bono Institute and ACC, many of the Fortune 500 companies, a majority of Fortune 100 companies, and a number of companies in Washington have set up or are moving to set

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2 Washington State Bar Association, About the Access to Justice Board, *available at* http://tinyurl.com/bv8kx54.

3 *Available at* http://tinyurl.com/c46jwgm.

4 *Available at* http://tinyurl.com/bojz9ff, at 20.

up formal pro bono programs. They want to do more, but state practice rules often stand in their way.

Therefore, this Court should authorize in-house counsel to represent a full range of pro bono clients, free from unnecessary restrictions, or any need to register.

III. A registration system would impose huge burdens without any need, and without any benefits.

Moving from an authorization rule to a registration rule under Proposed APR 8(f) will impose huge burdens on in-house counsel, including on their pocketbooks, with no corresponding benefits, such as the ability to broadly practice pro bono law.

A. No evidence supports imposing a new registration requirement.

Crucially, there is no evidence at all to support adding a registration requirement. The Washington State Bar Association has offered none. And we are aware of no problems that have occurred under the current system in Washington. That is not a surprise. In our experience across the country, in-house counsel are less likely to cause any concern to the bar, its regulators, or to the public than other groups of lawyers.

The fact that in-house lawyers are careful about meeting their professional and ethics obligations stems from their unique status. When a company hires in-house lawyers, those lawyers will represent that company and its affiliates. So if they cause a problem for the client, they expect that the client (the company itself) will punish them, or even fire them. The need to guard against malpractice, in the sense of protecting a client from an incompetent or malicious lawyer, is therefore much reduced in the in-house context.

Additionally, companies that hire in-house lawyers are sophisticated legal customers, with extensive experience in the legal marketplace, negotiating rooms, and courtrooms. They can calibrate the legal risk that they are willing to bear, even when that risk might be different than what law firms are willing to bear when representing outside clients. In short, companies that hire in-house lawyers are fully competent to make their own decisions about how to staff their legal needs.

B. Waiver provides no adequate substitute for the current system.

The proposal to allow out-of-state lawyers to waive into Washington is no substitute for the current system. The proposal would impose a slate of new requirements on in-house lawyers. It would require out-of-state lawyers to take and pass the Washington Law Component of the bar exam, to go through the bureaucratic hassle of filling out forms and registering, and to pay registration fees. *See* Proposed APR 3(c) and 5(b). Those are all new requirements. They would substantially burden in-house counsel whose employers wish them to work in Washington. And no one has demonstrated any current problem or need to justify this new rigmarole.

More generally, the option to waive in to the Washington State Bar Association ignores the reality that significant and increasing numbers of in-house counsel have practices that span many states and countries. Forcing these in-house lawyers to waive into a bar throws an obstacle into their path that does not parallel the reality of their day-to-day practice, or the needs of their clients and employers.

C. The proposal will thwart even the WSBA's stated goals.

We appreciate that the Washington State Bar Association shares some of the same goals as ACC. The WSBA has written about the pending proposal that "[t]his change benefits the many multi-national corporations that are headquartered and do business in Washington."[5] We agree with the WSBA about the need to best serve the many large companies that work in Washington. But we profoundly disagree with the proposed solution. That is, the WSBA's proposal would directly harm rather than help Washington's companies and their in-house lawyers. Therefore, this court should reject the proposed registration requirement.

IV. This Court should fix problems in the pending proposal.

If – despite the lack of evidence, the lack of need, and the lack of benefits – this Court ultimately decides to move away from the current "show up and work" system, the pending proposal contains several serious oversights and ambiguities that this Court should fix now.

A. Clarify the definition of "temporary" in-house work.

Under the pending proposals, in-house lawyers in Washington who have law licenses from other jurisdictions can continue to show up and work on a "temporary basis." *See* Proposed RPC 5.5(1). It is especially important to clarify this section of the rules, given three realities of in-house legal work today.

- First, given today's economy, many companies simply cannot devote an in-house lawyer to work all or even most of the time in a single jurisdiction. Washington knows this from its own experience, given that the state serves as a hub of international commerce. As a result, many lawyers work only intermittently on issues in a given state. The boundary between temporary and continuous work therefore becomes critical, given that professional ethics sanctions are at stake.

- Second, every in-house legal department runs its operations differently. Therefore, ideally, in-house legal departments would continue to receive the benefits of the current system, with its wide flexibility. But absent that, in-house lawyers at least need to know the contours of the rules. It's not fair to impose a

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[5] *Available at* http://tinyurl.com/cc4917e.

vague standard, when every lawyer who risks crossing an invisible line would put her or his livelihood and reputation in jeopardy.

- There is no evidence to support the need for a strict definition of "temporary" work. To the contrary, as is discussed above, ACC's experience is that in-house lawyers are less likely than other groups of lawyers to cause ethical problems.

To help focus consideration, it may be helpful for this Court to think about the following hypothetical situations, and whether or not the work described would count as temporary:

1) An in-house lawyer lives in Chicago, Illinois, is barred there, and works for a company headquartered there. Her employer has operations in Seattle. Twice a year – once in January and once in July – she spends one week working from her company's Seattle office.

2) Same as (1), but the in-house lawyer travels to Seattle once a month for a single workday, and then flies home.

3) Same as (2), but one year, her employer asks her to work for one month in the Seattle office before returning home.

4) Same as (2), but one year, her employer asks her to work for six months in the Seattle office before returning home.

5) Same as (2), but one year, her employer asks her to work for the entire year in the Seattle office before returning home.

6) Same as (2), but her employer asks her monitor several trials in the Pacific and Northwest for several years. As a result, she regularly flies in and out of Seattle, Portland, Vancouver, Anchorage, and Honolulu. Each visit can last from a single day to several weeks.

To address situations such as these – and myriad others that will certainly arise – revising Proposed RPC 5.5(1) to include a generous and clear rule would serve everyone better.

B. Extend the length of in-house registration between jobs.

In its application to this Court, the Washington State Bar Association asserts that changes to the rules "acknowledge increased mobility of lawyers and applicants."[6] In fact, the proposed rules changes would limit mobility. Specifically, if a registered in-house counsel leaves her job, the proposal would allow her only three months to start a new job before the registration becomes invalid. *See* Proposed APR 8(f)(7).

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6 *See* http://www.courts.wa.gov/court_rules/?fa=court_rules.proposed RuleDisplay&ruleId=292.

It is no secret that the current economy has been extremely difficult for lawyers. In-house lawyers, just like their peers at law firms, have often found themselves looking for work much more frequently than lawyers in the past. Under the proposal, however, registered in-house lawyers who leave their jobs have only three months to start new in-house jobs before their registrations expire. *See* Proposed APR 8(f)(7). This is not enough time.

To register in the first place for their in-house jobs, lawyers would need to jump through a series of hoops. They'd need to file applications, certificates, and affidavits. Proposed APR 8(f)(i-iii), They'd need to furnish, in fact, "whatever additional information or proof" is requested. Proposed APR 8(f)(v). And they'd need to pay fees – many in-house counsel do so out-of-pocket – which could be substantial. Proposed APR 8(f)(iv). That's not an easy process. It takes substantial effort, time, and money. Once in-house lawyers manage to successfully run that gauntlet, their registrations shouldn't evaporate a scant ninety-some days after leaving their jobs.

It can take often take many months for an in-house lawyer to even receive a new job offer; it might take months more to process paperwork and make personal and personnel arrangements. Therefore, ACC requests that this Court amend Proposed APR 8(f)(7) to allow in-house registrations to stay valid for at least one year after a lawyer leaves her or his job. Or, as an alternative, this Court may consider simply suspending in-house registration three months after a lawyer leaves her job, and then establishing a extremely streamlined process to re-register. Each of these options recognizes that the legal industry offers less stability than it has in the past, and also recognizes that the registration process is cumbersome and expensive. And there is no data to support the three-month grace period over a longer one that better reflects today's reality.

C. Eliminate the need for special letterhead and cards.

Proposed APR 8(f)(3) would require registered lawyers to use special business cards and letterhead to highlight that they are in-house counsel. This is a bad idea, for several reasons:

- First, there is no evidence that in-house lawyers who use regular business cards and letterhead have caused any problems. Without a problem, it is hard to understand the need to impose any new requirement in this area.

- Second, to the extent that the special letterhead and cards are meant to signal that the lawyers cannot work for anyone except their in-house employers, that's simply not accurate. Even Proposed APR 8(f)(8) would permit registered in-house counsel to represent pro bono clients in certain circumstances (this letter addresses the proposed rule on pro bono in more detail elsewhere).

- Third, it is a burden on in-house counsel and their employers to prepare and use special letterhead and cards. In some circumstances it could be awkward, for example, if multiple lawyers are signing the same letter or contract. And this proposal would especially burden in-house lawyers at small companies, which by

and large have fewer resources and less ability to juggle picayune rules such as this one.

- Fourth, and perhaps most important, the requirement for special letterhead and cards baselessly marks registered in-house counsel as second-class lawyers. In fact, the opposite is true. In-house lawyers are effective, experienced and smart – that's why their employers hire them (if they're not, their companies can fire them). They are peers of all other lawyers practicing in Washington. Under the proposed changes, they would need to submit to a rigorous application process. And they are subject to state ethics rules, which prohibit them from representing anyone other than their employers or certain pro bono clients. With all those safeguards, there is no good reason to justify special business cards and letterhead that may falsely imply that in-house counsel are less than full lawyers for their companies.

D. Permit registered lawyers to appear in court without *pro hac.*

Proposed APR 8(f)(2)(i) prohibits registered in-house lawyers from appearing in court unless they go through the cumbersome and expensive *pro hac* procedure outlined in APR 8(b). There is no need for this rule:

- First, it duplicates the new registration process in large part. That is, in order to complete their registration for in-house status, in-house counsel who successfully complete the registration process will have in effect already gone through much of the sort of screening that *pro hac* status requires. Complying with APR 8(b) simply adds delay and expense to the process.

- Second, there is no harm that could come to either the public or to the client. As is mentioned above, in-house counsel must comply with all state rules of professional conduct, which includes the mandate in RPC 1 that the lawyer have "requisite knowledge and skill" in the matter. So no lawyer would end up in court unless she or he knew how to litigate, at risk of serious professional sanctions by the bar and of being fired by her or his employer.

- Third, the *pro hac* requirement forces companies to waste more money and resources on litigation, either by hiring outside counsel or by running through the *pro hac* gauntlet.

Virginia and Colorado both permit registered in-house counsel whose law licenses come from elsewhere to appear in state court and before state tribunals, without going through the *pro hac* process. We have not heard of any related disciplinary or ethics problems in those states related to this issue, so there is good reason for Washington to also follow this model.

E. Expand pro bono for registered in-house lawyers.

Above, we argue that this Court should lift the limits that Washington imposes on authorized in-house counsel to provide pro bono services to clients in need. *See* RPC 5.5(d)(1), (e); Proposed APR 8(f)(8). If this Court does proceed to impose a registration requirement, then there is all the more reason to revise the rules to lift current restrictions on pro bono work.

The Illinois Supreme Court recently amended its practice rules to permit registered in-house lawyers to volunteer for pro bono projects free from unnecessary restrictions, such as only providing pro bono services in association with a legal services organization.[7] Virginia and Colorado have similar rules. And the Conference of Chief Justices has encouraged its members to expand opportunities for in-house lawyers with licenses from elsewhere to practice pro bono. Conf. of Chief Justices, Resol. 11 (passed July 25, 2012).[8] This Court should join Illinois, Virginia, and Colorado, and should allow in-house lawyers to offer as much assistance as possible to help address the state and national crisis of access to justice.

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The current authorization system works well for in-house lawyers, their clients who operate in multiple states and countries, and for the public. There is no evidence to support scrapping it for an inefficient and unwieldy registration system. To the contrary – our members and their employers have worked for years to oppose registration requirements such as the one now on the table.

If this Court decides, without supporting facts, to go ahead and adopt a registration system, the current proposal won't get the job done. To better serve the interests of in-house counsel, the proposal needs to better accommodate and address the realities of modern in-house practice without imposing irrelevant mandates.

And – whether this Court retains the current authorization system, or imposes a harmful registration system – it must do more to expand the opportunities for in-house lawyers with law licenses from elsewhere to provide pro bono services. Other states – most recently, Illinois – have recognized that fewer limits help needy clients. Washington should do the same.

We would be happy to talk with you about any of the issues that we have discussed in this letter.

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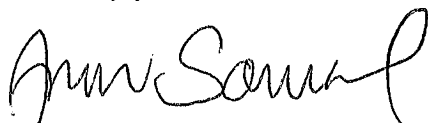
7 *See* http://www.state.il.us/court/SupremeCourt/Rules/Amend/2013/040813.pdf.
8 *Available at* http://tinyurl.com/arwjkq7.

Sincerely yours,



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