

July 3, 2018

*VIA EMAIL*

Julio Castillo  
Clerk, D.C. Court of Appeals  
430 E Street, NW  
Washington, DC 20001

***Re: Comments on proposed changes to Rule 49(c)(9) from the Committee on Unauthorized Practice of Law and the D.C. Access to Justice Commission***

Dear Mr. Castillo:

The Association of Corporate Counsel (“ACC”) and its National Capital Region Chapter appreciate the opportunity to comment on the proposals from the Committee on Unauthorized Practice of Law (“UPL Committee”) and the D.C. Access to Justice Commission to amend the unauthorized practice of law exemptions for pro bono legal services under D.C. App. Rule 49(c)(9). We urge the court to adopt ACC’s recommendations to remove the requirements for affiliation with a non-profit legal services provider and supervision by an active member of the D.C. Bar from the provisions of proposed Rule 49(c)(9)(A)(ii).

ACC is a global bar association that promotes the common professional and business interests of in-house counsel who work for corporations, associations and other organizations through information, education, networking opportunities and advocacy initiatives. ACC has more than 43,000 members worldwide, and our National Capital Region Chapter, which serves the Washington, D.C. metro area, has 2,400 members. ACC has long had a commitment to enabling and encouraging pro bono in the in-house community and has worked alongside Pro Bono Institute (“PBI”) and its Corporate Pro Bono project to challenge state bar restrictions on in-house counsel pro bono.

Because of ACC’s experience in challenging the roadblocks for in-house counsel who are practicing under unauthorized practice of law exemptions, we are pleased that the proposals from the UPL Committee and the D.C. Access to Justice Commission (hereinafter “the Proposals”) remove many of the burdens on out-of-state attorneys who practice in the District and wish to provide pro bono services in the District. Collapsing the authorization for all actively licensed out-of-state attorneys into a single rule is an excellent example of regulatory simplicity that all bars should endeavor to follow. We also appreciate that many organizations in D.C.’s legal services community have

submitted thoughtful recommendations to the D.C. Access to Justice Commission and the UPL Committee. ACC also submitted comments to the UPL Committee in September 2015 and followed that submission with a letter to this Court in August 2016. Both letters suggested removing the requirements for affiliation with a non-profit legal services provider and supervision by an active member of the D.C. Bar. So while we applaud the overall approach of the Proposals, we are disheartened to see that neither body appears to have considered removing these additional requirements that restrict pro bono by internal counsel.<sup>1</sup>

The requirements for affiliation with a non-profit legal services provider and supervision by an active member of the D.C. Bar restrict the ability of government and in-house attorneys to provide pro bono legal services while adding little value to protecting the public.<sup>2</sup> Only three other jurisdictions impose similar affiliation and supervision requirements on in-house counsel who are authorized to provide pro bono services,<sup>3</sup> so these requirements are clearly not best practices. We ask that this Court, exercising its inherent authority to regulate the practice of law in the District of Columbia, and acting in the best interest of D.C. residents who would benefit from additional pro bono programs, remove these requirements from Rule 49(c)(9)(A)(ii).<sup>4</sup>

### **The requirement to affiliate with a non-profit legal services provider should be removed**

For out-of-state attorneys to provide pro bono services under the UPL Committee's proposed Rule 49(c)(9)(A)(ii), the legal services must be provided "in affiliation with" a non-profit organization located in the District of Columbia that provides legal services at no charge to individuals of limited means. It is unclear why this requirement was written into the rule in 2014, and we have never received a formal response from the UPL Committee to our August 2015 letter suggesting this requirement be eliminated. Nonetheless, the effects of the requirement are undeniable – it needlessly limits the manner in which corporate legal departments can structure their pro bono programs.

The fact is, internal counsel who provide pro bono services will rarely work alone in providing those services – partnerships are essential to corporate pro bono. Indeed, a 2016 Corporate Pro Bono benchmarking survey of corporate legal departments revealed

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<sup>1</sup> The term "internal counsel" refers to attorneys licensed in other jurisdictions who are allowed to practice in the District under the exemption from unauthorized practice of law found in D.C. App. Rule 49(c)(6).

<sup>2</sup> We will be focusing our comments on how the provisions affect internal counsel, but we believe the same arguments can effectively be made for government counsel.

<sup>3</sup> California, Florida and South Carolina also require in-house counsel licensed in other states to be supervised by an attorney licensed in that state and only accept matters referred from a legal services provider.

<sup>4</sup> The Proposals are virtually identical with regard to the affiliation and supervision requirements for non-locally licensed internal counsel to do pro bono. Therefore, ACC's concerns about Rule 49(c)(9)(A)(ii) in the UPL Committee's proposal apply also to the parallel provision in the D.C. Access to Justice Commission's proposal (proposed Rule 49(c)(9)(B)).

that law firms were the most common partner with which to conduct pro bono projects (87 percent of corporate departments), followed by legal services providers (81 percent of corporate departments). The problem with Rule 49(c)(9)(A)(ii)'s requirement to affiliate with a legal services provider is that it eliminates the ability of corporate legal department to partner solely with a law firm on a pro bono matter, and it also restricts the type of non-profits with which corporate legal departments can partner.

There is a lot of innovation in the world of pro bono. The traditional model of receiving referrals from legal services providers has been supplemented in many ways. Law firms, especially those in the District, have such robust pro bono programs that they engage in a significant amount of pro bono legal services directly without the assistance of legal services providers. As in-house departments are increasingly partnering with law firms for pro bono, these engagements that do not involve a legal services provider are increasingly available to in-house lawyers. Another model of pro bono that does not directly engage legal services providers is when in-house departments provide pro bono services directly to non-profit organizations themselves or to people whom the non-profits serve. Many corporations have existing relationships with community services organizations that can benefit from legal assistance or know of other organizations or individuals with legal assistance needs. Indeed, the 2016 benchmarking survey of corporate pro bono programs showed that many legal departments are partnering with their corporate social responsibility (CSR) staff (51 percent); their corporate foundation (47 percent); and their community services team (36 percent) to engage in pro bono in their communities, and these divisions may help identify non-profits and individuals in need of pro bono legal services. In addition to providing direct legal services to non-profits and their constituents, corporate legal departments may also provide pro bono services to non-profit advocacy organizations that do not exclusively serve low income clients but often address issues that contribute to poverty and other challenges, such as the Washington Lawyers' Committee for Civil Rights Under the Law or the American Civil Liberties Union.<sup>5</sup>

The following are examples of pro bono projects that would not meet Rule 49(c)(9)(A)(ii)'s requirement that services be provided in affiliation with a non-profit legal services provider. Therefore, under the Proposals, internal counsel who are not licensed in the District would not be able to participate in these corporate pro bono projects:

- In 2015, in-house lawyers from Verizon Communications Inc. hosted a clinic in partnership with DLA Piper and the United Way of the National Capital Area to provide local non-profits with legal audits. Similar clinics have occurred in other cities, sponsored by other corporate legal departments working with their local United Way.

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<sup>5</sup> We are unsure if the description of non-profit legal services providers in Rule 49(c)(9)(A)(ii) intended to leave out such organizations that do provide legal services at no charge but will represent individuals who are not necessarily of limited means. If this was not the intent of the rule, we would suggest clarification regarding this point.

- Since 2012, in-house lawyers from Verizon Communications Inc. and attorneys from DLA Piper have been holding a monthly legal clinic for veterans at a Veterans Affairs medical center in New Jersey.
- Capital One Financial Corporation's legal department has worked with the Federal Trade Commission and a local non-profit to organize an identity theft clinic that provides legal services to victims of identity theft.
- AIG's legal department provides direct legal advice to Career Gear, a non-profit providing workforce development services to men transitioning out of prison.
- The Charlotte, North Carolina legal office of Duke Energy has served as a pro bono outside general counsel to Alexander Youth Network, a non-profit that provides professional treatment for children with serious emotional and behavioral issues.
- The legal department of Caterpillar Financial in Nashville chose two charities to partner with Renewal House, a treatment and counseling center for addicted mothers and their children, and Hospital Hospitality House, a home for families and patients receiving medical treatment in Nashville. Caterpillar Financial attorneys provide tax and business law assistance to the charities as well as individualized legal services to residents.
- Starbucks' legal department has worked on pro bono projects with the American Civil Liberties Union of Washington on cases involving voting rights, including advocating on behalf of former felons to have their voting rights restored and participating in a judicial challenge to a county's elections districts.

As these projects illustrate, the traditional pro bono model of referrals from legal services providers is not the only method for pro bono success. Especially when it is widely acknowledged that legal services organizations are understaffed and under-resourced to meet the District's legal needs, one wonders why there should be any restriction on the ability of corporate legal departments to partner with law firms or other organizations in their corporate pro bono programs, or to directly engage clients if they are competent to do so. But that is precisely what the affiliation requirement of Rule 49(c)(9)(A)(ii) does, and there is no clear rationale for doing so.

### **The requirement to be supervised by a D.C. Bar member should be removed**

The supervision requirement in Rule 49(c)(9)(A)(ii) is also unnecessary and detrimental to increasing available legal pro bono assistance as it requires two competent lawyers to work on one matter, limiting the number of hours and clients volunteer lawyers can provide services. Even though the Proposals contain commentary on what is expected regarding supervision, its focus is mostly on in-court supervision. While in-court supervision is certainly burdensome, the proposed guidance appears to overlook the fact that any requirement for supervision necessarily implicates the time and attention of the supervising attorney. If this supervision is undertaken by a legal services attorney with a necessarily heavy caseload, it begs the question of how many engagements can the attorney effectively supervise. If the supervision were to come from an attorney working in a private sector organization, it is questionable what value is derived from supervision by a D.C. Bar member. Most members of the D.C. Bar were admitted on motion, so the

fact that they are licensed in the District is not indicia of their competence in D.C. law. Whatever competence they have gained in D.C. law is through study and application, two avenues equally available to those practicing under Rule 49(c)(9)(A)(ii). The requirement for supervision forces redundancy without increasing quality. Given the critical need for pro bono legal services in the District, this meaningless requirement should be eliminated.

**ACC's recommendations do not frustrate the purpose of Rule 49 and do not adversely impact the public interest**

The specific reasons for including the affiliation and supervision requirements in the current version of Rule 49(c)(9) are not noted in the Rule 49 commentary. But according to the Commentary to Rule 49(a), the rule has four general purposes, which include protecting the public from persons not qualified by competence or fitness to provide professional legal advice or services; ensuring any person holding themselves out as a lawyer is subject to discipline in the District; maintaining the efficacy and integrity of the administration of justice and the system of regulation of lawyers; and ensuring that the activities of the Bar are appropriately supported financially by those exercising the privilege of membership in the Bar.

ACC's recommendations to remove the affiliation and supervision requirements in proposed Rule 49(c)(9)(A)(ii) in no way frustrate the elaborated purposes of Rule 49. The requirement that internal counsel be actively licensed and in good standing in another jurisdiction satisfies the need to protect the public from persons not qualified by competence or fitness. Rule 49(c)(9)(B) subjects those providing pro bono services under this provision to the D.C. Rules of Professional Conduct and enforcement, which addresses the purposes of discipline and maintaining the integrity of the administration of justice. Finally, the purpose of ensuring financial support of the Bar does not apply to those practicing under Rule 49(c)(9)(A)(ii), as they are not granted full privileges of membership in the Bar.

In its March 18, 2016 letter to the UPL Committee, the D.C. Bar Pro Bono Center suggests that the requirement of affiliation with a legal services provider ensures that lawyers providing pro bono services receive the training and advice they may need on any requirements of D.C. law or local practice. An affiliation requirement is not necessary for the Court to have this assurance. As those practicing under Rule 49(c)(9)(A)(ii) are subject to the D.C. Rules of Professional Conduct, including Rule 1.1 on competence, any lawyer needing assistance on requirements of D.C. law or local practice is required to obtain such assistance. Requiring such assistance come solely from legal services providers is undesirable for all the reasons described above.

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The District now has the opportunity to amend the current Rule 49(c)(9) in a way that will allow for the broadest possible participation in pro bono services by the city's

internal counsel who are licensed in other jurisdiction. Four other jurisdictions – Illinois, New York, Virginia and Wisconsin – have broad rules that allow internal counsel to engage in pro bono legal services without supervision or affiliation restrictions, but of course subject to the local rules of professional conduct. To date, no issues have arisen under these less restrictive regimes. Instead, legal departments have developed new pro bono programs for their legal staff, in-house counsel have collaborated with each other, law firms, legal services organizations, and public interest organizations to expand in-house pro bono engagement, and in-house pro bono culture has advanced.

We applaud the UPL Committee’s proposed changes that ease the administrative burden on internal counsel who seek to provide pro bono legal services. However, this does not change Rule 49(c)(9)(D)’s unnecessarily restrictive approach, nor the fact that our recommendations would increase the ability of internal counsel to provide needed pro bono services. In a statement to the honorees on the 2017 Capital Pro Bono Honor Roll, Chief Judge Robert E. Morin of the Superior Court and Chief Judge Anna Blackburne-Rigsby of the D.C. Court of Appeals noted that although the District has “a truly extraordinary cadre of legal services organizations,” the severity and urgency of the need for civil justice services means “the dedicated work of pro bono counsel is simply indispensable to our civil justice system.” In-house counsel can and do answer the pro bono call – ACC is asking that this Court remove needless obstacles in the path to them doing so.

Sincerely,



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