

July 19, 2018

Douglas T. Shima
Clerk of the Appellate Court
Kansas Judicial Center
301 SW 10th Avenue, Room 107
Topeka, Kansas 66612-1507

Via email to: rulenotice@kscourts.org

Re: Comments on proposed changes to Rule 712

Dear Mr. Shima:

The Association of Corporate Counsel (“ACC”) and its Mid-America Chapter appreciate the opportunity to comment on the proposal to amend Supreme Court Rule 712 to allow in-house counsel practicing on a restricted license to participate in pro bono legal services. Amending Rule 712 to allow these attorneys to provide pro bono services in Kansas communities will surely assist in closing the access to justice gap. Indeed, we urge the Court to go further and remove the requirement in proposed Rule 712(i) that in-house counsel practicing under Rule 712 (“Rule 712 Lawyers”) only provide pro bono services through a Supreme Court approved not-for-profit provider of legal services or an accredited law school clinic. ACC’s experience working with corporate legal departments and pro bono has shown that restrictions like this unnecessarily limit the amount and type of pro bono services that in-house lawyers can provide.

ACC is a global bar association with more than 43,000 members that promotes the common professional and business interests of in-house counsel who work for corporations, associations and other organizations. Our Mid-America Chapter serves Central-Western Missouri, Kansas, and Nebraska and includes members from Kansas’ largest corporate legal departments. 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 (“CPBO”) project to challenge state bar restrictions on in-house counsel pro bono.

We are pleased that Kansas is positioned to join the 38 other jurisdictions that allow in-house counsel practicing under unauthorized practice of law exemptions similar to Kansas’ Rule 712 to provide pro bono legal services. Expanding the ability of in-house counsel with limited licenses or practice authorizations to engage in pro bono without undue restrictions can help close the justice gap by increasing the pool of pro bono volunteers. Both the Conference of Chief Justices and the American Bar Association (ABA) have passed resolutions that encourage states to adopt rules allowing such in-

house counsel to provide pro bono services. Proposed Rule 712(i) will help Kansas' legal departments create pro bono programs open to all their lawyers. In-house counsel influence the legal profession as a whole, and their greater participation in pro bono can strengthen the overall community of lawyers involved in providing much needed legal services to the underserved.

While ACC strongly supports any change that advances the ability of in-house counsel to perform pro bono legal services, ACC urges the Court to consider removing the proposed requirement that pro bono services be provided only through a Supreme Court approved legal services provider or law school clinic. Doing so would enhance the ability of corporate legal departments to have a meaningful impact on access to justice in Kansas.

Proposed Rule 712(i)'s requirement that services be provided through a not-for-profit legal services provider or law school clinic needlessly limits the types of services Rule 712 Lawyers can provide

The requirement that pro bono services be provided through an approved not-for-profit legal services provider or accredited law school clinic limits the ability of corporate legal departments to include Rule 712 Lawyers in pro bono programs that partner with law firms or other non-profit organizations. Law firms are the number one pro bono partner of corporate legal departments, according to a 2016 CPBO benchmarking survey. Many law firms 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. But the current formulation of Rule 712 would prohibit Rule 712 Lawyers from participating in such projects simply because there is no legal services provider involved.

The current formulation of Rule 712 would also prohibit Rule 712 Lawyers from participating in pro bono projects that are organized in partnership with non-profits that are not legal services providers. 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, behind law firms and legal services providers, CPBO's 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. 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 or directly serve low income clients but often address issues that contribute to poverty and other challenges. Proposed Rule 712(i) would exclude Rule 712 Lawyers from participating in such projects.

The following are examples of pro bono projects that would not meet proposed Rule 712(i)'s requirement that services be provided through a Court-approved non-profit legal services provider or law school clinic:

- 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.
- 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 illustrated by the list above, the traditional pro bono model of receiving referrals from legal services providers has been supplemented in many ways. These different methods of providing pro bono legal services are especially important for corporate legal departments, as many in-house counsel are more comfortable with transactional projects as opposed to the typical litigation-related pro bono work that most not-for-profit legal services providers refer.¹

In fact, in a 2017 survey, ACC Mid-America members identified the following top areas of interest for providing pro bono services: (1) assisting small businesses and non-profits; (2) contracts; (3) corporate compliance; and (4) board responsibilities and duties. These interests reflect a comfort-level with this type of work but also reflect the reality that

¹ In this regard, in-house counsel are no different than other attorneys performing pro bono legal work. Indeed, in a national pro bono survey by the ABA, 79 percent of attorneys who had performed pro bono services in 2016 had expertise in the legal area in which they provided services.

most corporate legal departments simply do not have the litigation resources of a law firm. Based on these 2017 survey results, the ACC Mid-America Chapter is exploring pro bono opportunities that would include collaborating with a local United Way and a law firm to provide legal services to smaller non-profit organizations receiving United Way funding. Under proposed Rule 712(i), the chapter would be unable to extend this opportunity to members who are Rule 712 Lawyers.

Other jurisdictions have implemented less restrictive rules for in-house pro bono

Instead of limiting Rule 712 Lawyers to performing pro bono services through a legal services provider or law school clinic, Kansas should amend the current Rule 712 to allow for the broadest possible participation in pro bono services by Rule 712 Lawyers. Allowing Rule 712 Lawyers to participate in pro bono on equal footing with attorneys licensed in the state has several benefits. This approach: (1) supports increased participation among in-house counsel; (2) reduces the strain on overburdened legal service organizations; (3) supports avenues that would increase the number of clients served; and (4) allows in-house counsel to use their legal skills in support of underserved communities.

Other states have allowed similarly situated in-house counsel to provide pro bono services on equal footing with attorneys licensed in those states. Illinois, New York, Virginia and Wisconsin have broad rules that allow in-house counsel to engage in pro bono legal services without supervision or affiliation restrictions, but of course subject to the local rules of professional conduct.² 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.

It is unclear from the Supreme Court's proposal why pro bono services must be provided through an approved legal services provider or a law school clinic. Presumably, there is some desire for Rule 712 Lawyers providing pro bono services to affiliate with those who are more experienced in pro bono legal areas. We recognize that Supreme Court Rule 208 imposes the same restriction on retired and inactive attorneys providing pro bono services. However, unlike retired or inactive attorneys, Rule 712 Lawyers are subject to Kansas' professional conduct rules and discipline by this Court. Kansas' Rules of Professional Conduct require them to be competent to undertake representation. And as stated in the commentary to Rule 1.1, Kansas Rules of Professional Conduct, "a lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar." Indeed, the commentary states that a lawyer can provide adequate representation in a wholly novel field through necessary study. Requiring that the services be provided through legal services providers is a redundant safeguard given these ethical duties.

² See Appendix A for relevant language from these states' rules. Similar to these states' rules, Proposed Rule 712(i) could be revised to read: "An attorney licensed under this rule is authorized to provide pro bono legal services in accordance with Rule 6.1 of the Kansas Rules of Professional Conduct."

We are aware that Koch Industries, Inc., has suggested addressing the restrictive nature of proposed Rule 712(i) by proposing that Rule 712 Lawyers be allowed to provide pro bono legal services under the supervision of a fully licensed Kansas lawyer or in connection with a law firm pro bono program. While ACC prefers the less-restrictive approach taken by Illinois, New York, Virginia and Wisconsin, the Koch proposal is an acceptable compromise that will allow broader in-house attorney participation in pro bono than the currently proposed Rule 712(i).

We applaud the Kansas Supreme Court for proposing the amendment to Rule 712 to allow Rule 712 Lawyers to participate in pro bono services. We urge the Court to modify Rule 712's unnecessarily restrictive approach and increase the ability of Rule 712 Lawyers to provide needed pro bono services. In-house counsel can and do answer the pro bono call. By adopting a modified Rule 712(i), this Court can remove obstacles in the path to them doing so.

Sincerely,



Susanna McDonald
Vice President and Chief Legal Officer
Association of Corporate Counsel

Mary Blatch
Associate General Counsel and Director of Advocacy
Association of Corporate Counsel

Charlene Wilson
President
ACC Mid-America Chapter

Jennifer McAdam
Pro Bono Committee Chair
ACC Mid-America Chapter

APPENDIX A: Pro bono provisions of Illinois, New York, Virginia and Wisconsin

Illinois Rule 716. Limited Admission Of House Counsel:

(g) Authority and Limitations. A lawyer licensed and employed as provided by this Rule has the authority to act on behalf of his or her employer for all purposes as if licensed in Illinois. The lawyer may not act as counsel for the employer until the application is accepted and approved by the Court. A lawyer licensed under this rule shall not offer legal services or advice to the public or in any manner hold himself or herself out to be engaged or authorized to engage in the practice of law, except such lawyer may provide voluntary pro bono public services as defined in Rule 756(f).

New York Rule 522.8. Pro bono legal services:

Notwithstanding the restrictions set forth in section 522.4 of this Part, an attorney registered as in-house counsel under this Part may provide pro bono legal services in this State in accordance with New York Rules of Professional Conduct (22 NYCRR 1200.0) rule 6.1(b) and other comparable definitions of pro bono legal services in New York. An attorney providing pro bono legal services under this section:

(a) shall be admitted to practice and in good standing in another state or territory of the United States or in the District of Columbia and possess the good moral character and general fitness requisite for a member of the bar of this State, as evidenced by the attorney's registration pursuant to section 522.1(b) of this Part;

(b) pursuant to section 522.2(c)(2) of this Part, agrees to be subject to the disciplinary authority of this State and to comply with the laws and rules that govern attorneys admitted to the practice of law in this State, including the New York Rules of Professional Conduct (22 NYCRR Part 1200.0) and the rules governing the conduct of attorneys in the judicial department where the attorney's registration is issued;

(c) may appear, either in person or by signing pleadings, in a matter pending before a tribunal, as that term is defined in New York Rules of Professional Conduct (22 NYCRR 1200.0) rule 1.0(w), at the discretion of the tribunal, without being admitted pro hac vice in the matter. Prior to any appearance before a tribunal, a registered in-house counsel must provide notice to the tribunal that the attorney is not admitted to practice in New York but is registered as in-house counsel pursuant to this Part. Such notice shall be in a form approved by the Appellate Division; and

(d) shall not hold oneself out as an attorney admitted to practice in this State, in compliance with section 522.4(d) of this Part.

Virginia Rule 1A:5. Virginia Corporate Counsel & Corporate Counsel Registrants:

g) Notwithstanding the restrictions set out in Part I(f) above on the scope of practice, a lawyer certified pursuant to Part I of this rule may, and is encouraged to, provide voluntary *pro bono publico* services in accordance with Rule 6.1 of the Virginia Rules of Professional Conduct.

(h) All legal services provided in Virginia by a lawyer certified pursuant to Part I of this rule shall be deemed the practice of law and shall subject the lawyer to all rules governing the practice of law in Virginia, including the Virginia Rules of Professional Conduct and Part 6, Section IV, Paragraph 13 of the Rules of the Supreme Court of Virginia. Jurisdiction of the Virginia State Bar shall continue whether or not the lawyer retains the Corporate Counsel Certificate and irrespective of the lawyer's presence in Virginia.

Wisconsin Rule 10.03(4) f. Persons Included in Membership:

Counsel not admitted to the practice of law in this jurisdiction but admitted in any other U.S. jurisdiction or foreign jurisdiction, who is employed as a lawyer in Wisconsin on a continuing basis and employed exclusively by a corporation, association, or other nongovernmental entity, the business of which is lawful and consists of activities other than the practice of law or the provision of legal services, shall register as in-house counsel within 60 days after the commencement of employment as a lawyer or if currently so employed then within 90 days of the effective date of this rule, by submitting to the Board of Bar Examiners the following:

1. A completed application in the form set forth in Appendix B to this rule;
2. A nonrefundable fee of two hundred and fifty dollars (\$250) to the Board of Bar Examiners;
3. Documents proving admission to practice law in the primary jurisdiction in which counsel is admitted to practice law; and
4. An affidavit from an officer, director, or general counsel of the employing entity attesting to the lawyer's employment by the entity and the capacity in which the lawyer is so employed.

A lawyer registered under this subsection may provide pro bono legal services without fee or expectation of fee as provided in SCR 20:6.1.