SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: PASSAIC COUNTY
DOCKET NO. L-2059-92

UNITED JERSEY BANK,

Plaintiff,

v.

VALLEY FALLS FOOD PRODUCTS, INC., ROBERT AND ELEANOR FILIPPELLO and ROBERT FILIPPELLO,

Defendants.

Civil Action

MEMORANDUM OF LAW *AMICUS CURIAE* IN SUPPORT OF RULE PERMITTING IN-HOUSE ATTORNEYS TO REPRESENT CORPORATE EMPLOYERS

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OTHER AUTHORITIES

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PRELIMINARY STATEMENT

Plaintiff United Jersey Bank is represented in this case by an in-house attorney authorized to practice law in New Jersey. Defendants have moved to disqualify this attorney, contending that a corporation may not be represented in court by its in-house counsel. Defendants argue that such representation constitutes either an unauthorized practice of law or a pro se appearance by a corporation prohibited by R. 1:21-1(c).[1]

Defendants offer no support for the draconian remedy of disqualification under R. 1:21-1(c) here. They ignore the plain language of Rule 1:21-1(c); they cite no authority supporting their interpretation of R. 1:21-1(c), and they ignore existing authority, all of which negates defendants' interpretation of the rule.

The most immediate impact of defendants' interpretation of the rule would be to deprive plaintiff of its choice of counsel, and to deprive plaintiff's in-house counsel of her rights to equal protection and due process of law under the United States and New Jersey Constitutions. But defendants' reading of the rule could have far-reaching and devastating consequences beyond the instant case. It would threaten the job security and careers of more than 2500 in-house attorneys in New Jersey. Even more importantly, the Commissioner of the New Jersey Department of Commerce and Economic Development opposes defendants' motion because it would jeopardize the economic health of the entire State by discouraging corporations from relocating or maintaining offices in New Jersey.

Evidently, defendants have brought this motion in the hope of forcing plaintiff to hire outside counsel, thus making the continuation of this litigation more costly and therefore less palatable to plaintiff. Defendants' goal, presumably, would be to compel plaintiff to make settlement concessions to which plaintiff would not otherwise accede. Defendants' tactics underscore the importance of establishing here that R. 1:21-1(c) permits in-house counsel to appear in court and to utilize his or her unique and valuable skills on behalf of the corporation by whom counsel is employed. In order to protect the interests of 2500 New Jersey in-house attorneys and the citizens of this State, amicus curiae America Corporate Counsel Association and New Jersey Corporate Counsel Association submit this brief in opposition to defendants' motion.

ARGUMENT

I. **R. 1:21-1(c) AUTHORIZES IN-HOUSE COUNSEL TO REPRESENT CORPORATE CLIENTS.**

   A. **The Plain Language Of The Rule Dictates that In-House Counsel May Appear In Court.**

R. 1:21-1(c) permits in-house counsel to appear in court on behalf of the corporation that employs them as long as the attorney is a member of the Bar in good standing:

> Except as otherwise provided ... a corporation shall not practice law in this State, nor shall it appear nor file any paper in any action in any court of this State *except through an attorney authorized to practice in this State.* The fact that an officer, trustee, director, agent or employee of a corporation shall be an attorney authorized to practice in this State shall not be held to entitle such individual or corporation to do any act prohibited by these rules. (Emphasis added)

The rule clearly provides that a corporation may appear in court through an ttorney licensed to practice in this state. Therefore, if an in-house attorney is so licensed, he or she can appear in court on behalf of the corporation in accordance with the rule.

R. 1:21-1(c) has three objectives: 1) to prohibit a corporation from "practicing law"; 2) to prohibit a corporation from appearing in court except through a licensed attorney; and 3) to prohibit a corporation from doing what is otherwise proscribed under the rules notwithstanding that an agent of the corporation is authorized to practice law in this state. None of these three prohibitions applies here. The third prohibition does not prohibit anything not otherwise proscribed: it merely states that what is otherwise prohibited cannot be validated just because the corporation employs an attorney authorized to practice law in New Jersey. The second prohibition is not germane here because plaintiff's counsel is a licensed attorney. Thus, the sole thread by which defendants' argument hangs is the claim that in-house counsel appearing in court for his or her employer constitutes the "unauthorized practice of law."

Defendants misunderstand the rule. The practice prohibited by the rule is the representation of unaffiliated parties by the corporation, not the representation of the corporation itself or its affiliates by the in-house attorney. Defendants cite no authority for the novel proposition that in-house counsel appearing in court for the corporation that employs them constitutes the unauthorized practice of law. Indeed, the only cases to address the issue make absolutely clear that in-house counsel's representation of its own employer does not constitute the practice of law.

B. **In-House Counsel's Appearances in Court Do Not Constitute The Unauthorized "Practice of Law" Within The Meaning Of The Rule.**

The Supreme Court of New Jersey has expressly stated that representation of a corporation by its own-house attorney does not constitute the unauthorized practice of law. In interpreting the scope of R. 1:12-1 (a predecessor of R. 1:21-1), the Court held:

> In ... [a legal department of a corporation] the attorney-employees are hired to advise and protect the corporation, their employer. The legal work they do directly involves the employer and its relationships with others with whom it has dealings ... *Corporations may act for themselves through their own attorney-employees*, but they cannot perform acts *for others* in this capacity which amounts to the practice of law.

New Jersey State Bar Association v. Northern New Jersey Mortgage Associates, 22 N.J. 184, 197 (1956)(emphasis added). *Accord* Supreme Court Committee on Unauthorized Practice of Law Opinion No. 23 ("Where the attorney-employee advises and protects the corporate interest rather than the sole interest of third party clients, the use of the employee has been held not to constitute the practice of law"). Thus, the "practice of law" proscribed by R. 1:21-1(c) is the representation of unaffiliated third parties by the corporation through an in-house attorney. See Stack v. P.G. Garage, Inc., 7 N.J. 118, 121 (1951) ("[The practice of law] consists, generally, in the rendition of legal service *to another, or legal advise and counsel as to his rights and obligations under the law...") (emphasis added).*[2]

The one New Jersey case directly addressing the issue raised by the present motion makes clear that in-house counsel's representation of its employer does not constitute the practice of law. Jim Cook Assocs. v. Hammid, No. L-51772-78. There, in an unreported Order, the Court denied plaintiff's motion to disqualify defendant's in-house attorney under R. 1:21-1.[3]

The New Jersey Legislature has provided that insofar as the unauthorized practice of law may constitute a disorderly persons offense, the offense does not include in house counsel representing the corporation by which he or she is employed. The designation of the unauthorized practice of law as a disorderly persons offense is set forth in N.J.S.A. 2A:170-78, which provides that "[a]ny ... corporation that ... [e]ngages in this state in the practice of law ... [i]s a disorderly person.", and in N.J.S.A. 2A:170-79, which provides that "any ... corporation that ... [r]epresents any person in the pursuit of any legal remedy; or ... [r]epresents any person suing or sued ... in any legal action or proceeding ... [i]s a disorderly person." However, the statute goes on to state that corporations may use in-house attorneys to represent them in litigation:

> *[The statute does not prohibit any] person, firm, association or corporation from employing any duly licensed attorney or counselor at law in or about his or its owns affairs or in any litigation to which he or it may be a party, or directly or indirectly concerned, provided that such employment shall not enable such person, firm, association or corporation to perform any act or service otherwise prohibited by this chapter ... N.J.S.A. 2A:170-82(a).*

In light of the foregoing authority, defendants cannot seriously urge that when a corporation's in-house lawyer appears in court, this constitutes the unauthorized practice of law.

C. ***In-House Counsel's Appearances In Court Do Not Constitute A Prohibited Pro Se Appearance on Behalf of the Corporation.***

The New Jersey Court Rules further demonstrate that while a corporation may generally appear only through a licensed attorney and not pro se, a prohibited pro se appearance by a corporation consists of a non-lawyer agent, not in-house counsel, appearing in court. By way of illustration, although it generally prohibits corporations from filing papers in court, R. 1:21-1(c) exempts several types of "pro se" appearances. In so doing, the rule makes clear that an appearance on the corporation's behalf by a licensed attorney, including in-house counsel, is not a prohibited pro se appearance. Rather, a prohibited pro se appearance by a corporation occurs when a non-attorney agent or employee appears on the corporation's behalf. See, e.g., R. 6:11 (in Small Claims Section, "any authorized officer or employee may prosecute and defend on behalf of a party which is a business entity...); Comment to R. 7:4-2(b)("A defendant who is a business entity ... [may] enter a plea and appear pro se by an officer or agent in any other municipal court action"). In sum, the legal representation of a corporate litigant by an employee authorized to practice law in New Jersey is neither an unauthorized practice of law nor a prohibited pro se appearance within the meaning of R. 1:21-1(c).

II. ***DEFENDANTS' INTERPRETATION OF R. 1:21-1(c) VIOLATES THE CIVIL RIGHTS OF BOTH CORPORATIONS AND THEIR IN-HOUSE COUNSEL.***

Defendants' reading of R. 1:21-1(c) clearly conflicts with the right of corporations to be represented by counsel of their choice, a right enjoying constitutional protection. It also discriminates against in-house counsel's pursuit of their profession, without any rational relationship to any legitimate state interest, in violation of counsel's constitutional rights to equal protection and due process of law.

A. ***Corporations Have The Right To Counsel Of Their Choice.***

Court have long held that "[a] client is always entitled to be represented by counsel of his own choosing." Dwyer v. Jung, 133 N.J. Super. 343, 347 (Ch. Div.), aff'd, 137 N.J. Super. 135 (App. Div. 1975). Indeed:

> *[A litigant's] choice of counsel is entitled to substantial deference. The court should not quickly deprive ... [litigants] of their freedom to choose the advocate who will represent their claims, nor lightly dismiss the trust and confidence ... [litigants] have placed in their chosen counsel.*

Hamilton v. Merrill Lynch, 645 F. Supp. 60, 61 (E.D. Pa. 1986). The right to retain counsel of choice is an acknowledged corollary of the right to assistance of counsel protected by the Sixth Amendment to the Constitution of the United States. See, e.g., Wilson v. Mintzes, 761 F.2d 275, 278-280 (6th Cir. 1985).[4]

Defendants' motion to disqualify plaintiff's counsel cavalierly ignores the jurisprudential and constitutional issues referenced above, both of which must be balanced by a court in determining whether purported ethical considerations override the client's right to choose counsel. Disqualification is recognized as a drastic measure to be imposed only when absolutely necessary. See Panduit Corp. v. All States Plastic Mfg. Co., 744 F.2d 1564, 1577 (Fed. Cir. 1984). When determining whether a disciplinary rule requires the disqualification of an attorney, a court "should consider the ends that the disciplinary rule is designed to serve and any countervailing policies, such as permitting a litigant to retain the counsel of his choice and enabling attorneys to practice without excessive restrictions." United States v. Miller, 624 F.2d 1198, 1201 (3d Cir. 1980).

Judicial scrutiny must be particularly meticulous where, as here, the attorney facing disqualification possesses intimate knowledge of the client. As one court poignantly noted:

> *A litigant has a right to freely chosen, competent counsel. The protection of that right is particularly important in this case, where the attorneys sought to be disqualified have a unique and probably irreplaceable value to their client ... The judicial system benefits from attorneys who have a specialized expertise, for such attorneys bring to the process both experience and a special insight into those problems which are encountered within the areas of their expertise.*

Laker Airways Ltd. v. Pan Am. World Airways, 103 F.R.D. 22, 27-28 (D.D.C. 1984).

The above precedents mandate that, in view of the unique and valuable services generally provided by in-house counsel, limitations on the right of corporations to be represented by in-house counsel cannot pass muster. The quality of work provided by in-house counsel is enhanced, in many instances, by the in-house counsel's intimate knowledge of the corporation's business, policies and procedures. This knowledge gives in-house counsel a unique sensitivity to, and understanding of, the particular needs of their clients. The perspective that in-house counsel acquire through constant exposure to the company's affairs cannot easily be replicated by outside counsel.

In-house counsel, by virtue of their understanding of both corporate priorities and decisional channels, are often able to speed the progress of litigation and to focus discovery efforts more efficiently. By the same token, that business sense, combined with their superior access to corporate decision-makers, frequently allows in-house counsel to consummate settlements of litigation more efficiently. As a result, in-house counsel often times avoid wasteful and time-consuming discovery and other unnecessary litigative efforts.

Additionally, in-house counsel are particularly sensitive to litigation costs and may be expected to manage such costs more closely than retained counsel. Thus, in-house counsel can help to relieve the pressure on the judicial system. Given the over-crowded docket in most counties today, in-house counsel's ability to promote the efficient use of judicial resources militates strongly against disqualification.

In the final analysis, defendants can neither allege a single reason nor cite a single authority supporting their interpretation of R. 1:21-1(c). Defendants' arguments thus fail, since they have not even approached the high burden required to override a corporation's right to choose counsel.

B. ***Restrictions On In-House Counsel's Ability To Litigate Violates Their Equal Protection and Due Process Guarantees.***

Defendants' interpretation of R. 1:21-1(c) also denies in-house counsel equal protection and due process under the law. A law that discriminates between similarly situated classes of people, and is not rationally related to a legitimate state interest, is unconstitutional. See In re Professional Ethics Advisory Comm. Op. 475, 89 N.J. 74, 94-95, appeal dismissed sub nom Jacoby & Meyers v. Supreme Court of N.J., 459 U.S. 962 (1982); Taxpayers Ass'n of Weymouth Tp. v. Weymouth Tp., 80 N.J. 6, 43 (1976), appeal dismissed, cert. denied sub nom Feldman v. Weymouth Tp., 430 U.S. 977 (1977). So too, a rule limiting the ability of in-house counsel to practice law is equally unconstitutional absent a rational basis. See generally

Schwartz v. Judicial Retirement Sys. of N.J., 584 F. Supp. 711 (D.N.J. 1984)(applying rational relationship test to prohibition on certain prive law practices by retired judges receiving pensions); Ostroff v. New Jersey Sup. Ct., 415 F.Supp. 326 (D.N.J. 1976)(applying rational relationship test to requirement that bar applicants be graduates of accredited college).

Absolutely no rational basis exists for distinguishing between in-house counsel and retained counsel for purposes of providing legal services to a corporation. The Supreme Court of New Jersey has noted that in-house counsel "are not second-class lawyers; these are first-class lawyers who are delivering legal services in an evolving format." In re Weiss, Healey & Rea, 109 N.J. 246, 254 (1988). As the Court noted in Merrick v. American Sec. & Trust Co., 107 F.2d at 278:

> *Defendant is as free as any corporation to consult its own convenience in selecting and employing attorneys. What it may do through one member of the bar it may do through another, if he is not specially disqualified. The attorney's employment may be sporadic, frequent, or continuous; it may be performed in and from defendant's offices or other offices; and it may be paid for by fee or by salary. Salaried attorneys and outside counsel are subject to like motives and obligations, public and private, and to like public control. Either may be employed to perform legal services which are properly connected with their employer's business.*

See also Arkansas Bar Ass'n v. Union Nat'l Bank of Little Rock, 273 S.W.2d 408, 410 (Ark. 1954)([t]he attorney representing a corporation may be a full time employee of the bank.")[5] ; State Bar Ass'n of Conn. v. Connecticut Bank & Trust Co., 131 A.2d 646, 652 (Conn. Super. Ct. 1957), judgment modified, 145 Conn. 222, 140 A.2d 863 (1958)("There can be no distinction between acts performed by the banks through their salaried attorneys and the same acts performed through outside counsel retained by the banks in a specific situation").[6]

Defendants' reading of R. 1:21-1(c) would discriminate between equally qualified, licensed New Jersey attorneys respecting their ability to represent corporations. No reason whatsoever can be advanced to treat in-house counsel differently from retained counsel. In-house attorneys possess the same legal education, skills and qualifications that retained counsel possess. In-house counsel pay into the Client Security Fund in order to maintain their membership in the New Jersey bar. They are regularly called upon to perform pro bono services on behalf of indigent third parties in the federal and state courts in New Jersey. Their financial contributions and professional services are accepted without objection and without distinction on the basis of employment status. It would be anomalous to ask such attorneys in their individual capacities to represent third parties periodically, but to prohibit such attorneys in their official professional capacities from representing the clients for whom they work regularly. In short, there is no justification for distinguishing in-house counsel from retained counsel in regard to their ability in court on behalf of their corporate clients. This Court should reject any interpretation of the rule which creates such distinctions and insure that in-house counsel are not, in the Supreme Court's words, treated as "second class citizens" or denied equal protection or due process under law.

III. THE PUBLIC INTEREST MANDATES NO RESTRICTION ON THE ABILITY OF IN-HOUSE COUNSEL TO REPRESENT THEIR CORPORATE EMPLOYERS SINCE RESTRICTIONS COULD SERIOUSLY THREATEN THE ECONOMIC HEALTH OF THE STATE.

As set forth above, the overwhelming weight of authority is clearly against the defendants' interpretation of R. 1:21-1(c). Moreover, adopting such an interpretation could be disastrous, not only for the livelihood of hundreds of in-house counsel working in New Jersey, but also for the economic vitality and growth of the state itself.

The reading of R. 1:21-1(c) urged by defendants -- to prohibit in-house counsel from representing their corporate employers in court -- would jeopardize the job security of the numerous in-house counsel whose principal responsibilities involve litigation. A broader reading of R. 1:21-1(c), interpreting it to prohibit in-house attorneys from providing any legal services to corporate employers, could threaten approximately 2500 New Jersey attorneys with the loss of their jobs. In view of the currently existing tight job market for attorneys, the reading of R. 1:21-1(c) urged by defendants would be a

devastating blow to in-house attorneys.

Further, if New Jersey's corporations were required to retain outside counsel to perform necessary legal tasks, their legal costs would increase by millions of dollars. These additional costs would likely be passed on to New Jersey consumers. Further, municipal corporations and regulated public utilities, which also employ many in-house lawyers, would experience a significant increase in legal costs. New Jerseyans, in turn, would probably experience a direct increase in legal costs incurred by these public and quasi-public corporations through higher taxes and rate increases.[7] *This would be contrary to the mandate of the New Jersey Supreme Court that if in-house counsel "results in lower legal costs, the public has an interest in seeing that able attorneys continue to be attracted to it." In re Weiss, Healey & Rea, 109 N.J. at 254 (attorneys employed by insurance company, representing insureds).*

Finally, the freedom to utilize in-house effectively and the projected costs of legal work are significant factors corporations consider when choosing where to maintain their corporate offices, whether to expand existing facilities, and whether to relocate operations. New Jersey's ability to compete for corporate operations is a vital part of the economic health of the state. Indeed, a major function of the New Jersey Department of Commerce and Economic Development is to encourage new domestic and foreign companies to locate here. That department opposes defendants' motion because of its likely impact of New Jersey corporations.

The relocation of corporations to New Jersey does not simply create a new source of jobs and provide added tax revenues to the state; it improves the overall economic climate by providing a market for real estate, goods and services. By way of illustration, a 1991 survey identified a total of 103 companies that had announced a relocation or expansion into New Jersey during the year. These companies moved into 16 of the 21 New Jersey counties, and they are expected to absorb more than six million square feet of commercial real estate. The relocating firms are also expected to create an additional 10,000 jobs in the state.

Competition with other states or regions for corporate headquarters or other operations is intense, and all factors are taken into account by the courted corporation. Any restrictions, such as the interpretation of R. 1:21-1(c) sought by defendants here, becomes one more barrier to the promotion of New Jersey to national corporations. No conceivable public harm would result from in-house counsel representing their corporate employers as fully as any retained attorney represents another individual or corporate client. On the other hand, a court rule hampering the ability of in-house counsel to provide legal services to their corporate employers would adversely affect business relocations to New Jersey. It would also impose unnecessary costs and lost employee productivity on corporations already located in this State, discouraging existing corporations from maintaining or expanding their offices here. The economic interests of the people of New Jersey dictate that corporations be permitted to utilize their in-house counsel as fully as any client may use retained counsel.

CONCLUSION

For the reasons stated above, the American Corporate Counsel Association and New Jersey Corporate Counsel Association respectfully submit that the Court should deny the defendants' motion for disqualification of plaintiff's counsel, and that the Court should hold that the representation of a corporate litigant by an in-house attorney employee authorized to practice law in New Jersey is neither an unauthorized practice of law nor a prohibited pro se appearance within the meaning of R. 1:21-1(c).

Respectfully submitted,

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By: PHILIP R. SELLINGER

Dated: July 2, 1992

NOTES

1. *The facts set forth herein are predicated on the Certification of Barbara McConnell, Commissioner of the New Jersey Department of Commerce and Economic Development, and the Certifications of Barbara Sellinger and Diedre O. Stewart previously submitted to the court.*

2. *A corporation itself cannot practice law because it is not a natural person and presumably cannot fulfill the requirements of learning and integrity necessary for bar admission. See Merrick v. American Sec. & Trust Co. 107 F.2d 271, 279 (D.C. Cir. 1939), cert. denied, 308 U.S. 625 (1940) (Stephens, J., dissenting) ("Only a human being can conform to these exacting requirements [for bar admission]. Artificial creations such as corporations or associations cannot meet these prerequisites"). Further, courts prohibit corporations from practicing law for others through liscensed in-house attorneys on the ground that the loyalty inherent in the attorney-client relationship is threatened when the attorney is employed by a corporation, rather than by a third-party client. See Unger v. Landlords' Management Corp., 114 N.J. Eq. 68, 73 (Ch. 1933) ("The relation of attorney and client ... cannot exist between an attorney employed by a corporation to practice law for it, and a client of the corporation, for he would be subject to the directions of the corporation, and not to the directions of the client"). See also In re Education Law Center, 86 N.J. 124, 134-36 (1981).*

3. *A copy of Judge Moore's Order, dated October 14, 1980, is attached hereto as Exhibit "A".*

4. *R. 1:21-1 (c), which defendants assert prevents corporations from choosing to be represented by in-house counsel, does not on its face distinguish between civil and criminal actions.*

5. *The Arkansas statute in question is analogous to New Jersey's statutory prohibition against corporations practicing law.*

6. *Indeed, numerous courts have sanctioned the use of in-house counsel in litigation by awarding attorneys' fees to the corporate clients they represent. See Textor v. Board of Regents of N. Ill. Univ., 711 F.2d 1387 (7th Cir. 1983); Pittsburgh Plate Glass Co. v. Fidelity & Cas. Co. of N.Y., 281 F.2d 538 (3d Cir. 1960); Scott Paper Co. v. Moore Bus. Forms, Inc., 604 F. Supp. 835 (D. Del. 1984).*

7. *R. 1:21-1 (c), as interpreted by defendants, implicates common and statutory law prohibitions against restraints of trade since it would limit competition in the legal representation of corporations, thus driving up the cost of services. See N.J. Good Humor, Inc. v. Board of Comm'rs of Bradley Beach, 124 N.J.L. 162, 170 (E. & A. 1940) ("If the competition afforded by the practice of a lawful occupation may be thus stifled, the next step would be the exclusion of all outside commerce ... to the manifest hurt of the public at large.... Restraint of trade without some compelling public interest to justify it, is contrary to the spirit of the common law, and is not within the police power"). Cf. 15 U.S.C. § 1 (Sherman Act) ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among several States ... is declared to be illegal"); Goldfarb v. Virginia State Bar, 421 U.S. 773, 783-85 (1975) (Where interstate legal services are inseparable from interstate commercial transactions, interstate commerce is sufficiently implicated to invoke the Sherman Act).*

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