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October 10, 2007

VIA ELECTRONIC SUBMISSION & HAND DELIVERY

American Bar Association
Section of Legal Education and Admission to the Bar
Attn: Bucky Askew
321 N. Clark St. 21st floor

Chicago, IL 60610

Re: ABA Model Rule for Registration of In-House Counsel

Dear Members of the Committee:

The Association of Corporate Counsel (ACC),[1] appreciates this opportunity to comment on the proposed Model Rule for Registration of In-House Counsel. As you are aware, ACC is a long-time advocate for multijurisdictional practice (MJP) reform and has been involved in promoting MJP reforms since the Association's inception in 1982. ACC supports the ABA's efforts in connection with MJP reforms generally, and participated in the ABA Multijurisdictional Practice Task Force that drafted ABA Model Rule 5.5, which was created to recognize the realities of modern legal practice and client needs, as well as encourage greater uniformity in setting standards regulating lawyers working in cross-border practices.

ACC believes ABA Model Rule 5.5—without a separate administrative registration process-- offers the most concise method of authorizing the multijurisdictional practice of in-house lawyers. As such, ACC encourages the ABA to include, within the final rule or its commentary, language that reinforces our belief that ABA Model rule 5.5(d)(1) was crafted to meet the needs of jurisdictions that seek to authorize the practices of in-house lawyers and additional registration rules are generally unnecessary.[2] However, we understand that the commentary supporting

[1] ACC is the in-house bar association, with more than 21,000 members employed by more than 9000 corporations and other private sector organizations in the United States and 64 other countries. ACC members advise corporate clients on virtually every conceivable matter of law, compliance, and legal policy.

[2] A prime example of the registration system gone haywire is New Jersey, which had a full authorization (by opinion of court) for in-house counsel licensed and in good standing from another state who were working in New Jersey for decades before the adoption of the state's new MJP reforms under Model Rule 5.5's roll-out. While we laud the state for adopting the tenets of the larger rule, when they adopted 5.5(d), we thought that they were simply codifying the practice of the state that had worked without fault for many years. But instead, local bar officials took the opportunity of 5.5's adoption to install a new registration system which has become the bane of the in-house bar in the state, requiring drivers' license checks, lengthy and expensive application processes, testing for lawyers who've been in practice for many years without any blemish on their record or suggestion they may not be competent or ethical, fingerprinting, application and renewal fees unconnected to any benefits associated with being members of the local bar, limitations on the ability of counsel to engage in such vital services as pro bono work, and a regular spate of bar regulatory opinions issuing that seem focused on increasing the bar's ability to regulate in-house lawyers who work in other jurisdictions outside of New Jersey, and who New Jersey now claims should register under their system if they engage in the provision of legal services in New Jersey on anything more than the most irregular basis. ACC members working in New Jersey (and surrounding states) under the registration system are far worse off than they were prior to New Jersey's reforms, not because of passage of 5.5, but because the state used the opportunity to institute a registration system in an unreasonable and unjustified fashion. While we can't verify this without the bar's cooperation, we are reasonably sure that states such as

5.5 includes language that suggests that registration systems are options that many jurisdictions should consider in implementing the rule. So, while we find registration systems in general to be an unnecessary and onerous practice (for both the in-house lawyers required to comply with them, as well as the bars which must administer them), we also understand that some jurisdictions simply won't adopt an in-house counsel authorization under 5.5(d)(1) without a registration system in place. While this is a shame, for those jurisdictions who insist that a large and formal registration process is necessary, we appreciate the ABA's work to provide a model registration rule offering clarity and consistency, as well as best practices that will lead to the adoption of the most reasonable standards.

Through this letter, ACC hopes to offer some suggestions and clarifications that we believe would improve the proposal and eliminate unnecessary complications. Our comments are intended to be helpful, not critical, and we hope the Committee may find these comments persuasive. We look forward to working with the Committee towards adoption of the final model registration rule.

1. General Provisions- Clarifications for Relocations (Section A): We suggest inserting language to clarify that lawyers who are employed by an entity but move to a new state will be authorized under the registration rule (if it is in force in the new state as well) provided that they register within [xx] days of relocating to the new state. Possible language to offer this option might be to amend the introductory paragraph in Section A as follows:

"…,shall register as in-house counsel within [xx] days of the commencement of employment as a lawyer ***or moving to a new state in which the lawyer is not admitted but is similarly qualified under a local registration rule in the new state*** or within [xx] days of the effective date of this rule…"

2. General Provisions- Clarification to Authorize Foreign Counsel (Section A): We suggest enhancing the scope of the rule to include lawyers who are licensed and in good standing in the jurisdiction in which they hold a plenary license (not from another US jurisdiction only). In-house counsel working within corporate offices in other countries may regularly be posted to the United States for any period. If these lawyers are also practicing exclusively for the designated entity (as clarified in our comment in paragraph 4 below), then it should be permissible for these duly licensed foreign lawyers in good standing to also practice within the scope of the registration rule. More specifically, we suggest revising the first sentence of Section A to read as follows:

"…A lawyer not admitted to the practice of law in this jurisdiction but admitted in any other ***jurisdiction (within or outside of the United States)*** who is employed as a lawyer in the jurisdiction on a continuing basis…"

3. General Provisions-Suggestion to Delete A(5): We suggest that subsection A(5) in the current draft of the model rule (e.g., the general statement regarding other information or documentation) be deleted as unnecessary. A general catch-all provision that could lead to additional information and document requirements doesn't seem necessary and indeed, seems to invite 'administrivia' that the model Rule should be designed to discourage.

4. Scope of Authority of Registered Lawyer- Clarifications on 'designated entity' (Section B(1)): We suggest inserting language to clarify that authorization to practice would extend to work performed by the registered lawyer for the entity's parents, subsidiaries, employer sponsored entities and affiliates. Addition of this language would

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New Jersey spend far more adopting and administering a registration than they earn in fees they collect because of it, suggesting that this is not such a clever way to regulate folks who've never presented any kind of empirically quantified threat to public safety or the professionalism of lawyers in the state. States also use registration systems to suggest that in-house counsel working under them are authorized, but not quite as competent or trustworthy as their peers who are locally admitted. Registration infers a "mini-lawyer" status that is not justified by the facts, by experience, or by any identifiable threat posed by these lawyers to the bar or the public. Consider by contrast the experience of states such as Georgia, which adopted 5.5(d)(1) and no registration system. The sky has not fallen, and indeed, there's been absolutely no impact on professionalism at the in-house bar or the state's ability to feel that it regulates the practice of law in the state with the protection of the public and the profession in mind. If all that states want is to know who's on the rolls of 5.5(d)(1) status and to have the ability to communicate with them and integrate them into the fabric of the bar, it would be possible to accomplish this without a full regsitration system in place.

help clarify that work performed within the corporate family and for employer-sponsored benefit plans and the plans' fiduciaries (for example) would be authorized. More specifically, we suggest inserting the following parenthetical at the end of the proposed language in B(1):

"…shall practice exclusively for the designated entity ***(defined to include its respective parents, subsidiaries, affiliates and employer- sponsored entities and their fiduciaries)***."

5. Addition of Amnesty Provision: We suggest including an amnesty provision that we believe is an important and often overlooked aspect of any proposed registration rule.

States looking to adopt registration rules are already aware of the issues that traditional state-based license restrictions create for in-house lawyers who work for clients with multijurisdictional needs. A rule created to address the registration of in-house lawyers who will move to the state in the future, should first address the issues of in-house counsel already in the state and representing their employer-clients without a local license.

Without an amnesty provision, the model Rule misses the point: it will exclude and disqualify a large portion of those lawyers (and their local clients) to whom the rule is addressed. While the rule as currently drafted provides defined time frames for lawyers taking a new in-house job, we suggest also including a provision that allows a lawyer who has been operating as in-house counsel in the state, and who wishes to be registered, to apply for registration within some period of time (we suggest 6 months from the effective date of the rule)-- without concern of disciplinary report to their bar or denial of their application.

More specifically, we suggest including a Section that would read:

"***Registration of In-House Counsel Previously Working in the State Before Passage of this Rule:***

> ***This Rule generally applies to in-house counsel who meet the requirements of this Rule, including those in-house counsel who are in good standing in the jurisdiction(s) of their admission, and who have been working for a corporate client in the state without a local license prior to the passage of this Rule. This Rule offers a six-month "amnesty" period from the date of implementation of the registration system afforded by this Rule, whereby an in-house counsel who is engaged in practice in the state at the time of the passage of this Rule, but who has not yet registered, may apply for registration without fear of disciplinary action or rejection of their registration application based on an argument of past unauthorized practice in the state. Future applicants will likewise not be penalized for similar violations of unauthorized practice rules if such a practice took place prior to the passage of this Rule. Nothing in this provision shall prevent the state from pursuing an action against a counsel who falls under the authority of this provision but has engaged in some other form of inappropriate behavior for which the state prescribes a disciplinary sanction."***

6. Pro Bono Practice (Section C): We strongly support including a provision that recognizes authorization for pro bono practice. However, we suggest revising the draft model rule language to clarify that such services may be provided to those who meet the definition of clients qualified for pro bono representation by recognized legal services organizations (rather than limiting to only those legal services programs that are authorized by a registration authority). This offered revision clarifies that pro bono services for national projects would be included within the pro bono authorization, and continues to assure that participation in such programs occurs with adequate oversight. More specifically, we suggest revising the language as follows:

"Notwithstanding the provisions of paragraph B above, a lawyer registered under this section is authorized to provide pro bono legal services to ***those who meet the definition of clients qualified for pro bono representation by recognized legal services organizations***."

7. Alternatives to Full Registration Rules: We suggest the framework provide less onerous options for bars that only wish to implement a roster for lawyers working in the state under ABA Model rule 5.5(d)(1). Full registration

rules can be unnecessary and expensive for the state bar and the registrant. The bar is better off spending its resources on those individuals who actually and empirically pose a threat to the public and the profession. These folks don't, so why establish a system that presumes they need regulation that is totally inconsistent with what we know is the case-- that in-house counsel are the least likely lawyers working in the state to experience any kind of bar discipline or be the targets of public or other lawyer complaints.

8. General Comments for Consideration in the Commentary/Report Language: For the commentary report, we encourage including language suggesting types of provisions that state bars adopting registrations should **avoid,** and list some thoughts below:

- Avoid provisions that require applicants to replicate the kind of application forms and background checks they have already satisfied in becoming full-fledged members of the jurisdiction(s)which currently license them. These character and fitness requirements are unnecessary and repetitious work for lawyers who have otherwise sterling credentials, long and respected experience at the bar, and a history of exemplary practice. If necessary, these requirements can be mandated for individuals who are in bad standing and require further examination and those who are first-time lawyers (and for whom the bar has no other test to gauge their competence).

- Avoid provisions that require counsel to note their registration status on business cards, communications, letterhead, etc. These types of provisions are not necessary and unduly burdensome, as well as confusing to clients and others. What is conveyed to a client or other person who reads that the company's counsel with whom they're working is a registered in-house lawyer? Might it suggest that the lawyer is less or more qualified or authorized to practice? The statement carries with it no independent meaning ascertainable by the recipient. It also does not serve any purpose to "warn" a recipient of this disclosure statement of the registered lawyers' status as registered counsel: he or she is no less or more qualified for using it, and it should not be seen as a replacement of the title that the lawyer carries on the authorization of his or her client (but could have that affect if required).

- Avoid registration systems that include additional testing requirements as a condition of registration authorization. As set forth in the draft model rule, documents demonstrating admission to practice law and current good standing and an affidavit attesting to the lawyer's employment should be sufficient. Evidence of admission to practice and good standing in another jurisdiction is more valuable to help show competence than a test.

- Discourage fees that are inconsistent with fees required of plenary licensed lawyers in the state. Registration systems are not supposed to be money makers for the bar – they are supposed to be for the protection of the public and to help facilitate the bar's disciplinary reach.

Conclusion

ACC stands ready to assist the Committee in any way it can in connection with these efforts and appreciates the opportunity to provide input. Please feel free to contact me (202.293.4103, ext. 318; email: hackett@acc.com) if we can clarify any of our comments further, or be of assistance to you in the process. Thank you again for the opportunity to submit these comments.

Sincerely,

Susan Hackett
Senior Vice President and General Counsel