



The in-house bar association.SM **25TH ANNIVERSARY**

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**VIA ELECTRONIC SUBMISSION &
HAND DELIVERY**

Rules Committee of the Superior Court
Attn: Carl E. Testo, Director of Legal Services
P.O. Box 150474
Hartford, CT 06115-0474

Re: Proposed Revisions to Practice Book Concerning In-House Counsel

Dear Attorney Testo:

The Association of Corporate Counsel (ACC),¹ together with its two Connecticut chapters, CONNACCA and WESFACCA, and the undersigned corporations appreciate the opportunity that the Rules Committee of the Superior Court has provided to address the adoption of court rules authorizing the multi-jurisdictional practice of law (“MJP”) and the application of the Connecticut Rules of Professional Conduct to in-house lawyers. We commend the state bar, this Committee, our local leaders, and the many lawyers who have devoted long hours to the development of a MJP rule for the state that will advance the interests of both the legal profession and the clients they serve.

We support the proposed rules and look forward to working with the Committee towards the rules’ adoption by the Judges of the Superior Court at their annual meeting in June. As presently drafted, the proposed rules offer greatly needed reforms that recognize the realities of modern legal practice and the role of in-house lawyers. They also reaffirm the fundamental purpose

¹ ACC is the in-house bar association, with more than 21,000 members employed by more than 9,000 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. ACC currently has 637 members in the state of Connecticut, representing more than 235 organizations including public and private companies, both large and small, as well as in various not-for-profit organizations.

ACC is a recognized leader and advocate for MJP reform, and was part of the ABA Multijurisdictional Practice Task Force that drafted the new ABA Model Rule 5.5. ACC has encouraged the adoption the ABA Model Rule in the states that are considering these important reforms to their rules of professional regulation, but we also appreciate that many states, like Connecticut, have preferred a special registration systems for in-house counsel who are licensed and in good standing in another state. For states that have taken that approach, ACC has provided assistance in developing the administrative details of the registration system, and we would be pleased to assist the Bar Examining Committee and Statewide Grievance Committee should the need arise after passage of the proposed rules.

of attorney regulation in Connecticut--to protect the public from unfit practitioners. *See, e.g., Statewide Grievance Committee v. Burton*, 282 Conn. 1, 15, 917 A.2d 966 (2007).

We also want to take this opportunity to provide comments on the proposals under consideration, and to make a few recommendations that we believe improve the rule proposals. Our comments and recommendations are intended to be helpful to the Committee in its efforts to move the state toward MJP reforms that are crucial to lawyers and clients in the state, and are in no way made to hinder or delay the adoption of the MJP and Authorized House Counsel proposals.

This comment letter is divided into two substantive parts, followed by a Conclusion. Part I offers some background on why states in general and Connecticut in particular should adopt MJP reforms, and offers our reasoning why the state should include a special approach for registration of in-house counsel working in Connecticut who are not locally licensed in the state. Part II offers specific comments on the present draft rules.

I. Background: Unauthorized Practice of Law and The Distinct Roles Played by In-House Counsel

State supreme courts and legislatures have long sought to prohibit the unauthorized practice of law by individuals who are not licensed as lawyers in any American jurisdiction and to limit or exclude in-state practice by lawyers who are only licensed in other American jurisdictions. Nevertheless, few states historically concerned themselves with the regulation of in-house corporate counsel who were licensed in a state other than the one in which they were officed because those lawyers do not work for the general public, do not hold themselves out for retention, and typically do not try cases in court. At the same time, the bars recognize that in-house counsel do provide cost-effective business and vital compliance services to their corporate employers and thus serve an important role in ensuring corporate legal health and preventive practices that benefit the state's interests and citizens.

Further, bars have repeatedly recognized in recent years that all legal practice, but particularly corporate legal practice, is national (if not international) in scope, and thus that lawyers' services frequently involve counsel and matters that cross jurisdictional boundaries. *See, e.g., New Jersey Opinion 14*, 98 N.J.L.J. 399, 1975 WL 21651 at *1 (1975) (noting the different roles played by in-house and outside counsel and that, "[g]enerally the business of the corporation is interstate or national in nature and the involvement of the attorney-employee may have little or nothing to do with the laws of this state."). At least 38 states have adopted MJP reform.²

As commentators have noted, the in-house "lawyer's ability to represent the employer outside the jurisdiction in which the lawyer is licensed generally serves the interests of the employer and does not create an unreasonable risk to the client and others because the employer is well

² This historical practical approach is embodied today in the new ABA Model Rule 5.5(d)(1) which, as noted above, requires only that in-house counsel be licensed in *any* American jurisdiction. The basic approach of the ABA Model Rule, which does not require in-house counsel to be active, full members of the local state's Bar, has been adopted in at least 38 states, listed below (those listed in bold have adopted a version of ABA Model Rule 5.5(d) without any concomitant registration or authorization requirement):

Alabama, **Arizona**, **Arkansas**, California, Colorado, Delaware, Florida, **Georgia**, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, **Maryland**, **Massachusetts**, Michigan, Minnesota, Missouri, **Nebraska**, Nevada, **New Hampshire**, New Jersey, **New Mexico**, **North Carolina**, North Dakota, Ohio, **Oklahoma**, Oregon, Pennsylvania, Rhode Island, South Carolina, **South Dakota**, Utah, Virginia, **Washington**, and **Wyoming**.

situated to assess the lawyer's qualifications and the quality of the lawyer's work."³ If anything, this approach is more important today than it was three decades ago at the time of the New Jersey opinion.

An alternate way to consider the different roles of in-house and outside counsel for purposes of regulation is to consider the extent to which in-house counsel appear in published disciplinary decisions nationally. Although in-house counsel who are licensed in at least one jurisdiction are unquestionably subject to discipline in the jurisdiction in which they are licensed (as well as in any other jurisdiction in which they may happen to practice law, whether licensed there or not), attorney disciplinary cases involving in-house counsel are few and far between; empirically, in-house lawyers, according to work done by the National Organization for Bar Counsel, represent the least threat to the bar and the public of any group of lawyers practicing.

The different context of the in-house practice simply tends not to lend itself to many of the problems most frequently seen in the private, government, or legal services practice context, including trust account violations, overbilling, conflicts of interest, conduct sanctionable by a court in litigation, neglect of client matters and beyond. This is not to say that in-house counsel should not be regulated fully by the bar and live up to the same high standards we expect of other lawyers. It is to say that the fundamental nature of the position and the historical record plainly reflect that there is less potential for risk, and more potential for benefit, from allowing in-house counsel to act without in-state licenses than there is for the rest of the profession, who by contrast serve a range of business and non-business clients in matters predominantly or exclusively involving state law, state courts, and state practice.

II. Regulation of In-house Counsel Does Not Require Significant Administrative Burdens on the State or the Lawyer

We understand that the MJP debate in Connecticut has included requirements that in-house counsel register with the statewide grievance committee and obtain a limited authorization to practice law in Connecticut. We appreciate the time and energy that has gone into the MJP debate in the state, as well as the delicate balance that the proponents of the draft Rules were trying to achieve. We believe that such a registration system can and should be reasonable and practical and not impose unnecessary burdens and costs on regulators or in-house counsel. The Authorized House Counsel proposal largely accomplishes these objectives.

Based on our experience with similar rules in other states, we have some concerns with the present draft Rules and we offer a few suggestions. We do not believe these suggestions require material revisions that would require further consideration by the Connecticut Bar Association's House of Delegates or other action that would delay the approval process. ACC and its local chapters also would be pleased to work with the appropriate parties as they continue to fashion the registration process to help ensure a design that serves everyone's interests and that corporate counsel will embrace.

A. The Status of In-house Applicants Needs Further Clarification

Proposed Section 2-15A(g)(1) protects an in-house lawyer who makes an application within six months of the effective date of the rule against potential discipline for prior conduct. Similarly, Proposed Section 2-15A(g)(2) protects someone who becomes authorized under this rule from prosecution for prior conduct.

³ See Comment 16 to ABA Model Rule 5.5.

First, we believe that this six-month grace period may not be sufficient to properly notice and ensure widespread compliance with the new rule. Some in-house counsel have been working under the assumption that they do not need a Connecticut license, and therefore it will be necessary not only to find them and communicate with them, but also to re-educate them and encourage them to make the appropriate application. We therefore recommend a grace period of one year, so long as doing so does not delay the approval process for the proposed MJP and Authorized House Counsel rules.

Second, we believe that Commentary to proposed Section 2-15A(b)(1)(D) should indicate that the continuing practice of in-house counsel during the application period is permitted so long as the applicant has submitted a timely application or is within the process of application. While we believe this permission is implied in the rule, it should be made clear.

In addition, a related provision, Proposed Section 2-15A(b)(1)(D), provides that the application for registration under the proposed rule must be made by those “employed in the state of Connecticut by an organization or relocating to the state of Connecticut in furtherance of such employment within 3 months of such application.” We recommend that the application filing period be extended to six months, so as to permit the new employee adequate time to obtain the necessary certificates of good standing, recommendations, and other materials required under the rule, again, so long as extending this time period does not delay the approval process for the proposed rules.

B. Pro Bono Activities Should be Allowed -- and Indeed Encouraged -- for Registrants Under the New Rules.

The Authorized House Counsel proposal has the potential for being read as prohibiting registered in-house counsel from engaging in pro bono activities to benefit the State’s deserving citizens and organizations. This stems from the fact that, pursuant to Proposed Sections 2-15A(c)(1) and (c)(3), the only legal advice that can be given is advice to “the organization” or constituent parts or representatives of “the organization.”

On the other hand, Proposed Section 2-15A(d)(1)(b)(i) requires all applicants to read, be familiar with, and “abide by the provisions” of Connecticut’s Rules of Professional Conduct. These rules, of course, provide that “[a] lawyer should render public interest legal service.” (Rule 6.1.) We would read this requirement as permitting—indeed, encouraging—Authorized House Counsel to engage in pro bono activities.

In order to avoid any confusion, we recommend that the Committee clarify, either in the text of the rule or in the commentary, that Authorized House Counsel are permitted to engage in pro bono activities in Connecticut. Doing so will not only improve the rule itself, but also provide a meaningful benefit to the individuals of limited means, charitable organizations, and others who receive public interest legal services from in-house lawyers.

On the definition of “organization” in Section 2-15A, we also suggest that the parenthetical defining organization be revised to include employer-sponsored entities. The revised parenthetical would read: “(taken together with its respective parents, subsidiaries, employer sponsored entities and affiliates).” This is to include within the scope of the proposed Rules those in-house lawyers who perform legal services for company benefit plans, which may not be viewed as affiliates.

C. The Disclosure Requirement Should Be Clarified

Proposed Section 2-15A(c)(2) provides that licensed in-house counsel “shall represent themselves as Connecticut authorized house counsel.” We believe that the intent of the rule is not to prohibit the use of titles like “General Counsel” or “Assistant General Counsel,” or to require in-house counsel to explain their precise licensure capacity every time they write to or speak with a third party on behalf of their employer. However, we also believe that it is best to avoid traps for the potentially unwary and create less confusion in the rule, as well as avoid unnecessary regulation. Accordingly, we recommend that the Committee provide guidance in the Rule’s commentary. For example, the Committee should limit the required language to printed business letterhead and business cards, and perhaps email signature lines.

D. The Temporary Lawyering Provision May Cause Concerns

Lastly, we want to bring to the Committee’s attention a potential issue with the reciprocity provision in Proposed Connecticut Rule of Professional Conduct 5.5(c), which would only allow temporary lawyering in Connecticut if the state in which the lawyer is licensed “accords similar privileges to lawyers in its jurisdiction.” As noted above, there are at least 38 states that have adopted MJP rules, but that leaves a dozen that have not. To the extent the proposed language would preclude temporary lawyering from a member in good standing in one of those states, the rule does not serve the interests of corporations who rely on outside counsel and in-house lawyers from other states which may not have passed MJP reforms yet in the provision of appropriate legal services to the client. The fact that lawyers are licensed in a state that does not yet provide similar benefits should be of no concern to a bar that is purposed to regulate lawyers for the exclusive reason of ensuring the public’s safety.

The reciprocity issue may become moot as the remaining states adopt MJP reform, but we felt it important to raise at this time. Our doing so should not be read as objection to the proposed MJP rules, or a suggestion that the issue be taken back to the Connecticut Bar Association for further review and debate. To the extent the Committee believes it can address the issue without delaying the approval of the proposed rules under the current schedule, then it may want to do so.

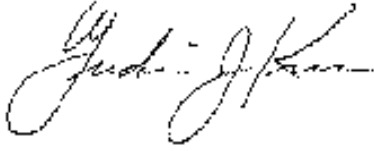
III. Conclusion

The Association of Corporate Counsel, its Connecticut chapters, and the undersigned corporations’ legal departments thank the Committee for the opportunity to present comments on the proposals to adopt Rule 5.5 on the Unauthorized Practice of Law and Section 2-15A of Rules of the Superior Court. As discussed above, we support the proposed rules and commend all those who have played an active role in the MJP effort over the past several years. The proposed rules offer greatly needed reforms that recognize the realities of modern legal practice and the important role of in-house lawyers.

In addition, to the extent the Committee is able to address the concerns raised in our comment letter, either by revisions to the text of the rules or in commentary, without delaying the approval process, we would appreciate those efforts. ACC also reiterates its offer to assist the Connecticut Bar and Judiciary in any way it can in the reform of the state’s unauthorized practice of law rules and the implementation of a registration system that is so clearly needed.

Please feel free to contact us if we can clarify any of our comments further, or be of assistance to you in the process.

Sincerely,



Frederick J. Krebs
President, Association of Corporate Counsel

The undersigned ACC chapters in Connecticut support these comments:

CONNACCA

Mr. Philip S. Wellman, Chapter President
Vice President, Associate General Counsel & Chief Compliance Officer--Mutual Funds
MassMutual Financial Group

WESFACCA

Mr. Frank Judge, Chapter President
Vice President & General Counsel
Honeywell Consumer Products Group, a Division of Honeywell International Inc.

In addition, the undersigned corporate signatories support these comments:

Boehringer Ingelheim Pharmaceuticals Inc.
Chemtura Corporation
Diageo North America, Inc.
Everwatch Financial
General Electric Company
Honeywell Consumer Products Group, Division of Honeywell International, Inc.
Kuehne & Nagel, Inc.
LEGO Systems, Inc
MassMutual Financial Group
Pfizer, Inc
Pitney Bowes
Terex Corporation
The Hartford Financial Services Group, Inc.
United Technologies Corporation
Xerox Corporation