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STATEMENT OF THE ASSOCIATION OF CORPORATE COUNSEL (ACC) CONCERNING THE PROPOSED MODEL RULE FOR REGISTRATION OF IN-HOUSE COUNSEL

AS RECOMMENDED BY THE COUNCIL OF THE SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR

July 2008

GENERAL PRINCIPLES

1. The Association of Corporate Counsel (ACC),[1] appreciates this opportunity to comment on the revision of the proposed Model Rule for Registration of In-House Counsel (Model Rule). 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 re-drafted ABA Model Rule 5.5, 8.5, and made various other proposals for MJP reform. In short, we join the ABA in working toward rules that better 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.

2. ACC believes ABA Model Rule 5.5 [in subsection (d)] – without a separate administrative registration process – offers a concise and complete authorization for in-house lawyers who are licensed and in good standing (somewhere) and who are "permanently" located in a state in which they are not admitted. 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. The experience of those states that have taken this approach (e.g., Georgia) underscores our point: additional administration (for both lawyers and the bar) is neither needed nor benefits the bar, profession, or public safety.

3. Although ACC considers 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, 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.

4. Accordingly, ACC offers its support for the proposed Model Rule with the following suggestions. We hope the Section and the ABA House of Delegates will find these comments persuasive and would be pleased to expand upon them or further assist at the Section's discretion.

[1] ACC is the in-house bar association, with more than 24,000 members employed by more than 10,000 corporations and other private sector organizations in more than 80 countries. ACC acts as the voice of the in-house bar, fighting for both our members' professional rights and their clients' representational needs before the courts, the media, government agencies, legislatures and bar groups.

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ACC URGES CONSIDERATION BY THE SECTION AND/OR BY THE HOUSE OF DELEGATES OF THE FOLLOWING SUGGESTED CHANGES TO SPECIFIC PROVISIONS OF THE PROPOSED MODEL RULE

ACC supports and concurs with the comments of the Association of Professional Responsibility Lawyers (APRL) regarding this proposed Model Rule and supports and incorporates by reference the positions regarding specific requested changes asserted in APRL's Statement. In addition, we wish to emphasize below specific concerns, and offer suggestions to address these concerns in the proposed Model Rule.

1. Statement that Registration Rules are Not Necessary: The Rule should include (within the final Rule or the commentary) a statement that reinforces the position that ABA Model Rule 5.5(d)(1) by itself meets the needs of jurisdictions that seek to authorize the practice of in-house lawyers and additional registration rules are generally unnecessary. It is important that in creating a model registration rule, that the ABA not suggest something that contradicts the original intention of the drafters of Rule 5.5(d): namely, that a registration procedure is unnecessary, and that bypassing the implementation of a registration system is not only acceptable, but actually intended by Model Rule 5.5(d).

II. Expanded eligibility for lawyers who may register under the rule: The Rule should allow in-house lawyers who are licensed and in good standing in any jurisdiction in which they hold a plenary license to practice within the scope of the Rule. If the premise of 5.5(d) and this registration rule is to assert that lawyers in good standing who are working exclusively for their employer-client in the state do not impose a threat to the public safety or the bar's standards, then there is no reason why lawyers who may register under the rule should not include lawyers from jurisdictions beyond the borders of the United States. This can be accomplished by revising both Rule 5.5(d) and the first sentence of Section A of the Model Registration Rule to omit reference to lawyers admitted in the United States.

III. Inclusion of an Amnesty Provision: The Rule should include an amnesty provision. Without an amnesty provision, the model Rule misses the point: it will exclude and disqualify a large portion of those lawyers the Rule should authorize so that their licensure is no longer in question. While the rule as currently drafted provides defined time frames for lawyers taking a new in-house job, we suggest including a provision for non-locally-admitted lawyers already at work in the jurisdiction for an employer-client. An amnesty window of 6 months from the effective date of the rule is reasonable and consistent with a number of states' current registration rules' amnesty provisions. Without an amnesty provision, full compliance with a new rule is unlikely; those currently in the state and otherwise eligible for registration will fear that "coming in from the cold" could not only disqualify their registration, but also lead to some other form of disciplinary sanction.

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In specific, 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 this Rule to apply for registration without fear of disciplinary action or rejection of a registration application based on an argument of past unauthorized practice in the state. Likewise, the state shall not discriminate against registration applicants who have been engaged in local practice as in-house counsel in a state in which they are not admitted if that state did not afford a similar rule providing authorization or registration without a bar exam. 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."

IV. Scope of Authority of Registered Lawyer- Clarifications on 'employing entity' (Section B(1)): The Rule should 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 help clarify that work performed within the corporate family and for employer-sponsored benefit plans and the plans' fiduciaries (for example) would be authorized.

This clarification can be accomplished by inserting the following bold and italicized language within B(1): "…shall practice exclusively for the employing entity, including subsidiaries, ***parents, affiliates and employer- sponsored entities and their fiduciaries,*** or other entities under common control."

V. Pro Bono Practice (Section C): Laudably, the Rule allows for pro bono services to be provided to clients of recognized legal services organizations as defined by the rules, but ACC suggests that while the Rule may appropriately designate the kinds of pro bono projects that services can be provided through, we would suggest that the limitation need not be based on locality. Many excellent and popular pro bono projects are cross-border, located in another state, or national in scope and should not be disqualified on that basis alone. Thus we request that the Rule's definition include the option for work done for out-of-state or national projects; this can be accomplished by deleting the last few words of this section of the proposed Model Rule so that it reads as follows: **"Notwithstanding the provisions of paragraph B above, a lawyer registered under this section is authorized to provide pro bono legal services to qualified clients of a legal services program."**

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VI. Application of registration procedures to lawyers not resident in the state. ACC notes that some states have begun to explore whether they may extend their in-house registration requirements to in-house lawyers working full time in other states on the basis of their significant business contacts in the registration state. Based on the example of Virginia, for instance, which recently considered this issue and soundly defeated such a proposition, it may be wise to insert language into the model rule commentary that reminds states that registration systems are intended to provide a means of regulating the practice of lawyers working in their state, and not an expanded authority to regulate lawyers who do not work in their state and are appropriately licensed in the states in which they reside and practice.

VII. Employer certification or affidavit: It seems strange to ACC that states and this rule should assume that it is appropriate or necessary for a client to "vouch" to the bar for a lawyer who represents the client. Presumably, if the regulatory authority of the state is requesting information on an application for registration, they either presume that it is correct or they test/verify it; if information is tested, it is quite easy to call or otherwise verify (for instance, on a website) a lawyer's employment if it is doubted by the bar. Lawyers who lie on their applications about being employed should be denied registration or otherwise disciplined. Lawyers who are responsible professionals accredited and experienced in practice in other states shouldn't be asked for their client's permission to practice. Asking clients to vouch for their lawyers goes against the grain of presumed professionalism, and frankly, is an exercise in embarrassment for the in-house counsel. Please consider deleting this provision and treating the in-house counsel the rules seek to authorize like the professionals they have proven they are.

VIII. Transferability of the license: We encourage the addition of text to the rule or commentary that encouarges bars to make the "transfer" of an in-house registrant's authorization to a new employer-client in the state (when the lawyer shifts jobs) possible. This means authorizing some kind of transition period (perhaps one year, given that an in-house position can be eliminated and a new job not easily found). This also means that provisions for transferring a registration from one place of valid employment to another should be as simple as possible, and not require the chore of general re-application; this is meaningless administration for both the lawyer and the bar if nothing else has changed about the lawyer's qualifications or status.

IX. Credit for time spent as a registered in-house counsel: ACC suggests the inclusion of text to clarify that time spent as a registered in-house counsel in the state will qualify as active practice upon application in the future (in the state of registration or elsewhere) for admission on motion or other forms of entry into a bar. Many registered in-house counsel are surprised to find their application to a bar rejected on the grounds that time spent as an authorized practitioner in a state pursuant to a registration rule cannot be applied toward "5 of 7" or similar rules regulating qualifications to apply for admission on motion. Bars tell such applicants that they have sterling

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records and otherwise would qualify, but for the fact that they practiced as a registered lawyer for some number of years, and this disqualifies them. For what reason? If a lawyer is authorized/ registered and practicing in a state under the authority of the bar, engaged in representation of a sophisticated corporate entity, in good standing in every bar in which she or he is licensed, and fully subject to professional responsibility requirements, we fail to see why any state should suggest that such a use of that lawyer's time does not constitute active (and indeed, laudable) practice.

ACC thanks the ABA Section of Legal Education and Admissions to the Bar and the House of Delegates for the opportunity to make this Statement. Please feel free to contact Susan Hackett, ACC's Senior Vice President and General Counsel (202-293-4103, extension 318; email: hackett@acc.com) if we may be of assistance or can provide further clarifications.