

November 5, 2018

The State Bar of California  
Re: Special Admissions Rules  
180 Howard Street  
San Francisco, CA 94105

Via Email: [Public.Comment@calbar.ca.gov](mailto:Public.Comment@calbar.ca.gov)

***Re: Revisions to Rule 9.46 of the California Rules of Court and Rule 3.372 of the California Rules of the State Bar***

Dear Board of Trustees of the California State Bar:

The Association of Corporate Counsel (“ACC”) and its four California chapters<sup>1</sup> are pleased to offer comments on the State Bar of California’s proposed revisions to the California Rule of Court 9.46 and California Rule of the State Bar 3.372, relating to the practice of registered in-house counsel (RIHC). We appreciate the willingness of the Board of Trustees’ Programs Committee and state bar staff to consider our feedback while drafting the revised rules. We write primarily to express our support for the proposed revisions, along with a few suggestions for improvement to the rules.

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 four California chapters serve more than 5,000 members who currently practice in California. 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.

**Rule 9.46: Registered In-house Counsel Pro Bono**

We strongly support the proposed changes to Rule 9.46 that allow RIHC to provide pro bono legal services with fewer restrictions than under the current rules. The elimination of the requirement for RIHC to separately register as a registered legal services attorney is a huge improvement over the burdensome system currently in effect. Moreover, we applaud the Programs Committee for broadening the amendment to permit RIHC to participate in pro bono services directly through their employer, in addition to a legal services organization. This will allow the thousands of RIHC in California to participate in pro bono legal services conducted in

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<sup>1</sup> ACC’s four California chapters are ACC San Francisco Bar Area, ACC Southern California, ACC Sacramento, and ACC San Diego.

partnerships with law firms or nonprofits that are not legal aid organizations. While the September 13, 2018 memorandum from State Bar legal counsel to the Programs Committee states that the proposed amendment “expressly permits the RIHC to provide pro bono services through his or her employer, not just through a legal aid organization,” we have identified a few instances in the rule where this intention may not be clearly reflected in the proposed language. In Appendix A, we have suggested changes to the proposed language that clarifies this intent.

#### Supervision requirement

While the above-mentioned changes are excellent, we urge the Board of Trustees to remove the proposed requirement that pro bono services by RIHC be provided only under the supervision of a California attorney. The supervision requirement in 9.46(b)(2) is unnecessary and does not, in practice, serve the public interest. Supervision of RIHC pro bono matters reduces the resources available to take on additional pro bono matters because the supervising attorney (whether in a legal aid organization or the RIHC’s legal department) must be cognizant of their ethical duties in supervision and may not then have the capacity to take on additional pro bono engagements.

While the state bar staff has expressed a desire for uniformity among the various special admission rules, the desire for uniformity should not override the purpose of the rules. The proposed scope of practice for Registered Legal Aid Attorneys (RLAAs) and Registered Military Spouse Attorneys (RMSAs) is much broader than for RIHC. RMSAs and RLAAAs can engage in all forms of legal practice permissible for a California licensee (with RLSAs being limited to doing so in the context of providing services through a legal aid organization), while RIHC cannot make court appearances or engage in any activities requiring *pro hac vice* admission. The narrower scope of RIHC practice, combined with existing good standing and disciplinary requirements, are compelling reasons that a supervision requirement for RIHC pro bono is unnecessary and that RIHC should be treated differently than RLAAAs and RMSAs.

#### Supplemental form requirement

We also recommend that the Board of Trustees remove the requirement for RIHC to submit a supplemental form prior to offering any pro bono services under 9.46(d)(2), as it places an unnecessary burden on in-house pro bono services. This requirement would not enhance the access to justice concerns motivating the state bar to allow RIHC to provide pro bono services. Instead, it prevents RIHC from taking on new or time-sensitive pro bono matters from a legal aid organization for which they have not already filed a supplemental application. It will likely cause RIHC to narrow the scope of their pro bono work, including the number of partnering legal aid organizations, to avoid filing numerous applications. Moreover, if the supervision requirement is not eliminated, then RIHC will face an additional burden of filing an application each time the supervising attorney assigned to a pro bono matter changes, which can occur during the lifetime of the matter for any number of reasons, including a change in position, a change in caseload, or a family or medical leave. If the intent of this provision is to enable the State Bar of California to track pro bono work, a far more efficient and less onerous system would be to require approved legal aid organizations to annually report to the Bar all the pro bono attorneys they have supervised.

### Eligible legal aid organizations

Finally, the definition of “eligible legal aid organization” in Rule 9.45(a), which is referenced in Rule 9.46(b)(2), is unnecessarily restrictive. First, this rule may prevent RIHC from directly providing legal services to a nonprofit organization, a community services organization, or a civil rights organization. This is particularly unfortunate because RIHC often elect to work on pro bono matters for nonprofit organizations that allow RIHC to apply their transactional legal skills. Second, the rule also prevents RIHC from working on criminal justice pro bono matters. Many RIHC opt to do pro bono work in criminal matters, such as reviewing files for the Innocence Project. We recommend that the rule be broadened to include working directly with nonprofit organizations, community services organizations, and civil rights organizations, and also to permit pro bono work on criminal justice matters. If the state bar does not want to change the definition of eligible legal aid organization in Rule 9.45, it could propose this broader definition as only applicable to RIHC in Rule 9.46.

### **Rule 9.46: Definition of a “Qualifying Institution”**

We applaud the Programs Committee for the changes made to Rule 9.46(a)(1) of the California Rules of Court. By removing the requirement that all of an organization’s employees must be in California and reducing the number of full-time employees required of a qualifying institution from 10 to five, the amendments to Rule 9.46 allow organizations greater flexibility in hiring in-house counsel with the expertise that meets their specific business needs.

While we fully support the proposed changes to the definition of a qualifying institution in Rule 9.46, we do note that it is to our knowledge the only in-house counsel registration rule that imposes a minimum employee requirement on organizations before they can hire a registered in-house counsel. We believe that the five-employee requirement is unnecessary, and urge the Board of Trustees to recommend elimination of the five-employee requirement in the Qualifying Institution definition and follow the practice of other states that allow registration for in-house counsel employed by a corporation, partnership, association or other legal entity, without limitations on the number of employees or other attorneys employed, provided the business of that entity is not the practice of law or the provision of legal services.

### **State Bar Rule 3.372: Registered In-House Counsel Title Requirement**

We appreciate the Committee’s willingness to review and incorporate our feedback into the proposed revisions of State Bar Rule 3.372(c). Removing the requirement for RIHC to use “no other” title in connection to their job duties will help eliminate unnecessary confusion between organizational roles and the registration status of in-house counsel. We urge the State Bar to eliminate the title requirement altogether from Rule 3.372.

To our knowledge, no other state requires in-house counsel to use a specific title in connection with being registered or otherwise authorized to practice in-house in that state. Removing the Registered In-house Counsel title requirement from Rule 3.372(c) would not harm the public interest. Requiring titles in the case of attorneys practicing under other rules allowing limited practice in California—pro hac vice admission, foreign legal consultants, certified law

students—makes sense and serves the public interest by notifying current and potential clients of the limitations imposed on the attorney’s practice in California. However, no such public interest is served by applying such a requirement to in-house counsel. In-house counsel do not hold out their services to the public, and RIHC are explicitly prohibited from doing so under Rule 9.46. If there are concerns that some RIHC are violating these rules and deceiving the public regarding their ability to provide direct legal services to consumers, such concerns are more properly addressed through disciplinary action than a blanket rule that affects all RIHC and their companies.

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Overall, we are extremely pleased by the changes proposed to the RIHC rules. Importantly, they reduce the barriers to RIHC pro bono, as well as increasing the number of California businesses that can employ their in-house counsel of choice. We urge the Board of Trustees to consider our suggestions above before sending this rules package to the California Supreme Court for final approval. Please do not hesitate to contact us if there are questions about our positions. For further information, please contact Mary Blatch, ACC’s associate general counsel and director of advocacy, at [m.blatch@acc.com](mailto:m.blatch@acc.com) or (202) 677-4775.

Sincerely,



Susanna McDonald  
Vice President and Chief Legal Officer  
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## Appendix A: Suggested Technical Corrections to Proposed Rule 9.46

### **Rule 9.46. Registered in-house counsel**

#### (b) Scope of practice

(2) Permitted to provide pro bono legal services under supervision of a California attorney ~~for~~ *through* either eligible legal aid organizations as defined by Rules of Court, rule 9.45(a)(1), or the qualifying institution that employs him or her;

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#### (c) Requirements

(4) Practice law exclusively for a single qualifying institution, except that, while practicing under this rule, the attorney may provide pro bono services through eligible legal aid organizations *or the qualifying institution that employs him or her*;

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#### (d) Application

(3) Submit to the State Bar of California a declaration signed by the attorney agreeing that he or she will be subject to the disciplinary authority of the Supreme Court of California and the State Bar of California and attesting that he or she will not practice law in California other than on behalf of the qualifying institution during the time he or she is registered in-house counsel in California, except if supervised, a registered in-house counsel may provide pro bono services through an eligible legal aid organization *or the qualifying institution that employs him or her*;