

September 30, 2014

John A. Tomasino, Clerk
Florida Supreme Court
500 South Duval Street
Tallahassee, Florida 32399-1925
Sent by overnight delivery

*Re: Letter of Association of Corporate Counsel Opposing Proposed
Advisory Opinion FAO #2014-3, Scharrer v.
Fundamental Administrative Services*

Dear Mr. Tomasino:

On behalf of the Association of Corporate Counsel, we are writing to oppose Proposed Advisory Opinion FAO #2014-3, *Scharrer v. Fundamental Administrative Services*. It would harm in-house counsel by introducing a great deal of uncertainty, and by putting in-house lawyers themselves at risk.

INTRODUCTION AND STATEMENT OF INTEREST

In-house lawyers aren't a reckless bunch. Like their employers, they tend to avoid needless risks. They prefer safety and certainty. And like all lawyers, in-house counsel seek enough clarity in the law to advise their clients with some confidence. They also want to stay out of hot water themselves.

Unfortunately, the Proposed Advisory Opinion in this case has unleashed plenty of fear, uncertainty, and doubt for in-house lawyers around the country. It mentions the roles of in-house counsel multiple times. They and their clients strongly prefer to avoid charges of unauthorized practice of law. But the proposed opinion fails to offer concrete guidance signaling what they and their clients can and cannot do. Indeed, this Court would create uncertainty simply by issuing an opinion on this topic, given that the current law does not demand any additional specificity.

Worse, the proposed opinion may prohibit a whole range of conduct that in-house counsel perform for their clients around the country. Crucially, those tasks greatly enhance the efficient and fair resolution to litigation. But the proposed opinion now calls into doubt whether Florida will continue to allow in-house counsel to perform these important activities.

The Association of Corporate Counsel is a global bar association that promotes the common professional and business interests of in-house counsel. For over 30 years, ACC has advocated across the country to ensure that courts, legislatures, regulators, bar associations, and other law or policy-making bodies understand the role of true in-house counsel and the legal departments where they work. ACC has over 35,000 members who are in-house lawyers employed in more than 85 countries by over 10,000 organizations.

ACC has for years fought efforts that would prevent in-house counsel from doing their jobs. The proposed advisory opinion here would have that effect. Therefore, we strongly oppose it, and request that this Court reject it. Doing so will help remove the uncertainty about the traditional, and important, role of in-house counsel that the proposal has caused.

ARGUMENT

I. In-house lawyers help resolve litigation more fairly, by offering seasoned advice.

In-house lawyers play a crucial role in advising their clients and their outside lawyers, particularly in helping them navigate and ultimately resolve litigation. They can offer deep legal experience and nuanced insight, because their employers become repeat players in all sorts of legal disputes.

A good in-house counsel can help in litigation in myriad ways. To offer just a few examples, they can offer strategies and defenses that have or have not worked in past cases; they can offer guidance on what sort of documents will or will not matter to the case; and when the time comes, they can suggest fair settlement values; if the claim loses, they can suggest theories for appeal that have worked in the past; and if necessary, they can recommend how much money to seek in attorneys' fees and legal costs from the other side.

None of this conduct is new. In-house lawyers have performed these tasks, and many others. And in-house lawyers have long since offered this sort of advice to local counsel in places far from where they work.

This system works. In-house lawyers help resolve legal disputes in a way that adds fairness and efficiency. Most importantly, the overwhelming number of in-house counsel follow the rules. Those who do not, depending on where their law licenses come from, can be disciplined either in Florida or elsewhere.

II. The Proposed Advisory Opinion offers a fundamentally arbitrary position on what Florida does and does not permit.

The proposed opinion threatens to undermine this system, with all its benefits. The proposal contains multiple passages that transform previously firm legal ground into bogs of doubt.

For instance, after posing the legal question in this case, the proposed opinion answers that “*generally* the answer is that the conduct is not the unlicensed practice of law” *Scharrer*, PAO at 9 (emphasis added). “Generally” is not a precise term. To the contrary, it is, literally, general. According to Merriam-Webster, that’s the primary definition for the word: “in a general way.”¹ As a secondary definition, the same dictionary offers, “in most cases.” *Id.* But “most” is hardly something to bank on. “Generally” offers scant protection to in-house counsel and their client trying to stay on the right side of the law.

And the proposed opinion nowhere offers more clarity. It continues that “there are circumstances when the opposite is true and the activity of the nonlawyer company or its in-house counsel could constitute the unlicensed practice of law.” *Scharrer*, PAO at 9-10. Which circumstances? When? How? What is it that makes some “circumstances” legitimate and others not?

The proposed opinion offers little concrete guidance. It holds that “whether the practice is or is not the unlicensed practice of law is dependent on the facts and circumstances of the case.” *Scharrer*, PAO at 10. This is hardly a clear legal rule that gives definite guidance to in-house lawyers, who advise

¹ See <http://www.merriam-webster.com/dictionary/generally> (visited Sept. 11, 2014).

on scores of legal disputes while seeking to avoid the unauthorized practice of law. Or a rule that can be applied in real-time, as in-house counsel advise their clients.

In providing more context to this facts and circumstances test, the proposed advisory opinion notes that whether unauthorized practice of law occurs “is dependent upon the level of involvement of the Florida lawyer versus the level of involvement of the nonlawyer.” *Scharrer*, PAO at 10. That hardly provides additional clarity. The language begs for an answer to the question of, what “level of involvement” is too much?

The best that the proposed opinion offers is a reference to Rule 4-1.2(a), R. Reg. Fla. Bar. *Scharrer*, PAO at 11. That rule, of course, requires a lawyer to consult with and follow the wishes of her or his client in all but narrow circumstances, a rule which ACC and its members take quite seriously, as their role is intimately connected to that of their employer-client. But the rule nowhere answers that key question, of “what level of involvement” is too much?

As a last attempt, the proposed opinion offers one additional suggestion. If the in-house lawyer “were making the decisions normally reserved for the Florida lawyer,” and “controlling the litigation and essentially acting as the lawyer in the matter,” then the in-house counsel crosses the line, and has engaged in unauthorized practice. *Scharrer*, PAO at 15-16. But this offers nothing concrete, as terms such as “decisions normally reserved,” and “controlling the litigation” and “acting as the lawyer” are conclusions, labels to apply after the misconduct occurs. But what *sort* of misconduct deserves that label is the key question, and one that the proposed opinion nowhere answers.

The proposed opinion also fails to acknowledge the simple, yet clear, difference between the prohibition against unauthorized practice of law by persons not licensed to practice in Florida (whether or not licensed in another jurisdiction) and a Florida lawyer’s separate obligation to ensure that he or she exercises independent judgment on behalf of his or her client. This latter obligation requires the Florida lawyer to resist untoward influence, but has little to do with any unauthorized practice of law requirement by another. By inappropriately conflating these separate doctrines, the proposed advisory opinion unsettles current legal practice and introduces

unnecessary uncertainty for in-house counsel around the country, who more closely represent their clients than do outside lawyers.

In fairness to the proposed opinion, it does not completely ignore the benefits of the current system, particularly in the insurance context. It recognizes that the relationship between an insurer, a policyholder, and the policyholder's lawyer is "a three way undertaking." *Scharrer*, PAO at 12. It acknowledges that a policyholder's lawyer "must exercise his or her independence of professional judgment and decide whether to follow that direction." *Id.* at 13. And it recognizes that "[t]here would certainly be a chilling effect on relationships, both business and otherwise, if there was a finding that exercising *any* control or management" constitutes the unauthorized practice of law. *Id.* at 17 (emphasis added).

But, again, the ambiguity surfaces. "Any" control is not sufficient to cross the line. But the proposed opinion stays silent on where the line actually falls. In-house lawyers need more guidance, referring to concrete situations, to let them know what they can and cannot do. The proposed opinion fails to provide that.

CONCLUSION

The proposed opinion fails to give in-house counsel any concrete advice on how to avoid practicing law without authorization. And ambiguity has consequences. The U.S. Supreme Court, discussing another ethics issue, has held that "[a]n uncertain privilege . . . is little better than no privilege at all." *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981). The same applies here - an ambiguous opinion is no better than no rule at all. Under the current system, in-house counsel provide a great service to their own clients and to the overall system of justice. But rules like this one may force them and their clients to alter their traditional roles in Florida, a change that will only hurt everyone involved. The current law does not demand any greater specificity.

Therefore, ACC requests that this Court reject the proposed opinion to remove obstacles and uncertainty that would affect in-house counsel across the country.

Respectfully submitted,



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