

December 1, 2017

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Trustee
State Bar of California
c/o
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Via email: jmendoza@theIPLawfirm.com

Dear Ms. Mendoza:

Thank you for your interest in the Association of Corporate Counsel's¹ views on California's special admission rules and how they affect in-house practice in the state. We are pleased that California is reviewing its special admission rules, and hope that your committee recommends changes that result in fewer restrictions on multijurisdictional practice.

The Association of Corporate Counsel (ACC) is joined in this letter by its four California chapters: ACC San Francisco Bay Area; ACC Southern California; ACC Sacramento; and ACC San Diego. Together these chapters represent more than 5,000 in-house counsel in California. ACC is a long-time advocate for multijurisdictional practice reform and advocates for policies that provide all lawyers the flexibility to practice across jurisdictions. Of particular interest to in-house counsel is the ability to be able to work where their employers need to place them, without needing to take another bar exam.

California is home to some of the largest and best-known corporate legal departments in the world, so changes to in-house counsel regulations can have an outsize effect on the national landscape. Our letter focuses on aspects of the special admission rules that have a negative impact on in-house counsel in the state of California. The most important of these are the limitation of in-house counsel registration to organizations that have 10 or more employees and the onerous and unnecessary restrictions on registered in-house counsel to provide pro bono legal services. We also ask that your team consider recommending changes to *pro hac vice* admission and the Application for Determination of Moral Character as they relate to registered in-house counsel.

¹ The Association of Corporate Counsel is a global bar association that promotes the common professional and business interests of more than 40,000 in-house counsel who work for more than 10,000 organizations in over 85 countries.

In-House Counsel Registration

Rule 9.46 of the California Rules of Court, California's in-house counsel registration rule, 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 think this is an arbitrary requirement that must be changed.

Rule 9.46 requires that registered in-house counsel work for a "Qualifying Institution." A Qualifying Institution must either employ a minimum of 10 full-time employees in California or employ at least one California-based, California-licensed attorney. The March 2004 Report of the California Supreme Court Multijurisdictional Practice Implementation Committee stated that the goal of this requirement was to limit in-house counsel registration to organizations with the ability to make an independent assessment of the quality of counsel. However, this minimum employee requirement does not bear any relation to an organization's ability to assess the quality of legal services. It merely presents a pointless obstacle to legitimate business needs for regular legal advice. Businesses in a position to hire in-house counsel are capable of assessing attorneys on their own, as they have already been working with outside counsel before they decide to hire an in-house attorney.

We can think of several examples in which companies would not meet the requirements of Rule 9.46, yet would clearly be sophisticated enough to evaluate the individuals they are considering hiring as in-house counsel:

- A national company wishes to open operations in California. It hires seven staff members for the new office, and decides to have counsel present in California to advise on the legal issues arising in the new office and other Western offices. It wants to move an attorney from its headquarters in New York to the new California office because the company wants a proven performer who is intimately familiar with its operations.
- A California-based startup is operating in a highly regulated environment – for example, using drones for consumer goods deliveries. Although it only has five employees, the company is starting to spend enough money on outside legal counsel that it wishes to bring on an in-house lawyer with expertise in dealing with the Federal Aviation Administration and other regulators in the aerospace field. The company's preferred hire is a partner in a Washington, D.C. law firm who has been advising it on regulatory issues since the company's founding.
- A large, national non-profit active on environmental issues wants to run a new Alaskan wildlife advocacy initiative out of its small, five-employee California office. They receive an application from a lawyer in Alaska who is the general counsel of an Alaska environmental group. She would be able to provide the non-profit with the technical and advocacy expertise they desire, but would also be able to serve as legal counsel and draft and review the California office's contracts and handle any employment issues.

As these examples show, there is no connection between the number of an organization's in-state employees and its ability to evaluate legal counsel. This is especially true in California, where there are numerous startup companies with lean staffing but potentially large regulatory hurdles.

Further, Rule 9.46's alternative to the 10-employee requirement – that the company employ a California attorney – is not generally useful, because a company or office with fewer than 10 employees is highly unlikely to employ two attorneys. Indeed, a large segment of California's in-house profession works as solo practitioners for their clients, without supervision of any other lawyer or any limitation of the size of their employers' workforce.

Additionally, the mere fact that a Qualifying Institution employs a licensed California attorney does not mean that California-licensed attorney would have more legal expertise or capability than a registered in-house counsel or would be able to appropriately supervise the registered in-house counsel. There could be infinite variations in the levels of experience and expertise between the California-licensed attorney and the registered in-house counsel. In short, there is no assurance that a California-licensed attorney gives any greater degree of confidence in the quality of legal services obtained than an attorney licensed elsewhere would.

The pointless nature of the 10-employee requirement is further illustrated by the fact that other states with in-house counsel registration rules have not placed such limitations on the organizations that can employ registered in-house counsel.² California appears to be the only state with such a requirement.

We urge your committee to recommend elimination of the 10-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.

Pro bono legal services by registered in-house counsel

California's rules regarding pro bono legal services by registered in-house counsel are so restrictive they are fundamentally incompatible with pro bono participation by registered in-house counsel. Under the current rules, a registered in-house lawyer would have to also register under California Rules of Court Rule 9.45 to be able to perform pro bono legal services. In addition to the burden of a second registration, Rule 9.45 includes restrictions that all but eliminate the ability of registered in-house counsel to provide pro

² Indeed, we note that 14 states and the District of Columbia allow in-house counsel admitted in other states to practice without any registration at all. In those states, qualified in-house counsel are authorized to work under the states' versions of ABA Model Rule 5.5 without further registration requirements by the state bar.

bono legal services. First, Rule 9.45 requires that registrants practice law exclusively for a single “qualifying legal services provider.” Second, registrants must practice law under the supervision of an attorney who is employed by the qualifying legal services provider and who is also a member in good standing of the California bar. And finally, the registration is limited to three years.

The requirement that registrants practice law for a single qualifying legal services provider is highly detrimental to increasing available pro bono legal assistance. Legal aid and similar legal services organizations are already stretched thin, and often do not have the staff and resources to support additional pro bono volunteers. They may also restrict the types of cases they handle, focusing on areas where in-house lawyers tend not to have expertise, such as litigation and family law. This requirement also limits participation of registered in-house counsel in communities without a qualifying legal services provider.

The fact is, many corporate legal department pro bono programs are conducted in partnership with law firms and non-profit organizations that would not qualify as legal services providers under Rule 9.45. Removing this requirement would permit legal departments to work with other organizations, like law firms, courts, social service agencies, foundations, and community groups to develop new pro bono opportunities and engage their entire legal department in pro bono legal services.

The requirement for supervision of registered legal aid attorneys is also unnecessary as applied to registered in-house counsel, as well as burdensome to the legal services provider. Requiring two competent attorneys to work on one matter limits the number of hours and clients that can be served. Registered in-house counsel will seek support when needed – it is not only required by the California Rules of Professional Conduct, but by the jurisdiction in which the attorney is barred. As noted above, most corporate pro bono programs are set up in partnership with organizations that can offer technical and legal expertise to assist the in-house counsel working on pro bono matters.

We understand the need to protect the public and maintain the efficacy and integrity of the administration of justice and the regulation of lawyers. However, for registered in-house counsel, Rule 9.46 adequately addresses those concerns. Rule 9.46(c)(1) requires that registrants be active members in good standing of another state’s bar. Rule 9.46(c)(2) requires registration with the California bar and evaluation of registrants’ moral character. Rules 9.46(c)(4) and (7) require compliance with rules adopted by the Board of Governors relating to the State Bar Registered In-House Counsel Program and all of the laws and rules that govern members of the State Bar of California. Rule 9.45’s supervision requirement does not further protect clients or the public interest, because attorneys registered under Rule 9.46 are already subject to the same ethical standards as California bar members.

Finally, the limited duration of registration under Rule 9.45 diminishes its utility to registered in-house counsel. For in-house counsel who are providing pro bono legal services in addition to their full-time employment, there is little incentive to meet the onerous requirements of Rule 9.45 (in addition to the requirements of Rule 9.46) if any benefit of having done so disappears after three years.

To alleviate the onerous requirements of Rule 9.45 as applied to registered in-house counsel, we recommend striking the references to registered in-house counsel in Rule 9.45 and amending Rule 9.46 to provide that registered in-house counsel are authorized to provide pro bono legal services, subject to the requirements of the California Rules of Professional Conduct and other relevant rules.

Easing restrictions on registered in-house counsel is a best practice in corporate pro bono and has several benefits. This approach: (1) supports increased participation among in-house counsel; (2) reduces the strain on overburdened legal service organizations; (3) supports avenues that would increase the number of clients served; (4) allows in-house counsel to use their legal skills in support of underserved communities; and (5) holds in-house counsel to the same high standards of competency and zealous representation required under the state's Rules of Professional Conduct of all lawyers. New York, Virginia, Wisconsin and Illinois all follow this model.³ For the registered in-house lawyers, any ethical lapses, including incompetence, would be subject to discipline not only in their home jurisdiction, but also in the jurisdiction in which they are registered.

Expanding the ability of registered in-house counsel to engage in pro bono without undue restrictions can help close the justice gap by increasing the pool of pro bono volunteers. According to Corporate Pro Bono, a global pro bono partnership of Pro Bono Institute and ACC, many Fortune 500 and a majority of Fortune 100 companies have set up or are moving to set up pro bono legal services programs. Thirty-seven California corporate legal departments have signed on to the Corporate Pro Bono Challenge[®] initiative – formally committing their departments to perform pro bono legal services.

Recognizing that California's registered in-house lawyers are able to provide pro bono services on equal footing with California-licensed in-house lawyers will help legal departments create pro bono programs open to all their lawyers. In-house counsel influence the legal profession as a whole, and their greater participation in pro bono can strengthen the overall community of lawyers involved in providing much needed legal services to the underserved.

Pro Hac Vice Admission

Rule 9.46 specifically prohibits registered in-house counsel from making appearances in court or performing activities for which *pro hac vice* admission would be required. Additionally, under California Rules of Court Rule 9.40, registered in-house counsel are unable to qualify for admission *pro hac vice* because they reside in and are regularly employed in California. Rule 9.40(a)(1) and (2). It is not clear to us why California has excluded registered in-house counsel from the ability to gain *pro hac vice* admission to its courts, but we recommend eliminating this prohibition.

³ See Appendix B for relevant language from these states' rules.

Clearly, by requiring registration for in-house practice, California considers its registered in-house counsel to be engaging in the practice of law, but it is denying them the ability to represent their corporate clients in courts. We note that many other states permit registered in-house counsel to appear in court. Some, like Virginia and Colorado, do not even require that they go through the *pro hac vice* process – their registration as in-house counsel allows them to make court appearances in the state. There is no evidence that Colorado or Virginia’s decision has led to abuse of the judicial or administrative process.

If a lawyer is deemed competent and professional enough to pass California’s registration requirements, it makes no sense why they would be excluded from the same process that out-of-state attorneys not registered or otherwise vetted by the California State Bar are permitted to use to access the state courts. We urge the committee to consider this issue and propose language to Rules 9.46 and 9.40 that would allow registered in-house counsel to apply for admission *pro hac vice* in California courts. We also urge the committee to recommend that registered in-house counsel be able to appear in court without *pro hac vice* admission if it is in the course of a pro bono representation.

Application for Determination of Moral Character

Registered in-house counsel must complete the State Bar Application for Determination of Moral Character. For registered in-house counsel, completion and processing of this form is unnecessary to protect the public and creates added burden and expense on the applicant and the State Bar. Importantly, registered in-house counsel are prohibited from holding themselves out to the public as licensed California attorneys, so there are fewer concerns with client protection related to registered in-house counsel. Applicants for registered in-house counsel have already passed a character and fitness examination in another state and must obtain a certificate of good standing from the jurisdictions where they are admitted. Therefore, much of the applicant’s character investigation has already been performed and communicated to the California bar.

We recommend that the bar adopt a more tailored “short form” application for registered in-house counsel applicants who are members in good standing of another state’s bar. Creating a specialized form requiring more pertinent information relative to the applicant’s status as in-house counsel would provide a better indication of the moral fitness of the applicant than utilizing the form intended for first-time registrants with the bar.

* * *

ACC and its California chapters sincerely appreciate the opportunity to offer our views at this point in the committee's process. We are attaching appendix A, which contains proposed changes to Rules 9.40, 9.45 and 9.46 to reflect our recommendations. We are also attaching Appendix B, which contains rules language from Illinois, New York, Wisconsin and Virginia on registered in-house counsel pro bono.

As the committee considers what its final recommendations will be to the state bar's board of trustees, please do not hesitate to contact us if there are questions about our positions. For further information, please contact Mary Blatch, ACC's director of advocacy and public policy, at m.blatch@acc.com or (202) 677-4775.

Sincerely,



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APPENDIX A: Proposed Revisions to California Rules of Court

Rule 9.40. Counsel pro hac vice

a) Eligibility

A person who is not a member of the State Bar of California but who is a member in good standing of and eligible to practice before the bar of any United States court or the highest court in any state, territory, or insular possession of the United States, and who has been retained to appear in a particular cause pending in a court of this state, may in the discretion of such court be permitted upon written application to appear as counsel *pro hac vice*, provided that an active member of the State Bar of California is associated as attorney of record. **Except for persons registered under Rule 9.46**, no person is eligible to appear as counsel *pro hac vice* under this rule if the person is:

- (1) A resident of the State of California;
- (2) Regularly employed in the State of California; or
- (3) Regularly engaged in substantial business, professional, or other activities in the State of California.

Rule 9.45. Registered legal services attorneys

(c) Requirements

For an attorney to practice law under this rule, the attorney must:

- (1) Be an active member in good standing of the bar of a United States state, jurisdiction, possession, territory, or dependency;
- (2) Register with the State Bar of California and file an Application for Determination of Moral Character;
- (3) Meet all of the requirements for admission to the State Bar of California, except that the attorney:
 - (A) Need not take the California bar examination or the Multistate Professional Responsibility Examination; and

- (B) May practice law while awaiting the result of his or her Application for Determination of Moral Character;
- (4) Comply with the rules adopted by the Board of Governors relating to the State Bar Registered Legal Services Attorney Program;
 - (5) Practice law exclusively for a single qualifying legal services provider, ~~except that, if so qualified, an attorney may, while practicing under this rule, simultaneously practice law as registered in-house counsel;~~
 - (6) Practice law under the supervision of an attorney who is employed by the qualifying legal services provider and who is a member in good standing of the State Bar of California;
 - (7) Abide by all of the laws and rules that govern members of the State Bar of California, including the Minimum Continuing Legal Education (MCLE) requirements;
 - (8) Satisfy in his or her first year of practice under this rule all of the MCLE requirements, including ethics education, that members of the State Bar of California must complete every three years; and
 - (9) Not have taken and failed the California bar examination within five years immediately preceding application to register under this rule.

(d) Application

To qualify to practice law as a registered legal services attorney, the attorney must:

- (1) Register as an attorney applicant and file an Application for Determination of Moral Character with the Committee of Bar Examiners;
- (2) 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 under supervision at a qualifying legal services provider during the time he or she practices law as a registered legal services attorney in California, ~~except that, if so qualified, the attorney may, while practicing under this rule, simultaneously practice law as registered in-house counsel;~~ and
- (3) Submit to the State Bar of California a declaration signed by a qualifying supervisor on behalf of the qualifying legal services provider in California attesting that the applicant will work, with or without pay, as an attorney for the organization; that the applicant will be supervised as specified in this rule; and that the qualifying legal services provider and the supervising attorney assume

professional responsibility for any work performed by the applicant under this rule.

Rule 9.46. Registered in-house counsel

(a) Definitions

The following definitions apply to terms used in this rule:

(1) "Qualifying institution" means a corporation, a partnership, an association, or other legal entity, including its subsidiaries and organizational affiliates. Neither a governmental entity nor an entity that provides legal services to others can be a qualifying institution for purposes of this rule. ~~A qualifying institution must:~~

~~(A) Employ at least 10 employees full time in California; or~~

~~(B) Employ in California an attorney who is an active member in good standing of the State Bar of California.~~

(2) "Active member in good standing of the bar of a United States state, jurisdiction, possession, territory, or dependency" means an attorney who meets all of the following criteria:

(A) Is a member in good standing of the entity governing the practice of law in each jurisdiction in which the member is licensed to practice law;

(B) Remains an active member in good standing of the entity governing the practice of law in at least one United States state, jurisdiction, possession, territory, or dependency, other than California, while practicing law as registered in-house counsel in California; and

(C) Has not been disbarred, has not resigned with charges pending, or is not suspended from practicing law in any other jurisdiction.

(b) Scope of practice

Subject to all applicable rules, regulations, and statutes, an attorney practicing law under this rule is:

- (1) Permitted to provide legal services in California **only** to the qualifying institution that employs him or her **and to provide pro bono legal services;**
- (2) ~~Not p~~Permitted to make court appearances in California state courts or to engage in any other activities for which *pro hac vice* admission is required, **provided the attorney makes a successful application under Rule 9.40. if they are performed in California by an attorney who is not a member of the State Bar**

~~of California~~ *Pro hac vice* admission is not required in pro bono legal service matters that require counsel to appear, either in person or by signing pleadings, in courts, administrative agencies, or other tribunals in this state; and

- (3) Not permitted to provide personal or individual representation to any customers, shareholders, owners, partners, officers, employees, servants, or agents of the qualifying institution.

(c) Requirements

For an attorney to practice law under this rule, the attorney must:

- (1) Be an active member in good standing of the bar of a United States state, jurisdiction, possession, territory, or dependency;
- (2) Register with the State Bar of California and file ~~any forms required by the State Bar of California an Application for Determination of Moral Character;~~
- (3) Meet all of the requirements for admission to the State Bar of California, except that the attorney:
 - (A) Need not take the California bar examination or the Multistate Professional Responsibility Examination; and
 - (B) May practice law while awaiting the result of his or her Application for Determination of Moral Character;
- (4) Comply with the rules adopted by the Board of Governors relating to the State Bar Registered In-House Counsel Program;
- (5) Practice law exclusively for a single qualifying institution, except that, while practicing under this rule, the attorney may ~~provide pro bono legal services, if so qualified, simultaneously practice law as a registered legal services attorney;~~
- (6) Abide by all of the laws and rules that govern members of the State Bar of California, including the Minimum Continuing Legal Education (MCLE) requirements;
- (7) Satisfy in his or her first year of practice under this rule all of the MCLE requirements, including ethics education, that members of the State Bar of California must complete every three years and, thereafter, satisfy the MCLE requirements applicable to all members of the State Bar; and
- (8) Reside in California.

(d) Application

To qualify to practice law as registered in-house counsel, an attorney must:

- (1) Register as an attorney applicant and file **any forms required by the State Bar of California** ~~an Application for Determination of Moral Character with the Committee of Bar Examiners~~;
- (2) 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 that ~~if so qualified, the attorney may,~~ while practicing under this rule, **the attorney may provide pro bono legal services** ~~simultaneously practice law as a registered legal services attorney~~; and
- (3) Submit to the State Bar of California a declaration signed by an officer, a director, or a general counsel of the applicant's employer, on behalf of the applicant's employer, attesting that the applicant is employed as an attorney for the employer, that the nature of the employment conforms to the requirements of this rule, that the employer will notify the State Bar of California within 30 days of the cessation of the applicant's employment in California, and that the person signing the declaration believes, to the best of his or her knowledge after reasonable inquiry, that the applicant qualifies for registration under this rule and is an individual of good moral character.

APPENDIX B: Pro bono provisions of Illinois, New York, Virginia and Wisconsin

Illinois Rule 716. Limited Admission Of House Counsel:

(g) Authority and Limitations. A lawyer licensed and employed as provided by this Rule has the authority to act on behalf of his or her employer for all purposes as if licensed in Illinois. The lawyer may not act as counsel for the employer until the application is accepted and approved by the Court. A lawyer licensed under this rule shall not offer legal services or advice to the public or in any manner hold himself or herself out to be engaged or authorized to engage in the practice of law, except such lawyer may provide voluntary pro bono public services as defined in Rule 756(f).

New York Rule 522.8. Pro bono legal services:

Notwithstanding the restrictions set forth in section 522.4 of this Part, an attorney registered as in-house counsel under this Part may provide pro bono legal services in this State in accordance with New York Rules of Professional Conduct (22 NYCRR 1200.0) rule 6.1(b) and other comparable definitions of pro bono legal services in New York. An attorney providing pro bono legal services under this section:

(a) shall be admitted to practice and in good standing in another state or territory of the United States or in the District of Columbia and possess the good moral character and general fitness requisite for a member of the bar of this State, as evidenced by the attorney's registration pursuant to section 522.1(b) of this Part;

(b) pursuant to section 522.2(c)(2) of this Part, agrees to be subject to the disciplinary authority of this State and to comply with the laws and rules that govern attorneys admitted to the practice of law in this State, including the New York Rules of Professional Conduct (22 NYCRR Part 1200.0) and the rules governing the conduct of attorneys in the judicial department where the attorney's registration is issued;

(c) may appear, either in person or by signing pleadings, in a matter pending before a tribunal, as that term is defined in New York Rules of Professional Conduct (22 NYCRR 1200.0) rule 1.0(w), at the discretion of the tribunal, without being admitted pro hac vice in the matter. Prior to any appearance before a tribunal, a registered in-house counsel must provide notice to the tribunal that the attorney is not admitted to practice in New York but is registered as in-house counsel pursuant to this Part. Such notice shall be in a form approved by the Appellate Division; and

(d) shall not hold oneself out as an attorney admitted to practice in this State, in compliance with section 522.4(d) of this Part.

Virginia Rule 1A:5. Virginia Corporate Counsel & Corporate Counsel Registrants:

g) Notwithstanding the restrictions set out in Part I(f) above on the scope of practice, a lawyer certified pursuant to Part I of this rule may, and is encouraged to, provide voluntary *pro bono publico* services in accordance with Rule 6.1 of the Virginia Rules of Professional Conduct.

(h) All legal services provided in Virginia by a lawyer certified pursuant to Part I of this rule shall be deemed the practice of law and shall subject the lawyer to all rules governing the practice of law in Virginia, including the Virginia Rules of Professional Conduct and Part 6, Section IV, Paragraph 13 of the Rules of the Supreme Court of Virginia. Jurisdiction of the Virginia State Bar shall continue whether or not the lawyer retains the Corporate Counsel Certificate and irrespective of the lawyer's presence in Virginia.

Wisconsin Rule 10.03(4) f. Persons Included in Membership:

Counsel not admitted to the practice of law in this jurisdiction but admitted in any other U.S. jurisdiction or foreign jurisdiction, who is employed as a lawyer in Wisconsin on a continuing basis and employed exclusively by a corporation, association, or other nongovernmental entity, the business of which is lawful and consists of activities other than the practice of law or the provision of legal services, shall register as in-house counsel within 60 days after the commencement of employment as a lawyer or if currently so employed then within 90 days of the effective date of this rule, by submitting to the Board of Bar Examiners the following:

1. A completed application in the form set forth in Appendix B to this rule;
2. A nonrefundable fee of two hundred and fifty dollars (\$250) to the Board of Bar Examiners;
3. Documents proving admission to practice law in the primary jurisdiction in which counsel is admitted to practice law; and
4. An affidavit from an officer, director, or general counsel of the employing entity attesting to the lawyer's employment by the entity and the capacity in which the lawyer is so employed.

A lawyer registered under this subsection may provide pro bono legal services without fee or expectation of fee as provided in SCR 20:6.1.