

October 25, 2013

Clerk of the Supreme Court
of the State of Arizona
1501 West Washington
Fourth Floor
Phoenix, Arizona 85007
Filed electronically

*Re: ACC views on new proposed revisions to Rule 38, on pro bono work by
Arizona's registered in-house counsel*

To the Clerk:

On behalf of the Association of Corporate Counsel and our Arizona Chapter, we are writing to oppose the new proposed amendment to Rule 38(e) that the Supreme Court of Arizona circulated on September 12. The proposal would restrict the practice of in-house pro bono even more than the emergency rule now in effect. Specifically, it would re-introduce the unnecessary requirement that in-house lawyers work for five years before they can volunteer for pro bono work.

Instead, we recommend that the Court roll back the restrictions, as we suggested in our May letter (attached). At the very least, we request that this Court reject the September version of the proposal, and instead implement the current emergency rule on a permanent basis. We note that the Rules Review Committee of the State Bar of Arizona recently voted to recommend that this Court adopt the current emergency rule, rather than the new proposal. Doing so would better serve Arizona's residents who need legal help but cannot afford to pay.

About ACC and our Arizona Chapter

ACC is a global bar association that promotes the common professional and business interests of in-house counsel, with over 30,000 members employed by over 10,000 organizations in more than 75 countries. ACC's Arizona Chapter represents over 360 in-house counsel. ACC's Arizona Chapter offers legal education classes, networking opportunities, and hosts discussions on public reform and internal investigations. For years, ACC has advocated across the country to remove obstacles that make it difficult for many in-house lawyers to donate their legal expertise to people and organizations that need help. ACC's Arizona Chapter also supports this effort to allow all of the state's in-house lawyers to offer pro bono legal services free from unnecessary restrictions.

Continued Restrictions Harm Pro Bono Clients

In our May letter, we wrote that the current emergency rule “is fairly modest compared to the approach other states have taken, and still retains unnecessary barriers.” Those unnecessary barriers would remain in the new proposed rule.

Specifically, the proposal would still require registered in-house counsel to work “in association” with an approved legal services organization that employs an Arizona-licensed lawyer. This restriction greatly hinders access to justice, for several reasons:

- It wastes precious resources, requiring locally-licensed lawyers in legal services organizations to work with fully qualified and sophisticated registered in-house lawyers. All lawyers involved could offer more help if they instead focused on serving as many pro bono clients as possible.
- It restricts the type of client that can receive help, given that legal services organizations often do not have the authority or the capacity to serve clients such as non-profits, community development groups, or small businesses.
- It restricts the type of case that in-house lawyers can work on, since legal services organizations often cannot serve even needy clients requiring help with issues related to credit, mortgage defaults, or divorces.

Additionally, the proposed rule would continue to require registered in-house counsel to seek pro hac vice admission. As with the other limits, the restriction would restrain precious legal talent, and limit assistance to people and organizations who need help.

The bottom line is that legal services organizations are already stretched thin. Providing additional pro bono volunteers requires additional staff and resources that legal services organizations may not have. Mandating that legal services organizations supervise in-house attorneys increases the burden on overworked organizations. Limiting pro bono to approved legal services organizations prevents in-house counsel from working with the full range of programs. And it discourages participation of in-house attorneys in communities without a local legal services organization (an increasing number of local offices have closed due to funding cutbacks), where the need for pro bono counsel is particularly acute.¹

Therefore, we request that this Court instead roll back these restrictions to allow registered in-house counsel more flexibility to provide needed pro bono services.

¹ Additional information is available from Corporate Pro Bono, which is a partnership between ACC and the Pro Bono Institute:
<http://www.cpbo.org/document/in-house-pro-bono-states-must-remove-the-handcuffs/>
<http://thebeye.probonoinst.org/2013/04/09/illinois-in-house-pro-bono-rule-now-effective/>
<http://www.cpbo.org/initiatives/multijurisdictional-practice/model-language/>

No Justification for Five-Year Requirement

If this Court decides not to remove from Rule 38(e) the restriction that registered in-house counsel work in association with an approved legal services organization, at a minimum, ACC recommends that this Court adopt the emergency rule on a permanent basis. Doing so would have the key benefit of eliminating the requirement that registered in-house lawyers work for five years before volunteering to practice on a pro bono basis. We hope that the addition of this limit was simply an oversight from the drafting process, and that this Court will remove it. To do so, this Court should take the current emergency rule – which does not contain the five-year requirement – and make it permanent. This is the solution that the Rules Review Committee of the State Bar of Arizona has recommended.

There is simply no basis to support the five-year requirement. A newly-minted lawyer admitted to the Arizona Bar lawyer suffers no such restriction. This Court points to no evidence indicating that only registered in-house lawyers with that much experience can help pro bono clients. Registered in-house counsel must comply with their local rules and with Arizona’s professional conduct rules, which require competence. There is also no evidence showing that Arizona-licensed in-house counsel can serve pro bono clients more effectively than registered in-house counsel. To our knowledge, no study has ever supported such conclusions. Employers hire in-house lawyers with all levels of experience. What these in-house lawyers have in common is that their employers trust them to handle sophisticated, important legal work. The state should have similar trust in their ability to use their ample talents to help people and organizations in need.

Growing Trend Toward Lifting Restrictions

As we mentioned in our May letter, Virginia and Colorado allow their registered in-house lawyers to practice pro bono without supervision by or affiliation with locally-licensed lawyers, and also without any pro hac vice requirements. Illinois has also recently passed a rule to grant flexibility to its registered in-house lawyers. We have not heard of any problems in these states.

Now New York is in the process of allowing its registered in-house lawyers great leeway to provide help to people who need it. The proposal would not impose any requirements for supervision, affiliation, or pro hac vice admission. The New York advisory committee report points out that too many restrictions harm the goal of providing pro bono help.² It states, “[w]e conclude that the result of these unnecessary restrictions is not that the work will get done by licensed attorneys, but that it simply will not get done at all.” If this Court adopts the pending proposal, we fear that same problem here as well.

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² Available at <http://www.nycourts.gov/rules/comments/PDF/PC-Packet-IHC-ProBono.pdf>.

Thank you for taking the time to consider our views. We hope that you will remove the unnecessary restrictions on pro bono practice by Arizona's registered in-house lawyers. At a minimum, we urge you to remove the five-year practice requirement, by adopting the current emergency rule on a permanent basis. Pro bono work in Arizona is too important to bog down with unnecessary restrictions for fully qualified registered in-house lawyers.

Very best wishes,



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Attachment



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May 21, 2013

Clerk of the Supreme Court
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Re: *Association of Corporate Counsel's support for amending Supreme Court Rule 38(e) to simplify the process for Arizona's registered in-house counsel to provide pro bono services.*

To the Clerk:

Arizona has a historic opportunity to recognize more fully the sophistication, the experience, and the capacity that all of Arizona's in-house lawyers have to help the enormous number of Arizona residents who need legal services but cannot afford to pay. The Supreme Court of Arizona is considering whether to permanently amend Supreme Court Rule 38(e) to make it easier for registered Arizona in-house lawyers whose law licenses come from elsewhere to provide pro bono assistance.¹ On behalf of the Association of Corporate Counsel and our Arizona Chapter, we are writing to support the proposal. Indeed, we urge this Court to go even further in removing rules that hinder the ability of registered in-house counsel to provide pro bono legal services.

ACC is a global bar association that promotes the common professional and business interests of in-house counsel, with over 30,000 members employed by over 10,000 organizations in more than 75 countries. ACC's Arizona Chapter represents over 360 in-house counsel. ACC's Arizona chapter offers legal education classes, networking opportunities, and hosts discussions on public reform and internal investigations. For years, ACC has advocated across the country to remove obstacles that make it difficult for many in-house lawyers to donate their legal expertise to people and organizations that need help. ACC's Arizona Chapter also supports this effort to allow all of the state's in-house lawyers to offer pro bono legal services free from unnecessary restrictions.

There's no question that people need more pro bono help, both in Arizona and across the country. According to the Legal Services Corporation, fewer than "one in five low-income persons get the legal assistance they need" from pro bono or legal aid lawyers. Legal Services Corporation, *Documenting the Justice Gap In America: The Current*

¹ See *In the Matter of Petition to Amend Rule 38, Arizona Rules of the Supreme Court*, No. R-12-0028 (Dec. 5, 2012) (available at http://azdnn.dnnmax.com/Portals/0/NTForums_Attach/1125342487471.pdf).

Unmet Civil Legal Needs of Low- Income Americans, An Updated Report of the Legal Services Corporation (2009).² See also American Bar Association, *Legal Needs and Civil Justice, A Survey of Americans* (1994) (stating that, for low-income households, the justice system does not address nearly three quarters of situations in which courts might intervene).³ Barriers to access to justice are a serious problem for Arizona as well. As this Court has stated, “the current economic recession . . . has increased the need for low or no cost legal services available to the indigent and working poor.”⁴

In-house legal departments are already making strong contributions toward meeting this need. Hundreds of in-house legal departments have formalized efforts to provide pro bono legal services. According to Corporate Pro Bono, a joint venture of the Pro Bono Institute and ACC, many of the Fortune 500 companies and a majority of Fortune 100 companies have set up or are moving to set up formal pro bono programs. They want to do more, but state practice rules often stand in their way.

The proposal to amend Rule 38(e) would make it easier for members of Arizona’s in-house legal departments to provide much-needed extra help. It would take the important step of removing the requirements that lawyers already registered pursuant to Rule 38(h) must have been practicing for a minimum of five years, and go through the additional cumbersome certification process of Rule 38(e)(3), before they can provide pro bono assistance. But the proposal is fairly modest compared to the approach other states have taken, and still retains unnecessary barriers.

First, the proposal would still require affected in-house lawyers to work “in association” with an approved legal services organization that employs an Arizona-licensed lawyer. See Rule 38(e)(1)(B). For staffing and budget reasons, many qualified legal service providers exclude a number of worthy and genuinely needy clients, such as non-profit organizations that often cannot afford to pay for legal work, and restrict the types of matters they support. Additionally, current Supreme Court rules potentially restrict legal departments from working with the full range of organized programs that support services to needy clients, including ACC Chapters, law firms, and in-house pro bono programs.⁵ By requiring registered in-house counsel to work in association with an approved legal services organization, the proposal would wrongly imply that the covered in-house lawyers – whose employers hire them because they are smart and effective and experienced – are second-class counsel.

² Available at <http://tinyurl.com/ahaoc5v>.

³ Available at <http://tinyurl.com/b6hbfs1>.

⁴ See *Petition to Amend Rule 38*, supra.

⁵ See Supreme Court Rule 38(f)(1), stating that an approved legal services organization must be “a non-profit legal services organization that has as one of its primary purposes the provision of legal assistance to indigents, free of charge, in civil matters. A legal services organization must be approved as such by the Supreme Court of Arizona.”

Second, while the proposal is not clear on this, it does not explicitly allow lawyers practicing under Rule 38(e)(1)(B) to do away with the *pro hac vice* process when representing pro bono clients in state courts. Given that in-house lawyers registered under Rule 38(h) do need to receive *pro hac vice* admission when representing their corporate clients in court, *see* Rules 38(h)(9) and 38(a), presumably that same process applies when representing pro bono clients. If the proposal does in fact retain the *pro hac* process for pro bono service, the restriction would restrain precious legal talent, and harm the people and organizations who need it.

By contrast, in Colorado and Virginia, registered in-house lawyers can provide the full range of legal services to their pro bono clients, without working in association with an approved legal services organization or locally-licensed lawyers, even in state courts. Illinois recently passed a reform greatly expanding the ability of its registered in-house lawyers to volunteer for pro bono clients, which included removing the unnecessary requirement to work with a “sponsoring entity.”

Therefore, we request that, in addition to the proposed changes to Rule 38(e)(3), this Court take the additional steps of eliminating the association and *pro hac vice* requirements.

While Arizona’s proposal may not go as far it could have, it is still a healthy and significant step toward improving Arizona’s rules and Arizona citizens’ access to pro bono resources. The proposal would continue the spirit of a resolution passed last summer by the Conference of Chief Justices, to expand pro bono legal services. That resolution supports allowing “non-locally licensed in-house counsel who are permitted to work for their employer to also provide pro bono legal services.” Conf. of Chief Justices, Resol. 11 (passed July 25, 2012).⁶

This proposal takes a step toward recognizing that Arizona’s in-house attorneys are well-qualified, ethical lawyers. That’s why their employers hire them, and why Arizona already allows them to serve their employers. The pending amendment simply recognizes that all of Arizona’s in-house lawyers can serve pro bono clients with the same excellence that they already serve their employers. By adopting these amendments to Rule 38(e), especially with the changes that we proposed above, this Court can help countless people in need.

⁶ See <http://ccj.ncsc.dni.us/AccessToJusticeResolutions/resol11ProBonoLegalServices.html>.

Sincerely yours,



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