Association of Corporate Counsel

1025 Connecticut Avenue, NW, Suite 200
Washington, DC 20036-5425

tel 202.293.4103
fax 202.293.4701

www.ACCA.COM

March 10, 2004

Members of the Wisconsin State Bar Board of Governors
C/O George Brown
Wisconsin State Bar
P.O. Box 7158
Madison, WI 53707-7158

Our thanks and appreciation go to the members of the Wisconsin Multijurisdictional Practices Working Group (Working Group) for their many months of labor on the important and necessary changes proposed to the rules of professional conduct in your state. You have done a great service to the bar, your clients, and your local communities.

We write on behalf of the Association of Corporate Counsel and its Wisconsin Chapter, both of which represent the interests of corporate counsel working in Wisconsin, as well as corporate counsel who work in other jurisdictions, but whose practices or client needs may on occasion take them to Wisconsin. Although we applaud the changes that you have suggested, we ask you to reconsider including a general authorization for lawyers working exclusively for an employer/client in Wisconsin, but who are not admitted to practice in Wisconsin. We are aware that the Working Group has suggested that such practices should be covered by a separate administrative rule; we urge you to include it in your recommendations for a new Rule 20:5.5, namely, by inserting a new provision (e)(2).

We would suggest that a new provision (e)(2) might read as follows:

> (e) A lawyer admitted to practice in another jurisdiction of the United States, is in good standing, and not disbarred or suspended from practice in a jurisdiction, may provide legal services in this jurisdiction that:
>
> (2) are provided to the lawyer's employer or its organizational affiliates.

Although historically, many states—in the absence of a larger MJP reform package that could resolve the problem—have used registration systems like the one that you propose to handle the issue of non-admitted in-house counsel, adopting a registration system may not be the best solution now that the Working Group has come so far in proposing sweeping MJP changes.

1. Why diminish an affected in-house counsel's authority to practice and the responsibilities that go with it by relegating corporate counsel to an exception not found within the rules of professional conduct?

There is no reason to relegate in-house counsel to a "back door" entry to authorized practice in the state. There is no benefit to the bar, the public, or the client community in diminishing their status through exclusion of their authorization to practice from the rules that otherwise authorizes other lawyers' MJP practices. Doing so affords no additional protection to the public. Indeed, placing corporate counsel practice exceptions under the province of an exception to the law examiners' requirements arguably engenders a perception that such lawyers are not fully subject to the rules of conduct or the disciplinary and regulatory mechanisms by which the state would seek to control other lawyers whose practices are regulated through the rules of conduct. If the bar recognizes that such corporate counsel practices are acceptable by suggesting that a separate rule should authorize them, then why not simply authorize them with the other multijurisdictional practices enunciated under the rule and save the registration systems for any administrative details that remain?

2. The Rules of Professional Conduct are the correct place to locate rules that govern lawyer conduct.

In-house counsel and others who require guidance regarding multijurisdictional practice obligations and requirements will appropriately consult the Rules of Professional Conduct. Indeed, that is the purpose of the publication of the rules: to create a penultimate authority that governs and guides the proper conduct of lawyers operating in the state. The absence of this provision from the Wisconsin version of Rule 5.5, coupled with the fact that such provisions will be in place in most every other state's rules of conduct, will suggest that Wisconsin does not authorize such practices.

Our experience is that in-house counsel who have questions about working full-time for their employer client in a state in which they are not admitted have had great difficulty unearthing the "exceptions" policies promulgated in states with a separate in-house authorization system; we have hundreds of questions on this subject every year. ACC has accordingly developed online charts and guidelines to help in-house counsel navigate these questions. It bears repeating that even in those states with such authorization systems, questions asked of bar counsel or other admission authorities regularly produce disparate answers or a lack of knowledge about the existence of an exception system. Although such episodes are unfortunate, it is possible to prevent them by simply putting the rule up front where lawyers know to look for it and where the rule's application will be easily referenced. It is inconsistent with the very purpose of lawyer regulation to make the rules hard to uncover. Because the Working Group is already inclined to create such a practice authorization, best place to put it is in Rule 5.5(e).

3. Corporate counsel working within your state under this admission exception offer tangible benefits to their clients and the bar; it is unreasonable to exclude them (and not other MJP practitioners) without any empirical evidence that they will cause harm.

We are hard-pressed to understand why the Working Group has given such careful consideration to very difficult questions regarding temporary practice incursions and decided to endorse the wisdom of the ABA MJP Commission provisions and yet has

"punted" the relatively uncontroversial issue of in-house counsel authorization and left it to the discretion and handling of the bar examiners' offices.

Empirical evidence in your state, as well as in every other jurisdiction in the country (according to the National Organization of Bar Counsel), indicates that MJP practitioners in general and in-house counsel as a group in particular, are the least likely to cause any concern to the bar, its regulators, or the public. All of us know that many in-house counsel (and their colleagues in outside practice) have been "flying under the radar" of regulation for their MJP practices in states in which they are not admitted and without any measurable level of complaint or concern. There is no reasonable basis on which to argue that their authorized presence under ABA Model Rule 5.5(d)(1) poses a greater threat than other kinds of MJP practices of the past, and quite a bit of evidence suggests that in-house counsel who are authorized to practice in a state can be significant contributors to their clients' well-being. There is also ample evidence that they support the local bars that welcome them and enrich the communities in which they live and work. Although we do not suggest that past unauthorized practice incursions are laudable, if the purpose of the MJP reforms in general is to update the rules to better reflect the practice realities and client demands of the 21st century and to encourage these practitioners to practice above-board, why omit this provision from the rules? Why relegate this group to a registration or exception system to be separately administered?

4. If the Working Group wishes to ensure that in-house counsel practicing under proposed rule 5.5 (e) are somehow registered and counted, then an in-house counsel registration provision is the correct tool to address that issue, but it is not the appropriate substitute for a general practice authorization in the rules.

If the state, the courts, the examiners, or the bar wish to keep track of counsel under a 5.5(e) authorization rule, then the adoption of a complementary registration system is appropriate, even if not absolutely necessary. We note for your consideration, however, a few points that are worth mentioning. First, there is little to nothing required in the Working Group's proposed registration system that has not already been collected or required of counsel by their home state bars. A system that simply requests a letter from the employer/client to confirm employment and a letter of good standing from each bar in which the applicant is admitted is probably just as likely to weed out bad applicants as a much more rigorous system will, and it will cost applicants and the state bar far less trouble to submit and cross check.

The costs of checking formal-type bar applications of candidates is high, as your examiners already know, and one of our concerns in counseling states considering a registration system is to make sure that they understand that such systems will likely cost far more to administer than they will generate in fees. If these systems run on a deficit, it will be at the expense of other service centers of the bar. Because there is no empirical evidence to support a need for such systems from the perspective of protecting the bar or clients or the public, this matter is of no small concern. Some states have suggested that the way around this issue is to charge a very hefty registration fee. This approach is guaranteed to raise protests because in-house counsel will argue, we believe appropriately, that because these lawyers pose no threat and provide great services, they should not be made to bear inappropriately high registration fee requirements. Many employers, especially in companies with smaller legal departments, do not pay bar fees, and in-house counsel should not have to bear disproportionate costs that are not related to public protection concerns in order to maintain their practices.

We worry that, in states that adopt a registration system and offer no general authority in the overarching rules, if the registration system becomes a burden that the bar does not wish to continue to carry, then in-house counsel practice in the state will be scrapped when the system is scrapped. Without the overarching authority, the right to practice in the state can be unilaterally and without any further authority discontinued by the bar examiner's offices. The important strides you have made and that we hope that your state's high court will adopt should not be left to the discretion of bar examiners to judge, to continue, or to discontinue at will. The bar examiners' role is rightly focused on the procedural administration of the rules and not on the decision as to the availability of the rules themselves. If you intend for in-house counsel to be authorized to practice in the state, then you should recommend incorporating that intention into the rules and not into procedural regulations that are under the authority of others to administer at will.

Registration systems for in-house lawyers served a laudable purpose in the past in states that did not have MJP reforms in place. Now that we are no longer in a position of having no other alternative, and indeed, now that the ABA MJP Commission, other states, and this Working Group have shown us that in-house counsel can and should be authorized to practice for their employer/clients so long as they are licensed and in good standing in a U.S. jurisdiction and working exclusively for their employer/clients, we hope that you will consider moving the authorization for in-house lawyers from an administrative exception in the province of the bar examiners and into the state's rules of practice.

If ACC or its members can provide further comments or be of assistance to you, please call on us. We thank you again for your timely and important proposals, and we very much appreciate your time and consideration of our recommendations.

On behalf of ACC, its members, and its chapter in Wisconsin:

Frederick J. Krebs
President

Susan Hackett
Senior Vice President and General Counsel