American Corporate Counsel Association

1025 connecticut avenue, nw
suite 200
washington, dc 20036-5425
p 202.293.4103
f 202.293.4701
www.acca.com

The in-house bar association[SM]

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To: The Judicial Council of California
c/o Ms. Romunda Price
Supreme Court Multijurisdictional Practice Implementation Committee
c/o of Administrative Office of the Courts
455 Golden Gate Avenue
San Francisco, CA 94102

From: Leaders of the American Corporate Counsel Association (ACCA), and its Chapters in California (a list of signers appears at the end of this letter)

Re: Comments to the Report: "The Multijurisdictional Practice of Law by Lawyers Not Admitted to the State Bar of California"

On behalf of the American Corporate Counsel Association and its 14,500 members, over 1,900 of whom practice law in California, we urge the Judicial Council (the "Council") to consider the following changes to the proposals offered by the California Supreme Court's Multijurisdictional Practice Implementation Committee (the "Committee"):

Executive Summary:

Under Proposed Rule 965:

A. Corporate counsel eligible for registration under the Rule should not be limited to those working for a "qualifying institution."

B. Corporate counsel operating under the Rule should be able to appear in a California court; at a minimum, they should be allowed to apply for pro hac vice admission.

C. Corporate counsel operating under the Rule should be able to represent the officers, directors, and employees of the company as individuals when appropriate (e.g., when they are named as individuals in a joint suit against the organizational client).

D. Corporate counsel operating under the Rule should be allowed to provide pro bono legal services in California - if not generally, then in conjunction with certified legal services organizations.

E. The Proposed Rule should cover existing, as well as future, in-house counsel operating in the state, but not licensed in California.

Under Proposed Rules 966 and 967:

A. The authorization to engage in non-litigation temporary practice in California under Proposed Rule 967(b)(1) and (2) is unnecessarily and inappropriately limited, affecting the legitimate practices of transactional/counseling attorneys and unnecessarily limiting client's choice of counsel; our alternative proposed language provides a more appropriate standard.

C. The requirement to list the bars of which one is not a member is unnecessary and cumbersome.

I. Changes Requested Under Proposed Rule 965 – Authorizing the Practices of Corporate Counsel Working – but Not Admitted – in California.

We are pleased the Committee recognizes the need for a rule authorizing the practice of employed in-house counsel who are licensed and in good standing in other US jurisdictions, and whose clients wish them to establish a full-time practice in California, working exclusively for the employer client. The Committee correctly states that such a rule makes sense because these lawyers pose no threat or risk to the public in California, and indeed, serve important purposes for California business clients. Additionally, the State should not prohibit a client from hiring the attorney of its choice if there is no public protection concern involved.

A. Proposed Rule 965 should not be restricted to those working for a "qualifying institution."

After establishing the fact that a corporate counsel registration system should be available, the Committee inappropriately seeks to limit the availability of the registration system to lawyers working for only certain kinds of clients: namely, those who work for "qualified institutions." This prohibition is found in 965(a)(1). A "qualifying institution" in turn is defined in 965(f)(1) as "a corporation, a partnership, an association, or other legal entity, including its subsidiaries and organizational affiliates . . . . [which] (A) Employ[s] at least 10 employees full-time in California; or (B) Employ[s] in California an attorney who is an active member in good standing of the State Bar of California." The limitation is unnecessary, arbitrary, and lacks any articulated purpose.

The 10-employee threshold is not well founded. The competence and ethics of any lawyer, in-house or otherwise, is not dependent on or determined by whether their client has more or less than 10 employees in the state. We understand that the Committee was likely concerned that the registration only be offered to counsel with employers who have some minimal level of presence in the state, but the size and presence of the employer is completely unrelated to the competence and professionalism of the lawyer applying for this license.

Likewise, it is not appropriate to judge the merit of a client to retain the counsel of its choice by the size of their operation. It is flawed to suggest that if an employer who has 9 employees

merely hires another admin or a gardener or a sales rep in the state, that the client's lawyer's professional credentials would be suddenly recognized as acceptable and the client would be afforded its full choice of counsel.

The only concern of the Committee in promulgating this Rule should be the better service of the client or the protection of the public or the administration of justice in the state. The Committee's arbitrary standard of 10 employees serves none of these purposes and thus needlessly discriminates against clients and lawyers who are part of "unqualified" institutions.

The Committee's alternative, which is that the lawyer working in a company with less than 10 employees is nonetheless eligible if he works in a legal department with at least one lawyer already admitted in California, is also flawed. The Committee has no problem with solo practitioners employed by clients with more than 10 employees California, so the Committee is clearly not suggesting that solo practitioners must have supervision. Likewise, 20 in-house registrants under this Rule can work together without a "regularly admitted" member of the California bar to watch over them if their client hires an administrative assistant to work for each of them. So why is the Committee worried that a solo in-house lawyer, hired by an employer with less than 10 California employees, is a threat?

In fact, the empirical evidence does not support the Committee's exclusion of *any* in-house counsel otherwise qualified (in terms of practice record, standing in their states of admission, etc.) under the Rule's provisions. The National Organization of Bar Counsel recognizes that lawyers who are employed in-house are the *least* of the bar's disciplinary problems. And this is true nationally, as well as in California, even though the largest single segment of the in-house profession works as solo practitioners for their clients (without the "supervision" of any other lawyer or any qualification of the size of their employers' workforce).

Why do in-house counsel pose such a disproportionately low concerns for disciplinary authorities? First and foremost, because only sophisticated legal consumers hire – rather than retain – a lawyer or a team of lawyers to pursue their legal needs on an ongoing basis. Such clients have the ultimate remedy against incompetent counsel: they fire them. Second, and as an indicator of these lawyers' professionalism, it is worth noting that in-house counsel positions are highly coveted and usually only those with the most impeccable records are successful applicants: candidates for in-house jobs with poor records, low standards, disciplinary problems, and a lack of documented and recommendable experience simply never make the cut.

Indeed, under Rule 965's registration system, the bar has plenty of opportunity to make its own cuts . . . any lawyer registering for the Rule's protections would have to provide a documented record of good standing, previous experience and other criteria showing competence and ethical responsibility in practice. Presumably, examiners reviewing these applications can deny registration privileges to candidates with significant disciplinary problems in their pasts or who pose some other kind of risk. This Rule provides more than adequate mechanisms for weeding out high-risk lawyers in the application process without the need for the unsubstantiated and

improperly discriminating standard imposed by the Committee's "qualified institution" criteria. For that rare occasion on which an in-house counsel is accused of a professional breach, wouldn't it be better to have a rule which has cast its net to cover the entire in-house community in the state, and thus subjects all of its members to the disciplinary processes of the state's rules?

Without any rationalization as to why in-house lawyers working for "unqualified" institutions constitute some level of risk to the public, the bar, or clients, and given that the Committee's own presumptions suggest that all other in-house lawyers do not pose a risk, we ask the Council to remove the language limiting the applicability of Rule 965 to employed lawyers who work for "qualifying institutions."

B. Corporate counsel operating under the Rule should be able to appear in a California court; at a minimum, they should be allowed to apply for pro hac vice admission.

While ACCA appreciates the Committee's (and the courts') concern over clogging the system with inexpert litigators, there is no reason to assume that in-house counsel registered under Proposed Rule 965 will contribute to that problem. If a lawyer is deemed competent and professional enough to pass the registration system's strict requirements, it makes no sense to assume that she would behave in an incompetent and unprofessional manner by seeking to represent her client in a California court if she was not qualified to do so well. No lawyer of merit takes on a representation which he or she is not competent to provide – this is the first rule of ethics. So why would the Committee presume that an in-house counsel who is a competent litigator would proceed to a California courthouse without a working knowledge of the local court rules? or that an in-house counsel with no experience litigating would suddenly want to assume the role of litigator for the client and head off to court unprepared?

Good litigators appear in any number of different courts in their state(s) of admission, in other states on admission pro hac vice, and otherwise in the federal courts; they research the rules of the courts in which they are to appear as a matter of course, and they hire local or expert litigation counsel to assist them where they are concerned that they don't know what they should in order to succeed. There is no reason for this Rule to arbitrarily limit the practice of experienced litigators who will continue to practice responsibly and efficiently in the California courts to they degree they feel competent to do so.

Alternatively, if the Council wishes to propound a rule designed to protect the courts from inexperienced or irresponsible in-house litigators (even in the absence of such rules to prevent the litigation abuses of inexperienced or irresponsible California bar members), then we would request that the Council at least allow corporate counsel who are registered under this Rule the same rights they would otherwise have as lawyers from another state coming to California on a litigation matter: namely, to apply for a pro hac vice admission on a case-by-case basis. Any court receiving a pro hac petition from a registered counsel may review the credentials of the in-house counsel and determine for itself whether the applicant has the expertise to meaningfully and efficiently participate in the court's docket. As written, Rule 965(a) prohibits a counsel

operating under the registration system from even moving her admission on a pro hac vice basis in the California courts.

C. Corporate counsel operating under the Rule should be able to represent the officers/directors/employees of the company when appropriate and to the same extent as a regularly admitted California attorney can under the conflict rules.

There is a problem with the wording of Proposed Rule 965(a)(3) which prohibits the in-house counsel from providing "personal or individual representation" to a whole class of recipients. In-house counsel are often called upon to defend the client in lawsuits that name both the entity and individual executives or managers in the suit. They are sometimes asked to advise managers and others about their individual responsibilities in the context of corporate activities in which they are engaged. Thus, we suggest that the term "individual" be removed from the clause and that the term "personal" be left to stand on its own. It can adequately cover all circumstances in which we agree that an in-house counsel operating ethically under the Rule and consistent with California's conflict of interest rules should not be involved. An alternative would be to add after "personal representation" the phrase "not arising from their corporate affiliation, directly or indirectly."

D. There should be a provision for corporate counsel operating under this Rule to provide pro bono services.

ACCA believes that the provisions of Proposed Rule 965(a) should afford the in-house counsel who wishes to provide pro bono legal services the ability to do so as a part of his ongoing duty to the bar, the public and his profession. By limiting the definition of appropriate services to those provided only to his employer, the Rule prevents the lawyer from providing pro bono legal services to indigent or non-profit clients. While many in-house counsel who seek this Rule's safe harbor will nonetheless provide (non-legal) volunteer services in California while they are employed in the state as a matter of course, it seems a shame to prohibit them from providing the kind of volunteer service that is uniquely a part of their professionalism, and especially if related to their areas of expertise (for example, representing clients who need tax, employment, general corporate, consumer credit, or other "business" type legal services).

The Committee has clearly recognized the importance of authorizing the work of lawyers from other states who wish to be employed by qualifying public interest organizations that provide pro bono legal services under Proposed Rule 964. Allowing in-house counsel who volunteer with some of these same organizations to provide pro bono services is entirely consistent.

Thus, an alternative approach might be to allow registered corporate counsel to provide pro bono services under the auspices of a state-licensed legal services or pro bono project, such as those described in Proposed Rule 964. These projects provide training, supervision, teaming, and malpractice insurance, as well as matching expertise to client needs at intake.

Most pro bono work is essentially local in nature, and lawyers who are living in California will find their only meaningful opportunities for one-on-one indigent or non-profit client representation at the local bar. Lawyers authorized to practice under this Rule should not be precluded from providing these important volunteer services. We request the Council to amend Proposed Rule 965(a)(1) to read:

> Is permitted to provide legal services in California only to:
> (A) the institution that employs him or her, or
> (B) on a pro bono basis under the auspices of a certified pro bono provider/legal services organization licensed by the state.

E. The Proposed Rules should include an "amnesty" provision.

Finally, the focus of this Rule should be generally forward-looking. But before the State offers this registration to in-house counsel moving to the state in the future, it should first address the issues of in-house counsel already in the state and representing their employer-clients without a California license. Proposed Rule 965 needs some form of amnesty provision so that unauthorized in-house lawyers currently at work in the state won't have to worry that if they come forward to register, their past practices will be used against them. Without an amnesty provision, the Rule misses a large portion of those whom it was created to serve, leaving behind a significant number of in-house counsel who will likely continue to practice outside of the authority of the California state bar licensing and disciplinary process.

We suggest including a provision that allows any lawyer who has been operating as in-house counsel in the state, and who wishes to be registered, to apply for registration without concern of disciplinary report to their bar or denial of their application for some period of time from the effective date of the Rule: we suggest six months as a reasonable amount of time. After that time, anyone who continues to practice in the state in an unauthorized fashion must do so at his or her own risk.

Such a provision might read: [965(g)]

> Registration of Counsel Previously Working in the State Before Passage of this Rule: This Rule generally applies to in-house counsel who meet all other requirements of this Rule, including those in-house counsel who have been working for a corporate client in the state without a California license prior to the passage of this Rule. This Rule offers a six-month "amnesty" period from the date of passage of the Rule, whereby an in-house counsel who is engaged in practice in the state at the time of the passage of this Rule, but who has not yet registered, may apply for registration without fear of disciplinary action or rejection of their registration application based on an argument of past unauthorized practice in the state. Future applicants will likewise not be penalized for similar violations of unauthorized practice rules if such a practice took place prior to the passage of this Rule. Nothing in this provision shall prevent the State Bar of California from

pursuing an action against a counsel who falls under the authority of this provision but has engaged in some other form of inappropriate behavior for which the state prescribes a disciplinary sanction.

F. Finally, it appears that there is a typographical error in Rule 965, subsection (f)(2)(B). In the second from last line, the text should read "as a registered in-house counsel" rather than "as a registered public interest attorney."

II. Proposed Rules 966 and 967 – Authorizing the Practice of Lawyers Licensed Elsewhere in the US and providing temporary services to clients in California, whether those clients are California clients or based elsewhere.

A. The Council should replace the standards of permissible temporary practice codified in Rule 967(b)(1) and (2) with the more simple and appropriate standard adopted by the ABA MJP Commission.

Proposed Rule 967(b) offers a list of permissible activities in which a lawyer who meets the Rule's requirements may engage on a temporary basis in the state. There are three listed activities: (1) legal assistance or advice to a client concerning a transaction or other non-litigation matter, a substantial part of which is taking place outside of California and in a state in which the lawyer is licensed to provide legal services; (2) legal assistance or advice in California on an issue of federal law or the law of another state, but only as provided to another lawyer licensed in California; and (3) legal assistance or advice provided in California by the client's in-house counsel.

While ACCA appreciates that subsection (3) provides a safe harbor for in-house counsel (and we make no request for its modification), the remainder of the Rule does not serve corporate clients well and should be modified. The Rule prohibits a number of legitimate functions performed by practitioners who need to enter the state on a temporary basis to conduct client business. There is no justification offered for why such practices pose a danger to the public.

Most corporate clients expend a significant portion of their legal budgets on outside counsel and in so doing, are able to make appropriate judgments as to who has the necessary expertise they need to retain. This Rule would have the perverse effect of requiring corporate clients to forego their "national" or subject matter expert outside counsel on a wide variety of matters that take place in California. Ironically, the bar would have little problem if these services were provided by lawyers who met their California-based clients outside of the state, or met with them by telephone or videoconference, so clearly, there is no concern that California clients or the public are being ill-served, except for the imposed inconvenience of forcing them to travel outside of the state or talk electronically with the counsel they choose to represent them.

A practical, alternative approach to more appropriately defining authorized temporary legal practice incursions by non-litigators is rapidly becoming the standard in other states adopting MJP reforms. It is based on Section 3 of the American Law Institute's Restatement of the Law Governing Lawyers, as well as the American Bar Association's corresponding new Model Rule of Professional Conduct 5.5(c), which ACCA endorses. Accordingly, we encourage this Council to replace the current language of Proposed Rule 967(b)(1) and (2) with the following language:

> (1) Provides legal assistance or legal advice in California to a client concerning a transaction or other non-litigation matter that arises out of or is reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is licensed to provide legal services.
>
> (2) Provides legal assistance or legal advice in California on an issue of federal law, or of the law of a jurisdiction other than California.

ACCA submits that its proposed alternatives to Proposed Rules 967(b)(1) and (2) are better for the following reasons:

First, these proposed alternatives are broad enough to encompass most temporary activities in another jurisdiction by a lawyer working on a matter arising from the lawyer's practice in the lawyer's home state of admission.

Second, linking the provision of authorized temporary services to only those matters which take place in substantial part outside of California and in substantial part inside of a state in which the lawyer is admitted [as in subsection (b)(1)] is not related to the protection of the public in California nor the protection of the standards of the California bar.

Third, if these Rules are intended to codify existing practice realities, then our alternative Rule (and not the California proposal) is a better reflection of current practices. There are no indications that such current practices harm the public or the bar, or most importantly, the corporate client, who had reason to call on the specific lawyer's expertise.

Fourth, it is not appropriate to force clients to pay for unnecessary local counsel (or travel outside of the jurisdiction) for matters which touch the jurisdiction in a temporary fashion or which are primarily the subject of federal law or the law of another jurisdiction (and thus not arguably of greater province to California lawyers than any other lawyer licensed and in good standing in another state). Further, for those matters where the participation of local California counsel is appropriate, the client and lawyer can (and very often do) decide to engage local counsel. The Rule should not create a significant number of circumstances in which a client who wishes to resolve a multijurisdictional legal matter must regularly engage a lawyer from every jurisdiction the matter touches.

Finally, while the fact that these provisions are "right" elsewhere does not mean that they are "right" in California, it is important to note that – unlike other kinds of bar regulations – MJP

reforms really only work appropriately when they can be easily and consistently understood and obeyed by lawyers moving from jurisdiction to jurisdiction in their practices. These Rules make such practitioners subject to the rules in the states in which they travel, but should not place an unreasonable burden on the lawyer or they will miss their point. A plethora of slightly different temporary practice authorization rules will not serve any particular purpose of public protection, but will effectively moot the purpose of these Rules – to create an easier way for lawyers to ethically and responsibly participate in cross-border temporary practices to which no one objects, which clients demand, and which pose no threat to the public.

And there is a value to agreeing to standards that everyone can live with and that are consistent from jurisdiction to jurisdiction. If California wishes to assure that its lawyers traveling to other jurisdictions have the same opportunity to engage in authorized and open temporary practices, then it should not set a model for adopting a more protective system at home than it expects its lawyers to enjoy "abroad." (Other jurisdictions do watch – and for good reason – what it is that California does; this is a highly influential state and its role as a leader should not be underestimated.) If the standards proposed by the Committee's Rules were applied in other states, it could prove very harmful to California companies, California lawyers, and multi-state law firms with large bases in California.

Consider, for example, the following practices that would be inappropriately forbidden under the Committee's proposed temporary practice Rules, and which should be open to the same authorization as other temporary incursions the Committee agrees are non-threatening:

• a national manufacturing and distribution client hires a firm with national expertise in government contracting law, ERISA, environmental or intellectual property matters to conduct a 50-state audit of local legal requirements, and company policies and procedures, with a request to then educate local managers on proper compliance initiatives in their states in on-site seminars and trainings.

• the client wishes to hire a foremost expert in corporate governance from New York to visit with executive management and directors in their home states (including California) to conduct interviews, examine state initiatives on governance (including California's) and then develop and present for the next board meeting (in California) new governance policies that meet and exceed the standards set by each state in which the company does business.

• the client wishes to acquire a business or property located in California and needs to use its regular due diligence team. These lawyers know the client's preferences and history and use their expertise to assess and report on local standards that will need to be met (zoning, environmental, workforce, local and state licensing requirements, taxes, etc.); they investigate and conduct diligence on these matters and more.

These are but a few examples. Since there is no sense that any of these practices are heinous or a threat to the public or the bar, they should not be circumscribed from the protections of this Rule.

B. The requirement to list bars of which one is not a member is unnecessary, cumbersome, and potentially confusing.

Both Rules 966 and 967 would require lawyers who wish to engage in temporary activities in California [in subsection (a)(3) of both Rules] to "indicate on any Web site or other advertisement that is accessible in California that he or she is not a member of the State Bar of California." Corporate counsel and outside lawyers from other jurisdictions often travel and assist in matters that span the US and even the globe. Listing where a lawyer is admitted should suffice. It boggles the mind to imagine how websites (and any other medium considered advertising) – might look if the lawyers listed in them had to list every place they are not admitted but where their practices lead them!

III. CONCLUSION

We trust that our comments will be helpful to the Council and its important work. We thank you for your consideration of our perspectives and requests. Should you have any questions regarding this submission, please feel free to contact Susan Hackett, ACCA's General Counsel, at 202/293-4103, ext. 318, or hackett@acca.com.

As a final note, we suggest that any future task force continuing work on these matters – as proposed by the Committee as part of the implementation and review process going forward – include a more substantial number of in-house counsel members. We were pleased that the Committee included ACCA Board member Karen Randall, Executive Vice President and General Counsel of Universal Studios, Inc. (Vivendi). In the event that future implementation committees are formed, Ms. Randall, ACCA, or any of our local California chapters would be pleased to assist the Bar or Court in identifying in-house counsel representatives.

Sincerely,

Madeleine Elizabeth Wall
2003 Chairman of the Board, American Corporate Counsel Association
General Counsel, The European Lawyer (London, UK)
California Bar Number: 107405 AAA

John H. McGuckin, Jr.
2003 Vice Chairman of the Board, and 2004 Chairman Nominee, American Corporate Counsel Association
Executive Vice President, General Counsel, and Secretary
Union Bank of California

California Bar Number: 55090

Michael Roster
2001 Chairman of the Board, American Corporate Counsel Association
Executive Vice President and General Counsel, Golden West Financial
California Bar Number: 56053

American Corporate Counsel Association San Francisco Bay Area Chapter:
By:

William Cosden
President, San Francisco Bar Area Chapter
California Bar Number: 47622

Sherri L. Crawford
Co-Chair, San Francisco Bay Area Chapter Advocacy Committee
General Counsel, Sendmail, Inc.

Joseph J. Catalano
Treasurer and Co-Chair, Litigation and Risk Management Committee,
San Francisco Bay Area Chapter
General Counsel, Bay View Capital Corporation

John McDonnell
Co-Chair, San Francisco Bay Area Chapter Advocacy Committee
Associate General Counsel, Handspring, Inc.

American Corporate Counsel Association, Southern California Chapter:
By:

Michael Dwyer
President, Southern California Chapter
Senior Attorney, NMB Technologies Corporation
California Bar Number: 181187

Jonathan L. Block
Co-Chair, Southern California Chapter Advocacy Committee
Vice President and General Counsel, Salem Communications Corp.
California Bar Number: 166645

Joseph J. Craciun
Co-Chair, Southern California Chapter Advocacy Committee
General Counsel, Money Mailer, LLC
California Bar Number: 175374

Jay D. McFadyen
Member of the Board of Directors, Southern California Chapter
Vice President and General Counsel, Anixter Pentacon, Inc.
California Bar Number: 122039

American Corporate Counsel Association, San Diego Chapter:
By:

Karen L. Boudreau
Board of Directors, San Diego Chapter
Director, Commercial Legal Affairs, Iomega Corporation

James R. Edwards
Past President and Director, San Diego Chapter; Member of the Board of Directors, American Corporate Counsel Association
Senior Legal Counsel, Qualcomm Incorporated
California Bar Number: 74356

Dennis J. Stryker
Past President and Director, San Diego Chapter; Member of the Board of Directors, American Corporate Counsel Association
General Counsel, Rick Engineering Company
California Bar Number: 110035

Michael C. Tierney
Chair, ACCA Leadership Development Institute, and Past President and Director, San Diego Chapter
California Bar Number: 165133