Section Chair
David S. Rothenberg, Esq.

Chair Pro Bono Committee
Cynthia Beagles, Esq.

Treasurer & Vice-Chairperson
Jeffrey P. Laner, Esq.

Co-Chair of the Membership Committee
Thomas A. Reed, Esq.

Greg Hoffman, Esq.
Head of Legal, US & Canada
BT Americas, Inc.

Randal S. Milch, Esq.
Executive Vice President & General Counsel,
Verizon Communications, Inc.

NYSBA

Right to Practice Reform: Registered In-House Counsel and Pro Bono Service

Report of the Corporate Counsel Section of the New York State Bar Association

June 2012

Approved by the NYSBA House of Delegates June 23, 2012

NYSBA

Right to Practice Reform:
Registered In-House Counsel and Pro Bono Service

SUMMARY

The crisis in access to justice "has reached a breaking point."[1] The gap between unmet legal needs and available legal resources has widened to an unprecedented degree, demanding that no resource be left untapped. This includes the efforts of in-house attorneys, who are a growing force in pro bono assistance. Yet, hundreds of registered in-house attorneys in New York are unable to fulfill their ethical obligations and serve as valuable resources, due to a lapse in New York's practice rules.

Fortunately, there is an easy solution. To empower in-house counsel, provide them the opportunity to satisfy their ethical obligations, and grant them the authority to efficiently provide pro bono assistance to New Yorkers and nonprofit organizations in need, New York should amend its practice rules to permit registered in-house counsel to provide pro bono services in addition to working for their employer. In-house counsel should be freed in most representations[2] from cumbersome requirements mandating that registered in-house counsel be supervised by locally licensed attorneys or work with an approved organization. Such limitations are unnecessary due to requirements and protections provided for in the New York Rules of Professional Conduct.

For these reasons, which are further detailed in this report, New York should amend Part 522 of the Rules of the Court of Appeals for the Admission of Attorneys and Counselors at Law to include the following provision:

> ***§522.8 Pro bono services***
> *An attorney registered as in-house counsel under this Part may also provide pro bono legal services in this State, and in the provision of such pro bono legal services the registered in-house counsel may:*
>
> > *(a) make appearances in this State before a tribunal, as that term is defined in Rule 1.0[w] of the New York Rules of Professional Conduct (22 NYCRR 1200.0), or engage in any activity for which pro hac vice admission would be required, only after having sought and obtained permission to make such appearances or engage in such activities in the same manner required of an attorney not admitted to the practice of law in this State; and*
> >
> > *(b) not hold oneself out as an attorney admitted to practice in this State except on letterhead with a limiting designation.*
>
> *The provisions of §522.4 shall not apply to the provision of such pro bono legal services.*

---

[1] The Task Force to Expand Access to Civil Legal Service in New York. *Report to the Chief Judge of the State of New York* at 1 (Nov. 2010), available at http://www.courts.state.ny.us/ip/access-civil-legal-services/PDF/CLS-TaskForceREPORT.pdf (Report 2010).

[2] The proposed amendment at subsection (a) leaves in place a requirement that in-house counsel remain subject to the current rules requiring pro hac vice admission for "foreign" lawyers to practice before New York tribunals. This requirement should be reconsidered after appropriate study to determine if its maintenance for pro bono activities is necessary to protect pro bono clients.

REPORT

Effective April 20, 2011, New York implemented "Rules for the Registration of In-house Counsel" that permit in-house counsel who are licensed to practice in another jurisdiction but not in New York to work for their company in New York.[3] This rule does not include language permitting those lawyers to also engage in pro bono work.[4]

This report proposes that New York amend its rule and grant registered in-house counsel the authority to engage in pro bono services. It suggests language that would enable registered in-house counsel to provide pro bono support free from unnecessary restrictions but subject to the same ethical and disciplinary rules that apply to attorneys licensed to practice in New York as well as, until further study is completed, the *pro hac vice* admission rules that apply to attorneys not licensed to practice in the State.

The State of Legal Needs in New York

Legal services in the United States and New York are in crisis. According to the national Comprehensive Legal Needs Study of the American Bar Association, 80 percent of the legal needs of low income people go unmet.[5] This number has been reaffirmed in legal needs studies across the nation.[6] In addition, the Legal Services Corporation (LSC) found in 2005 that there is only one legal services attorney for every 6,861 low income persons.[7] Coupled with the recent cuts in legal aid resources, including Interest on Lawyer Account Funds (IOLA) and the $56 million decrease in basic field funding for LSC for Fiscal Year 2012, the situation for low-income individuals, the lawyers who assist them, and court systems around the nation is devastating. Providing essential legal assistance to persons in need and the organizations that support them helps stabilize communities and ensures the viability of public trust in the justice system.

In New York, the situation is equally dire. Charged by the courts to assess the degree of unmet legal needs, the Task Force to Expand Access to Civil Legal Services in New York (Task Force) issued a report to the Chief Judge in 2010 that reveals that more than 2.3 million people in New York attempt to navigate the legal system without the assistance of counsel.[8] Most of these people

---

[3] Part 522 of the Rules of the Court of Appeals for the Registration of In-House Counsel, relating to the registration of in-house counsel in New York.

[4] To date, more than 350 in-house counsel have registered to practice in New York.

[5] American Bar Association, *Legal Needs and Civil Justice: A Survey of Americans. Major Findings from the Comprehensive Legal Needs Study* (1994), available at http://www.abanet.org/legalservices/downloads/sclaid/legalneedstudy.pdf.

[6] In 2004, nine state studies found that less than 20 percent of the legal needs of low-income people were being met. *See,* Legal Services Corporation, *Documenting the Justice Gap in America, The Current Unmet Civil Legal Needs of Low-Income Americans, Overview* at 2 (2005), available at http://www.lsc.gov/pdfs/JusticeGapReportOverview120105.pdf

[7] Legal Services Corporation, *Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-Income Americans* at 15 (2005), available at http://www.lsc.gov/justicegap.pdf.

[8] Report 2010 at 12.

are low-income New Yorkers and are unrepresented not by choice but due to financial limitations.

This report also states that annually nearly 3 million low-income New Yorkers are faced with a civil legal problem and 1.2 million face three or more legal problems.[9] Yet, IOLA funded legal services organizations handle only about 260,000 matters a year, creating a tremendous gap in the provision of legal services to those in need. Providers in New York are serving, at best, only 20 percent of the need.[10]

Just as, nationally, there are not enough legal service lawyers to assist the number of low-income individuals in need, in New York, legal service providers reported that, in 2009, they turned away 50 percent of eligible low-income New Yorkers due to lack of resources.[11] In 2010, as the weight of the recession continued to impact the most vulnerable, legal aid organizations reported a substantial increase in the number of individuals turned away.[12] Importantly, this increase does not include or reflect the number of low-income people who are unaware of their rights or who do not seek assistance from legal service organizations.

New York's charitable organizations face a similar dilemma in obtaining necessary legal services. According to Charity Corps, a joint initiative of the New York State Bar Association and the New York Attorney General's office, New York State is home to approximately 80,000 charities that enrich communities and provide crucial services to residents across the state. However, most New York State charities are comparatively small in size. An estimated 80 percent of New York nonprofits do not have access to legal counsel to properly address organizational legal needs such as employment law issues, contract reviews, real estate matters, and board governance/fiduciary responsibilities - important issues that when properly addressed, help ensure that charitable assets are being efficiently used, and that legal matters are properly identified and addressed before they become problems.[13]

Despite the increase in demand, funding for legal service organizations has decreased dramatically. New York State IOLA revenues for civil legal services, a critical source of legal services funding, fell from $32 million in 2008 to $6.5 million in 2010 and 2011.[14] More than 57 percent of legal service organizations report staffing reductions because of decreased resources, increasing the

---

[9] *Id.* at 11.

[10] The Task Force to Expand Access to Civil Legal Service in New York. *Report to the Chief Judge of the State of New York* at 1 (Nov. 2011), available at http://www.nycourts.gov/ip/access-civil-legal-services/PDF/CLS-2011TaskForceREPORT_web.pdf (Report 2011).

[11] Report 2010 at 4.

[12] *Id.*

[13] See "Charity Corps: NYSBA & NYAG Joint Initiative to Secure Pro Bono Legal Services for Unrepresented Charities in New York ," available at http://www.nysba.org/Content/NavigationMenu/ForAttorneys/CharityCorpsResources/Full_Program_Descrip.htm

[14] Report 2011 at 1.

number of low-income individuals the organizations are unable to serve.[15]

This gap between the need for legal services and the services available for low-income individuals and organizations that support them has a tremendous impact on the judicial system in New York.[16] The Task Force reports that judges in New York found that valid court claims are lost because unrepresented parties do not present evidence or understand the law.[17] Courts must spend tens of thousands of hours trying to assist the unrepresented, becoming less efficient and impairing the quality of justice for all New Yorkers, even those with representation.[18]

The Need for Pro Bono Service

While pro bono assistance alone cannot fill the widening gap between legal needs and available assistance, the Task Force continues to emphasize leveraging resources through pro bono work. In its most recent report, the Task Force lists "increasing the available pro bono assistance by private lawyers" as one of its "significant non-monetary recommendations."[19] With additional pro bono resources, there is potential to increase representation and expand the work of legal service organizations. Currently in New York, the private bar contributes over 2 million hours of pro bono service to low-income individuals and communities, and the nonprofits that serve them.[20] However, there still remains a significant untapped resource.

Growing Willingness and Capacity of In-House Pro Bono

There are more than 9,500 in-house counsel practicing in New York, and, to date, more than 350 of them have registered as in-house counsel under the new rule. A large number of in-house lawyers work at legal departments where supporting low-income communities through pro bono assistance to individuals and to nonprofit organizations is a core value.

Over the past five years, in-house pro bono has grown tremendously. According to Corporate Pro Bono (CPBO), a partnership project of the Pro Bono Institute and the Association of Corporate Counsel (ACC), many of the Fortune 500 companies and a majority of the Fortune 100 companies have either set up or are moving to establish formal pro bono programs for the lawyers in their legal departments. This list includes Aetna Inc., Caterpillar Inc., The Coca-Cola Company, Ford Motor Company, The Gap, Inc., General Electric Company, Hewlett-Packard Company, Merck & Co., Inc., Microsoft Corporation, Shell Oil Company, Wal-Mart Stores, Inc., and a host of others. In addition, lawyers in smaller companies and legal departments engage in pro bono legal services through opportunities organized by CPBO, local bar associations, and ACC Chapters.

---

15 Report 2010 at 13.

16 Report 2011 at 3.

17 Report 2010 at 1.

18 *Id.*

19 Report 2011 at 1.

20 Report 2010 at 4.

This trend is especially true in New York. Companies such as American International Group, Inc., American Express Company, Citigroup Inc., Deloitte and Touche, Federal Reserve Bank of New York, The Goldman Sachs Group, Inc., International Business Machines Corporation, JPMorgan Chase & Co., MasterCard Corporation, MetLife, Inc., News Corporation, New York Life, PepsiCo, Inc., Philip Morris International Inc., Pfizer Inc., Time Warner Inc., Verizon Communications Inc., Viacom Inc. and others have not only expressed an interest in pro bono, they have begun to set up or have set up formal pro bono programs within their legal departments. The Pro Bono Partnership, Inc., a Westchester County- based nonprofit, 501(c)(3) legal services provider, has as a core mission to engage in-house attorneys on transactional and corporate pro bono matters for charitable organizations in New York, New Jersey and Connecticut. Since its start in 1997, it has successfully worked with most of these and other legal departments. In addition, the New York ACC Chapters and the New York State Bar highlight pro bono opportunities for in-house counsel to its members.

The Need to Create a Simple Process

Rule 6.1 of the New York Rules of Professional Responsibility provides that "Lawyers are strongly encouraged to provide pro bono legal services to benefit poor persons. (a) Every lawyer should aspire to (1) provide at least 20 hours of pro bono legal services each year to poor persons…." (The Rule also applies to pro bono services provided to charitable, religious, civic and educational organizations.). Rule 6.1 makes no distinction between locally licensed and registered in-house counsel.

To ensure that the private bar is fully supporting the role it can play in addressing the crisis in legal services, and to afford in-house counsel the opportunity to efficiently provide pro bono assistance to communities in need, New York should amend its rule to grant in-house counsel the ability to easily comply with Rule 6.1, satisfy their ethical obligations, and provide pro bono representation to underserved individuals and nonprofit organizations.

In order for the amended rule to most benefit New York, its citizens, and its courts, it should be drafted so that it will: (1) add to the number of lawyers able to assist low-income communities; (2) broaden the reach of services legal aid providers are able to give; (3) minimize the burden overtaxed legal service providers already bear; (4) expand the number of low-income individuals and communities served; (5) reduce the burden on the courts; (6) bring efficiencies to the justice system; and (7) ensure that pro bono counsel provide competent and diligent assistance, subject to the rules of New York.

The language proposed below, as §522.8 Pro bono services, achieves these goals. However, some states have adopted rules counter to these objectives.

Unnecessary Obstacles to Pro Bono Practice

Several jurisdictions have adopted practice rules that, while allowing in-house counsel to perform pro bono work, unduly restrict the ability of registered in-house counsel to provide pro bono services to indigent communities. These limitations are unnecessary and serve to decrease the number of competent lawyers able to provide assistance to those in desperate need and reduce the number of clients served.

Under the Supervision of a Locally-Licensed Lawyer

Some states have adopted requirements that in-house counsel licensed to practice in another jurisdiction provide pro bono assistance under the supervision of a lawyer licensed to practice in-state. This is an unnecessary restriction that limits the amount of time competent lawyers are able to provide direct assistance to clients and reduces the number of clients served.

First, it requires that lawyers licensed in-state dedicate time and resources to act as supervisors to lawyers who are already licensed to practice and are in good standing in another jurisdiction, constraining the ability of licensed lawyers to serve clients directly. Second, it hampers the ability of qualified in-house counsel to provide advice and services to communities in need by insisting that they only do so under close supervision. Third, it mandates that two lawyers provide services to one client regardless of whether the matter requires such staffing.

New York rules already require lawyers, including registered in-house counsel, to competently represent their clients and to acquire "the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Rule 1.1 of the New York Rules of Professional Conduct. Further, the new in-house counsel rule already requires registered in-house counsel to "abide by all of the laws and rules that govern attorneys admitted to the practice of law in this State," except as specifically limited in the new rule. Part 522.3(d) of the Rules of the Court of Appeals for the Registration of In-House Counsel. To mandate that, in addition, these lawyers must work under the supervision of another is an unnecessary limit on services that are in desperate need.

In Association with an Approved Legal Aid Organization

Other states require that registered in-house counsel provide pro bono services in association with an approved legal aid or similar organization. Many in-house legal departments and corporate counsel already work with legal aid organizations in New York and will continue to do so. However, restricting registered in-house counsel from working with other organizations that serve low income communities, including law firms, courts, social service agencies, and community groups, prevents in-house counsel from serving the breadth of low income families and organizations in need.

Legal aid organizations are already exhausting their resources; they can only assist volunteer attorneys so much. In a number of communities, local legal service programs have reduced staff or have closed offices. This limits the ability of volunteers to provide services through those organizations.

In addition, legal aid organizations only serve a small segment of low income households in need. Many legal aid organizations narrow the focus of their work, excluding certain types of clientsor certain types of matters, like foreclosures and divorce. Furthermore, only a small percentage of low income households in New York seek assistance from legal aid organizations.[21]

---

[21] Only seven percent of low income households in New York who experienced a civil legal problem in the past year sought help from legal aid organizations. *See*, Findings of Lake Research Partners on Civil Legal Needs Among Low Income New York State Residents, Appendix 17 to The Task Force to Expand Access to Civil Legal Service in New York. *Report to the Chief Judge of the State of New York* at 58 (Nov. 2010), available at

The need to identify diverse avenues through which low income communities can be served is tremendous. Mandating that registered in-house counsel can only provide services in partnership with an approved legal service provider or similar organization unnecessarily hand-cuffs what these lawyers can do and who they can help.

Further Study of the Continued Applicability of the Pro Hac Vice Rules

The proposed language maintains the applicability of the current *pro hac vice* admission rules to in-house counsel, limiting their ability to appear before tribunals without the assistance of fully barred New York attorneys. Although maintaining these rules will diminish the benefits that in-house counsel can bring to those in need of representation in New York, some study is required to better understand whether applying these rules is necessary to protect clients in need. This study should be undertaken expeditiously.

Proposed Language:

The underlined and italicized language below has been drafted to empower New York registered in-house counsel to provide pro bono services, without unnecessary restrictions, but subject to the New York Rules of Professional Conduct.

§522.4 Scope of legal services

An attorney registered as in-house counsel under this Part shall:

(a) provide legal services in this State only to the single employer entity or its organizational affiliates, including entities that control, are controlled by, or are under common control with the employer entity, and to employees, officers and directors of such entities, but only on matters directly related to the attorney's work for the employer entity, and to the extent consistent with the New York Rules of Professional Conduct;

(b) not make appearances in this State before a tribunal, as that term is defined in the New York Rules of Professional Conduct (22 NYCRR 1200.0 Rule 1.0[w]) or engage in any activity for which *pro hac vice* admission would be required if engaged in by an attorney who is not admitted to the practice of law in this State;

(c) not provide personal or individual legal services to any customers, shareholders, owners, partners, officers, employees or agents of the identified employer; and

(d) not hold oneself out as an attorney admitted to practice in this State except on the employer's letterhead with a limiting designation.

---

http://www.courts.state.ny.us/ip/access-civil-legal-services/PDF/CLS-TaskForceREPORT.pdf.

§522.8 Pro bono services

§522.8 Pro bono services

An attorney registered as in-house counsel under this Part may also provide pro bono legal services in this State, and in the provision of such pro bono legal services the registered in-house counsel may:

> *(a) make appearances in this State before a tribunal, as that term is defined in Rule 1.0[w] of the New York Rules of Professional Conduct (22 NYCRR 1200.0), or engage in any activity for which pro hac vice admission would be required, only after having sought and obtained permission to make such appearances or engage in such activities in the same manner required of an attorney not admitted to the practice of law in this State; and*
>
> *(b) not hold oneself out as an attorney admitted to practice in this State except on letterhead with a limiting designation.*

The provisions of §522.4 shall not apply to the provision of such pro bono legal services.