

April 25, 2014

Illinois Supreme Court
Committee on Professional Responsibility
Attn: Richard A. Redmond, Chair
421 East Capitol Avenue
Springfield, Illinois 62701
Sent by email to richard.redmond@hklaw.com

Association of Corporate Counsel, its Chicago Chapter and Illinois Chief Legal Officers Urge Illinois to Adopt Ethics Rules to Help Companies Utilize In-House Foreign Lawyers and Leverage Their International Expertise

To the Illinois Supreme Court Committee on Professional Responsibility:

On behalf of the Association of Corporate Counsel, our Chicago Chapter, and the 28 Chief Legal Officers from Illinois companies listed below, we strongly urge the Committee on Professional Responsibility to propose amending the Illinois Rules of Professional Conduct to allow companies to more easily utilize and leverage foreign in-house lawyers.

In-house lawyers, like the companies in Illinois they work for, operate in an increasingly global economy. Organizations retain in-house lawyers around the world, and need to move them to work where they can best meet the companies' legal needs. Illinois should amend its rules of professional conduct to support that trend. It can do this by adopting a robust system for employing in-house foreign lawyers, which is our preference. As an alternative, Illinois could adopt more modest changes that the ABA recommended. Either option would improve the current system, which risks putting Illinois legal profession at a growing disadvantage in the global marketplace. The companies represented on the attached list of companies in Illinois reflect the global reach and diversity of the state's economy – and the need for a robust approach to international legal challenges in a competitive global marketplace.

I. About ACC, ACC's Chicago Chapter, and the Chief Legal Officers

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. For years, ACC has worked to expand lawyers' right to practice. That is, we try to remove unnecessary barriers within the U.S. and around the world that prevent in-house lawyers from working where their employers need to send them. ACC played a critical role in supporting the original version of ABA Model Rule 5.5(d), which allows U.S. companies to employ in-house lawyers whose law

licenses come from other states. ACC also worked with the ABA's 20/20 Commission as it proposed amendments to the Model Rules, including its expansion of Rule 5.5(d) and (e) to include foreign in-house lawyers, and its model registration rules.

ACC's Chicago Chapter has more than 2,000 in-house counsel members representing leading local, national and international companies. The chapter is dedicated to serving the needs and interests of the in-house counsel community in Chicago and the State of Illinois. It also promotes education, diversity, and opportunities for in-house counsel to work on pro bono matters. The Chicago Chapter deeply understands the global nature of the industries its members work in.

The 28 Chief Legal Officers and General Counsels listed below work at Illinois companies of all shapes and sizes. They understand that, to compete on the world stage, Illinois companies need to employ in-house counsel from around the world.

II. In-House Practice Requires A Broad Right to Practice Law

Essentially by definition, legal issues today cross borders. This is true for in-house lawyers, lawyers in private practice, and lawyers in government practice. The borders that the law and lawyers cross exist both domestically between states, and globally between countries. For in-house legal departments in particular, companies need the flexibility to choose in-house lawyers, and to move them around in order to meet constantly changing business and legal demands.

To support this trend, ACC supports a system allowing an in-house lawyer who is authorized to practice in his or her home jurisdiction to practice in other jurisdictions on behalf of his or her client-employer, by simply agreeing to submit to regulation by the appropriate authorities and be subject to the applicable rules in those jurisdictions. This system works extremely well for in-house legal departments. Companies can employ lawyers without worrying that a registration or bar requirement will cause any additional delay or expense.¹

Illinois already realizes some of the benefits of this approach, given that it has adopted Illinois Rule of Professional Conduct 5.5(d) and Illinois Supreme Court Rule 716. These rules already allow companies to retain in-house lawyers whose law licenses come from other U.S. jurisdictions, but the need is broader. Companies should be able to employ in-house lawyers with foreign law licenses or authorizations to practice on the same terms they currently retain in-house lawyers with licenses from states outside Illinois.

¹ For a more detailed discussion of ACC's approach to legal practice, *see* Response of the Assoc. of Corp. Counsel to the Request for Comment on the Proposals of ABA Comm'n on Ethics 20/20 Working Group - Inbound Foreign Lawyers (Jul. 2010) (*available at* <http://www.acc.com/advocacy/keyissues/mjp/upload/ACC-Comments-ABA-Ethics-20-20-WGIFL-7-10.pdf>).

III. The Global Market Requires Companies to Use Foreign In-House Lawyers

Illinois understands the need to take a global view of legal practice, given that its economy engages the whole world. Illinois has grown its stake in a wide range of international fields, such as finance, technology, food and consumer products, and seeks to secure its position in the global economy.² Doing so requires people and knowledge from around the country and around the globe. Not surprisingly, in-house legal practice in Illinois reflects this international focus. Companies seek advice from lawyers who understand the laws and regulations in many different countries, and who know when, and how, to partner with local counsel to solve problems unique to a given jurisdiction. They need the flexibility to employ in-house lawyers from around the world to work in the U.S.

This also holds true for the U.S. as a whole. The ABA 20/20 Commission report noted “the increasing number of foreign companies with substantial operations and offices in the U.S. as well as U.S. companies with substantial foreign operations.”³ It continued that companies and organizations “have an existing and growing need to employ in-house foreign lawyers in their U.S. offices.” *Id.* As a result, “[t]hese companies often find that this advice can be offered most efficiently and effectively if those lawyers relocate to a corporate office in the U.S.” *Id.*

The Conference of Chief Justices (“CCJ”) - the organization of state supreme court chief justices - reached the same conclusion. In supporting an earlier version of the 20/20 Commission’s proposal, the CCJ noted that “the number of foreign companies with offices and operations within the United States has grown rapidly over the past decade and is expected to continue to increase.”⁴ It continued that “the number of legal transactions and disputes involving foreign law and foreign lawyers is increasing as a result of these trends.” *Id.*

In short, as the 20/20 Commission urged, “the realities of client needs in the global legal marketplace necessitate that the ABA address more directly” a form of “practice authority for inbound foreign lawyers.” 20/20 *Model Rule 5.5 Report* at 3. A rule that expressly allows foreign in-house lawyers to freely serve their corporate employers in

² See, e.g., <http://www.illinois.gov/dceo/Pages/default.aspx> (Illinois Department of Commerce emphasizes state economy’s stake in technology and biological sciences); <https://www.illinois.gov/dceo/whyillinois/Pages/default.aspx> (Department of Commerce states “[i]n today’s global economy, Illinois connects you and your business to the world” and that Illinois is “home to worldwide corporations”).

³ ABA Comm’n on Ethics 20/20 Resol. and Report: Model Rule 5.5, Report at 1 (*available at* <http://tinyurl.com/ptvlg9y>) [“20/20 Model Rule 5.5 Report”].

⁴ Conf. of Chief Justices, *Resol. 13*, Endorsing in Principle the Recommended Changes to the ABA Model Rules Regarding Practice by Foreign Lawyers, July 28, 2010 (*available at* <http://tinyurl.com/nvfatz6>).

Illinois would enhance Illinois' stature as a business-friendly jurisdiction that is attractive to global businesses..

IV. Illinois Can Address These Client Needs By Making Small Changes to its Practice Rules

A. ACC's Preferred Recommendation

We recommend making three small changes to the Illinois rules:

- First, in Rule 716, make explicit that the rule applies to foreign lawyers on the same terms that it applies to U.S. lawyers from jurisdictions other than Illinois.
- Second, make clear that Rule 716 should apply to lawyers who are *either* licensed or authorized to practice in their home jurisdictions. In many countries, such as France or South Africa, lawyers must surrender their bar memberships before practicing in-house. But the law in those countries still authorizes the lawyers to practice in-house without law licenses. In others, such as the Netherlands and Lithuania, a license is not required for many facets of in-house practice. U.S. companies need to work with in-house lawyers, whether their countries use licenses or authorization to permit their in-house practice.
- Third, make conforming changes to Rule 5.5(d), so that it syncs up with these revisions to Rule 716.

After these changes, the relevant part of Rule 716 would read:

“A person who, as determined by the Board of Admissions to the Bar, has been licensed OR AUTHORIZED to practice in the highest court of law in any United States state, territory, or the District of Columbia, OR A FOREIGN JURISDICTION may receive a limited license to practice law in this state”

And the relevant part of Rule 5.5(d) would read:

“A lawyer admitted in another United States OR FOREIGN jurisdiction”

(Changes indicated in capital letters.)

This proposal would treat registered in-house lawyers the same, whether their authorization to practice comes from the U.S. or from abroad. As a result, it would require the same character and fitness review for both domestic and foreign lawyers.

As for effects, this system would let companies employ in-house lawyers and give them assignments according to the employers' business and legal needs. Equally important, ACC's proposed amendment would ensure that assignments fall within lawyers' areas of competence, in accordance with ABA Model Rule 1.1 and Illinois Professional Rule 1.1.

This proposed amendment would not set different limits on what an in-house lawyer can do, depending on whether the lawyer's authorization to practice comes from the U.S. or from a foreign country, as the ABA model rule described below requires.

Significantly, this proposal poses no risk to the public. Companies that retain in-house lawyers are sophisticated legal consumers. The foreign in-house lawyers that companies employ would work only for them, not for anyone in the public. The foreign lawyers will need to meet high levels of competence. And if the lawyers cannot meet expectations, their employers can fire them. Only the companies would be affected.

B. ABA's Less Robust Recommendation For Amending Rule 5.5

As an alternative, this Court might also consider adopting the changes that the ABA itself made last year to Model Rule 5.5, and to its model registration rules.⁵ These, while not ideal, at least offer a path for U.S. companies to retain foreign in-house lawyers. They would achieve the necessary minimum. If Illinois does adopt the ABA's suggestions, however, we strongly urge Illinois to remove the requirement for a separate character and fitness review, which is both cumbersome and unnecessary for foreign in-house lawyers who would be working with the advice of U.S. lawyers.

The ABA's new changes are modest. To qualify under them, a foreign lawyer must have an active membership in a foreign bar. She cannot work on any matter before courts that would require *pro hac vice* admission. She must only advise her employer and its affiliates. If she works on any U.S. legal matters, she must do so only "based upon the advice" of a lawyer who is licensed in the relevant U.S. jurisdiction to provide such advice. She only qualifies under the rules if she comes from a country that allows licensed lawyers to work in-house; lawyers from countries who must give up bar memberships to work in-house do not qualify under the ABA system.

Finally, while the changes to Model Rule 5.5 do not explicitly require it, ACC supports provisions requiring all foreign in-house lawyers to abide by the ethical and professional conduct rules of the jurisdictions where they practice.

These limits are strict – so strict, in fact, that ACC strongly protested many of them,⁶ and instead favors the stronger alternative discussed above. Crucially, we again emphasize that if Illinois adopts the ABA system, Illinois eliminate the requirement of cumbersome background checks. As is mentioned above, companies that utilize in-house lawyers are sophisticated legal consumers. They can determine on their own what level of legal risk to bear. Foreign in-house lawyers working under the ABA system must work under and with the advice of U.S.-licensed lawyers, who have themselves already gone through background checks.

⁵ The ABA's amendments to Rule 5.5 are in ABA Proposal 107A, and its amendments to the Model Registration Rule are in ABA Proposal 107B.

⁶ See Letter from ACC to ABA Comm'n on Ethics 20/20 (Oct. 12, 2012) (available at <http://tinyurl.com/mhh9w3w>).

If the Committee decides to follow the ABA approach, we ask that two changes be made. *First*, the ABA-recommended rule fails to accommodate in-house lawyers, such as those from France or South Africa, who must surrender their licenses upon entering the in-house bar. Other jurisdictions, such as the Netherlands or Lithuania, don't require licenses for many facets of in-house practice. Therefore, Illinois should modify that rule to incorporate foreign authorization to practice, in addition to licensure. *Second*, in order to avoid the unnecessary burden of character & fitness review for foreign in-house counsel registrants who would themselves be advised by US-trained lawyers, we recommend that their practice be authorized by Rule 5.5(d), without further registration under Rule 716.

Despite the limitations of the ABA system, it does provide in-house legal departments a needed path to work with foreign lawyers, thereby giving in-house legal departments at least a modest amount of flexibility in deciding how to deploy the foreign lawyers. Significantly, in the states that have adopted rules to allow in-house legal departments to make use of foreign lawyers, none have reported any violations of professional conduct rules.⁷

Therefore, ACC strongly urges Illinois to adopt a rule broadly authorizing foreign in-house lawyers to work for their client-employers in the state, or in the alternative, the more modest rules that the ABA has already approved.

V. Illinois Now Offers No Simple Way to Utilize Foreign In-House Lawyers

Despite the great need for Illinois companies to use foreign in-house lawyers, Illinois provides no efficient method to do so.

1) *Bar exams*: It is difficult for foreign lawyers to qualify to take the bar exam in Illinois. See Rule 715, which establishes high thresholds.⁸ Further, taking a new bar exam always presents a serious difficulty to experienced in-house lawyers.

2) *Admission on Motion*: Illinois does not permit foreign lawyers who have only licenses from outside the U.S. to apply for admission by motion.⁹

3) *Foreign Legal Consultant*: The Illinois rule allowing lawyers from other countries to work as foreign legal consultants also does not fit the needs of in-house legal departments and lawyers. Most important, the rule permits a foreign legal consultant to only provide advice and professional services regarding his or her home jurisdiction. In-house counsel

⁷ 20/20 Model Rule 5.5 Report at 1.

⁸ See also <https://www.ilbaradmissions.org/appinfo.action?id=3> (Illinois Board of Admissions to the Bar: Rule 715 Qualifying Graduates of Foreign Law Schools General Information).

⁹ See Rule 705, which applies by its terms only to “licensed to practice in the highest court of law in any United States state, territory, or the District of Columbia.”

are often tasked with identifying a range of legal issues across jurisdictions, and, if necessary, identifying a range of lawyers qualified to advise on those legal issues.

* * *

Making it easier for companies to employ in-house lawyers from foreign countries will greatly boost Illinois' ability to compete on the global stage. Companies need a wide choice of foreign counsel to accommodate their expanding global needs. The approaches described above – the broad ACC proposal and the narrower recent ABA revisions to Model Rule 5.5(d) and (e) – will meet those needs. Therefore, ACC, our Chicago Chapter, and the 28 Illinois Chief Legal Officers below strongly urge this Court to adopt one of them.

Sincerely yours,



Amar D. Sarwal
Vice President and
Chief Legal Strategist

Evan P. Schultz
Senior Counsel and
Director of Advocacy

V. Alexandra Darrow
President
ACC Chicago

Julia E. Jackson
Advocacy Liaison
ACC Chicago

* * *

Susan L. Lees
Executive Vice President, General Counsel and Secretary
Allstate Insurance Company

Andrew J. Long
General Counsel & Secretary
Applied Systems, Inc.

Paul M. Liebenson
GM - Regional General Counsel, North America
ArcelorMittal USA

Cameron Findlay
Senior Vice President, General Counsel & Secretary
Archer Daniels Midland Company

David P. Scharf
General Counsel
Baxter International Inc.

James B. Buda
Executive Vice President of Law and Public Policy
Caterpillar Inc.

James G. Ongena
Senior Vice President and General Counsel
Chicago Stock Exchange

Matt Myren
SVP, General Counsel and Secretary
Enesco, LLC

Thomas P. LaFrance
General Counsel
GE Transportation

Jared Schensky
Senior Vice President & General Counsel
InterCall, Inc.

Joseph C. Blasko
General Counsel
James Hardie Industries plc

Timothy P. Davisson
Vice President, Secretary & General Counsel
KapStone Paper & Packaging Corporation

David N. Goltz
VP and Corporate Counsel
KemperSports

Greg Collins
General Counsel & Sr VP
Levi, Ray & Shoup, Inc.

Gloria Santona
Executive Vice President, General Counsel and Secretary
McDonald's Corporation

Jonathan Cole
Vice President, General Counsel
Merisant Company

Gerd Pleuhs
Executive Vice President & General Counsel
Mondelez International

Richard Casey
Chief Legal Officer & Secretary
Nordex USA, Inc.

Daniel M. Leep
General Counsel
Old World Industries, LLC

Donna B. Coaxum
Senior Vice President, General Counsel & Secretary
OSI Group, LLC

Bruce L. Boruszak
Executive Vice President and General Counsel
Pine Tree Commercial Realty, LLC

Kenneth D. Greisman
Senior Vice President, General Counsel and Secretary
Takeda Pharmaceuticals International, Inc.
Takeda Pharmaceuticals U.S.A., Inc.

LaKeisha C. Marsh
Associate Vice President & Counsel
Office of Compliance and Legal Affairs
TCS Education System

Paul W. Doerscheln
General Counsel
United Service Companies, Inc.

Eric Robben
EVP & General Counsel
Veolia North America

Thomas Sabatino
Executive Vice President, General Counsel & Corporate Secretary
Walgreen Co.

Ellen O. Kollar
Senior Vice President, General Counsel
Wm. Wrigley Jr. Company

Dennis Kerrigan
Chief Legal Officer
Zurich North America