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Supreme Judicial Court of Massachusetts
Standing Advisory Committee
on the Rules of Professional Conduct
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*Association of Corporate Counsel Urges Massachusetts to Adopt Ethics Rules to
Help Companies Hire In-House Foreign Lawyers*

To the Standing Advisory Committee:

On behalf of the Association of Corporate Counsel and our Northeast Chapter, which includes Massachusetts, we strongly urge the Supreme Judicial Court to adopt additional changes to the Massachusetts Rules of Professional Conduct, to allow companies to more easily hire foreign in-house lawyers.

In-house lawyers, like the companies in Massachusetts they work for, operate in an increasingly global economy. Organizations hire in-house lawyers around the world, and need to move them to work where they can best meet the companies' legal needs. Massachusetts should amend its professional conduct rules to support that trend. It can do this by adopting a robust system for hiring in-house foreign lawyers, which is ACC's preference. Or Massachusetts could adopt more modest changes that the ABA made to Model Rule of Professional Conduct 5.5(d) and (e). Either option would improve the current system, which risks putting Massachusetts' legal profession at a growing disadvantage in the global marketplace.

I. About ACC and Our Northeast Chapter

ACC is a global bar association that promotes the common professional and business interests of in-house counsel, with over 33,000 members employed by over 10,000 organizations in more than 85 countries. For years, ACC has worked to expand lawyers' right to practice. That is, we try to remove 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 hire 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.

ACC's Northeast Chapter includes over 1,200 members working in companies and other organizations throughout Massachusetts and other New England states. The chapter offers monthly educational programs sponsored by local law firms that cover topics of interest to in-house counsel. It also supports strong advocacy, pro bono, and diversity initiatives, and holds an annual ethics award event honoring with scholarships selected law students from the twelve regional law schools. The Northeast Chapter deeply understands the global nature of the industries its members work in.

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 hire in-house lawyers, and to move them around, to meet constantly changing business and legal demands.

To support this trend, ACC supports a system allowing an in-house lawyer who is licensed and in good standing 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 other jurisdictions. This system works extremely well for in-house legal departments. Companies can hire lawyers without worrying that a registration or bar requirement will cause any additional delay or expense.¹

Massachusetts already realizes some of the benefits of this approach, given that it has adopted S.J.C. Rule 3:07, §5.5. That allows companies to hire in-house lawyers whose law licenses come from other U.S. jurisdictions. *See* S.J.C. Rule 3:07, §5.5(d)(1). But the need is broader. Companies should be able to hire in-house lawyers with foreign law licenses on the same terms they currently hire in-house lawyers with licenses from states outside Massachusetts.

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

Massachusetts no doubt understands the need to take a global view of legal practice, given that its economy engages the whole world. It includes renowned operations in information technology and computers, biotechnology, health, education, and other

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>).

vibrant industries.² All of these fields require people and knowledge from around the country and around the globe. Not surprisingly, in-house legal practice in Massachusetts reflects this international focus. Companies seek advice from lawyers who understand the laws and regulations of scores of different countries. They need the flexibility to hire in-house lawyers from around the world to work in the United States.

This also holds true for the U.S. as a whole. A 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 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.” *Rule 5.5 Report* at 3. So should Massachusetts.

IV. Changes to Rule 5.5 Offer a Needed Path to Hire Foreign In-House Counsel

A. ACC’s Stronger Recommendation For Amending Rule 5.5

To incorporate ACC’s view into the Massachusetts practice rules, we recommend treating domestic and foreign in-house lawyers the same under S.J.C. Rule 3:07, §5.5. A simple fix amending the current version of Massachusetts Rule 5.5(d) to state: “[a] lawyer admitted in another United States OR FOREIGN jurisdiction . . .,” with the amendment in capital letters, would accomplish this goal.

ACC’s proposed amendment would let companies hire in-house lawyers and give them assignments according to the employers’ business and legal needs. Equally important,

² See, e.g., Mass. Tech. Collaborative, *Annual Index of the Massachusetts Innovation Economy*, Dec. 2012 (available at <http://index.masstech.org>).

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>).

ACC's proposed amendment would ensure that assignments fall within lawyers' areas of competence, in accordance with ABA Model Rule 1.1 and S.J.C. Rule 3:07, §1.1, whether the in-house lawyer has a license from the U.S. or from abroad. This proposed amendment would not set different limits on what in-house lawyer can do, depending on whether the lawyer's license comes from the U.S. or from a foreign country, as the ABA model rule described below requires.

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 this year to Model Rule 5.5 (d) and (e). These, while not ideal, at least offer a path for U.S. companies to hire foreign in-house lawyers. They would achieve the necessary minimum.

The ABA's new changes to Rule 5.5(d) and (e) 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. And 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. And while Model Rule 5.5 does not explicitly require it, ACC supports provisions requiring all in-house lawyers to abide by the ethical and professional conduct rules of the jurisdictions where they practice, at the risk of sanctions.

These limits are strict – so strict, in fact, that ACC strongly protested many of them,⁵ and favors the stronger alternative discussed above. That said, the ABA's changes to Rule 5.5 do provide in-house legal departments a needed path to hire foreign lawyers, and they give in-house legal departments at least a modest amount of flexibility in deciding how to deploy the foreign lawyers.

Significantly, in the seven states that have adopted rules to allow in-house legal departments to hire foreign lawyers, none have reported any violations of professional conduct rules.⁶

Therefore, ACC strongly urges Massachusetts to adopt a rule broadly authorizing foreign in-house lawyers to work for their client-employers in the state, or in the alternative, the changes to Model Rule 5.5(d) and (e) that the ABA has already approved.

V. *Massachusetts Now Offers No Simple Way to Hire Foreign In-House Lawyers*

Despite the great need for companies in the United States to hire foreign in-house lawyers, Massachusetts provides no efficient method to do so. Instead, foreign lawyers wishing to work in-house now need to take the Massachusetts Bar Exam, seek admission

⁵ See *Letter from ACC to ABA Comm'n on Ethics 20/20* (Oct. 12, 2012) (available at <http://tinyurl.com/mhh9w3w>).

⁶ *20/20 Model Rule 5.5 Report* at 1.

on motion, or practice as foreign legal consultants. The ethics rules governing these routes anticipate that foreign lawyers will work in the state's legal environment. But each poses serious problems for in-house counsel.

1) *Bar exams*: Massachusetts should not force foreign lawyers to take the local bar exam, given that doing so offers no benefit to the lawyers' employers or the public. Taking a new bar exam always presents a serious difficulty to experienced in-house lawyers, whether their law licenses come from other states in the U.S., or from other countries. To apply for and study for the exam, in-house lawyers need to take weeks or even months off from their careers, and from ongoing responsibilities to their clients.

Worse, for many foreign lawyers wishing to take the bar exam, Massachusetts imposes a separate approval system that precedes and adds to the already cumbersome process of applying to take the bar exam. *See* S.J.C. Rule 3:01, §3.2; Bd. of Bar Exam. Rule VI. Specifically, the Board of Bar Examiners must usually make a "determination of educational sufficiency," Bar Rule VI.3, which takes at least four months to process. Bar Rule VI.2.⁷ And the Board of Bar Examiners retains discretion to require the applicant to take "further legal studies" before sitting for the exam. S.J.C. Rule 3:01, §3.2; Bar Rule VI.4.

Perhaps most important, in-house lawyers – both foreign and domestic – pose no risk to any client, or to the legal system. When a company hires in-house lawyers, except for pro bono matters, those lawyers will represent *only* that company and its affiliates. So if they cause a problem for the company, they expect that the company itself will take appropriate action. The need to guard against malpractice, in the sense of protecting a vulnerable and unsuspecting client from an incompetent or malicious lawyer, is much-reduced in the in-house context. In-house legal departments are sophisticated players in the legal market, so companies can fully calibrate the legal risk they wish to bear.

2) *Admission on Motion*: For foreign lawyers seeking to work in-house in Massachusetts, admission on motion under S.J.C. Rule 3:01 §6 presents many of the same problems as admission by exam, along with new ones.

Just like with exam applicants, those seeking admission on motion must submit to the same drawn-out pre-clearance process. The Board of Bar Examiners can require applicants to take additional law school classes. And the long approval process grants no benefit to in-house legal departments, given that companies themselves are best suited to gauge the level of legal risk they can comfortably bear.

Additionally, the admission on motion rule helps only foreign lawyers who have already clocked several years working in the U.S. It requires applicants to have "been admitted" in another jurisdiction "of the United States" for at least five years, and to have practiced

⁷ *See also Seeking an Advanced Determination of Eligibility to Apply for Admission* (May 2012), available at <http://www.mass.gov/bbe/foreignstop.pdf>. The bar rules do cut down red tape for graduates of Canadian law schools. *See* Bar Rules VI.2 and VI.7.

for five of the past seven years, again, in “the United States.” S.J.C. Rule 3:01, §6.1.1. These requirements starkly limit the number of foreign lawyers who qualify for admission on motion. Further, to the extent that companies in Massachusetts want to hire foreign lawyers with full fluency in their own countries’ laws, these rules may pose a serious obstacle, given that they require the lawyer to have worked for so long in the U.S.⁸

3) *Foreign Legal Consultant*: The Massachusetts 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. The rule has several limits, which generally restrict the usefulness of this category of practice license for in-house legal departments. We note three of the most significant restrictions here:

- First, the governing rule, S.J.C. Rule 3:05, does not clearly account for in-house legal practice within its explicit terms. The rule itself stays silent on this question so crucial to in-house legal departments. As one recent article stated more generally about practice by foreign lawyers in Massachusetts, “[t]he boundaries are somewhat unclear.” That unfortunate conclusion certainly describes how the foreign legal consultant rule applies to in-house practice.⁹
- Second, the rule encourages reciprocity. That is, the state can “take into account whether a member of the bar of this Commonwealth would have a reasonable and practical opportunity to establish an office for the giving of legal advice to clients in the applicant’s country of admission.” S.J.C. Rule 3:05, §3. Reciprocity subjects the needs of clients to the whims of state-to-nation diplomacy. The source of the lawyer’s law license, of course, has nothing to do with what clients need. The rule essentially subjects clients to a roulette wheel, with everything riding on where the lawyers’ licenses happen to come from. Worse, the reciprocity system places lawyers’ own economic interests over the needs of clients.
- Third, the rule flat-out prohibits foreign legal consultants from working on any U.S. legal issues. S.J.C. Rule 3:05, §5. Specifically, the rule states that they cannot “render professional legal advice on the law of this Commonwealth or of the United States of America (whether rendered incident to the preparation of legal instruments or otherwise).” *Id.* at §5.1(e). That is simply untenable for in-house practice. In order to properly advise their clients about foreign legal issues, in-house lawyers may well need to refer to U.S. law, for instance, to compare it to the laws of other countries. And in-house legal departments often staff leanly – at the very least, foreign in-house lawyers need the ability to work with U.S.-licensed lawyers on issues that span international borders. The foreign legal consultant rule seems to prohibit that.

⁸ Just like with applicants seeking to take the bar, applicants for admission on motion who graduated from law schools in Canada need to jump over fewer hurdles than other foreign lawyers. See S.J.C. Rule 3:01, §6.2.; Bar Rules VI.2 and VI.7.

⁹ Robert Muldoon Jr. and Debra Squires-Lee, MASS. LAW. WKLY., *Foreign Lawyers in Massachusetts: Rules and Regs* (Feb. 4, 2013).

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Overly strict rules that prohibit experienced lawyers with law licenses from elsewhere from practicing in Massachusetts will harm the ability of companies in Massachusetts to compete on the global stage. Companies need a wide choice of foreign counsel to accommodate their expanding global needs. Massachusetts clearly understands the importance of foreign lawyers in today's increasingly global economy. That's why it already provides three paths for foreign lawyers to work in the state. Unfortunately, none of them meet the needs of in-house legal departments. 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 and our Northeast Chapter strongly urge this Court to adopt one of them.

Sincerely yours,



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