

September 30, 2014

Chief Justice Mark Martin  
North Carolina Supreme Court  
Justice Building  
P.O. Box 1841  
Raleigh, NC 27602-1841  
*Sent by U.S. Post*

*RE: Association of Corporate Counsel Urges North Carolina to Adopt Proposed Changes to Rule 5.5 to Help Companies Hire In-House Foreign Lawyers*

Dear Chief Justice Martin:

On behalf of the Association of Corporate Counsel, we are writing to strongly support the proposal from the North Carolina Bar Association to amend Rule 5.5 of the North Carolina Rules of Professional Conduct, to allow companies to more easily hire foreign in-house lawyers.

The proposal correctly recognizes that in-house lawyers, like the companies in North Carolina 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 companies' legal needs. While we support the pending proposal, we urge this Court to go even further. Either option would improve the current system, which does not do enough to keep pace with North Carolina's growing place in the global marketplace. Both options also recognize that the organizations that employ in-house counsel are sophisticated legal customers who can themselves determine what level of risk to bear.

***I. About ACC***

ACC is a global bar association that promotes the common professional and business interests of in-house counsel, with over 35,000 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.

## ***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.<sup>1</sup> Crucially, since companies that utilize in-house lawyers are sophisticated legal consumers, they can determine on their own what level of legal risk to bear.

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

North Carolina understands the need to take a global view of legal practice, given that its economy engages the whole world. Charlotte today has become the second largest banking center in the United States. The Research Triangle, anchored by three universities, has grown into a world-class incubator for advances in technology, health, and other sciences. According to the state Department of Commerce, North Carolina ranks tenth in America for employment supported by foreign direct investment. Dozens of foreign businesses have opened operations in the state. And North Carolina serves as the home to the headquarters of twelve Fortune 500 companies.

In-house legal practice in North Carolina 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.”<sup>2</sup> 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.*

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<sup>1</sup> 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*

<sup>2</sup> *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”].

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."<sup>3</sup> 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. The pending proposal hopefully demonstrates that North Carolina agrees.

#### ***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***

The pending amendments essentially follow the ABA's good but modest recommendations for change. But North Carolina can go further.

To incorporate ACC's view into the North Carolina ethics rules, we recommend treating domestic and foreign in-house lawyers the same under Rule 5.5. Specifically, North Carolina can strengthen the proposal in two ways:

1) North Carolina should let companies hire in-house lawyers and give them assignments according to the employers' business and legal needs. Under the current proposal, the work of foreign in-house lawyers often must be "based upon the advice" of lawyers licensed in the U.S. That rule belittles the foreign in-house lawyers, and forces companies to use two lawyers when one can do the job. The touchstone should be whether a lawyer has the competence to perform a given assignment -- the same standard that North Carolina Rule 1.1 already imposes, and which would apply to foreign in-house lawyers.

2) The proposal to amend rule 5.5(i) limits North Carolina companies and organizations to hiring "member in good standing of a recognized legal profession." This is a significant flaw in the ABA proposals, which North Carolina should avoid. The amendment would make it impossible for North Carolina companies to hire in-house lawyers from many countries, such as France, that require lawyers to surrender their bar membership before moving in-house. Instead, Rule 5.5 should allow companies to hire any in-house lawyer with authorization to practice law, with or without a formal membership in a bar association. That is the best way to meet the in-house legal needs of North Carolina's global companies.

##### ***B. The Pending Less Robust Recommendation For Amending Rule 5.5***

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<sup>3</sup> 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>).

As a weaker alternative, this Court can also consider adopting the proposal from the North Carolina Bar Association. While weaker than what ACC prefers, the proposal at least offers a path for U.S. companies to hire foreign in-house lawyers. It would achieve the necessary minimum. But, for the reasons described in the immediately preceding part, the proposal does impose strict limits, along the lines that American Bar Association suggested. These limits are so strict, in fact, that ACC strongly protested many of them,<sup>4</sup> 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.

Therefore, ACC strongly urges North Carolina 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 changes to Rule 5.5 in the pending proposal.

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To compete in the global economy, North Carolina needs to allow companies to hire and deploy in-house lawyers from other countries. The approaches described above – the broad ACC proposal and the narrower pending proposal – will meet those needs. And both recognize that companies that hire in-house counsel are by definition sophisticated legal customers who can themselves determine who much risk to bear. Therefore, ACC strongly urges this Court to adopt one of them.

Sincerely yours,



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<sup>4</sup> See *Letter from ACC to ABA Comm'n on Ethics 20/20* (Oct. 12, 2012) (available at <http://tinyurl.com/mhh9w3w>).