Association of Corporate Counsel

1025 Connecticut Avenue, NW, Suite 200
Washington, DC 20036-5425 USA
tel +1 202.293.4103
fax +1 202.293.4701
www.acc.com

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John W. McConnell, Esq.
Counsel
Office of Court Administration
25 Beaver Street, 11th Floor
New York, NY 10004

Re: Proposed amendment of 22 NYCRR Parts 522 and 523 of the Rules of the Court of Appeals

Dear Mr. McConnell:

The Association of Corporate Counsel ("ACC"), our New York chapters, and the XX chief legal officers from the New York companies listed below are writing to express our strong support for the amendments to Parts 522 and 523 of the New York Court of Appeals rules that would allow foreign lawyers to practice as in-house counsel in the state of New York, both on a long-term (Part 522) and temporary (Part 523) basis.

There are currently 21 U.S. jurisdictions that allow foreign lawyers to either practice temporarily in the jurisdiction or permanently as in-house counsel.[1] Given New York's position as a center of global commerce, New York's absence from this group is conspicuous. The proposed amendments to Parts 522 and 523 present an opportunity to rectify this outlier status and reinforce New York's commitment to being a business-friendly state. We also encourage the New York Court of Appeals to adopt a more inclusive definition of foreign lawyers under these rules so that lawyers from foreign jurisdictions where in-house counsel are not allowed to be admitted members of the bar (but who are authorized to provide legal services in-house) may practice in-house in New York.

I. About ACC and its New York Chapters

ACC is a global bar association that promotes the common professional and business interests of in-house counsel, with more than 40,000 members employed by over 10,000 organizations in more than 75 countries. For years, ACC has worked to remove unnecessary barriers within the United States and around the world that prevent in-house lawyers from working where their employers need to send them. ACC played a critical

[1] See, "Jurisdictions with Rules Regarding Foreign Lawyer Practice," prepared on Oct. 13, 2015 by Prof. Laurel Terry, Dickinson School of Law, Pennsylvania State University. Available at: http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mjp_8_9_status_chart.authcheckdam.pdf. Also, on October 15, 2015, the Illinois Supreme Court entered an order amending its rules to allow foreign in-house counsel to practice in the state.

role in supporting the original version of ABA Model Rule 5.5(d), which allowed U.S. companies to employ in-house lawyers whose law licenses come from other U.S. states. ACC also worked with the ABA's Commission on Ethics 20/20 as it proposed amendments to the Model Rules, including the expansion of ABA Model Rule 5.5 to include foreign in-house lawyers.

ACC's three New York chapters represent Central and Western New York, Greater New York, and Westchester County (with part of Connecticut). These chapters have more than 2,300 in-house counsel members in New York representing leading local, national and international companies. The chapters are dedicated to serving the needs and interests of the in-house counsel community in New York by promoting education, diversity, and opportunities for in-house counsel to work on pro bono matters. The chapters have supported past efforts to expand the ability on lawyers licensed in other states to practice as in-house counsel in New York and provide pro bono services.

II. The Global Nature of New York's Economy Makes Foreign In-House Lawyers a Valuable Resource for New York Businesses

No one needs to tell the state of New York about the global nature of today's business world and the need for lawyers to be able to cross international borders to serve their business clients. New York is home to 54 of the world's Fortune 500 companies, the most of any U.S. state. It is the third largest economy in the United States and if it were a country, it would have the 14th largest economy in the world. International trade is a fixture of the New York economy – according to the U.S. Department of Commerce, New York has over $88 billion statewide in international exports, and more than 40,000 New York companies are involved in exporting goods out of the state.[2] As business issues cross borders, so do legal issues.

A rule that allows foreign in-house lawyers to freely serve their corporate employers in New York will enhance New York's stature as a center of global commerce. In 2010, three of New York's largest bar associations recognized the need for foreign lawyers to be admitted as in-house counsel in New York when they recommended that the New York Court of Appeals adopt a proposal similar to the Part 522 and 523 amendments currently under consideration. The bar associations noted that New York's outlier status on the issue "undermines the State's position as a business and non-profit capital of the world."[3]

The international nature of New York's economy is reflected in the issues faced by its in-house lawyers. Based on an analysis utilizing data from the 2015 ACC Global Census of in-house lawyers, 62 percent of respondents from New York reported having cross-border or multi-national work responsibilities. New York in-house lawyers also reported,

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[2] "New York Exports, Jobs, and Foreign Investment," prepared by the Office of Trade and Economic Analysis, International Trade Administration, U.S. Department of Commerce. Available at: http://www.trade.gov/mas/ian/statereports/states/ny.pdf.

[3] "Proposed Rules for Licensing of In-House Counsel," November 2010, New York State Bar Association, New York City Bar Association, New York County Lawyers' Association, p. 4.

on average, having about a third of their workload involve cross-border or multi-national issues. ACC's general counsel members have told us that restrictions on bringing foreign in-house counsel to practice in the United States makes it harder for multi-national companies to leverage the full experience of their in-house legal departments. Foreign lawyers working for the company abroad will have different subject matter expertise than their U.S. counterparts, but unlike foreign outside counsel, will still have history with the company and familiarity with the company's risk profile and governance procedures. U.S. restrictions on foreign in-house counsel also mean that a company cannot bring its foreign lawyers to the United States so they can assist more closely on U.S. legal matters. Working on U.S. legal matters alongside the company's U.S. attorneys would help the foreign lawyers learn the U.S. laws that affect the company. As the foreign lawyers gain competence in the U.S. laws, they will be able to work on U.S. matters independently and carry that ability with them when they work abroad. We note that the New York proposal is especially well-suited for this type of educational experience because it does not limit foreign lawyers working on U.S. legal matters to doing so only "based upon the advice" of a lawyer who is licensed in the relevant U.S. jurisdiction to provide such advice.

III. The Proposed Amendments to Parts 522 and 523 Present Little Risk of Harm to the Public or the Legal Profession While Helping to Meet the Needs of New York Businesses

In 2011, New York adopted a rule allowing a limited New York law license for in-house lawyers licensed in other U.S. states. We are unaware of any ill-effects stemming from adoption of this rule, and in fact have heard from our New York members that clarity as to their practice status was a welcome change. We believe the same effects would be derived from the current proposals to extend Parts 522 and 523 to foreign lawyers. Because the limited license under Part 522 is only valid for in-house practice, the amendments would have no effect on legal services provided to the general public. Nor is there risk of harm to the companies employing the foreign in-house lawyer. Companies large enough to have foreign in-house lawyers are sophisticated consumers of legal services. They have an on-going employment relationship with the foreign lawyer and are able to evaluate the foreign lawyer's competence and quality of work.

Moreover, under both rules, a foreign lawyer would be subject to the disciplinary jurisdiction of New York. If the foreign in-house lawyer acted unethically, New York would be able to take disciplinary action against the foreign lawyer.

IV. The New York Court of Appeals Should Consider a Broader Definition of Foreign Lawyers Eligible Under the Rules

While we commend New York for proposing these rules that recognize the international nature of corporate legal practice, we urge the Court of Appeals to consider adopting language that would allow a broader range of foreign lawyers to practice temporarily or register as in-house counsel in New York. Proposed Part 522.1(b)[4] applies to a foreign

[4] We focus on the language in Part 522.1(b) for this discussion, but we would make the same arguments with respect to Part 523, as that applies to lawyers "admitted and authorized to practice," (emphasis added).

lawyer who is:

> A member in good standing of a recognized legal profession in a foreign (non-U.S.) jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent and subject to effective regulation by a duly constituted professional body or public authority.

The problem with this language is that it would exclude foreign in-house lawyers from jurisdictions where in-house lawyers are either not required or not permitted to hold law licenses. In these jurisdictions, in-house lawyers may not be admitted to practice and would not be regulated by a professional body or public authority. They would also be unable to satisfy the proof requirements found in Part 522.2, as they would not have the ability to obtain a certificate of good standing or letter from a grievance committee.

These requirements in the proposed rule would have a huge impact on the rule's applicability to foreign in-house lawyers. According to research conducted by the National Organization of Bar Counsel, more than 70% of the world's countries do not require in-house counsel to be members of the bar.[5] These are not jurisdictions with nascent corporate legal practices, but rather established and important global commerce partners such as France, Italy, China, Japan, India, and South Africa, to name just a few of the countries where in-house counsel are not even permitted to be members of the bar. The countries that do not require bar admission of in-house counsel still have stringent requirements for these lawyers. Generally, they are required to complete the same legal education requirements and often the same competency exams or apprentice requirements that lawyers in private practice must complete.

That is why the ACC endorses an approach to the admission of foreign in-house counsel that uses the language "authorized to practice." We would suggest the below change to the proposed language in Part 522.1(b):

> A member in good standing of a recognized legal profession in a foreign (non-U.S.) jurisdiction, the members of which are admitted or authorized to practice as lawyers or counselors at law or the equivalent ~~and subject to effective regulation by a duly constituted professional body or public authority~~.

This change would make the rule applicable to vastly more foreign in-house lawyers.[6] The ACC recently proposed similar language in Illinois, and Illinois

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[5] National Organization of Bar Counsel, "The Regulation of In-House Counsel – Overview of Research Trends," March 2015. Available at: http://nobc.org/docs/Global%20Resources/In%20House%20Counsel%20-%20Research%20OverviewMarch2015.pdf.

[6] To account for those jurisdictions that do not require a license to practice in-house we would also suggest changing the language in Part 522.1(b)(3) from "would similarly permit an attorney admitted to practice in this State to register as in-house counsel," to "would similarly permit an attorney admitted to practice in this State to *practice in the jurisdiction as in-house counsel*."

recently adopted that language in its new Rule 5.5 and in-house registration rule. Illinois now allows lawyers "admitted or otherwise authorized to practice in a foreign jurisdiction," to register as in-house counsel in Illinois. Illinois Rule 5.5(e) states that "the foreign lawyer must be a member in good standing of a recognized legal profession in a foreign jurisdiction." In the commentary to Rule 5.5(e) it is recognized that "structure and procedures vary among foreign jurisdictions," and that in considering the admission of a foreign lawyer from a jurisdiction where in-house counsel are not subject to regulation and discipline, "other attributes of the system must be considered to determine whether they supply assurances of an appropriate legal background."

We think the approach adopted by Illinois strikes an ideal balance between the need for companies to be able to employ foreign lawyers from legal systems with different structures and the need for the state to have some assurance of the competence of foreign lawyers admitted under the rule. As New York's proposed approach would exclude foreign lawyers from 70% of the world's jurisdictions, we strongly urge New York to adopt a broader approach and use the "authorized to practice" language.

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Companies need a wide choice of foreign counsel to accommodate their expanding global needs. We urge New York to consider our modification to the proposed amendment to Part 522. If New York does not adopt our suggested modification, we still strongly support the proposed amendments to Parts 522 and 523. Making it easier for companies to employ in-house lawyers from foreign countries will greatly boost New York's ability to compete on the global stage. We strongly urge the New York Court of Appeals to adopt the amendments to these rules.

Sincerely yours,

Amar D. Sarwal
Vice President and
Chief Legal Strategist
Association of Corporate Counsel
sarwal@acc.com

Mary L. Blatch
Director of Government and
Regulatory Affairs
Association of Corporate Counsel

Brian Campbell
President
ACC Greater New York

Dobbyn Colm
President
ACC Westchester County NY/Southern Connecticut

David Mowry
President
ACC Central & Western New York