

October 15, 2014

The Honorable Shawn-Michael Malone
Senate President, 30th Legislature of the U.S. Virgin Islands

The Honorable Samuel Sanes, Chair, Committee on Rules and Judiciary

The Honorable Clifford Graham, Chair, Committee on Finance

Via hand delivery

Re: Association of Corporate Counsel supports legislation to restore companies' right to employ qualified lawyers in order to increase economic activity in the United States Virgin Islands

Dear President Malone, Chairman Sanes, and Chairman Graham:

On behalf of the Association of Corporate Counsel, we are writing to strongly support a proposed bill that would permit in-house counsel from other jurisdictions to work for their client-employers. The summary of the pending bill correctly states that “[t]he ability of companies to freely move with in-house counsel is a necessity in today’s interconnected and heavily regulated business world.” Forty-seven states in the U.S. already recognize that reality in their rules. This is an opportunity for the Virgin Islands to join them, and to surpass Puerto Rico, in encouraging economic development. For the benefit of the corporations our members serve, we ask the U.S. Virgin Islands Legislature to pass the proposed bill as soon as possible.

Currently, *every state in the U.S. except for three* encourages economic development by allowing companies to hire in-house lawyers with law licenses from elsewhere without taking a local bar exam. Like those 47 states, the U.S. Virgin Islands seek to attract foreign investment from multinational corporations and the economic benefits they produce. But to achieve their business objectives, these companies need the flexibility to move their in-house lawyers to different locations. Unfortunately, the Virgin Islands’ current approach to in-house counsel practice places unnecessary and unjustified burdens on Virgin Islands in-house lawyers who are licensed to practice in other jurisdictions. Not only does this approach harm Virgin Islands companies who have already chosen to locate on the islands, but it will also directly affect the relocation or investment decisions of companies from other jurisdictions.

Fortunately, the proposed bill would address this harm by permitting in-house counsel to counsel their client-employer after providing notification to the Virgin Islands Supreme Court. Doing so would follow the model rules of the American Bar Association, as well

as the decisions of 47 states within the U.S.¹ In short, passing the bill would bring the Virgin Islands more into line with the laws of the overwhelming majority of states in the U.S. that eagerly host vibrant economic hubs. Doing so would place the U.S. Virgin Islands on a level playing field with these economic engines in the United States, and would place it in a much more competitive situation than Montana, Mississippi, Hawaii, or Puerto Rico.

I. ACC represents in-house lawyers from companies around the world that are deeply concerned about the Supreme Court’s decisions and support the proposed bill.

ACC is a global bar association that promotes the common professional and business interests of in-house counsel. Since its founding in 1982, ACC has grown to become the world’s largest organization serving the professional and business interests of lawyers who practice in private-sector legal departments. ACC has over 35,000 members employed by over 10,000 organizations in more than 75 countries. For years, ACC has worked to remove obstacles that can make it difficult for in-house lawyers to practice law for their employers.

ACC has worked to reform rules governing right-to-practice and multi-jurisdictional practice since the Association’s inception. ACC participated in the ABA Multijurisdictional Practice Task Force that drafted ABA Model Rule 5.5(d),² which permits in-house counsel to work in various states without taking bar exams. We have in the past encouraged other jurisdictions to refrain from implementing unnecessary and burdensome requirements for in-house counsel.

¹ See Am. Bar. Assoc., *State Implementation of ABA Model Rule 5.5* (Oct. 16 2014) http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/quick_guide_5_5.authcheckdam.pdf, listing 45 states. In addition, Texas and New York allow in-house lawyers with law degrees from elsewhere to work for their employers.

² ABA Model Rule 5.5(d) states:

- (d) A lawyer admitted in another United States jurisdiction or in a foreign jurisdiction, and not disbarred or suspended from practice in any jurisdiction or the equivalent thereof, may provide legal services through an office or other systematic and continuous presence in this jurisdiction that :
- (1) are provided to the lawyer’s employer or its organizational affiliates; are not services for which the forum requires pro hac vice admission; and, when performed by a foreign lawyer and requires advice on the law of this or another jurisdiction or of the United States, such advice shall be based upon the advice of a lawyer who is duly licensed and authorized by the jurisdiction to provide such advice; or
 - (2) are services that the lawyer is authorized by federal or other law or rule to provide in this jurisdiction.

ACC takes the position that, 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.³ This system has worked extremely well for in-house legal departments. Companies can hire lawyers without worrying that unnecessary bar admission requirements will cause any additional delay or expense.

For that reason, 47 states have modified their rules to allow for multijurisdictional practice by in-house counsel on the behalf of their sophisticated client-employers. All of them allow in-house lawyers with law licenses from elsewhere to give legal counsel to their employers. But the U.S. Virgin Islands do not. Just like the Virgin Islands, those states are seeking economic development. Fortunately, the proposed bill would restore much of the substance of the ABA model rule to the Virgin Islands, while incorporating a notification requirement,⁴ allowing the Virgin Islands to be on an even playing field with the great majority of U.S. jurisdictions.

II. The proposed amendment meets companies' need to move in-house lawyers between jurisdictions, which current law hinders.

The proposed bill addresses the needs of companies to move in-house lawyers between offices. In today's interconnected economy, legal issues today cross borders. Significant and increasing numbers of in-house counsel have practices that span many U.S. jurisdictions, and even multiple countries. Forcing these in-house lawyers to take a new bar exam throws an obstacle into their path that does not parallel the reality of their day-to-day practice, or the needs of their client-employers.

It is particularly frustrating to see the Virgin Islands head in the wrong direction, because the Virgin Islands has an especially good understanding of companies' need for flexibility in today's mobile economy. For instance, the U.S. tax code encourages companies to come to the Virgin Islands. *See, e.g.*, 26 U.S.C. § 934(b)(3)(A-B) (discussing taxes for "certain foreign corporations"). And the Virgin Island's own laws emphasize "the promotion of the growth, development and diversification of the economy of the Virgin Islands." 29 V.I.C. § 701.

³ 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>).

⁴ The proposed bill would require in-house counsel from other jurisdictions to inform the Virgin Island Supreme Court of their presence within the jurisdiction. This modification to the ABA model rule addresses any objection that the Supreme Court would not know who is practicing in the Virgin Islands.

III. The U.S. Virgin Islands should join the overwhelming majority of states in the U.S. that have already adopted rules similar to the bill.

Forty-seven states have already adopted some version of ABA Rule 5.5. As a result, the U.S. Virgin Islands now joins a tiny minority of jurisdictions, which includes only Mississippi, Montana, Hawaii, and Puerto Rico. States that focus on economic growth have chosen the better route, one which the U.S. Virgin Islands should also take.

That rule allows in-house counsel with law licenses from other states to advise their client-employers. It is significant that such an overwhelming majority of states in the U.S. have made this policy decision. They understand that in-house lawyers best help their client-employers to follow the law when companies have the flexibility to post in-house lawyers where the companies need them. That great majority of states also understand that no harm comes about when these in-house lawyers advise only their employers, who are sophisticated legal consumers. They have the ability to decide what works best for them, in a way that will ensure they receive the legal advice they need without any harm accruing to anyone else. The results have been strong. Indeed, we have heard of few or zero instances in which in-house lawyers have in any way abused the rules. If they did, of course, their own employers could punish them, or even fire them.

Indeed, even the small minority of jurisdictions that do not follow Rule 5.5, some allow more flexibility than the Virgin Islands. Mississippi allows lawyers from some jurisdictions to waive in on motion after working for five years.⁵ And Puerto Rico allows admission by motion for people who have practiced in the federal district court there.⁶

IV. There is no good policy reason to bar in-house counsel with licenses from elsewhere.

In ACC's experience across the country, in-house counsel are less likely to cause any concern to the bar, its regulators, or to the public than other groups of lawyers. This is especially so for experienced in-house lawyers, who have already proven themselves to their employers. Employers will derive no benefit by forcing their existing in-house lawyers to go through the gauntlet of taking another bar exam.

The fact that in-house lawyers are careful about meeting their professional and ethics obligations stems from their unique status.⁷ Companies that hire in-house lawyers are

⁵ Rules Governing Admission to the Mississippi Bar, Rule VI, Admission by Comity and Reciprocity (*available at* http://courts.ms.gov/rules/msrulesofcourt/rules_admission_msbar.pdf).

⁶ See 4 L.P.R.A. § 722, Admission to practice--Admission on motion.

⁷ See Third Restatement of the Law Governing Lawyers, §3, comment f ("*Multistate practice by inside legal counsel*). States have permitted practice within the jurisdiction by inside legal counsel for a corporation or similar organization, even if the lawyer is not locally admitted and even if the lawyer's work consists entirely of in-state activities, when all of the lawyer's work is for the employer-client (compare §4, Comment e) and

sophisticated legal customers, with extensive experience in the legal marketplace, negotiating rooms, and courtrooms. When a company hires in-house lawyers, those lawyers will represent that company and its affiliates. So if the in-house lawyers cause a problem for the employer, they expect that the company will punish them, or even fire them. The need to guard against malpractice, in the sense of protecting a client from an incompetent or malicious lawyer, is therefore much reduced in the in-house context.⁸

ACC has encountered objections in the past from some admitted lawyers that they might lose work if the bar rules permit multijurisdictional practice by in-house counsel. Not only does this objection contradict the experience of the 47 jurisdictions that have permitted such practice, but it also runs counter to the experience of in-house counsel who, when hired by a company, find legal issues that need to be addressed and therefore retain outside lawyers (licensed in the appropriate jurisdiction) to assist them. Like the old witticism that a town cannot support one lawyer, but could certainly support two, the outside bar in the Virgin Islands will benefit from having more sophisticated legal counsel inside companies.

Of course, on occasion individual lawyers will fail to meet ethical requirements. *See, e.g., In re Motylinsky*, 2014 WL 714522 (Feb. 25, 2014). The fact that some lawyers ignore rules does not justify barring an entire class of in-house lawyers from providing necessary legal advice to their employers and clients. The Virgin Islands Supreme Court could have barred the in-house counsel in *Motylinsky* from practicing without depriving good in-house counsel from being able to serve their sophisticated clients, but chose not to. The Virgin Islands Legislature should correct that error and adopt the proposed bill.

* * *

Making it difficult for companies to employ their in-house counsel of choice will undermine the Virgin Islands' economic development plans. Fortunately, the proposed bill will address the problem. Therefore, ACC strongly urges the Legislature to pass it.

does not involve appearance in court. Leniency is appropriate because the only concern is with the client-employer, who is presumably in a good position to assess the quality and fitness of the lawyer's work. In the course of such work, the lawyer may deal with outsiders, such as by negotiating with others in settling litigation or directing the activities of lawyers who do enter an appearance for the organization in litigation.")

⁸ As Comment 16 to ABA's Model Rule 5.5(d) makes clear, "the [in-house] lawyer's ability to represent the employer outside the jurisdiction in which the lawyer is licensed generally serves the interests of the employer and does not create an unreasonable risk to the client and others because the employer is well situated to assess the lawyer's qualifications and the quality of the lawyer's work."

Sincerely yours,

A handwritten signature in black ink that reads "Amar Sarwal". The signature is written in a cursive, flowing style.

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