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Response of the Association of Corporate Counsel
to the Request for Comment on the Proposals of ABA Commission on Ethics 20/20
Working Group – Inbound Foreign Lawyers

THE GUIDING PRINCIPLE – FREEDOM OF MOVEMENT FOR ALL LAWYERS ACROSS STATE BOUNDARIES

I. EXECUTIVE SUMMARY

In this paper we pose for discussion the following propositions:

1. *FREEDOM OF MOVEMENT:* Any lawyer (broadly defined) should be free to practice across jurisdictional boundaries on behalf of a client and in the course of the lawyer's practice, and to relocate and apply for simple recognition in a new jurisdiction based on admission and good standing in their home and other practice jurisdictions.

2. *DEFINING WHO IS AUTHORIZED TO PRACTICE AS A LAWYER:* Any individual who has been admitted as a lawyer in a jurisdiction recognized as one that appropriately regulates the legal profession – whether foreign or domestic – should be entitled to operate under the first guiding principle as to freedom of movement.

3. *CREATING A UNIFORM REGULATORY STRUCTURE TO ASSURE PROFESSIONAL PRACTICES AND METE OUT DISCIPLINE WHEN NEEDED:* A simple and uniform set of regulations is needed to facilitate the practice of law across jurisdictional lines, perhaps overseen by a single clearinghouse/agency invested with determining who is authorized to practice as a lawyer across borders.

II. BACKGROUND

The Association of Corporate Counsel ("ACC") commends the extensive, thoughtful work that the ABA Commission on Ethics 20/20 Working Group – Inbound Foreign Lawyers

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("WGIFL") has done to date. We also wholeheartedly support what appears to be the underlying core concerns of the WGIFL, that the rules governing the movement of lawyers between jurisdictions need to be modified to include foreign as well as US admitted lawyers, that whatever rules are adopted have as their primary objective the improvement of service to clients (including improved access to professional services), and that regulation should be carefully tailored so as to allow the US to compete in the global marketplace for legal services.

In this Response we address what we believe to be the principles that need to be embodied in rules that may ultimately be proposed for adoption. We hope that, as the discussion continues on proposals propounded by the WGIFL, we will have a further opportunity to comment on or even propose specific rules crafted to implement these principles. But at this stage, since the issues have not yet been joined, we feel it most appropriate to lay out principles and opinions that we hope can help shape the discussion.

Core Recommendations: As indicated in the Executive Summary, ACC encourages the WGIFL to adopt as its bedrock principle a rule whereby a lawyer – however defined – who is licensed and in good standing in his or her home jurisdiction, may practice temporarily in other jurisdictions by simply agreeing to submit to regulation by appropriate authorities and be subject to applicable rules, without requiring local admission. This concept is often described as a "driver's license" rule. Similarly, an equally simple and uniform rule is required to enable lawyers to relocate on a permanent basis and waive into a US jurisdiction based on their existing credentials (and not a full bar examination process).

III. THE NEED FOR A SINGLE UNIFORM REGULATORY SYSTEM

It is vitally important to regulate lawyer movement under a uniform set of regulations. Accordingly, whatever rules are to be promulgated should apply to all who fit within a broad definition of who is a "lawyer" (which is discussed separately below). No distinction should be

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made, for instance, between lawyers admitted in the US who are private practitioners and those who employed as in-house counsel, or between US lawyers and foreign lawyers. If we take as a given that the purpose of regulating the bar is the protection of the public, then that objective is best accomplished by insuring that those who hold themselves out to practice as lawyers are subject to and governed by predictable and strong standards of professionalism and competence. Local admission rules based largely on jurisdictional origin or educational dissimilarities have a stronger purpose in sustaining anti-competitive structures than in promoting protection of the public or lawyer competence or client choice in counsel, and should be swept away.

Unless and until a way can be found to attain uniformity in practice requirements and admission, the United States and our legal profession will be at a growing disadvantage in the global marketplace, and we will not be serving the needs of clients who increasingly operate in a cross-border or global fashion.

IV. WHO IS A LAWYER?

If we seek uniform admission and recognition standards, then we necessarily need a definition for "who is a lawyer" that is simple, fair, and can be uniformly applied. A definition that can be applied to lawyers who are admitted in foreign (non-US) jurisdictions – the specific problem that the WGIFL is seeking to address in its Proposal – is subordinate to the larger, required conversation about defining who is a lawyer generally.

This issue is unnecessarily complicated by the traditional manner in which lawyer admission and movement within the United States is restricted (even as those same practice proscriptions are widely ignored by both sophisticated lawyers and their clients who practice across borders both virtually and in reality every day). The traditional regulatory model still in place in the states rests on three criteria for admission: 1) qualifying legal education, 2) the passage of a local examination, and 3) passing a local character and fitness review. In turn, the

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restrictive impact of these regulations is reinforced – and enforced – through the application by states of the laws relating to the unauthorized practice of law ("UPL"), which are themselves also different from state to state.

In ACC's view, according weight to a person's formal legal education at a locally accredited institution or passage of a local bar examination is not an appropriate substitute for the more meaningful assessment of their professionalism and actual competence to provide legal services to clients. An emphasis on whether a person attended a specific number of defined/required courses, or sat in classrooms for a defined period of time, or took requisite tests on which they scored sufficient grades (all suggesting that completing "academic" class work is a better indicator of fitness to practice than the person's actual experience representing clients) impedes admission and recognition of well qualified lawyers (both in the US and outside our borders) simply on the basis of geographic origin. Such restrictions have little to do with the protection of the public and even less to do with assuring competent and professional client service.

ACC suggests the question to be asked in determining competency to practice should be simple and complete – *has the person been admitted to practice as a lawyer by a properly constituted regulator in a jurisdiction which regulates the practice of law in a manner consistent with professional regulation as it exists in each of the United States, and is that person in good standing*?

Such a standard has an important additional advantage in that it facilitates the negotiation of similarly simple reciprocal rights for US lawyers entering other foreign jurisdictions to serve their client's multinational legal needs. Establishing a single standard that rests on good standing to practice in a jurisdiction that appropriately regulates lawyers can be easily understood and replicated, creating the necessary basis for comity. This removes the barrier to the negotiation of

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reciprocal rights not only for inbound foreign lawyers, but also for outbound US attorneys who are "products" of the traditional US state-based licensing rather than a national standard of admission. Other countries cannot negotiate admission rights with individual US states, but could accept a nationally recognized and uniform standard that allows for freedom of movement by both US and foreign counsel crossing national and state borders.

In the same way, uniform adoption throughout the United States of a "driver's license" model would – appropriately – make the UPL question irrelevant. The essence of the "driver's license" model suggests that if you have a license and a good driving record, you may drive temporarily in another jurisdiction by subjecting yourself to abide by that jurisdiction's rules and laws. If a driver/lawyer moves permanently to another jurisdiction which is in comity with the licensing pact, then the license is largely transferrable based on a clean record and good standing, and without suggesting that the driver needs to be re-tested again. The presumption is that a good driver, like a good lawyer, develops the requisite skill to not only perform the essential tasks needed to practice the craft of driving elsewhere, but can learn and live by the local rules of the road.

Thus, under a driver's license regime, any individual who is a lawyer (as defined above), wherever admitted (whether within or outside the United States), would be free to move across state boundaries on behalf of their clients and in the course of their practices. This approach should apply to everyone falling within the definition of lawyer, whether US- or foreign-trained and licensed. In sum, ACC urges the WGIFL to propose and support regulation that recognizes that *any individual who has been admitted as a lawyer in a jurisdiction recognized as one that appropriately regulates the legal profession – whether foreign or domestic – should be entitled to operate under the guiding principle of freedom of movement*.

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V. ACTING TO PRESERVE BUT UPDATE STATE-BASED REGULATION

Acceptance of the guiding principle of freedom of movement, and of a simplified definition of "who is a lawyer," does not require us to abandon state-based original admission systems or state-based regulation and enforcement standards. But when examining greater comity between the states (through a driver's license-type pact), the Commission will need to consider at least two closely linked questions that are critical to lawyer mobility: first, whether we should assume that all lawyers (as broadly defined above) are equally entitled to move among jurisdictions in the US; and, second, who should regulate moving lawyers and how?

Some may suggest that there should be limitations defining which lawyers are or are not entitled to rely upon the guiding principle of freedom of movement. ACC suggests that two of these limitations may merit consideration: one is experience and the other is language skill. While not requirements we would seek to impose across the board, we could envisage a legitimate addendum to the definition of who is a lawyer to require that a lawyer must practice for a period of time to establish a record of good standing and proven capability before that lawyer should be empowered to take full advantage of the right to move among jurisdictions. We are also aware that in some kinds of practice, a lawyer entering a jurisdiction where his or her language skills (in the host jurisdiction's predominant language) are limited could present problems for clients who may share the lawyer's language, but not understand the limitations that the lawyer will encounter in representing the client's interests before local courts, regulators, or in other situations where the lawyer must navigate the local legal system.

The question of who should authorize and regulate the movement of lawyers between jurisdictions will likely create the need to discuss whether lawyers should be required to register their presence in a host jurisdiction or their general intention to cross multiple borders. In our view, registering in each host jurisdiction in the US creates unnecessary administrative burdens for both the bars and lawyers, doing little or nothing to improve the protection of the public, and

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much to frustrate the multijurisdictional practice that is an integral part of almost every lawyer's activities in the modern world. Redundant, document-heavy applications are of no utility in determining the competence or professionalism of lawyers who are serving clients across jurisdictional borders.

Continuing to focus on jurisdiction-by-jurisdiction registration will encourage bureaucratic and prohibitively expensive documentation and fee requirements. As local regulators are unevenly equipped and often poorly staffed/funded to evaluate credentials (even where fees attach to registration procedures), local registrars may be left to do nothing more than to assure that relevant "boxes are checked," especially for applications from lawyers not licensed in the US. Thus, in our view, registration requirements will likely do little or nothing to improve quality or assure meaningful evaluation of lawyers entering any particular jurisdiction, or moving among multiple jurisdictions.

No one can deny that lawyers cross jurisdictional lines every day (whether in cars, on planes, or over the phone lines and internet). The vast majority of lawyers in corporate practice and a large and increasing number of lawyers engaged in individual representations commonly engage in cross-border practices as a standard part of their work, whether it entails child custody arrangements, criminal extradition, or a complex merger or multistate litigation. Instead of investing further in a system that already creates almost universal disregard of current state-by-state restrictions on practice, bars interested in protecting their local populations from bad lawyering should encourage compliance with a rule that focuses not on trying to stem (or document) the irreversible and overwhelming direction of the tide, but rather clearly establishes their full authority to prosecute any lawyer from any place else who actually does harm in their local jurisdictions. Legitimate concerns regarding the protection of the public within any individual state will, in our view, be much better addressed by requiring that all lawyers who avail themselves of the privilege of crossing jurisdictional lines for purposes of legal practice be

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automatically subject to the rules and disciplinary authority of the jurisdiction in which lawyers are working.

Accordingly, we suggest that the WGIFL consider proposing a single, simple uniform set of standards to authorize practice and regulation across jurisdictional lines, reserving local protection of the public to the states, but facilitating comity between states for the movement of properly credentialed lawyers (both US and foreign). Ideally, the states would see the benefit of vesting the administration of such regulations in a single national clearinghouse or agency, the role of which is to determine who is a properly credentialed lawyer and to facilitate their "registration" in the multiple US jurisdictions into which their work might take them, relieving states of this burden and assuring that all lawyers practicing in their jurisdictions are authorized (and regulated) as they do so.

VI. SUMMARY

ACC encourages the WGIFL to address the broad issues raised in this paper before drafting rules – we know it will be tempting to respond by stating that what we propose is beyond the charter of the WGIFL to consider. But someone must and we hope the Commission will be interested in leading this important discussion. We also recognize that many states may find these proposals threatening, even though what we propose is a solution that allows us to preserve a traditional state-based licensing system in a multijurisdictional practice world.

Our purpose is to place the Proposals on which we have been asked to comment into their proper – and wider – context as a prelude to engaging in more detailed discussion that requires the Commission to balance many perspectives. One thing is clear to us: we need comprehensive solutions to the challenges we face as a profession: a series of modest proposals to amend traditional admission rules will not protect clients or help lawyers navigate legal and global practice challenges in the modern era.