

STATE OF NORTH CAROLINA  
COUNTY OF GUILFORD

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
12 CVS 10736

ATLANTIC COAST CONFERENCE, )  
Plaintiff )  
v. )  
UNIVERSITY OF MARYLAND, COLLEGE )  
PARK; BOARD OF REGENTS; )  
UNIVERSITY SYSTEM OF MARYLAND, )  
Defendants )

**ORDER ON MOTIONS  
TO HAVE COUNSEL  
APPEAR *PRO HAC VICE***

THIS MATTER comes before the court on (a) Defendants' Motion to Have Counsel Appear *Pro Hac Vice* for Mary K. Braza ("Braza Motion"), (b) Defendants' Motion to Have Counsel Appear *Pro Hac Vice* for Andrew J. Wronski ("Wronski Motion") and (c) Defendants' Motion to Have Counsel Appear *Pro Hac Vice* for John J. Kuchno ("Kuchno Motion") (collectively, "Motions"), and;

THE COURT, having considered the briefs in support of and against the Motions, oral arguments and the ends of justice, FINDS and CONCLUDES as follows:

1. Defendants filed their Motions on February 26, 2014, seeking admission *pro hac vice* of Mary K. Braza, Esq. ("Braza") and Andrew J. Wronski, Esq. ("Wronski"), both of Foley & Lardner LLP ("Foley & Lardner"), and John J. Kuchno, Esq. ("Kuchno"), Assistant Attorney General in the Civil Litigation Division for the Office of the Attorney General for the State of Maryland.

2. Plaintiff filed objections to Defendants' Motions on March 4, 2014. The Motions came before the court for hearing on April 10, 2014.

3. As to Braza and Wronski, Plaintiff argues that attorneys employed by Foley & Lardner are conflicted out of representing Defendants because Foley & Lardner

has attorney-client relationships with at least three institutions that are current members of Plaintiff Atlantic Coast Conference ("ACC") and one institution that will be joining ACC later this year (collectively, "Client Institutions"). Specifically, Plaintiff argues that representation of Defendants in the instant action is adverse to Client Institutions, in violation of Rule 1.7 of the North Carolina Rules of Professional Conduct ("Rule 1.7"), because (a) Client Institutions' presidents were instrumental in enacting the provision of the ACC constitution being challenged by Defendants, (b) a victory by Defendants would significantly decrease ACC's available funds, and therefore annual distributions from ACC to Client Institutions, (c) Defendants are seeking to invalidate a provision in the ACC constitution that protects Client Institutions and (d) partaking in this action would require Foley & Lardner to depose Client Institutions. Further, Plaintiff argues that Foley & Lardner has not obtained conflict waivers from Client Institutions that would be required under Rule 1.7 to permit representation of Defendants in the instant action.<sup>1</sup>

4. In response, Defendants argue that (a) Defendants' choice of counsel is entitled to substantial deference by the court, (b) Plaintiff ACC is bringing suit in its own capacity, so there is no direct conflict with Client Institutions as members of ACC<sup>2</sup> and Plaintiff therefore lacks standing to challenge Foley & Lardner's participation and (c)

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<sup>1</sup> ACC Obj. Defs.' Mot. Pro Hac Vice Admission of Braza & Wronski.

<sup>2</sup> Defendants cite to Comment 34 of Rule 1.7, which provides that "[a] lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary." However, the comment goes on to provide that this qualification will not apply if "the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client."

Plaintiff ACC has not produced evidence of direct adversity.<sup>3</sup> Defendants further posit that adverse economic interest is not sufficient in itself to create a conflict of interest.<sup>4</sup>

5. Finally, Defendants point to ABA Standing Committee on Ethics and Professional Responsibility, Formal Opinion 92-367 (1992) ("ABA Opinion"), in support of their contention that Foley & Lardner may proceed with discovery in this action, so long as independent counsel is hired to depose Client Institutions. The ABA Opinion specifies that using independent counsel for depositions is a remedy in cases where representation commenced before the conflict was discovered, but "[w]here one of the two representations is prospective only, and conflict is clearly foreseeable, then the solution, absent client consent, is clear enough: the prospective engagement must be declined." *Id.* The court is persuaded that the posture of the instant action is more akin to the latter scenario above and that the ABA Opinion does not resolve the conflict issue.

6. While it is true that a party's right to choose its own counsel is generally considered fundamental, "an out-of-state attorney has no absolute right to practice law in another forum. [*Pro hac vice* admission is] subject to the sound discretion of the Court." *State v. Hunter*, 290 N.C. 556, 568 (1976), *cert. denied*, 429 U.S. 1093 (1977).

7. Rule 1.7 precludes a lawyer from representing a client if that representation would involve a concurrent conflict of interest, either because

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<sup>3</sup> At hearing on the Motions, Defendants argued that a member of the Virginia Attorney General's staff who was responsible for engaging Foley & Lardner in this matter purported to consent on behalf of Virginia Tech, a member institution of the ACC, to Foley & Lardner's participation. In response, Plaintiff argued that University Legal Counsel for Virginia Tech specifically declined to waive any conflict on the part of Foley & Lardner. By Order dated April 2, 2014, the court denied Defendant's request to submit further evidence with regard to the contended Virginia Tech waiver. However, the court did allow oral argument on the issue at hearing on the Motions.

<sup>4</sup> Md. Defs.' Resp. Pls.' Obj. Defs.' Mot. Pro Hac Vice Admissions of Braza & Wronski 2-5, 9-12.

representation of one client will be directly adverse to another client or because the representation would be materially limited by a lawyer's responsibilities to another client. In spite of a concurrent conflict of interest, a lawyer may represent a client if, *inter alia*, the lawyer obtains informed written consent from each client and the lawyer reasonably believes that he or she will be able to provide competent representation to both clients.

8. The court is not persuaded that Braza and Wronski's representation of Defendants in the instant action would not be a violation of Rule 1.7, either because of direct adversity or because concurrent representation of Client Institutions and Defendants would result in material limitations to Foley & Lardner's ability to competently and diligently represent all clients. Even if informed written consent would cure the conflict, Defendants have not demonstrated to the court that Foley & Lardner obtained appropriate written consent from Client Institutions. The court therefore declines to admit Braza and Wronski *pro hac vice* for purposes of the instant action.

9. As to Kuchno, Plaintiff argues that it is unclear whether the state of Maryland has vested the Office of the Attorney General for the State of Maryland ("Office of the Attorney General") with the ability to litigate in trial courts of other states. Further, Plaintiff express concerns that Maryland's Public Records Act would make anything received by Kuchno in the course of litigation a public record.<sup>5</sup>

10. Defendants counter that members of the Office of the Attorney General previously have appeared in state courts of other states, including North Carolina. Further, the Maryland legislature has promulgated statutory law vesting the Attorney

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<sup>5</sup> ACC Obj. Defs.' Mot. Pro Hac Vice Admission of Kuchno.

General with the power to appear in courts such as this one, and Plaintiff's concerns about private records could be alleviated by the use of a protective order.<sup>6,7</sup>

11. Notwithstanding Plaintiff's concerns, the court is persuaded that the public policy behind permitting the attorney general of another state to practice in North Carolina courts, combined with the absence of direct legal authority preventing Kuchno's appearance in this case, supports granting him admission *pro hac vice* for purposes of the instant action.

THEREFORE, it is ORDERED that:

1. The Braza Motion and Wronski Motion are DENIED. Braza and Wronski shall not appear in North Carolina courts *pro hac vice* as to the instant action.

2. The Kuchno Motion is GRANTED. Kuchno is permitted to appear in North Carolina courts *pro hac vice* as to the instant action, subject to the provisions of N.C. Gen. Stat. § 84-4.1.

3. The court declines to address the issue raised by Plaintiff at oral argument as to Braza and Wronski's participation in this action outside of North Carolina courts. The court is not persuaded that it has the authority to make a ruling as to this issue.

4. Defendants' Motion for Leave to File the Supplemental Affidavit of Mary K. Braza is DENIED.

This the 25th day of June, 2014.

/s/ John R. Jolly, Jr.  
John R. Jolly, Jr.  
Chief Special Superior Court Judge for  
Complex Business Cases

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<sup>6</sup> Md. Defs.' Resp. Pl.'s Obj. Defs.' Mot. Pro Hac Vice Admission of Kuchno.

<sup>7</sup> At oral argument, Plaintiff voiced concerns regarding the enforceability of a protective order in the event that Kuchno's participation, and consequently the resulting protective order, is challenged by a Maryland voter.