

1 The views expressed herein have not been approved by the House of Delegates or the Board
2 of Governors of the American Bar Association and, accordingly, should not be construed as
3 representing the policy of the American Bar Association.

4
5 **Resolution**

6
7 **RESOLVED: That the American Bar Association amends the ABA Model Rule for**
8 **Registration of In-House Counsel as follows (insertions underlined, deletions ~~struck~~**
9 **through):**

10
11 **Model Rule for Registration of In-House Counsel**
12

13 **GENERAL PROVISIONS:**

14 A. A lawyer admitted to the practice of law in another United States jurisdiction, or
15 in a foreign jurisdiction, who is ~~employed as a lawyer and~~ has a continuous
16 presence in this jurisdiction and is employed as a lawyer by an organization as
17 permitted pursuant to Rule 5.5(d)(1) of the Model Rules of Professional Conduct,
18 the business of which is lawful and consists of activities other than the practice of
19 law or the provision of legal services, shall register as in-house counsel within
20 [180 days] of the commencement of employment as a lawyer or if currently so
21 employed then within [180 days] of the effective date of this ~~¶~~Rule, by submitting
22 to the [registration authority] the following:

- 23 1) A completed application in the form prescribed by the [registration
24 authority];
25 2) A fee in the amount determined by the [registration authority];
26 3) Documents proving admission to practice law and current good standing
27 in all jurisdictions, U.S. and foreign, in which the lawyer is admitted to
28 practice law; ~~–~~ If the jurisdiction is foreign and the documents are not in
29 English, the lawyer shall submit an English translation and satisfactory
30 proof of the accuracy of the translation; and
31 4) An affidavit from an officer, director, or general counsel of the employing
32 entity attesting to the lawyer's employment by the entity and the capacity
33 in which the lawyer is so employed, and stating that the employment
34 conforms to the requirements of this ~~¶~~Rule.

35 For purposes of this Rule, a "foreign jurisdiction" is one with a recognized legal
36 profession, the members of which are admitted to practice as lawyers or
37 counselors at law or the equivalent and subject to effective regulation and
38 discipline by a duly constituted professional body or a public authority.
39

40 **SCOPE OF AUTHORITY OF REGISTERED LAWYER:**

41 B. A lawyer registered under this ~~section~~ Rule shall have the rights and privileges
42 otherwise applicable to members of the bar of this jurisdiction with the following
43 restrictions:

- 44 1. The registered lawyer is authorized to provide legal services to the entity
45 client or its organizational affiliates, including entities that control, are

- 46 controlled by, or are under common control with the employer, and for
47 employees, officers and directors of such entities, but only on matters
48 directly related to their work for the entity and only to the extent
49 consistent with Rule 1.7 of the Model Rules of Professional Conduct [or
50 jurisdictional equivalent provision in the jurisdiction]; and
51 2. The registered lawyer shall not:
52 a. Except as otherwise permitted by the rules of this jurisdiction,
53 appear before a court or any other tribunal as defined in Rule
54 1.0(m) of the Model Rules of Professional Conduct [or
55 jurisdictional equivalent], or
56 b. Offer or provide legal services or advice to any person other than
57 as described in paragraph B.1., or hold himself or herself out as
58 being authorized to practice law in this jurisdiction other than as
59 described in paragraph B.1.
60

61 PRO BONO PRACTICE:

- 62 C. Notwithstanding the provisions of paragraph B above, a lawyer registered under
63 this ~~section~~ Rule is authorized to provide pro bono legal services through an
64 established not-for-profit bar association, pro bono program or legal services
65 program or through such organization(s) specifically authorized in this
66 jurisdiction.
67

68 OBLIGATIONS:

- 69 D. A lawyer registered under this ~~section~~ Rule shall:
70 1. Pay an annual fee in the amount of \$_____;
71 2. Pay any annual client protection fund assessment;
72 23. Fulfill the continuing legal education requirements that are required of
73 active members of the bar in this jurisdiction;
74 34. Report within [___] days to the jurisdiction the following:
75 a. Termination of the lawyer's employment as described in
76 paragraph B.4.;
77 b. Whether or not public, any change in the lawyer's license status
78 in another jurisdiction, whether U.S. or foreign, including by the
79 lawyer's resignation;
80 c. Whether or not public, any disciplinary charge, finding, or
81 sanction concerning the lawyer by any disciplinary authority,
82 court, or other tribunal in any jurisdiction, U.S. or foreign.
83

84 LOCAL DISCIPLINE:

- 85 E. A registered lawyer under this ~~section~~ Rule shall be subject to the [jurisdiction's
86 Rules of Professional Conduct], [Rules of Lawyer Disciplinary Enforcement], and
87 all other laws and rules governing lawyers admitted to the active practice of law
88 in this jurisdiction. The [jurisdiction's disciplinary counsel] has and shall retain
89 jurisdiction over the registered lawyer with respect to the conduct of the lawyer in
90 this or another jurisdiction to the same extent as it has over lawyers generally
91 admitted in this jurisdiction.

92 AUTOMATIC TERMINATION:

93 F. A registered lawyer’s rights and privileges under this Rule section automatically
94 terminate when:

- 95 1. The lawyer’s employment terminates;
96 2. The lawyer is suspended or disbarred from practice in any jurisdiction or
97 any court or agency before which the lawyer is admitted, U.S. or foreign;
98 or
99 3. The lawyer fails to maintain active status in at least one jurisdiction, U.S.
100 or foreign.

101

102 REINSTATEMENT:

103 G. A registered lawyer whose registration is terminated under paragraph F.1. above,
104 may be reinstated within [~~xx~~__] months of termination upon submission to the
105 [registration authority] of the following:

- 106 1. An application for reinstatement in a form prescribed by the [registration
107 authority];
108 2. A reinstatement fee in the amount of \$_____;
109 3. An affidavit from the current employing entity as prescribed in paragraph
110 A.4.

111

112 SANCTIONS:

113 H. A lawyer under this ~~¶~~Rule who fails to register shall be:

- 114 1. Subject to professional discipline in this jurisdiction;
115 2. Ineligible for admission on motion in this jurisdiction;
116 3. Referred by the [registration authority] to ~~the~~ this [jurisdiction’s bar
117 admissions authority]; and
118 4. Referred by the [registration authority] to the disciplinary authority of the
119 jurisdictions of licensure, U.S. and/or foreign.

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Report

Introduction

The ABA Commission on Multijurisdictional Practice (MJP Commission) included two foreign lawyer recommendations in the package of reforms it proposed and the House of Delegates adopted in August 2002. They are the ABA Model Rule for the Licensing of Legal Consultants and the ABA Model Rule for Temporary Practice by Foreign Lawyers.¹ Since 2002, the number of foreign companies with U.S. offices or operations in the United States has grown, as has the number of U.S. companies with foreign offices or operations. Consequently, interstate and international legal practice for in-house counsel, including those who are foreign lawyers, has also increased. It is now common for employers to require their in-house counsel to relocate to another U.S. jurisdiction or country.

In November 19, 2009, the ABA Commission on Ethics 20/20 issued its Preliminary Issues Outline, indentifying a number of issues for consideration and study and welcoming comments from all segments of the profession, the judiciary, and the public. Among the questions raised was whether the ABA should include foreign lawyers within the scope of Model Rule of Professional Conduct 5.5's practice authorization for in-house counsel and its Model Rule for Practice and Registration of in-house counsel.

In response to the comments it received, the Commission's Working Group on Inbound Foreign Lawyers studied these and related issues. In addition to members of the Commission, members from the ABA Standing Committee on Ethics and Professional Responsibility, the ABA Standing Committee on Professional Discipline, the Section of International Law, the Real Property, Trust and Estate Law Section, the Task Force on International Trade in Legal Services, and the Section of Legal Education and Admissions to the Bar actively participated on the Working Group. The Commission thanks them for their participation and valuable contributions.

The Working Group conducted research and carefully considered whether (1) Rule 5.5 of the ABA Model Rules of Professional Conduct should permit limited practice authorization for foreign in-house counsel; and (2) whether the ABA Model Rule for Registration of In-House Counsel, which was adopted by the House of Delegates in

¹ The House of Delegates adopted amendments to the Model Rule for the Licensing of Legal Consultants in August 2006, the Rule is now known as the Model Rule for the Licensing and Practice of Foreign Legal Consultants, <http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/FLC.authcheckdam.pdf>. See also, Model Rule for Temporary Practice by Foreign Lawyers, <http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/201j.authcheckdam.pdf>.

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August 2008, should include foreign lawyers and thus provide jurisdictions with a mechanism to implement the in-house authority in Rule 5.5(d). Model Rule 5.5(d) and the Model Rule on In-House Counsel Registration are closely related. The practice authorization for U.S. in-house counsel in Model Rule 5.5 (d) served as the basis for the creation of the In-House Counsel Registration Rule, which builds on it and provides a model rule for U.S jurisdictions to use to identify lawyers admitted elsewhere and who will be permitted to practice in-house in the jurisdiction.² Identification of these lawyers will ensure their compliance with the jurisdiction's dues and MCLE requirements and protect the public because these lawyers are required to comply with the jurisdiction's rules of professional conduct and are subject to discipline.

The Working Group first recommended that the Commission propose amendments to Model Rule 5.5 that would provide limited practice authorization to foreign lawyers who are admitted in a foreign jurisdiction, but who are providing legal services solely to their employers as in-house counsel. This amendment would ensure that foreign lawyers who work solely for their employers as in-house counsel are not considered to be engaged in the unauthorized practice of law under Rule 5.5. To complement this proposed change to Model Rule 5.5, the Working Group also recommended that the Commission propose amendments to the ABA Model Rule for Registration of In-House Counsel to include foreign in-house counsel.

In June 2010, the Commission took no position on the Working Group's recommendation, but disseminated broadly for comment Working Group templates and memoranda illustrating and explaining the basis for those suggested changes. At subsequent meetings, the Commission considered additional written responses and oral testimony on the subject. At its April 2011 meeting, the Commission endorsed both of the Working Group's recommendations.

This Resolution and Report urges the ABA House of Delegates to amend the ABA Model Rule for Registration of In-House Counsel to include foreign lawyers. It should be read in conjunction with a separate Resolution and Report in which the Commission is recommending that the ABA House of Delegates amend Model Rule 5.5 to allow foreign in-house counsel to work for their employer in a U.S. jurisdiction where they are not licensed without running afoul of the prohibition against the unauthorized practice of law.³

The Proposed Amendments to the ABA Model Rule for Registration of In-House Counsel

Adding foreign lawyers to the Model Rule for Registration of In-House Counsel would have several benefits. The Model Rule sets forth a method for monitoring and regulating

² ABA SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, Report 112, ABA House of Delegates (adopted August 2008). *See also*, Paragraph [17] of the Comment to ABA Model Rule 5.5.

³ The Commission agreed that there is no reasonable risk to the client or the public from this authorization because: (1) the employer is competent to assess the lawyer's qualifications and the quality of the lawyer's work; and (2) the lawyer's only client is the employer.

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those lawyers who qualify and register as in-house counsel. Moreover, it subjects lawyers to the professional conduct rules and disciplinary authority of the local jurisdiction and provides for sanctions if they fail to register as in-house counsel. Thus, amending the Model Rule to permit foreign lawyers to register ensures that those lawyers are identifiable, subject to monitoring, and accountable for their conduct. Registration process does not create an automatic full licensing or admission process, nor does it place an undue burden on in-house counsel or the lawyer regulatory authority.

Some have expressed concerns that amending Model Rule 5.5 and the In-House Registration Rule to include foreign lawyers will constitute the “camel’s nose under the tent” of increased foreign lawyer presence in the U.S. The Commission disagrees with that proposition for several reasons. First, foreign lawyers are already in the U.S. and are practicing as in-house counsel. The Commission’s proposals would make sure that the regulatory authorities know who these lawyers are and which companies employ them. The proposals also ensure that the foreign lawyers are subject to the professional conduct rules of the jurisdiction where they are employed, are subject to sanctions if they fail to register or do not comply with the professional conduct rules, and can be referred to appropriate authorities in their home jurisdictions of registration and licensure in the event of a violation.

Second, the ABA Model Rule for Licensing and Practice of Foreign Legal Consultants demonstrates that ABA policy has long recognized that permitting foreign lawyers limited practice authority in the U.S. is beneficial to clients. That Model Rule was originally adopted in 1993.⁴ The Foreign Legal Consultant Rule limits the body of law on which the foreign lawyers may advise but does not limit the client population they may serve; Model Rule 5.5 and the In-House Registration Rule limit the clients whom foreign lawyers may advise and places certain limits on their scope of practice. In effect, the foreign lawyers will be able to provide the same scope of service to their organizational clients as they can now do from their home country offices.

Third, the quality of these foreign lawyers has been subject to careful scrutiny in two ways. In the context of the definition of “foreign jurisdiction” described below, they have been screened and admitted by the bar in their home jurisdiction, and their employers have determined that their credentials are worthy of employment. Both the bar and the employer possess a strong incentive to thoroughly investigate the lawyer’s character, fitness, and background.⁵ Because these lawyers work under a limited scope of practice and only for their client/employer, risk to the public associated with these proposed amendments is *de minimus*.

Arizona, Connecticut, Delaware, Georgia, Virginia, Washington, and Wisconsin have in-house registration rules that permit foreign lawyers limited authorization to work for their

⁴ Supra note 1.

⁵ See, e.g., J. Charles Mokriski, In-House Lawyers’ Bar Status: “Counsel, You’re Not in Kansas Anymore,” Boston Bar Journal, January/February 2008.

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employers in the U.S.⁶ Georgia permits this limited practice authority, but does not require registration. Critically, the Commission is aware of no adverse consequences in these jurisdictions from such authority.

The Commission's approach is also consistent with a joint proposal submitted in November 2010 to the New York Court of Appeals by the New York State Bar Association, the New York City Bar Association, and the New York County Lawyers' Association. That proposal sought the adoption of rules that would provide for the limited licensure and registration of U.S. and foreign in-house counsel.⁷ Although the New York Court of Appeals ultimately adopted an in-house rule that does not include foreign lawyers,⁸ the unified recommendation of the three bar associations reflects the increasingly shared view that foreign lawyers should be permitted to serve as in-house counsel for their employers.

Support for the Commission's approach is further evidenced by a July 2010 resolution adopted by the Conference of Chief Justices.⁹ The resolution was proposed by the Conference's Task Force on the Regulation of Foreign Lawyers and the International Practice of Law. It endorses in principle the changes proposed by the Commission, and it urges the adoption of those changes by the ABA House of Delegates.¹⁰

With regard to the particular amendments that the Commission is proposing, the definition of "foreign jurisdiction" in Paragraph A of the Model Registration Rule is taken from the ABA Model Rule for Licensing of Foreign Legal Consultants and the ABA Model Rule for Temporary Practice by Foreign Lawyers. It provides that the lawyer must be a member in good standing of a recognized legal profession in the lawyer's home country, and the members of that profession must be subject to effective regulation and discipline by a duly constituted professional body or public authority. This existing ABA definition has been adopted by U.S. state supreme courts in related contexts, and the Commission is not aware of problems that have arisen from its use.

The Commission also recommends requiring all lawyers registered under the Rule, domestic or foreign, to pay the annual lawyers' fund for client protection assessment that is normally paid by licensed lawyers in the jurisdiction. This requirement is consistent with Comment [17] of Model Rule 5.5, which states that lawyers who establish an office or continuous presence in the state "may be subject to registration or other requirements, including assessments for client protection funds and mandatory continuing legal

⁶ See, e.g., American Bar Association Center for Professional Responsibility Comparison of ABA Model Rule for Registration of In-House Counsel With State Versions (last updated October 26, 2009), http://www.americanbar.org/groups/professional_responsibility/commission_on_multijurisdictional_practice.html.

⁷ See, Joint Report at, http://www.nysba.org/AM/Template.cfm?Section=Substantive_Reports&Template=/TaggedPage/TaggedPageDisplay.cfm&TPLID=16&ContentID=9927.

⁸ The Court, in its order adopting the rule did not explain its decision to exclude foreign lawyers. See, <http://www.nycourts.gov/ctapps/news/nottobar/InHouseCounsel041111.pdf>

⁹ See, <http://ccj.ncsc.dni.us/InternationalResolutions/resol13ABA.html> (last viewed March 14, 2011).

¹⁰ Id.

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education.” It also is consistent with Rule 1(B)(2) of the ABA Model Rules for Lawyers’ Funds for Client Protection.¹¹

Consistent with the ABA Model Rule for Licensing and Practice of Foreign Legal Consultants, the Commission also proposes adding language to the In-House Registration Rule to require that a foreign lawyer provide with the completed application form required by the registration authority accurate English translation(s) of any documents demonstrating his or her admission to practice and good standing as a lawyer in any foreign jurisdictions.

The Rule would continue to prohibit registered in-house lawyers from appearing in court or other tribunal under the auspices of this registration, even if on behalf of the employer, unless they are admitted *pro hac vice* or by some other exception to the local licensure law. The amended Rule would continue to provide that lawyers registered under the Rule, whether U.S. or foreign, bear the burden of reporting any change in licensure and employment status.

Conclusion

With the Commission on Ethics 20/20’s suggested changes to Model Rule 5.5, these corresponding amendments to the Model Rule for Registration of In-House Counsel ensure that foreign lawyers who practice in the United States as in-house counsel are identified and subject to the disciplinary authority of the jurisdiction where they practice. Accordingly, the Commission on Ethics 20/20 respectfully requests that the House of Delegates approve the amendments to the Model Rule for Registration of In-House Counsel.

¹¹ See, http://www.americanbar.org/groups/professional_responsibility/resources/client_protection/rule1.html.