

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 a
15 foreign lawyer, who is employed as a lawyer ~~and has a continuous presence in~~
16 ~~this jurisdiction~~ by an organization and has a continuous presence in this
17 jurisdiction as permitted pursuant to Rule 5.5(d)(1) of the Model Rules of
18 Professional Conduct, the business of which is lawful and consists of activities
19 other than the practice of law or the provision of legal services, shall register as
20 in-house counsel within [180 days] of the commencement of employment as a
21 lawyer or if currently so employed then within [180 days] of the effective date of
22 this ~~¶~~Rule, by submitting 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 lawyer" is a member in good standing of a
36 recognized legal profession in a foreign jurisdiction, the members of which are
37 admitted to practice as lawyers or counselors at law or the equivalent and subject
38 to effective regulation and discipline by a duly constituted professional body or a
39 public authority.
40

41 SCOPE OF AUTHORITY OF REGISTERED LAWYER:

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

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Registration

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- 45 1. The registered lawyer is authorized to provide legal services to the entity
46 client or its organizational affiliates, including entities that control, are
47 controlled by, or are under common control with the employer, and for
48 employees, officers and directors of such entities, but only on matters
49 directly related to their work for the entity and only to the extent
50 consistent with Rule 1.7 of the Model Rules of Professional Conduct [or
51 jurisdictional equivalent provision in the jurisdiction]; and
52 2. The registered lawyer shall not:
53 a. Except as otherwise permitted by the rules of this jurisdiction,
54 appear before a court or any other tribunal as defined in Rule
55 1.0(m) of the Model Rules of Professional Conduct [or
56 jurisdictional equivalent]; ~~or~~
57 b. Offer or provide legal services or advice to any person other than
58 as described in paragraph B.1., or hold himself or herself out as
59 being authorized to practice law in this jurisdiction other than as
60 described in paragraph B.1.; and
61 c. If a foreign lawyer, provide advice on the law of this or another
62 U.S. jurisdiction, other than international law, except in
63 consultation with a U.S. lawyer authorized to provide such
64 advice.
65

66 PRO BONO PRACTICE:

- 67 C. Notwithstanding the provisions of paragraph B above, a lawyer registered under
68 this ~~section~~ Rule is authorized to provide pro bono legal services through an
69 established not-for-profit bar association, pro bono program or legal services
70 program or through such organization(s) specifically authorized in this
71 jurisdiction.
72

73 OBLIGATIONS:

- 74 D. A lawyer registered under this ~~section~~ Rule shall:
75 1. Pay an annual fee in the amount of \$_____;
76 2. Pay any annual client protection fund assessment;
77 23. Fulfill the continuing legal education requirements that are required of
78 active members of the bar in this jurisdiction;
79 34. Report within [___] days to the jurisdiction the following:
80 a. Termination of the lawyer's employment as described in
81 paragraph B.4.;
82 b. Whether or not public, any change in the lawyer's license status
83 in another jurisdiction, whether U.S. or foreign, including by the
84 lawyer's resignation;
85 c. Whether or not public, any disciplinary charge, finding, or
86 sanction concerning the lawyer by any disciplinary authority,
87 court, or other tribunal in any jurisdiction, U.S. or foreign.
88

89 LOCAL DISCIPLINE:

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90 E. A registered lawyer under this ~~section~~ Rule shall be subject to the [jurisdiction’s
91 Rules of Professional Conduct], [Rules of Lawyer Disciplinary Enforcement], and
92 all other laws and rules governing lawyers admitted to the active practice of law
93 in this jurisdiction. The [jurisdiction’s disciplinary counsel] has and shall retain
94 jurisdiction over the registered lawyer with respect to the conduct of the lawyer in
95 this or another jurisdiction to the same extent as it has over lawyers generally
96 admitted in this jurisdiction.
97

98 AUTOMATIC TERMINATION:

99 F. A registered lawyer’s rights and privileges under this Rule ~~section~~ automatically
100 terminate when:
101 1. The lawyer’s employment terminates;
102 2. The lawyer is suspended or disbarred from practice in any jurisdiction or
103 any court or agency before which the lawyer is admitted, U.S. or foreign;
104 or
105 3. The lawyer fails to maintain active status in at least one jurisdiction, U.S.
106 or foreign.
107

108 REINSTATEMENT:

109 G. A registered lawyer whose registration is terminated under paragraph F.1. above,
110 may be reinstated within [~~xx~~__] months of termination upon submission to the
111 [registration authority] of the following:
112 1. An application for reinstatement in a form prescribed by the [registration
113 authority];
114 2. A reinstatement fee in the amount of \$ _____;
115 3. An affidavit from the current employing entity as prescribed in paragraph
116 A.4.
117

118 SANCTIONS:

119 H. A lawyer under this ~~¶~~Rule who fails to register shall be:
120 1. Subject to professional discipline in this jurisdiction;
121 2. Ineligible for admission on motion in this jurisdiction;
122 3. Referred by the [registration authority] to ~~the~~ this [jurisdiction’s bar
123 admissions authority]; and
124 4. Referred by the [registration authority] to the disciplinary authority of the
125 jurisdictions of licensure, U.S. and/or foreign.

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Report

Introduction

In this Resolution the ABA Commission on Ethics 20/20 seeks amendment of the 2008 ABA Model Rule for Registration of In-House Counsel to include foreign in-house lawyers. If adopted by the House of Delegates, this Resolution would subject those lawyers to specific registration and scope of practice requirements. These requirements would complement the limited practice authorization for foreign in-house counsel sought by the Commission in a separately filed Resolution seeking to amend Rule 5.5(d) of the ABA Model Rules of Professional Conduct (Unauthorized Practice of Law; Multijurisdictional Practice of Law). Together these changes to ABA policy would, if adopted by the House, provide to state supreme courts a balanced and publicly protective regulatory approach for meeting the needs of global organizational clients to have the counsel of their choice work in their U.S. office.

In August 2002, the ABA House of Delegates adopted recommendations proposed by the Commission on Multijurisdictional Practice (MJP Commission) to amend Rule 5.5 of the ABA Model Rules of Professional Conduct. These amendments provided enhanced opportunities for U.S. lawyers to engage in cross-border practice by permitting temporary practice of law by U.S. lawyers in jurisdictions where they are not licensed. Model Rule 5.5(d) further authorized lawyers admitted in another U.S. jurisdiction, and not disbarred or suspended from practice in any jurisdiction, to establish a continuous and systematic presence to provide legal services to the lawyer's employer or its organizational affiliates (in-house counsel) or services that the lawyer is authorized to provide by federal law or other law of the jurisdiction in which the lawyer is not admitted.

In 2008, the practice authorization for U.S. in-house counsel in Model Rule 5.5(d) served as the basis for the proposal and adoption of the ABA Model Rule for Registration of In-House Counsel. The Model Registration Rule builds on the authorization granted under Model Rule 5.5(d) by providing a model mechanism for U.S. jurisdictions to identify lawyers admitted elsewhere and who will be permitted to practice in-house in the jurisdiction.¹

On November 19, 2009, the ABA Commission on Ethics 20/20 issued its Preliminary Issues Outline, identifying a number of subjects about which the Commission solicited broad-based feedback. In addition to querying whether Model Rule 5.5(d) should be amended to include foreign lawyers within its practice authorization for in-house counsel, the Commission also questioned, because it is closely related, whether complementary

¹ ABA SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, Report 112, ABA House of Delegates (adopted August 2008). *See also*, MODEL RULES OF PROF'L CONDUCT R. 5.5 cmt. [17] (2012).

amendments should be made to the ABA Model Rule for Registration of In-House Counsel.

In response to the comments the Commission received, it directed its Working Group on Inbound Foreign Lawyers to study these 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.

Consecutively with its study of whether Model Rule 5.5 should permit limited practice authorization for foreign in-house counsel, the Working Group deliberated upon related proposed changes to the ABA Model Rule for Registration of In-House Counsel so that jurisdictions would have a mechanism by which to implement the proposed new in-house authority for foreign lawyers. Identification of these foreign lawyers via the registration mechanism will ensure their compliance with the limited scope practice as well as the jurisdiction's dues and MCLE requirements, and will 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 ultimately decided to recommend that the Commission propose amendments to both ABA policies to include lawyers who are admitted in a foreign jurisdiction, but who are providing legal services solely to their employers as in-house counsel from the employer's U.S. office.

In June 2010, the Commission took no position on the Working Group's recommendations, 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 and concluded that the realities of client needs in the global legal marketplace necessitate that the ABA address more directly inbound foreign lawyers and associated regulatory concerns. 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 so that, consistent with public protection, those lawyers are readily identifiable and subject to effective regulation and monitoring. As noted above, 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.

Why Foreign Lawyer Should be Added to the ABA Model Rule for Registration of In-House Counsel

As noted above, adding foreign lawyers to the Model Rule for Registration of In-House Counsel has the benefits of ensuring that those lawyers are identifiable, subject to

monitoring, and accountable for their conduct. The amendments for foreign in-house lawyers recommended by the Commission provide the corresponding procedural mechanism to regulate the limited practice authority for these lawyers sought in the Commission's proposal to amend Model Rule 5.5(d). The registration process does not provide for the licensing of foreign in-house lawyers. Nor does it place an undue burden on the lawyer regulatory authority or the in-house counsel subject to it.

Foreign lawyers are already in the U.S. and are practicing as in-house counsel with little guidance in the Model Rules and other ABA policies. Seven jurisdiction's rules address foreign lawyers working as in-house counsel in the U.S. office of their client. See below. As noted in the Report accompanying the Commission's proposed inclusion of foreign lawyers in Model Rule 5.5(d)², since 2002, the number of foreign companies with U.S. offices or operations in the United States has grown (frequently due to active solicitation by U.S. jurisdictions), as has the number of U.S. companies with foreign offices or operations. Interstate and international legal practice for in-house counsel, including those who are foreign lawyers, has also increased. Those employers often require their in-house counsel to relocate to another U.S. jurisdiction or country.

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, must comply with continuing legal education requirements, and can be referred to appropriate authorities in their home jurisdictions of registration and licensure in the event of a violation.

The ABA has long recognized that permitting foreign lawyers limited practice authority in the U.S. is beneficial to clients so long as appropriate client and public protections are in place (e.g., the ABA Model Rule for Licensing and Practice of Foreign Legal Consultants, originally adopted in 1993). 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 (i.e., the entity client and its organizational affiliates) and places certain limits on their scope of practice. The Commission's proposal to include foreign lawyers in the Model Rule for Registration of In-House Counsel contains an added client protection that is mirrored in the proposed changes to Model Rule 5.5 so as to further decrease any risk to the client. That new provision in the black letter of Paragraph B(2)(c) provides that if a matter involves the law of a U.S. jurisdiction, other than international law, the foreign in-house counsel's services must be undertaken in consultation with a U.S. lawyer authorized to provide such advice. The qualifying language, "other than international law," is intended to make clear that, for

² See ABA Commission on Ethics 20/20, *Draft for Comment: Rule 5.5 Unauthorized Practice of Law; Multijurisdictional Practice of Law* (Sept. 4, 2012), http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120904_ethics_20_20_revised_draft_proposal_model_rule_5_5_foreign_lawyers.authcheckdam.pdf.

example, when U.S. law obligates the application of international law to a matter, the foreign lawyer need not consult with a U.S. lawyer.

The quality of these foreign in-house lawyers has also been subject to careful scrutiny in two ways. In the context of the definition of “foreign lawyer” 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.³ 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 employers in the U.S.⁴ 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.⁵ Although the New York Court of Appeals ultimately adopted an in-house rule that does not include foreign lawyers,⁶ 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.⁷ The resolution was proposed by the Conference’s Task Force on the Regulation of Foreign Lawyers and the International

³ See, e.g., J. Charles Mokriski, *In-House Lawyers’ Bar Status: Counsel, You’re Not in Kansas Anymore*, Boston Bar Journal, Jan.-Feb. 2008.

⁴ 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 January 9, 2012), http://www.americanbar.org/groups/professional_responsibility/commission_on_multijurisdictional_practice.html.

⁵ See N.Y. State Bar Ass’n, N.Y. City Bar Ass’n & N.Y. Cnty. Lawyers’ Ass’n, *Proposed Rules for Licensing of In-House Counsel* (Nov. 2010), available at http://www.nysba.org/AM/Template.cfm?Section=Substantive_Reports&ContentID=59866&template=/CM/ContentDisplay.cfm.

⁶ The Court, in its order adopting the rule did not explain its decision to exclude foreign lawyers. See State of New York Court of Appeals, *Notice to the Bar Registration of In-House Counsel*, available at <http://www.nycourts.gov/ctapps/news/nottobar/InHouseCounsel041111.pdf>.

⁷ See Conference of Chief Justices, *Resolution 13: Endorsing in Principle the Recommended Changes to the ABA Model Rules Regarding Practice by Foreign Lawyers*, <http://ccj.ncsc.dni.us/InternationalResolutions/resol13ABA.html> (last viewed March 14, 2011).

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.⁸

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

In addition to the requirement described above that the foreign in-house counsel consult with an appropriately authorized U.S. lawyer on matters involving the law of a U.S. jurisdiction, the definition of “foreign lawyer” 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’s research has not revealed 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 education.” It also is consistent with Rule 1(B)(2) of the ABA Model Rules for Lawyers’ Funds for Client Protection.⁹

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

⁸ *Id.*

⁹ See MODEL RULES FOR LAWYERS’ FUNDS FOR CLIENT PROTECTION R. 1(B)(2), available at http://www.americanbar.org/groups/professional_responsibility/resources/client_protection/rule1.html.

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.