

**AMERICAN BAR ASSOCIATION**

**COMMISSION ON ETHICS 20/20**

**STANDING COMMITTEE ON CLIENT PROTECTION**

**STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY**

**STANDING COMMITTEE ON PROFESSIONALISM**

**STANDING COMMITTEE ON SPECIALIZATION**

**TASK FORCE ON INTERNATIONAL TRADE IN LEGAL SERVICES**

**REPORT TO THE HOUSE OF DELEGATES**

**RESOLUTION**

1 **RESOLVED:** That the American Bar Association amends the ABA Model Rule for  
2 **Registration of In-House Counsel** as follows (insertions underlined, deletions ~~struck~~  
3 **through**):  
4

5 **Model Rule for Registration of In-House Counsel**  
6

7 **GENERAL PROVISIONS:**

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

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

29 For purposes of this Rule, a “foreign lawyer” is a member in good standing of a  
30 recognized legal profession in a foreign jurisdiction, the members of which are admitted  
31 to practice as lawyers or counselors at law or the equivalent and subject to effective  
32 regulation and discipline by a duly constituted professional body or a public authority.  
33

34 SCOPE OF AUTHORITY OF REGISTERED LAWYER:

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

37 1. The registered lawyer is authorized to provide legal services to the entity client or  
38 its organizational affiliates, including entities that control, are controlled by, or are  
39 under common control with the employer, and for employees, officers and  
40 directors of such entities, but only on matters directly related to their work for the  
41 entity and only to the extent consistent with Rule 1.7 of the Model Rules of  
42 Professional Conduct [or jurisdictional equivalent ~~provision in the jurisdiction~~];  
43 and

44 2. The registered lawyer shall not:

- 45 a. Except as otherwise permitted by the rules of this jurisdiction, appear  
46 before a court or any other tribunal as defined in Rule 1.0(m) of the  
47 Model Rules of Professional Conduct [or jurisdictional equivalent]; ~~or~~  
48 b. Offer or provide legal services or advice to any person other than as  
49 described in paragraph B.1., or hold himself or herself out as being  
50 authorized to practice law in this jurisdiction other than as described in  
51 paragraph B.1.; ~~and~~  
52 c. If a foreign lawyer, provide advice on the law of this or another U.S.  
53 jurisdiction except in consultation with a U.S. lawyer authorized to  
54 provide such advice.  
55

56 PRO BONO PRACTICE:

57 C. Notwithstanding the provisions of paragraph B above, a lawyer registered under this  
58 ~~section~~ Rule is authorized to provide pro bono legal services through an established not-  
59 for-profit bar association, pro bono program or legal services program or through such  
60 organization(s) specifically authorized in this jurisdiction.  
61

62 OBLIGATIONS:

63 D. A lawyer registered under this ~~section~~ Rule shall:

- 64 1. Pay an annual fee in the amount of \$\_\_\_\_\_;
- 65 2. Pay any annual client protection fund assessment;
- 66 ~~23.~~ Fulfill the continuing legal education requirements that are required of active  
67 members of the bar in this jurisdiction;
- 68 ~~34.~~ Report within [\_\_\_] days to the jurisdiction the following:
- 69 a. Termination of the lawyer’s employment as described in paragraph  
70 BA.4.;
- 71 b. Whether or not public, any change in the lawyer’s license status in  
72 another jurisdiction, whether U.S. or foreign, including by the lawyer’s  
73 resignation;

74 c. Whether or not public, any disciplinary charge, finding, or sanction  
75 concerning the lawyer by any disciplinary authority, court, or other  
76 tribunal in any jurisdiction, U.S. or foreign.  
77

78 LOCAL DISCIPLINE:

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

87 AUTOMATIC TERMINATION:

88 F. A registered lawyer's rights and privileges under this Rule ~~section~~ automatically terminate  
89 when:  
90 1. The lawyer's employment terminates;  
91 2. The lawyer is suspended or disbarred from practice in any jurisdiction or any  
92 court or agency before which the lawyer is admitted, U.S. or foreign; or  
93 3. The lawyer fails to maintain active status in at least one jurisdiction, U.S. or  
94 foreign.  
95

96 REINSTATEMENT:

97 G. A registered lawyer whose registration is terminated under paragraph F.1. above, may be  
98 reinstated within [~~xx~~\_\_\_] months of termination upon submission to the [registration  
99 authority] of the following:  
100 1. An application for reinstatement in a form prescribed by the [registration  
101 authority];  
102 2. A reinstatement fee in the amount of \$\_\_\_\_\_;  
103 3. An affidavit from the current employing entity as prescribed in paragraph A.4.  
104

105 SANCTIONS:

106 H. A lawyer under this ~~r~~Rule who fails to register shall be:  
107 1. Subject to professional discipline in this jurisdiction;  
108 2. Ineligible for admission on motion in this jurisdiction;  
109 3. Referred by the [registration authority] to ~~the~~ this [jurisdiction's bar admissions  
110 authority]; and  
111 4. Referred by the [registration authority] to the disciplinary authority of the  
112 jurisdictions of licensure, U.S. and/or foreign.

## **REPORT**

### **Introduction and Executive Summary**

The Resolution accompanying this Report proposes to amend the 2008 ABA Model Rule for Registration of In-House Counsel so that foreign lawyers are permitted to serve as in-house counsel, but with the added requirement that the foreign lawyer may not advise on U.S. law except in consultation with a U.S.-licensed lawyer. This Resolution complements the Commission's proposal to amend Model Rule 5.5(d) of the ABA Model Rules of Professional Conduct (Unauthorized Practice of Law; Multijurisdictional Practice), which makes a corresponding change to that Model Rule.

These proposed amendments respond to the increasing number of multinational companies with substantial operations in the U.S. – often recruited by states encouraging investment.<sup>1</sup> These companies, like U.S.-based multinational companies, want to have among their ranks of in-house counsel lawyers from other countries in which they operate. Seven states – Arizona, Connecticut, Delaware, Georgia, Virginia, Washington and Wisconsin – have already changed their rules to permit companies to bring non-U.S. lawyers to the state to work for them. Additional jurisdictions are likely to follow given the substantial growth of multinational companies within the United States.

The Commission concluded that clients and lawyers would benefit from consistency across jurisdictions on this issue, including requirements that such lawyers register, contribute to client protection funds, and consult with U.S. counsel before advising their employer on issues involving U.S. law. These lawyers would have a limited authority to practice: only for their employer and, with respect to questions of U.S. law, only after consultation with a U.S. lawyer. The requirement that the foreign lawyer consult with a qualified U.S. lawyer on questions of U.S. law is consistent with that set forth in Section 3(e) of the ABA Model Rule for the Licensing and Practice of Foreign Legal Consultants. They would be subject to discipline under the professional conduct rules in the jurisdiction where they are employed, contribute to the client protection fund, and comply with the jurisdiction's continuing legal education requirements. Their employers would have to attest to their compliance with these requirements.

The definition of who would qualify under the Rule as a foreign lawyer is substantively the same as what is found in longstanding ABA policy, including the ABA Model Rule for the Licensing and Practice of Foreign Legal Consultants, which state supreme courts have adopted, with no adverse consequences.

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<sup>1</sup> See, e.g., ABA Task Force on International Trade in Legal Services, *International Trade in Legal Services and Professional Regulation: A Framework for State Bars Based on the Georgia Experience* (Feb. 4, 2012), available at <http://arbitrateatlanta.org/wp-content/uploads/2011/08/FINAL-ITILS-toolkit-2-4-12.pdf> (noting that “[o]ver 3600 foreign businesses from more than 60 countries have established operations in Georgia [alone]”); Texas Office of the Governor, *Foreign Investment in Texas: The Industries and Countries Leading Current Growth*, [www.governor.state.tx.us/files/ecodev/Foreign\\_Investment.pdf](http://www.governor.state.tx.us/files/ecodev/Foreign_Investment.pdf) (last viewed Nov. 12, 2012) (finding that more than 2,000 foreign multinationals have established locations in Texas).

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

If adopted by the House of Delegates, the changes proposed in these Resolutions would not provide foreign in-house counsel with full practice rights or admission status. The Commission suggests only a limited practice authorization for qualified foreign lawyers.

Clients and lawyers would benefit from consistency across jurisdictions. The proposed amendments to the Model In-House Registration Rule, with the proposed changes to Model Rule 5.5, would provide state supreme courts with a comprehensive regulatory approach that is protective of clients while meeting the needs of global organizational clients to have the in-house counsel of their choice work in their U.S. offices.

### **Relevant History**

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 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) authorized lawyers to provide legal services to the lawyer's organizational client and its affiliates even if not admitted in the state in which the company was employing him.

The Commission on Ethics 20/20 has studied how globalization has changed the legal landscape in the United States. At the outset of its work, it asked in its Preliminary Issues Outline whether Model Rule 5.5(d) should be amended to include foreign lawyers within its practice authorization for in-house counsel.<sup>2</sup> Over the ensuing three years, the Commission took testimony and received many comments that have informed its consideration of this issue.

The Commission's Inbound Foreign Lawyers Working Group included active participants 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. These representatives contributed significantly to the Commission's deliberations and the Resolution that accompanies this Report. The Commission is grateful for their contributions to its work. The Commission also received helpful input from many elements of the bar.

During its meetings and public hearings, the Commission considered additional written responses and oral testimony on the subject. At its October 2012 meeting, it concluded that the

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<sup>2</sup> A July 2009 Report of the Special Committee on International Issues of the ABA Section of Legal Education and Admissions to the Bar noted that this was one of several areas where the ABA lacked policy relating to limited practice authority for foreign lawyers in the U.S. Another area where the Special Committee noted a policy gap related to pro hac vice admission of foreign lawyers. See ABA Section of Legal Education and Admissions to the Bar, *Report of the Special Committee on International Issues* (July 15, 2009), available at [http://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/council\\_reports\\_and\\_resolutions/june\\_2012\\_council\\_open\\_session/2012\\_supplemental\\_report\\_5\\_foreign\\_law\\_schools.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/june_2012_council_open_session/2012_supplemental_report_5_foreign_law_schools.authcheckdam.pdf). This subject is addressed by the Commission in a separate Resolution to the House of Delegates.

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realities of client needs in the global legal marketplace necessitate that the ABA address more directly limited practice authority for inbound foreign lawyers and associated regulatory concerns.

### **Foreign Lawyers Should be Added to the ABA Model Rule for Registration of In-House Counsel**

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 the Licensing and Practice of Foreign Legal Consultants, originally adopted in 1993). There is already a significant level of cross-border legal services, with U.S. lawyers providing assistance abroad and, to a lesser extent, non-U.S. lawyers providing assistance in the U.S. In 2011, the U.S. exported \$7.4 billion in legal services while importing a little under \$1.8 billion.<sup>3</sup>

In the last decade, the number of foreign companies with U.S. offices or operations in the United States has grown substantially – often due to active solicitation by U.S. jurisdictions – as has the number of U.S. companies with foreign offices or operations. *See* the accompanying Report supporting the Commission’s Resolution to Amend Model Rule 5.5. Those employers often require their in-house counsel to relocate to a U.S. jurisdiction or transfer to the U.S. for a period of time. As noted above, Arizona, Connecticut, Delaware, Georgia, Virginia, Washington and Wisconsin already permit foreign lawyers to work as in-house counsel with no adverse consequences that the Commission has been able to determine.

Foreign lawyers are currently practicing in-house in the U.S. with little guidance in the Model Rules or other ABA policies. The realities of globalized legal practice means that states will need to ensure that these lawyers (a) abide by the limitations on their ability to practice in a state; (b) pay both bar dues and client protection fund contributions; (c) take on continuing legal education obligations; and (d) submit to the disciplinary process of the state. Adding foreign lawyers to the Model Rule for Registration of In-House Counsel achieves the worthwhile goal of facilitating the ability of the courts to hold these lawyers accountable for the limited conduct for which they are permitted to engage while in the U.S.

Including foreign lawyers in the Model In-House Registration Rule would mean these lawyers are identifiable. Their employers have to vouch for them. They would be subject to the professional conduct rules of the jurisdiction where they are employed, subject to sanctions if they fail to register or do not comply with the those rules, and can be referred to appropriate authorities in their home jurisdictions of registration and licensure in the event of a violation.<sup>4</sup>

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<sup>3</sup> *See* U.S. Bureau of Economic Analysis, *Table G. Other Private Services Receipts*, available at [http://www.bea.gov/international/xls/table\\_G.xls](http://www.bea.gov/international/xls/table_G.xls) (last visited Nov. 10, 2012); U.S. Bureau of Economic Analysis, *Table H. Other Private Services Payments*, available at [http://www.bea.gov/international/xls/table\\_H.xls](http://www.bea.gov/international/xls/table_H.xls) (last visited Nov. 10, 2012).

<sup>4</sup> As noted in the Commission’s Report accompanying its Resolution to amend Model Rule 5.5, the ABA Standing Committee on Professional Discipline and the ABA Task Force on International Trade in Legal Services are developing a model international reciprocal discipline notification protocol to facilitate the necessary information exchange between U.S. and non-U.S. lawyer regulators.

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This proposal to include foreign lawyers in the Model Rule for Registration of In-House Counsel also contains the added client protection (mirrored in the proposal to amend Model Rule 5.5) that, if a matter involves the law of a U.S. jurisdiction, the foreign in-house counsel's services may not be undertaken except in consultation with a U.S. lawyer authorized to provide such advice.<sup>5</sup>

For purposes of the proposed amendments, qualified foreign lawyers are defined as those who are a member in good standing of a recognized legal profession in the lawyer's home country, who must be subject to effective regulation and discipline by a duly constituted professional body or public authority. This definition has long been ABA policy and has been adopted by U.S. state supreme courts in their rules allowing foreign lawyers to practice as Foreign Legal Consultants.<sup>6</sup> The Commission's research revealed no problems that have arisen from its use. Further the foreign lawyer's employer would have to have determined that he or she is competent to perform the job. The employer has a strong incentive to investigate the lawyer's character, fitness, and background.<sup>7</sup>

The Conference of Chief Justices has indicated its approval, in principle, of the Commission's approach to this issue, passing a Resolution to that effect. The Conference's position was also consistent with its Task Force on the Regulation of Foreign Lawyers and the International Practice of Law, which endorsed an earlier version of the Commission's proposal and urged adoption of the Commission's recommendation by the ABA House of Delegates.<sup>8</sup> Notably, the Conference's Resolution related to a version of this proposal that did not yet include the new requirement for consultation with a U.S. lawyer and was, thus, less restrictive than the proposal the Commission has formally submitted to the House for its consideration.

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

As noted above, the definition of "foreign lawyer" in Paragraph A of the Model Registration Rule is taken from the ABA Model Rule for the Licensing and Practice of Foreign Legal Consultants. The ABA Model Rule for Temporary Practice by Foreign Lawyers and the August 2012 ABA Model Rule on Practice Pending Admission also utilize that definition.

The Commission also recommends requiring all registered lawyers to pay bar dues as well as the assessment for the lawyers' fund for client protection 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

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<sup>5</sup> The Commission used "authorized" in conjunction with the consulting U.S. lawyer, instead of "admitted," because, while the consulting U.S. lawyer may not be admitted in the jurisdiction at issue, he or she may be permitted to advise on that U.S. jurisdiction's law pursuant to authorization under another rule.

<sup>6</sup> For example, see the foreign legal consultant rules for states including, but not limited, to Georgia, Massachusetts, New Mexico, North Dakota, Utah, and Virginia.

<sup>7</sup> J. Charles Mokriski, *In-House Lawyers' Bar Status: Counsel, You're Not in Kansas Anymore*, Boston Bar J., Jan.-Feb. 2008.

<sup>8</sup> 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 Nov. 12, 2012). In the Conference's Resolution, it noted that "legal transactions and disputes involving foreign law and foreign lawyers is increasing."

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mandatory continuing legal education.” It also is consistent with Rule 1(B)(2) of the ABA Model Rules for Lawyers’ Funds for Client Protection, stating in relevant part that “[e]very lawyer has an obligation to the public to participate in the collective effort of the bar to reimburse persons who have lost money or property as a result of the dishonest conduct of another lawyer...”<sup>9</sup>

Consistent with the ABA Model Rule for the 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 Registration 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.

Respectfully submitted,

ABA Commission on Ethics 20/20  
Jamie S. Gorelick, Co-Chair  
Michael Traynor, Co-Chair

February 2013

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<sup>9</sup> 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](http://www.americanbar.org/groups/professional_responsibility/resources/client_protection/rule1.html).

## GENERAL INFORMATION FORM

Submitting Entity: ABA Commission on Ethics 20/20

Submitted By: Jamie S. Gorelick and Michael Traynor, Co-Chairs

1. Summary of Resolution(s).

### **Inbound Foreign Lawyers: Model Rule for Registration of In-House Counsel**

The Commission is proposing amendments to the 2008 ABA Model Rule for Registration of In-House Counsel to permit foreign lawyers to serve as in-house counsel in the U.S., but with the added requirements. One notable requirement is that the foreign lawyers not advise on U.S. law except in consultation with a U.S.-licensed lawyer. The proposed amendments would not authorize the licensing or full admission of foreign in-house lawyers. The Commission is suggesting only a limited and necessary practice authorization for qualified foreign in-house lawyers and a method to ensure they are identifiable, accountable and subject to monitoring.

These proposed amendments respond to the increasing number of foreign companies with substantial operations and offices in the U.S. as well as U.S. companies with substantial foreign operations. These companies routinely encounter legal issues that implicate foreign or international law and want the advice of trusted lawyers from other jurisdictions. These companies often find that this advice can be offered most efficiently and effectively if those lawyers relocate to a corporate office in the U.S. The Commission learned that foreign lawyers (including foreign legal consultants) are already engaged as in-house counsel within the U.S., but are subject to little oversight.

As stated above, the amendments would only provide a limited authority to practice for the foreign lawyer's employer on matters that do not involve U.S. law, unless the foreign lawyer consults with a U.S. lawyer authorized to provide such advice. The definition of who would qualify as a foreign lawyer is also set forth in longstanding ABA policy, including the ABA Model Rule on Licensing and Practice by Foreign Legal Consultants, which state supreme courts have adopted with no adverse consequences.

The proposed amendments to the Model Rule for Registration of In-House Counsel also would ensure that foreign in-house counsel are subject to the professional conduct rules of the jurisdiction where they are employed, contribute to the client protection fund, are subject to sanctions if they fail to register or do not comply with the professional conduct rules, and comply with continuing legal education requirements. Their employer would have to attest to their compliance with these requirements, and the lawyers could be referred to appropriate authorities in their home jurisdictions of registration and licensure in the event of a violation.

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

This Resolution complements a separate Resolution to amend Rule 5.5 of the ABA Model Rules of Professional Conduct. The amendments to Model Rule 5.5 would provide the authorization for this limited form of practice, and the changes to the Model Registration Rule provide the mechanism to regulate these lawyers. The Commission concluded that adding foreign lawyers to both Model Rule 5.5 and the Model Rule for Registration of In-House Counsel has the benefit of ensuring that those lawyers are identifiable, subject to monitoring, and accountable for their conduct.

The changes proposed by the Commission would provide state supreme courts with an approach to this issue that protects clients and the public while allowing global organizational clients to employ in-house foreign lawyers of their choice to work in their U.S. offices. Currently, seven jurisdictions have rules permitting foreign in-house counsel, and other jurisdictions are considering doing the same. The Commission's proposal would ensure greater consistency across jurisdictions on this issue.

2. Approval by Submitting Entity.

The Commission approved the Resolutions relating to inbound foreign lawyers at its October 25 and 26, 2012 meeting.

3. Has this or a similar resolution been submitted to the House or Board previously?

No.

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?

The adoption of this resolution would result in amendments to the ABA Model Rule on Registration of In-House Counsel.

5. What urgency exists which requires action at this meeting of the House?

The ABA is the national leader in developing and interpreting standards of legal ethics and professional regulation, and therefore, has the responsibility to ensure that its Model Rules of Professional Conduct and related regulatory policies keep pace with social change and the evolution of law practice. By adopting the Commission's proposal, the ABA would retain its leadership role in setting the ethical standards for limited practice in the U.S. by foreign in-house counsel, just as other jurisdictions have adopted or are considering related changes. In sum, the Commission's proposal would foster greater uniformity and ensure that jurisdictions adopt appropriate, and carefully limited, rules on the role of foreign lawyers in the U.S.

6. Status of Legislation. (If applicable)

N/A

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

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

The Center for Professional Responsibility will publish any updates to the ABA Model Rules of Professional Conduct and Comments, and also will publish electronically other newly adopted policies. The Policy Implementation Committee of the Center for Professional Responsibility has in place the procedures and infrastructure to successfully implement any policies proposed by the Ethics 20/20 Commission that are adopted by the House of Delegates. The Policy Implementation Committee and Ethics 20/20 Commission have been in communication in anticipation of the implementation effort. The Policy Implementation Committee has been responsible for the successful implementation of the recommendations of the ABA Ethics 2000 Commission, the Commission on Multijurisdictional Practice and the Commission to Evaluate the Model Code of Judicial Conduct.

8. Cost to the Association. (Both direct and indirect costs)

None

9. Disclosure of Interest. (If applicable)

10. Referrals.

From the outset, the Ethics 20/20 Commission agreed that transparency, broad outreach and frequent opportunities for input into its work would be crucial. Over the last three and one-half years the Commission routinely released for comment to all ABA entities (including the Conference of Section and Division Delegates), state, local, specialty and international bar associations, courts and the public the following: its many issues papers; draft proposals; discussion drafts; and draft informational reports. The Commission held thirteen open meetings where audience members participated; conducted numerous public hearings and roundtables, domestically and abroad; created webinars and podcasts; made CLE presentations, received and reviewed hundreds of written and oral comments from the bar and the public. To date, the Commission has made more than 100 presentations about its work, including presentations to the Conference of Chief Justices, the House of Delegates, the ABA Board of Governors, the National Conference of Bar Presidents, and numerous ABA entities, and local, state, and international bar associations.

All materials were posted on the Commission's website. The Commission created and maintained a listserv for interested persons to keep apprised of the Commission's activities. There are currently over 800 people on that list.

The Commission's process was collaborative. It created seven substantive Working Groups with participants from relevant ABA and outside entities. Included on these Working Groups were representatives of the ABA Standing Committee on Ethics and Professional Responsibility, ABA Standing Committee on Professional Discipline, ABA Standing Committee on Client Protection, ABA Standing Committee on Delivery of Legal Services, ABA Section of International Law, ABA Litigation Section, ABA Section of Legal

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Education and Admissions to the Bar, ABA Section of Real Property, Trust and Estate Law, ABA Task Force on International Trade in Legal Services, ABA General Practice, Solo and Small Firm Division, ABA Young Lawyers Division, ABA Standing Committee on Specialization, ABA Law Practice Management Section, and the National Organization of Bar Counsel.

11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address)

Ellyn S. Rosen  
Regulation Counsel  
ABA Center for Professional Responsibility  
321 North Clark Street, 17<sup>th</sup> floor  
Chicago, IL 60654-7598  
Phone: 312/988-5311  
Fax: 312/988-5491  
[Ellyn.Rosen@americanbar.org](mailto:Ellyn.Rosen@americanbar.org)  
[www.americanbar.org](http://www.americanbar.org)

12. Contact Name and Address Information. (Who will present the report to the House? Please include name, address, telephone number, cell phone number and e-mail address.)

**Jamie S. Gorelick, Co-Chair**  
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## EXECUTIVE SUMMARY

### 1. Summary of the Resolution

#### **Inbound Foreign Lawyers: Model Rule for Registration of In-House Counsel**

The Commission is proposing amendments to the 2008 ABA Model Rule for Registration of In-House Counsel to permit foreign lawyers to serve as in-house counsel in the U.S., but with the added requirements. One notable requirement is that the foreign lawyers not advise on U.S. law except in consultation with a U.S.-licensed lawyer. The proposed amendments would not authorize the licensing or full admission of foreign in-house lawyers. The Commission is suggesting only a limited and necessary practice authorization for qualified foreign in-house lawyers and a method to ensure they are identifiable, accountable and subject to monitoring.

These proposed amendments respond to the increasing number of foreign companies with substantial operations and offices in the U.S. as well as U.S. companies with substantial foreign operations. These companies routinely encounter legal issues that implicate foreign or international law and want the advice of trusted lawyers from other jurisdictions. These companies often find that this advice can be offered most efficiently and effectively if those lawyers relocate to a corporate office in the U.S. The Commission learned that foreign lawyers (including foreign legal consultants) are already engaged as in-house counsel within the U.S., but are subject to little oversight.

As stated above, the amendments would only provide a limited authority to practice for the foreign lawyer's employer on matters that do not involve U.S. law, unless the foreign lawyer consults with a U.S. lawyer authorized to provide such advice. The definition of who would qualify as a foreign lawyer is also set forth in longstanding ABA policy, including the ABA Model Rule on Licensing and Practice by Foreign Legal Consultants, which state supreme courts have adopted with no adverse consequences.

The proposed amendments to the Model Rule for Registration of In-House Counsel also would ensure that foreign in-house counsel are subject to the professional conduct rules of the jurisdiction where they are employed, contribute to the client protection fund, are subject to sanctions if they fail to register or do not comply with the professional conduct rules, and comply with continuing legal education requirements. Their employer would have to attest to their compliance with these requirements, and the lawyers could be referred to appropriate authorities in their home jurisdictions of registration and licensure in the event of a violation.

This Resolution complements a separate Resolution to amend Rule 5.5 of the ABA Model Rules of Professional Conduct. The amendments to Model Rule 5.5 would provide the authorization for this limited form of practice, and the changes to the Model Registration Rule provide the mechanism to regulate these lawyers. The Commission concluded that adding foreign lawyers to both Model Rule 5.5 and the Model Rule for

Registration of In-House Counsel has the benefit of ensuring that those lawyers are identifiable, subject to monitoring, and accountable for their conduct.

The changes proposed by the Commission would provide state supreme courts with an approach to this issue that protects clients and the public while allowing global organizational clients to employ in-house foreign lawyers of their choice to work in their U.S. offices. Currently, seven jurisdictions have rules permitting foreign in-house counsel, and other jurisdictions are considering doing the same. The Commission's proposal would ensure greater consistency across jurisdictions on this issue.

## 2. Summary of the Issue that the Resolution Addresses

As the national leader in developing and interpreting standards of legal ethics and professional regulation, the ABA has the responsibility to ensure that its Model Rules of Professional Conduct and regulatory policies keep pace with social change and the evolution of law practice. In furtherance of this, in August 2009, then-ABA President Carolyn B. Lamm created the Commission on Ethics 20/20 to study the ethical and regulatory implications of globalization and technology on the legal profession and propose necessary amendments to and/or new ABA policies.

Globalization continues to transform the legal marketplace, with more clients confronting legal problems that cross jurisdictional lines, more lawyers needing to respond to those client needs by crossing borders (including virtually) and relocating to new jurisdictions. The Commission on Ethics 20/20 reviewed the regulatory framework adopted by the House of Delegates in 2002 at the recommendation of the Commission on Multijurisdictional Practice. Unsurprisingly, in light of the accelerated pace of change and the growing proportion of legal work that involves more than one U.S. or foreign jurisdiction, the Commission found that ethical issues are arising with greater frequency. Courts, lawyers, clients and the public need enhanced guidance to address these issues.

These proposed amendments to the Model Rule for Registration of In-House Counsel respond to the increasing number of foreign companies with substantial operations and offices in the U.S. as well as U.S. companies with substantial foreign operations. These companies routinely encounter legal issues that implicate foreign or international law and want the advice of trusted lawyers from other jurisdictions. These companies often find that this advice can be offered most efficiently and effectively if those lawyers relocate to a corporate office in the U.S. The Commission learned that foreign lawyers (including foreign legal consultants) are already engaged as in-house counsel within the U.S., but are subject to little oversight.

The Commission's proposal is consistent with following guiding principles that then ABA President Lamm directed the Commission to follow: protecting the public; preserving the core professional values of the American legal profession; and maintaining a strong, independent, and self-regulated profession.

3. Please Explain How the Proposed Policy Position will address the issue

The proposed resolution of the Commission on Ethics 20/20, if adopted, will provide necessary guidance to the profession that will allow lawyers to meet the ethical and regulatory challenges posed by globalization, as well as take advantage of the opportunities for the ethical delivery of legal services. The Commission's proposal will allow entity clients to meet their needs with counsel of their choice. The separately filed proposed amendments to Model Rule 5.5 provide the authorization for this carefully limited form of practice by foreign in-house counsel, and the changes to the Model Registration Rule provide the mechanism to regulate these lawyers. The Commission's proposal has the benefit of ensuring that those lawyers are identifiable, subject to monitoring, and accountable for their conduct. The proposal are also appropriately limiting because they only provide a limited authority to practice for the foreign lawyer's employer on matters that do not involve U.S. law, unless the foreign lawyer consults with a U.S. lawyer authorized to provide such advice. The proposed amendments to the Model Registration Rule would not authorize the licensing or full admission of foreign in-house lawyers.

4. Summary of Minority Views

From the outset, the Commission on Ethics 20/20 committed to and implemented a process that was transparent, open, and provided broad outreach and frequent opportunities for input into its work. Inherent in any undertaking of this scope and complexity is the recognition that there will be disagreements about the approach to issues as well as the substance of proposals. That said, with the exception of concerns by only some ABA members the Commission was not aware of any organized or formal minority views or opposition at the time the Resolution and Report were filed.