

**AMERICAN BAR ASSOCIATION
SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR
REPORT TO THE HOUSE OF DELEGATES**

RECOMMENDATION

RESOLVED, That the American Bar Association adopts the Model Rule for Registration of In-House Counsel dated August 2008, for those jurisdictions that elect to impose registration requirements on lawyers practicing therein under Model Rule 5.5(d).

Model Rule for Registration of In-House Counsel

GENERAL PROVISIONS:

- A. A lawyer admitted to the practice of law in another United States jurisdiction who has a continuous presence in this jurisdiction and is employed as a lawyer by an organization as permitted pursuant to Rule 5.5(d)(1) of the Model Rules of Professional Conduct, the business of which is lawful and consists of activities other than the practice of law or the provision of legal services, shall register as in-house counsel within [180 days] of the commencement of employment as a lawyer or if currently so employed then within [180 days] of the effective date of this rule, by submitting to the [registration authority] the following:
- 1) A completed application in the form prescribed by the [registration authority];
 - 2) A fee in the amount determined by the [registration authority];
 - 3) Documents proving admission to practice law and current good standing in all jurisdictions in which the lawyer is admitted to practice law; and
 - 4) An affidavit from an officer, director, or general counsel of the employing entity attesting to the lawyer's employment by the entity and the capacity in which the lawyer is so employed, and stating that the employment conforms to the requirements of this rule.

SCOPE OF AUTHORITY OF REGISTERED LAWYER:

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

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

PRO BONO PRACTICE:

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

OBLIGATIONS:

- D. A lawyer registered under this section shall:
1. Pay an annual fee in the amount of \$_____;
 2. Fulfill the continuing legal education requirements that are required of active members of the bar in this jurisdiction;
 3. Report within [___] days to the jurisdiction the following:
 - a. Termination of the lawyer's employment as described in paragraph A.4.;
 - b. Whether or not public, any change in the lawyer's license status in another jurisdiction, including by the lawyer's resignation;
 - c. Whether or not public, any disciplinary charge, finding, or sanction concerning the lawyer by any disciplinary authority, court, or other tribunal in any jurisdiction.

LOCAL DISCIPLINE:

- E. A registered lawyer under this section shall be subject to the [jurisdiction's Rules of Professional Conduct] and all other laws and rules governing lawyers admitted to the active practice of law in this jurisdiction. The [jurisdiction's disciplinary counsel] has and shall retain jurisdiction over the registered lawyer with respect to the conduct of the lawyer in this or another jurisdiction to the same extent as it has over lawyers generally admitted in this jurisdiction.

AUTOMATIC TERMINATION:

- F. A registered lawyer's rights and privileges under this section automatically terminate when:
1. The lawyer's employment terminates;
 2. The lawyer is suspended or disbarred from practice in any jurisdiction or any court or agency before which the lawyer is admitted; or
 3. The lawyer fails to maintain active status in at least one jurisdiction.

REINSTATEMENT:

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

SANCTIONS:

- H. A lawyer under this rule who fails to register shall be:
1. Subject to professional discipline in this jurisdiction;
 2. Ineligible for admission on motion in this jurisdiction;
 3. Referred by the [registration authority] to the [jurisdiction's bar admission authority]; and
 4. Referred by the [registration authority] to the disciplinary authority of the jurisdictions of licensure.

REPORT

The Council of the Section of Legal Education and Admissions to the Bar, at its meeting of December 1-2, 2006, approved the Model Rule for Registration of House Counsel (Registration Rule). The purpose of the Registration Rule is to create a regulatory model useful to states that might wish to follow the registration approach when adopting Rule 5.5(d) of the Model Rules of Professional Conduct.

Rule 5.5(d) now excludes from the definition of unauthorized practice of law the provision of legal services by in-house counsel admitted in one jurisdiction and practicing in another jurisdiction, when the lawyer is providing legal services solely to the lawyer's employer. Rule 5.5(d) states:

A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:

- (1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission.

Rule 5.5(d) applies to lawyers who are employed to render legal services to the employer. The provision assumes that the in-house lawyer can establish an office or other "systematic presence" in the jurisdiction and forgo local licensure without unreasonable risk to the client or others because the employer is able to assess the lawyer's qualifications and the quality of the lawyer's work.

Model Rule 5.5, Comment [17], 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." In an effort to create a regulatory model useful to states that might wish to follow the registration approach, the Bar Admission Committee drafted, and the Council of the Section has approved for submission to the House, this Rule.

PURPOSE OF REGISTRATION RULE

The Council recognizes that in addition to client security fund assessments and continuing legal education requirements, registration would make an in-house counsel's status known to the public. Local public records would be available to verify that such lawyers are licensed by another state and in good standing. Furthermore, a lawyer who practices pursuant to this rule is subject to the disciplinary authority of the local jurisdiction. (*See Rules 5.5 and 8.5, ABA Model Rules of Professional Conduct.*)

The Registration Rule would provide a mechanism for jurisdictions to identify and monitor in-house counsel who are practicing in the jurisdiction. The Rule also provides sanctions for those who fail to register.

TIMING OF REGISTRATION

Paragraph A of the Registration Rule anticipates that the adopting jurisdiction would designate a time within which the lawyer must register after he or she establishes the office or “continuous presence” in the jurisdiction. The Council recognizes that following the adoption of the Rule those already engaged in an in-house counsel practice would have to come into compliance with the registration system. Each adopting jurisdiction could select the number of days or months within which those lawyers subject to this provision would need to register.

SPECIFIC FILING REQUIREMENTS

The lawyer subject to the registration requirement would pay a fee in an amount determined by the jurisdiction and submit three types of essential documents:

- **An application in a form prescribed by the jurisdiction, requesting information such as name, address, employer’s name and address, status of license in another state or states.** No “character and fitness” questions would be asked because a background investigation is not part of the registration process. If there is some reason to doubt the authenticity or accuracy of the documentation, good standing or employment, the prospective registrant would have the burden of resolving all questions to the satisfaction of the registering authority.
- **Proof of admission and proof of current good standing in all jurisdictions where licensed.** An individual who is not in good standing in one or more jurisdictions would be required to disclose this issue whether the status is due to disbarment or because the lawyer is not current with annual registration fees or CLE requirements. Disclosure of the nature and extent of any license restrictions, regardless of how minor, would be required.
- **A sworn statement of an authorized individual from the employing entity attesting that the registering lawyer is employed by the entity and the employment is consistent with the requirements of the rule.** This provision requires a specific attestation that the lawyer is working exclusively for the employer, that the employer is engaged in a lawful enterprise, and that the employment takes place in the state of registration.

SCOPE OF AUTHORITY

Paragraph B describes what the registered lawyer would and would not be permitted to do under the authority of this registration. The registered lawyer could practice law in the state except that the lawyer could not represent anyone other than the employer and subsidiaries under common control. The lawyer could also represent employees, officers and directors of the employer or its subsidiaries on matters that arise from the work for these entities and so long as the representation complies with the jurisdiction’s conflict of interest rules. For example, if an employee has been subpoenaed by name to testify at an administrative hearing about matters within the scope of his or her employment, the lawyer could counsel the employee about the subpoena and testimony and, if consistent with the rules of the administrative agency, represent the

employee at the hearing. The lawyer could not appear before a court or other tribunal unless permitted by law or rule.

This provision prohibits registered lawyers from engaging in occasional representation of friends, relatives or employees of the employer and assures that the only permitted client is the employer. The provision also would prohibit the registered lawyer 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.

PRO BONO PRACTICE

Paragraph C authorizes and encourages registered lawyers to participate in authorized pro bono programs and to provide legal services to clients of those programs. By limiting pro bono representation to clients of authorized programs, the Rule removes any impediment to full participation by in-house counsel in pro bono legal work while assuring that participation in such programs occurs with adequate oversight.

OBLIGATIONS

The Rule requires payment of an annual fee and completion of whatever continuing legal education requirement the jurisdiction would impose. In addition, the registered lawyer has three obligations:

- To report any change in the lawyer's employment;
- To report any change in the lawyer's licensing status in any other licensing jurisdiction; and
- To report any professional charge, finding or sanction arising in any jurisdiction.

The lawyer must inform the registering authority of any termination of the employment relationship upon which the registrant's status rests. Because the registration status assumes that registered lawyers are in good standing in their state or states of licensure, they bear the burden of reporting any change in that status. By requiring the registered lawyer to report "any change in the lawyer's licensing status," the Rule requires that the lawyer must report any lapse in good standing in a law license for reasons other than professional discipline. Similarly, by stating that the lawyer must report "any professional charge, finding or sanction," the lawyer must report the filing of a complaint, not just the final disposition of a professional discipline complaint.

LOCAL DISCIPLINE

In paragraph E, the Council intends that the Rule give the disciplinary counsel jurisdiction over registered lawyers' professional conduct, whether the conduct arises from the in-house counsel practice or from any other aspect of practice. This authority exists concurrently with that of disciplinary counsel in other states of licensure.

AUTOMATIC TERMINATION

Paragraph F provides that three events can result in *automatic* termination of the registration and thus the lawyer's right to practice as in-house counsel in the state. These are the loss of qualifying employment, whether voluntary or involuntary; suspension or

disbarment from any jurisdiction or from any federal court or agency before which the lawyer had been admitted to practice; and the failure to maintain active status in at least one jurisdiction.

REINSTATEMENT

By paragraph G's reinstatement provision, the Council sought to permit the lawyer to move from one in-house counsel position to another without beginning the registration process anew. The "application for renewal" described in paragraph G.1-3 could be no more than a short submission identifying the new qualifying employer, assuring the payment of a fee, and providing for an affidavit from the new employer assuring compliance with the registration requirements. The jurisdiction could specify a reasonable period of time, perhaps 3 to 6 months, during which a registered lawyer could transfer the registration from one qualifying employer to another. Failure to transfer the registration within the stated period would result in the termination of the registration status, requiring the lawyer to begin the process anew.

SANCTIONS

The Committee concluded that a provision would be necessary so that a lawyer who is required to register under this provision but fails to do so would be subject to sanctions. The jurisdiction in which in-house counsel practices without registration could sanction such counsel by subjecting him or her to professional discipline. Although Model Rule 5.5 exempts in-house counsel from prosecution for unauthorized practice, the jurisdiction adopting a registration requirement would subject the in-house counsel who fails to comply with the registration rule to prosecution for unauthorized practice. The Rule would prohibit in-house counsel who fail to register from being admitted on motion without examination in the jurisdiction. In-house counsel who fail to register will be referred to the appropriate authorities in the jurisdictions of registration and licensure.

CONCLUSION

By this Rule, the Council proposes a straightforward registration process that neither creates a *de facto* licensing process nor places an undue burden on in-house counsel or on states' bar regulatory systems. The Rule will encourage in-house counsel to come forward and register and that registration will inure to the benefit of the bar as well as to the benefit of the public.

The Council respectfully requests that the House of Delegates approve the Model Rule.

Respectfully submitted,

Ruth McGregor, Chairperson
August 2008