REPORT

Introduction and Executive Summary

The ABA Commission on Ethics 20/20 proposes to amend Rule 5.5(d) of the ABA Model Rules of Professional Conduct (Unauthorized Practice of Law; Multijurisdictional Practice of Law) to permit foreign lawyers to serve as in-house counsel in the U.S., but with the added requirement that foreign lawyers not advise on U.S. law except in consultation with a U.S.-licensed lawyer. This Resolution is complemented by a separate Resolution to amend the 2008 ABA Model Rule for Registration of In-House Counsel.

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.[1] 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.

Global organizational clients have an existing and growing need to employ in-house foreign lawyers in their U.S. offices. This development is evidenced by the seven U.S. jurisdictions (Arizona, Connecticut, Delaware, Georgia, Virginia, Washington and Wisconsin) that expressly permit foreign lawyers to work as in-house counsel in the U.S. offices of their clients.[2] The Commission inquired and is aware of no adverse consequences in these jurisdictions from such authority.

Notably, the proposed amendments to Model Rule 5.5(d) and the related Resolution to amend the Model Rule for Registration of In-House Counsel would not authorize the licensing or full admission of foreign in-house lawyers. Rather, the amendments would 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.

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[1] *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 [hereinafter ABA Task Force on International Trade in Legal Services, *A Framework for State Bars*] (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* [hereinafter Texas Office of the Governor, *Foreign Investment in Texas*], 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). According to the Illinois Department of Commerce & Economic Opportunity, foreign direct investment "is a major contributor to the economic vitality of the state. Illinois ranks number one in the Midwest as a destination for foreign investment. Illinois is home to nearly 1,600 foreign firms with 6,416 locations, employing 323,362 Illinois residents. *See* Illinois Department of Commerce & Economic Opportunity, *Foreign Direct Investment in Illinois*, *available at* http://www.ildceo.net/dceo/Bureaus/Trade/Foreign_Direct_Investment (last visited Nov. 12, 2012).

[2] *See, e.g.*, ABA Center for Professional Responsibility, *Comparison of ABA Model Rule for Registration of In-House Counsel With State Versions* (last updated Jan. 11, 2012), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/in_house_comp.authcheckdam.pdf. Georgia does not require registration.

Foreign lawyers (including foreign legal consultants) are already engaged as in-house counsel within the U.S.,[3] but are subject to little oversight. 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 proposals also ensure that the foreign lawyers 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.[4] Clients and lawyers will benefit from consistency across jurisdictions on this issue.

The definition of who would qualify under Model Rule 5.5 as a foreign lawyer is the same as the one used in longstanding ABA policy, including the ABA Model Rule for the Licensing and Practice of Foreign Legal Consultants,[5] which state supreme courts have adopted with no adverse consequences.

If adopted by the House of Delegates, the changes proposed in this Resolution and the accompanying Resolution to amend the Model Rule for Registration of In-House Counsel 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.

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. Among other amendments, Model Rule 5.5(d) now authorizes U.S. lawyers to provide legal services to their organizational clients in the jurisdictions where those clients are located even if the lawyers are not admitted in those jurisdictions.

At the outset of its work, the Commission 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-

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

[4] In this regard, the Commission is aware that 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. The Commission believes the development of such a protocol is necessary and will enhance client and public protection given increased globalization of the profession.

[5] The ABA Model Rule on Temporary Practice by Foreign Lawyers and the August 2012 Model Rule on Practice Pending Admission also contain this definition of a foreign lawyer.

house counsel.[6] 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.

In June 2010, the Commission circulated broadly for comment templates and memoranda illustrating and explaining the basis for the proposals of its Working Group on Inbound Foreign Lawyers. At subsequent meetings, the Commission considered additional written responses and oral testimony on the subject. At its October 2012 meeting, it concluded that the 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. As the proposed changes to Model Rule 5.5 and the accompanying Resolution to amend the Model Rule for Registration of In-House Counsel reflect, the Commission favors narrow practice authorization for qualified foreign lawyers, not full admission.

Permitting Limited Practice Authorization for Foreign In-House Counsel in Model Rule 5.5

The number of foreign companies with U.S. offices or operations in the United States has increased substantially in the last decade, as has the number of U.S. companies with foreign offices or operations, necessitating the hiring of non-U.S. lawyers into their operations. States actively recruit foreign companies to open offices in their jurisdictions. For example, the ABA Task Force on International Trade in Legal Services, in a 2012 White Paper, examined how the State of Georgia came to change its rules relating to practice authorization by foreign lawyers, including those in-house:

> Over 3600 foreign businesses from more than 60 countries have established operations in Georgia, including the U.S. headquarters of such notable names as Porsche Cars North America, Siemens, ING Americas, Philips Consumer Electronics, Ciba Vision,

[6] 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. *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. Another area where the Special Committee noted a policy gap related to *pro hac vice* admission of foreign lawyers. *Id.* at 8. This subject is addressed by the Commission in a separate Resolution to the House of Delegates.

> Intercontinental Hotels Group, Novelis, Munich Re and Mizuno. These companies directly employ approximately 194,000 Georgians and, by virtue of the ripple effect, indirectly generate jobs for many thousands more. Indeed, according to the Metro Atlanta Chamber of Commerce, foreign companies accounted for 20% of the metro area's new business activity in the last decade...The state actively recruits foreign international business, with the Georgia Department of Economic Development maintaining international offices in Brazil, Canada, Chile, China, Germany, Japan, Korea, Mexico, Israel, and the United Kingdom. At least 66 countries are represented in Atlanta by a consulate, trade office or bi-national chamber of commerce.[7]

Similarly, in Texas, the 2011 Foreign Investment in Texas Report issued by the Office of the Governor's Office of Economic Development and Tourism found: "Texas is a top-ranked global destination for foreign direct investment (FDI). The state's strong economy, competitive business climate, and central location within North America have attracted more than 2,000 foreign multinationals to establish locations here."[8]

The result of these and similar developments[9] has been a rise in the movement of both U.S. and foreign in-house counsel. These lawyers' employers often require them to relocate to the US from a foreign jurisdiction where the company has an office or from the U.S. to a foreign office. As noted by the ABA Task Force on International Trade in Legal Services White Paper discussed above, lawyers are enmeshed in the global economy; "[c]lients travel, lawyers follow those clients, and this has an impact on legal practice and legal regulation."[10]

In light of these trends, more states are likely to address this issue. The Commission concluded that these states should have guidance about how to proceed and that lawyers would benefit from uniformity in this area. For this reason, the Commission proposes to amend Model Rule 5.5(d), and to add a new black letter paragraph 5.5(e), to provide limited and regulated practice authorization to qualified lawyers who are admitted in a foreign jurisdiction but who are providing legal services solely to their employers as in-house counsel. As specified below, foreign lawyers would be limited in what they can do within the U.S. jurisdiction.

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[7] ABA Task Force on International Trade in Legal Services, *A Framework for State Bars*, *supra* note 1.
[8] *See* Texas Office of the Governor, *Foreign Investment in Texas*, *supra* note 1.
[9] For example, according to an October 2012 International Trade Administration report relating to exports, jobs and foreign investment in Utah, in 2010 foreign controlled companies employed 29,000 Utah workers. Significant sources of foreign investment in that state included the U.K, German, Japan and Switzerland. U.S. Department of Commerce International Trade Administration, *Utah: Exports, Jobs, and Foreign Investment October* 2012, http://www.trade.gov/mas/ian/statereports/states/ut.pdf. (last viewed Nov.12, 2012). According to the Illinois Department of Commerce & Economic Opportunity, foreign direct investment "is a major contributor to the economic vitality of the state. Illinois ranks number one in the Midwest as a destination for foreign investment. Not surprising, since Illinois offers companies unrivaled strategic location and transportation infrastructure-as well as a diversified, technologically advanced economy, productive workforce, and a world-class cultural environment. Illinois is home to nearly 1,600 foreign firms with 6,416 locations, employing 323,362 Illinois residents." *See* Illinois Department of Commerce and Economic Opportunity, *Foreign Direct Investment in* Illinois, *supra* note 1.
[10] *Supra* note 5.

Permitting Limited Practice Authorization by Foreign In-House Counsel

For purposes of the proposed amendments to Model Rule 5.5, the meaning of "foreign lawyer" would be defined in paragraph (e) to mean people who are members in good standing of a recognized legal profession in the lawyer's home country. Moreover, the members must be subject to effective regulation and discipline by a duly constituted professional body or public authority. This is the definition that has long been used in the ABA Model Rule on Licensing and Practice by Foreign Legal Consultants, which state supreme courts have adopted with no adverse consequences.[11]

The Commission's proposal contains important client protections. The lawyer may not advise on an issue concerning the law of a U.S. jurisdiction except in consultation with a U.S. lawyer authorized to provide such advice.[12] The requirement that the foreign lawyer consult with a qualified U.S. lawyer on questions of U.S. law is consistent with the requirement set forth in Section 3(e) of the ABA Model Rule for the Licensing and Practice of Foreign Legal Consultants. The foreign in-house lawyer is subject to the U.S. jurisdiction's rules of professional conduct and to the disciplinary authority of the jurisdiction. The Commission's companion Resolution to add foreign in-house counsel to the ABA Model Rule for Registration of In-House Counsel would require that the foreign lawyer register with the duly authorized registration authority in the state, prove his or her admission and good standing in the bar of his or her jurisdiction, pay both annual dues and annual client protection fund assessments, satisfy the U.S. jurisdiction's continuing legal education requirements, and present an affidavit from an officer of his or her employer attesting to compliance with the Rule.

Adding foreign lawyers to Model Rule 5.5's practice authority for in-house counsel benefits the clients of those lawyers without subjecting them or the public to any increased risks. The premise of Rule 5.5(d) is that a U.S. licensed in-house lawyer can establish an office or other "systematic presence" in a jurisdiction where that lawyer is not admitted and forgo traditional local licensure without unreasonable risk to the client or public because: (1) the employer is able to assess the lawyer's qualifications and the quality of the lawyer's work; and (2) the lawyer's only client is the employer. The Commission on Ethics 20/20 concluded that these rationales also apply to foreign in-house counsel if other protections are in place.[13]

The Conference of Chief Justices has indicated its approval of the Commission's approach to this issue. The Conference's Task Force on the Regulation of Foreign Lawyers and the International Practice of Law endorsed in principle – and the Conference itself approved in principle – an

[11] For example, see the foreign legal consultant rules for states including, but not limited to, Georgia, Massachusetts, New Mexico, North Dakota, Utah, and Virginia.

[12] 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.

[13] *Supra* note 1.

earlier version of this proposal and urged adoption of the Commission's recommendation by the ABA House of Delegates.[14]

Some commenters have suggested that the proposed constraints on foreign in-house counsel are too restrictive (e.g., it is not necessary to require such counsel to consult with U.S. counsel when advising on issues of U.S. law). They argue that these foreign lawyers could offer advice on U.S. law to their organizational clients from their home jurisdictions, so they should be able to offer the same advice to the same clients while on U.S. soil. The Commission rejected this argument because U.S. lawyers are subject to similar constraints on where they are permitted to offer their advice. For example, a New Hampshire lawyer can offer advice about Missouri law while in New Hampshire, but the New Hampshire lawyer is not permitted to relocate to Missouri and offer advice on Missouri law without becoming licensed to practice. Also, as referenced above, this limitation is consistent with the limitation already contained in the Model Foreign Legal Consultant Rule.

Conversely, some commenters have suggested the proposal is not sufficiently restrictive. They argue that it would open the floodgates to unlimited practice by foreign lawyers in the U.S. As noted above, this proposal would not permit unlimited practice or practice for clients other than the organizational client. Moreover, foreign lawyers are already engaged as in-house counsel within the U.S., but are subject to relatively little oversight. Adding foreign lawyers to Model Rule 5.5 and also to the Model Rule for Registration of In-House Counsel enables organizational clients to meet their needs with counsel of their choice, while ensuring that foreign lawyers are identifiable, subject to monitoring, and accountable for their conduct. In Georgia, there was recognition by a broad segment of the bar that it was sensible to consider these developments before a regulatory crisis occurred, not after the fact. The State Bar of Georgia considered what regulations would protect the public and recognized that a balanced regulatory approach to globalization could enhance the state's business climate and attractiveness for foreign trade and investment.[15] The Commission also believes that it is best to acknowledge and address these realities.

Nor is the specter of foreign in-house lawyer malpractice or misconduct well-founded. Arizona, Connecticut, Delaware, Georgia, Virginia, Washington, and Wisconsin currently permit foreign in-house counsel to work for their employers, and there have been no adverse consequences. Moreover, the Commission's proposals provide additional client protections than the Rules found in some of those states.

Finally, one commenter suggests that the Commission's proposal is flawed because communications between foreign in-house lawyers and their clients in the U.S. may not be privileged because most other nations do not recognize the attorney-client privilege in the in-house context. The privilege issue long predates the Commission's proposals. It arises whenever

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[14] *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). The version before the Conference did not include the requirement for consultation with a U.S. lawyer and was, thus, less restrictive than the instant proposal. In the Conference's Resolution it noted that "legal transactions and disputes involving foreign law and foreign lawyers is increasing."

[15] *Supra* note 7.

a matter crosses national borders, for example, with regard to communications with foreign in-house lawyers abroad when the litigation is here in the U.S. and for communications with U.S. lawyers here or abroad when the litigation is abroad. Multinational organizations must and do address this issue today when they rely on non-U.S. lawyers wherever they sit.[16]

Conclusion

These proposed amendments to Rule 5.5 of the ABA Model Rules of Professional Conduct and its Comments meet the needs of 21st century clients and counsel while providing adequate safeguard for the courts, the profession, and the public. The Commission on Ethics 20/20 respectfully requests that the House of Delegates approve the amendments to the Model Rule 5.5.

Respectfully submitted,

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

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[16] U.S. courts will sometimes consider communications with foreign lawyers to be privileged without regard to whether that lawyer's home jurisdiction would do so. *See* FED. R. EVID. 501. *See, e.g., Gucci America, Inc. v. Guess?, Inc.*, 271 F.R.D. 58 (S.D.N.Y. 2010).