

## **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

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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).