

1 The views expressed herein have not been approved by the House of Delegates or the Board
2 of Governors of the American Bar Association and, accordingly, should not be construed as
3 representing the policy of the American Bar Association.
4

5 **Resolution**
6

7 **RESOLVED:** That the American Bar Association amends Rule 5.5 of the ABA
8 Model Rules of Professional Conduct follows (insertions underlined, deletions
9 ~~struck through~~):

10 **RULE 5.5: UNAUTHORIZED PRACTICE OF LAW;**
11 **MULTIJURISDICTIONAL PRACTICE OF LAW**
12

13 (a) A lawyer shall not practice law in a jurisdiction in violation of the
14 regulation of the legal profession in that jurisdiction, or assist another in doing so.

15 (b) A lawyer who is not admitted to practice in this jurisdiction shall not:

16 (1) except as authorized by these Rules or other law, establish an
17 office or other systematic and continuous presence in this jurisdiction for the
18 practice of law; or

19 (2) hold out to the public or otherwise represent that the lawyer is
20 admitted to practice law in this jurisdiction.

21 (c) A lawyer admitted in another United States jurisdiction, and not
22 disbarred or suspended from practice in any jurisdiction, may provide legal services
23 on a temporary basis in this jurisdiction that:

24 (1) are undertaken in association with a lawyer who is admitted to
25 practice in this jurisdiction and who actively participates in the matter;

26 (2) are in or reasonably related to a pending or potential
27 proceeding before a tribunal in this or another jurisdiction, if the lawyer, or
28 a person the lawyer is assisting, is authorized by law or order to appear in
29 such proceeding or reasonably expects to be so authorized;

30 (3) are in or reasonably related to a pending or potential
31 arbitration, mediation, or other alternative dispute resolution proceeding in
32 this or another jurisdiction, if the services arise out of or are reasonably
33 related to the lawyer's practice in a jurisdiction in which the lawyer is
34 admitted to practice and are not services for which the forum requires pro
35 hac vice admission; or

36 (4) are not within paragraphs (c)(2) or (c)(3) and arise out of or
37 are reasonably related to the lawyer's practice in a jurisdiction in which the
38 lawyer is admitted to practice.

39 (d) A lawyer admitted in another United States jurisdiction or in a foreign
40 jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may
41 provide legal services in this jurisdiction that:

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

45 (2) are services that the lawyer is authorized by federal or other
46 law to provide in this jurisdiction.

47 **(e) A lawyer admitted only in a foreign jurisdiction and not disbarred or**
48 **suspended from practice in any jurisdiction, may provide legal services on a**
49 **temporary basis in this jurisdiction:**

50 **(1) as provided in paragraphs (c)(1) through (c)(3);**

51 **(2) that are not within paragraphs (c)(2) or (c)(3) and**

52 **(i) are performed for a client who resides or has an office in**
53 **a jurisdiction in which the lawyer is authorized to practice, to the**
54 **extent of that authorization; or**

55 **(ii) arise out of or are reasonably related to a matter that**
56 **has a substantial connection to a jurisdiction in which the lawyer**
57 **is authorized to practice, to the extent of that authorization; or**

58 **(3) that are governed primarily by international law or the law of**
59 **a non-U.S. jurisdiction.**

60 **(f) For purposes of paragraph (e), the foreign lawyer must be a member in**
61 **good standing of a recognized legal profession in a foreign jurisdiction, the**
62 **members of which are admitted to practice as lawyers or counselors at law or**
63 **the equivalent, and are subject to effective regulation and discipline by a duly**
64 **constituted professional body or a public authority.**

65
66 **Comment**

67
68 [1] A lawyer may practice law only in a jurisdiction in which the lawyer is
69 authorized to practice. A lawyer may be admitted to practice law in a jurisdiction on a
70 regular basis or may be authorized by court rule or order or by law to practice for a
71 limited purpose or on a restricted basis. Paragraph (a) applies to unauthorized practice of
72 law by a lawyer, whether through the lawyer's direct action or by the lawyer assisting
73 another person.

74 [2] The definition of the practice of law is established by law and varies from
75 one jurisdiction to another. Whatever the definition, limiting the practice of law to
76 members of the bar protects the public against rendition of legal services by unqualified
77 persons. This Rule does not prohibit a lawyer from employing the services of
78 paraprofessionals and delegating functions to them, so long as the lawyer supervises the
79 delegated work and retains responsibility for their work. See Rule 5.3.

80 [3] A lawyer may provide professional advice and instruction to nonlawyers
81 whose employment requires knowledge of the law; for example, claims adjusters,
82 employees of financial or commercial institutions, social workers, accountants and
83 persons employed in government agencies. Lawyers also may assist independent
84 nonlawyers, such as paraprofessionals, who are authorized by the law of a jurisdiction to
85 provide particular law-related services. In addition, a lawyer may counsel nonlawyers
86 who wish to proceed pro se.

87 [4] Other than as authorized by law or this Rule, a lawyer who is not admitted
88 to practice generally in this jurisdiction violates paragraph (b) if the lawyer establishes an
89 office or other systematic and continuous presence in this jurisdiction for the practice of
90 law. Presence may be systematic and continuous even if the lawyer is not physically
91 present here. Such a lawyer must not hold out to the public or otherwise represent that

92 the lawyer is admitted to practice law in this jurisdiction. See also Rules 7.1(a) and
93 7.5(b).

94 [5] There are occasions in which a lawyer admitted to practice in another
95 United States jurisdiction, and not disbarred or suspended from practice in any
96 jurisdiction, may provide legal services on a temporary basis in this jurisdiction under
97 circumstances that do not create an unreasonable risk to the interests of their clients, the
98 public or the courts. Paragraph (c) identifies four such circumstances. There also are
99 occasions in which a lawyer admitted to practice in a foreign jurisdiction, and not
100 disbarred or suspended from practice in any jurisdiction, may provide legal services on a
101 temporary basis in this jurisdiction under circumstances that do not create an
102 unreasonable risk to clients, the public or the courts. Paragraph (e) indentifies five such
103 circumstances and paragraph (f) defines a foreign lawyer for purposes of this grant of
104 authority. The fact that conduct is not so identified does not imply that the conduct is or
105 is not authorized. With the exception of paragraphs (d)(1) and (d)(2), this Rule does not
106 authorize a U.S. or foreign lawyer to establish an office or other systematic and
107 continuous presence in this jurisdiction without being admitted to practice generally here.

108 [6] There is no single test to determine whether a lawyer's services are
109 provided on a "temporary basis" in this jurisdiction, and may therefore be permissible
110 under paragraphs (c) and (e). Services may be "temporary" even though the lawyer
111 provides services in this jurisdiction on a recurring basis, or for an extended period of
112 time, as when the lawyer is representing a client in a single lengthy negotiation or
113 litigation.

114 [7] Paragraphs (c) (1)–(3) and (d) apply to lawyers who are admitted to
115 practice law in any United States jurisdiction, which includes the District of Columbia
116 and any state, territory or commonwealth of the United States and to lawyers admitted in
117 a foreign jurisdiction. Paragraph (c)(4) applies only to U.S. lawyers and paragraphs
118 (e)(2) and (3) apply only to foreign lawyers. The word "admitted" in paragraphs (c), (d)
119 and (e) contemplates that the lawyer is authorized to practice in the jurisdiction in which
120 the lawyer is admitted and excludes a lawyer who while technically admitted is not
121 authorized to practice, because, for example, the lawyer is on inactive status.

122 [8] Paragraph (c)(1) recognizes that the interests of clients and the public are
123 protected if a lawyer admitted only in another jurisdiction associates with a lawyer
124 licensed to practice in this jurisdiction. For this paragraph to apply, however, the lawyer
125 admitted to practice in this jurisdiction must actively participate in and share
126 responsibility for the representation of the client.

127 [9] Lawyers not admitted to practice generally in a jurisdiction may be
128 authorized by law or order of a tribunal or an administrative agency to appear before the
129 tribunal or agency. This authority may be granted pursuant to formal rules governing
130 admission pro hac vice or pursuant to informal practice of the tribunal or agency. Under
131 paragraph (c)(2), a lawyer does not violate this Rule when the lawyer appears before a
132 tribunal or agency pursuant to such authority. To the extent that a court rule or other law
133 of this jurisdiction requires a lawyer who is not admitted to practice in this jurisdiction to
134 obtain admission pro hac vice before appearing before a tribunal or administrative
135 agency, this Rule requires the lawyer to obtain that authority.

136 [10] Paragraph (c)(2) also provides that a lawyer rendering services in this
137 jurisdiction on a temporary basis does not violate this Rule when the lawyer engages in

138 conduct in anticipation of a proceeding or hearing in a jurisdiction in which the lawyer is
139 authorized to practice law or in which the lawyer reasonably expects to be admitted pro
140 hac vice. Examples of such conduct include meetings with the client, interviews of
141 potential witnesses, and the review of documents. Similarly, a lawyer admitted only in
142 another jurisdiction may engage in conduct temporarily in this jurisdiction in connection
143 with pending litigation in another jurisdiction in which the lawyer is or reasonably
144 expects to be authorized to appear, including taking depositions in this jurisdiction.

145 [11] When a lawyer has been or reasonably expects to be admitted to appear
146 before a court or administrative agency, paragraph (c)(2) also permits conduct by lawyers
147 who are associated with that lawyer in the matter, but who do not expect to appear before
148 the court or administrative agency. For example, subordinate lawyers may conduct
149 research, review documents, and attend meetings with witnesses in support of the lawyer
150 responsible for the litigation.

151 [12] Paragraph (c)(3) permits a lawyer admitted to practice law in another
152 jurisdiction to perform services on a temporary basis in this jurisdiction if those services
153 are in or reasonably related to a pending or potential arbitration, mediation, or other
154 alternative dispute resolution proceeding in this or another jurisdiction, if the services
155 arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the
156 lawyer is admitted to practice. The lawyer, however, must obtain admission pro hac vice
157 in the case of a court-annexed arbitration or mediation or otherwise if court rules or law
158 so require.

159 [13] Paragraph (c)(4) permits a lawyer admitted in another United States
160 jurisdiction to provide certain legal services on a temporary basis in this jurisdiction that
161 arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the
162 lawyer is admitted but are not within paragraphs (c)(2) or (c)(3). These services include
163 both legal services and services that nonlawyers may perform but that are considered the
164 practice of law when performed by lawyers.

165 [14] Paragraphs (c)(3) and (c)(4) require that the services arise out of or be
166 reasonably related to the United States lawyer's practice in a jurisdiction in which ~~the~~ that
167 lawyer is admitted. A variety of factors evidence such a relationship. The lawyer's client
168 may have been previously represented by the lawyer, or may be resident in or have
169 substantial contacts with the jurisdiction in which the lawyer is admitted. The matter,
170 although involving other jurisdictions, may have a significant connection with that
171 jurisdiction. In other cases, significant aspects of the lawyer's work might be conducted
172 in that jurisdiction or a significant aspect of the matter may involve the law of that
173 jurisdiction. The necessary relationship might arise when the client's activities or the
174 legal issues involve multiple jurisdictions, such as when the officers of a multinational
175 corporation survey potential business sites and seek the services of their lawyer in
176 assessing the relative merits of each. In addition, the services may draw on the lawyer's
177 recognized expertise developed through the regular practice of law on behalf of clients in
178 matters involving a particular body of federal, nationally-uniform, foreign, or
179 international law. The authority granted to foreign lawyers under paragraph (e)(2),
180 however, is narrower than that afforded to United States lawyers under paragraph (c)(4)
181 because the practice nexus is more demanding. Also, the scope of the work the foreign
182 lawyer may perform under this provision would be limited to the services the lawyer may
183 perform in the authorizing jurisdiction. For example, if a German lawyer came to the

184 United States to negotiate on behalf of a client in Germany, the lawyer would be
185 authorized to provide only those services that the lawyer is authorized to provide for that
186 client in Germany. A foreign lawyer may also be authorized as a foreign legal consultant
187 in one United States jurisdiction and cite that authority as the basis for temporary
188 presence in a second United States jurisdiction. If so, the lawyer could provide in the
189 second jurisdiction only those services that the lawyer is authorized to perform in the
190 jurisdiction in which the lawyer is a foreign legal consultant provided the additional
191 requirements of this paragraph were satisfied. Lawyers desiring to provide pro bono
192 legal services on a temporary basis in a jurisdiction that has been affected by a major
193 disaster, but in which they are not otherwise authorized to practice law, as well as
194 lawyers from the affected jurisdiction who seek to practice law temporarily in another
195 jurisdiction, but in which they are not otherwise authorized to practice law, should
196 consult the [*Model Court Rule on Provision of Legal Services Following Determination*
197 *of Major Disaster*].

198 [15] Paragraph (d) identifies two circumstances in which a lawyer who is
199 admitted to practice in another United States or a foreign jurisdiction, and is not disbarred
200 or suspended from practice in any jurisdiction, may establish an office or other systematic
201 and continuous presence in this jurisdiction for the practice of law as well as provide
202 legal services on a temporary basis. Except as provided in paragraphs (d)(1) and (d)(2), a
203 lawyer who is admitted to practice law in another jurisdiction and who establishes an
204 office or other systematic or continuous presence in this jurisdiction must become
205 admitted to practice law generally in this jurisdiction.

206 [16] Paragraph (d)(1) applies to a United States or foreign lawyer who is
207 employed by a client to provide legal services to the client or its organizational affiliates,
208 i.e., entities that control, are controlled by, or are under common control with the
209 employer. This paragraph does not authorize the provision of personal legal services to
210 the employer's officers or employees. The paragraph applies to in-house corporate
211 lawyers, government lawyers and others who are employed to render legal services to the
212 employer. The lawyer's ability to represent the employer outside the jurisdiction in
213 which the lawyer is licensed generally serves the interests of the employer and does not
214 create an unreasonable risk to the client and others because the employer is well situated
215 to assess the lawyer's qualifications and the quality of the lawyer's work.

216 [17] If an employed lawyer establishes an office or other systematic presence
217 in this jurisdiction for the purpose of rendering legal services to the employer, the lawyer
218 may be subject to registration or other requirements, including assessments for client
219 protection funds and mandatory continuing legal education.

220 [18] Paragraph (d)(2) recognizes that a lawyer may provide legal services in a
221 jurisdiction in which the lawyer is not licensed when authorized to do so by federal or
222 other law, which includes statute, court rule, executive regulation or judicial precedent.

223 [19] A lawyer who practices law in this jurisdiction pursuant to paragraphs (c),
224 ~~or (d)~~ or (e) or otherwise is subject to the disciplinary authority of this jurisdiction. See
225 Rule 8.5(a).

226 [20] In some circumstances, a lawyer who practices law in this jurisdiction
227 pursuant to paragraphs (c), ~~or (d)~~ or (e) may have to inform the client that the lawyer is
228 not licensed to practice law in this jurisdiction. For example, that may be required when

229 the representation occurs primarily in this jurisdiction and requires knowledge of the law
230 of this jurisdiction. See Rule 1.4(b).

231 [21] Paragraphs (c), ~~and (d)~~, and (e) do not authorize communications
232 advertising legal services to prospective clients in this jurisdiction by lawyers who are
233 admitted to practice in other jurisdictions. Whether and how lawyers may communicate
234 the availability of their services to prospective clients in this jurisdiction is governed by
235 Rules 7.1 to 7.5.

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.

Report

Introduction

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

In November 19, 2009, the ABA Commission on Ethics 20/20 issued its Preliminary Issues Outline, identifying a number of issues for consideration and study and soliciting input about them. Among the issues identified was the following:

Model Rule 5.5(c), which authorizes multijurisdictional practice of law by U.S. lawyers, does not include temporary practice by foreign lawyers. The ABA adopted a separate Model Rule for Temporary Practice by Foreign Lawyers.¹ Most jurisdictions that have adopted Model Rule 5.5 have not, however, adopted the corollary foreign temporary practice rule. Should the ABA amend Model Rule 5.5 to include lawyers from outside the U.S.? Should the scope of authority be the same for them as for U.S. lawyers?

Because Model Rule 5.5(d) and the Model Rule on In-House Counsel Registration are closely related, in response to the comments received, the Commission's Working Group on Inbound Foreign Lawyers examined the questions relating to temporary practice by foreign lawyers as well as considered whether the ABA Model Rule for Registration of In-House Counsel should be include foreign lawyers within its scope. The Commission's Working Group included 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 actively participated on the Working Group. These representatives contributed significantly to the Commission's deliberations and the Resolution that accompanies this Report.

¹ See Report 201J, American Bar Association Commission on Multijurisdictional Practice, Report to the House of Delegates (2002), available at <http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/201j.authcheckdam.pdf>.

The Working Group conducted research and carefully evaluated whether to recommend (1) incorporating the provisions of the 2002 Model Rule for Temporary Practice by Foreign Lawyers into Model Rule 5.5 and (2) permitting limited practice authorization for foreign in-house counsel via Rule 5.5(d). The Working Group concluded that the Commission should recommend both of these changes.

In June 2010, without taking a position on the Working Group's recommendation, the Commission circulated broadly for comment templates and memoranda illustrating and explaining the basis for those suggested changes. At subsequent meetings the Commission considered additional written responses and oral testimony on the subject. At its April 2011 meeting, the Commission agreed that the realities of the global legal marketplace heighten the need for U.S. jurisdictions to address more directly inbound foreign lawyers and associated regulatory concerns, and that the way in which to do this was to adopt the Working Group's recommended changes regarding Model Rule 5.5. In a separate but related Resolution and Report, the Commission is seeking an amendment of the 2008 ABA Model Rule for Registration of In-House Counsel to include foreign lawyers.

ABA Model Rule 5.5 Should Be Amended to Include Temporary Practice by Foreign Lawyers and Limited Practice Authorization for Foreign In-House Counsel

A. The Model Rule on Temporary Practice by Foreign Lawyers

ABA Model Rule 5.5 (unauthorized practice of law; multijurisdictional practice of law) has remained essentially unchanged since 2002.² Forty-four U.S. jurisdictions now have some form of Model Rule 5.5; fourteen jurisdictions have adopted a rule identical to the ABA Model Rule; and thirty jurisdictions had adopted a rule substantially similar to it.³

The primary focus of the MJP Commission's recommendations was cross-border law practice within the United States. The MJP Commission was cognizant, however of parallel increases in transnational legal practice driven by technology and globalization. As a result, it put forth two foreign lawyer recommendations as part of the package of reforms that it proposed and the House of Delegates adopted in August 2002. They were amendments to the 1993 ABA Model Rule for the Licensing of Legal Consultants and the ABA Model Rule for Temporary Practice by Foreign Lawyers.⁴ The Model Rule for Temporary Practice by Foreign Lawyers was adopted by the House of Delegates with no opposition.

² In 2007, a sentence to Comment [14] was added to reflect the existence of the Model Court Rule on Provision of Legal Services Following Determination of Major Disaster.

³ See http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/quick_guide_5_5.authcheckdam.pdf.

⁴ The House of Delegates adopted amendments to the Model Rule for the Licensing of Legal Consultants in August 2006. The Rule is now known as the Model Rule for the Licensing and Practice of Foreign Legal Consultants, <http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/FLC.authcheckdam.pdf>. See also, Model Rule for Temporary Practice by Foreign Lawyers, <http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/201j.authcheckdam.pdf>.

The MJP Commission developed the Model Rule for Temporary Practice by Foreign Lawyers because it recognized that situations existed where foreign lawyers should be authorized to perform limited services in the U.S. on behalf of their clients, but that it was not feasible, in those circumstances, for them to seek admission as a foreign legal consultant. Permitting this limited practice authorization for foreign lawyers did not create an unreasonable risk to the lawyer's client, the public or the courts in 2002, and it does not do so today.

The foreign lawyer corollary to multijurisdictional temporary practice by U.S. lawyers in Model Rule 5.5 has not, however, received the same attention from state supreme courts. Thus far, Delaware, the District of Columbia, Florida, Georgia, Pennsylvania, and Virginia allow temporary practice by foreign lawyers.⁵ Georgia and Pennsylvania incorporated the foreign lawyer temporary practice provisions into their versions of Model Rule 5.5. In addition, North Carolina's rule appears to permit such temporary practice by omitting reference to the words "U.S. jurisdiction." The Commission believes that the sparseness of adoption of a temporary practice authority for foreign lawyers is in large part a product of the fact that the authority exists in a separate Model Court Rule and not in Model Rule 5.5.

The need for foreign lawyers to have limited practice authorization in the U.S. has not lessened since adoption of the Model Rule in 2002. Rather, the realities of 21st Century legal practice have resulted in an increase in foreign lawyers seeking to provide legal services to their clients in the U.S. (as well as a concurrent increase in the efforts by U.S. lawyers and law firms to do the same abroad⁶). When the Model Rule was adopted in 2002, the U.S. imported \$820 million in legal services.⁷ In 2009, that number had risen to \$1.7 billion.⁸ The June 14, 2010 Background Note by the Secretariat of the World Trade Organization Council for Trade in Services⁹ states as follows:

The 1998 Secretariat background Note on legal services observed that the legal services sector had experienced continuous growth as a consequence of the rise in international trade and of the emergence of new fields of practice, in particular in the area of business law. This trend has further continued over the last decade, and brought about sizable growth to the legal services sector. The widening and deepening of international trade and investment links, combined with strong economic growth in many developing countries have increased worldwide demand for legal services, and encouraged the establishment of foreign affiliates in China, Russia, and other fast growing emerging markets... The global market

⁵ See

http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/8_and_9_status_chart.authcheckdam.pdf.

⁶ For example, in 2009, the U.S. exported \$7.26 billion in legal services, up from \$6.4 billion in 2007 and \$5.26 billion in 2006. See, http://www.bea.gov/international/xls/table_G.xls ; <http://www.bea.gov/international/xls/tab7a.xls> .

⁷ See http://www.bea.gov/international/xls/table_H.xls.

⁸ Id.

⁹ See

http://docsonline.wto.org/GEN_highLightParent.asp?qu=&doc=D%3A%2FDDFD%2FDOCUMENTS%2F%2F%2F%2FC%2FW318%2EDOC%2EHTM&curdoc=21&popTitle=S%2FC%2FW%2F318.

for trade in services is estimated to have generated total revenues of US\$581 billion in 2008, representing an annual growth rate of 5 per cent for the period from 2004-2008.¹⁰ This figure is calculated on the basis of globally received revenue by law firms.

The Commission's proposal to move the Model Rule for Temporary Practice by Foreign Lawyers into Model Rule 5.5 does not change any of the permissions for foreign lawyers already existing in longstanding ABA policy. The Commission is merely recommending that, to encourage and achieve increased implementation by the states, it be imported to Model Rule 5.5. Further, as explained in the proposed amendments to paragraph [14] of the Comment to Rule 5.5, the suggested scope of the foreign lawyer's temporary practice authority for transactional matters is narrower than the scope of that authority for the domestic lawyer engaging in temporary practice. This is accomplished by making the practice nexus for the foreign lawyer more demanding to meet. The Commission on Ethics 20/20 concluded that the more limited scope of authority and the heightened practice nexus should be retained.

B. Foreign In-House Counsel

The number of foreign companies with U.S. offices or operations in the United States has increased since 2002, as has the number of U.S. companies with foreign offices or operations. The result has been a continued rise in interstate and international legal practice for in-house counsel, including those who are foreign lawyers. These lawyers' employers often require them to relocate to a foreign jurisdiction where the company has an office.

The Commission concluded that Model Rule 5.5 should be amended to provide limited practice authorization to lawyers who are admitted in a foreign jurisdiction, but who are providing legal services solely to their employers as in-house counsel. Doing so will ensure that foreign lawyers who work solely for their employers as in-house counsel are not considered to be engaged in the unauthorized practice of law under Rule 5.5. As noted above, to complement this proposed change to Model Rule 5.5, the Commission is also recommending that the House adopt proposed amendments to the ABA Model Rule for Registration of In-House Counsel to include foreign in-house counsel.

For purposes of the proposed amendments to Model Rule 5.5, foreign lawyers are defined in proposed paragraph (f) as those who are a member in good standing of a recognized legal profession in the lawyer's home country. Moreover, the members of that profession must be subject to effective regulation and discipline by a duly constituted professional body or public authority. This definition of foreign jurisdiction or foreign lawyer has long been ABA policy, and has been adopted by U.S. state supreme courts. The Commission is not aware of problems that have arisen from its use.

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

¹⁰ Datamonitor; Global Legal Services, December 2009.

increased risks. Coupled with the proposed changes to the Model Rule for Registration of In-House Counsel, the changes proposed by the Commission ensure that these lawyers are identifiable, subject to monitoring, and accountable for their conduct.

Rule 5.5(d) currently assumes 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. Moreover, in-house lawyers admitted in a foreign jurisdiction (as currently defined by ABA policy), but working for their employer in the U.S., have been vetted by the admissions authorities in their country of licensure. That authority and the employer possess sufficiently strong incentives to thoroughly investigate the lawyer’s character, fitness, and background.¹¹

Some feel that including foreign lawyers within the scope of Model Rule 5.5(d) presages undesired and increased foreign lawyer presence in the U.S. The Commission disagrees with this position. The available data regarding the global legal services market, including that described above, indicates that these lawyers are already here and serving as in-house counsel. Their multinational corporation clients, regardless of size, have a need for legal services provided by counsel of their choice. Further, since 1993, when it first adopted the Model Rule for Licensing and Practice of Foreign Legal Consultants, the ABA has recognized that there are benefits to allowing foreign lawyers limited practice authorization in the U.S. The Commission believes that it is best to acknowledge these realities and to regulate these lawyers while they are here in the U.S.

Arizona, Connecticut, Delaware, Georgia, Virginia, Washington, and Wisconsin currently permit foreign in-house counsel limited authorization to work for their employer in the U.S. so long as they register.¹² Georgia also permits foreign in-house counsel this limited practice authority, but does not require registration. The Commission is aware of no adverse consequences following adoption of these rules.

Support for the Commission’s tempered approach to these issues is evidenced by the July 28, 2010 Resolution of the Conference of Chief Justices endorsing these changes in principle and urging their adoption by the ABA House of Delegates.¹³ The resolution was proposed by the Conference’s Task Force on the Regulation of Foreign Lawyers and the International Practice of Law.

¹¹ See, e.g., J. Charles Mokriski, In-House Lawyers’ Bar Status: “Counsel, You’re Not in Kansas Anymore,” Boston Bar Journal, January/February 2008.

¹² See, e.g., American Bar Association Center for Professional Responsibility Comparison of ABA Model Rule for Registration of In-House Counsel With State Versions (last updated October 26, 2009), http://www.americanbar.org/groups/professional_responsibility/commission_on_multijurisdictional_practice.html.

¹³ See <http://ccj.ncsc.dni.us/InternationalResolutions/resol13ABA.html> (last viewed March 14, 2011).

The Commission's approach is also consistent with a joint proposal submitted in November 2010 to the New York Court of Appeals by the New York State Bar Association, the New York City Bar Association, and the New York County Lawyers' Association. That proposal sought the adoption of rules that would provide for the limited licensure and registration of U.S. and foreign in-house counsel.¹⁴ The unified position of these three New York bar associations reflects an increased recognition that foreign lawyers should be permitted to serve as in-house counsel for their employers, even though the New York Court of Appeals ultimately adopted an in-house rule that does not include foreign lawyers.¹⁵

C. Pro Hac Vice Authority

The proposed amendments to Model Rule 5.5 also anticipate adoption of the recommendations in a separate Resolution to amend the ABA Model Rule on Pro Hac Vice Admission to allow foreign lawyers to gain authority to practice pro hac vice before a U.S. court or administrative agency. The Model Rule for Temporary Practice by Foreign Lawyers, as currently written, does not do that. As the separate Resolution and Report to amend the Model Rule on Pro Hac Vice Admission makes clear, the Commission concluded that the realities of legal practice and client needs support including such limited practice authority for foreign lawyers within the scope of ABA policy.

Conclusion

These proposed amendments to Rule 5.5 of the ABA Model Rules of Professional Conduct 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.

¹⁴ See Joint Report at, http://www.nysba.org/AM/Template.cfm?Section=Substantive_Reports&Template=/TaggedPage/TaggedPageDisplay.cfm&TPLID=16&ContentID=9927 .

¹⁵ The Court, in its order adopting the rule did not explain its decision to exclude foreign lawyers. See <http://www.nycourts.gov/ctapps/news/nottobar/InHouseCounsel041111.pdf>