



NEW YORK STATE
Unified Court System

OFFICE OF COURT ADMINISTRATION

LAWRENCE K. MARKS
CHIEF ADMINISTRATIVE JUDGE

JOHN W. McCONNELL
COUNSEL

MEMORANDUM

September 24, 2015

To: All Interested Persons

From: John W. McConnell

Re: Proposed amendment of 22 NYCRR Part 522 of the Rules of the Court of Appeals, relating to permitting foreign lawyers to register as In-House Counsel.

=====

Public comment is requested on a proposed amendment of Part 522 of the Rules of the Court of Appeals that would permit the Appellate Division to register as in-house counsel an applicant who is a member in good standing of a recognized legal profession in a foreign jurisdiction (Exh. A). Part 522, adopted in April 2011, requires registration by attorneys who, though not admitted to the New York bar, are employed full-time in this state as in-house counsel by a corporation, partnership, association or other legal entity not itself engaged in the practice of law. Part 522 presently does not apply to attorneys admitted in jurisdictions outside the U.S. The Conference of Chief Justices and the American Bar Association have recommended that states amend their rules governing registration of in-house counsel to permit registration by foreign lawyers (Exh. B). Fifteen jurisdictions have adopted rules recognizing foreign in-house counsel (Exh. C). In November 2010, the New York State Bar Association, New York City Bar Association and New York County Lawyers' Association issued a joint report in support of rules permitting both out-of-state and foreign lawyers to register as in-house counsel in New York (Exh. D).

As amended, section 522.1(b) would permit the Appellate Division to register as in-house counsel an applicant who "is a member in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent and subject to effective regulation by a duly constituted professional body or a public authority" (Exh. A). Under section 522.3, registered foreign in-house counsel would be required to remain active members in good standing of a recognized legal profession in a foreign jurisdiction; notify the Appellate Division promptly of any disciplinary disposition in another jurisdiction; comply with the laws and rules governing attorneys admitted to the practice of law in New York; and register biennially with the Office of Court Administration.

Persons commenting on this proposal may also wish to review the proposed amendment of Part 523 of the Rules of the Court of Appeals, authorizing temporary law practice in New York by out-of-state and foreign lawyers. See www.nycourts.gov/rules/comments/index.shtml.

Persons wishing to comment on this proposal should e-mail their submissions to rulecomments@nycourts.gov or write to: John W. McConnell, Esq., Counsel, Office of Court Administration, 25 Beaver Street, 11th Fl., New York, New York 10004. **Comments must be received no later than November 9, 2015.**

All public comments will be treated as available for disclosure under the Freedom of Information Law and are subject to publication by the Office of Court Administration. Issuance of a proposal for public comment should not be interpreted as an endorsement of that proposal by the Unified Court System or the Office of Court Administration.

EXHIBIT A

§ 522.1 Registration of In-House Counsel

(a) In-House Counsel defined. An in-house counsel is an attorney who is employed full time in this State by a non-governmental corporation, partnership, association, or other legal entity, including its subsidiaries and organizational affiliates, that is not itself engaged in the practice of law or the rendering of legal services outside such organization.

(b) In its discretion, the Appellate Division may register as in-house counsel an applicant who:

(1) (a) has been admitted to practice in the highest law court in any other state or territory of the United States or in the District of Columbia; or (b) is a member in good standing of a recognized legal profession in a foreign (non-U.S.) jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent and subject to effective regulation by a duly constituted professional body or a public authority;

(2) is currently admitted to the bar as an active member in good standing in at least one other jurisdiction (within or outside the U.S.) which would similarly permit an attorney admitted to practice in this State to register as in-house counsel; and

(3) possesses the good moral character and general fitness requisite for a member of the bar of this State.

§ 522.2 Proof required

An applicant under this Part shall file with the Clerk of the Appellate Division of the department in which the applicant resides, is employed or intends to be employed as in-house counsel:

(a) a certificate of good standing from each jurisdiction in which the applicant is licensed to practice law; and

(b) a letter from each such jurisdiction's grievance committee, or other body entertaining complaints against attorneys, certifying whether charges have been filed with or by such committee or body against the applicant, and, if so, the substance of the charges and the disposition thereof; and

(c) an affidavit certifying that the applicant:

(1) performs or will perform legal services in this State solely and exclusively as provided in section 522.4; and

(2) agrees to be subject to the disciplinary authority of this State and to comply with the New York Rules of Professional Conduct (22 NYCRR Part 1200) and the rules governing the conduct of attorneys in the judicial department where the attorney's registration will be issued;

and

(d) an affidavit or affirmation signed by an officer, director, or general counsel of the applicant's employer, on behalf of said employer, attesting that the applicant is or will be employed as an attorney for the employer and that the nature of the employment conforms to the requirements of this Part.

(e) Documents in languages other than English shall be submitted with a certified English translation.

§ 522.3 Compliance

An attorney registered as in-house counsel under this Part shall:

(a) remain an active member in good standing in at least one state or territory of the United States or in the District of Columbia or a foreign jurisdiction as described in § 522.1(b)(1);

(b) promptly notify the appropriate Appellate Division department of a disposition made in a disciplinary proceeding in another jurisdiction;

(c) register with the Office of Court Administration and comply with the appropriate biennial registration requirements; and

(d) except as specifically limited herein, abide by all of the laws and rules that govern attorneys admitted to the practice of law in this State.

§ 522.4 Scope of legal services

An attorney registered as in-house counsel under this Part shall:

(a) provide legal services in this State only to the single employer entity or its organizational affiliates, including entities that control, are controlled by, or are under common control with the employer entity, and to employees, officers and directors of such entities, but only on matters directly related to the attorney's work for the employer entity, and to the extent consistent with the New York Rules of Professional Conduct;

(b) not make appearances in this State before a tribunal, as that term is defined in the New York Rules of Professional Conduct (22 NYCRR 1200.0 Rule 1.0[w]) or engage in any activity for which pro hac vice admission would be required if engaged in by an attorney who is not admitted to the practice of law in this State;

(c) not provide personal or individual legal services to any customers, shareholders, owners, partners, officers, employees or agents of the identified employer; and

(d) not hold oneself out as an attorney admitted to practice in this State except on the employer's

letterhead with a limiting designation.

§ 522.5 Termination of registration

(a) Registration as in-house counsel under this Part shall terminate when:

(1) the attorney ceases to be an active member in another jurisdiction, as required in section 522.1(b)(2); or

(2) the attorney ceases to be an employee of the employer listed on the attorney's application, provided, however, that if such attorney, within 30 days of ceasing to be such an employee, becomes employed by another employer for which such attorney shall perform legal services as in-house counsel, such attorney may request continued registration under this Part by filing within said 30-day period with the appropriate Appellate Division department an affidavit to such effect, stating the dates on which the prior employment ceased and the new employment commenced, identifying the new employer and reaffirming that the attorney will provide legal services in this State solely and exclusively as permitted in section 522.4. The attorney shall also file an affidavit or affirmation of the new employer as described in section 522.2(d) and shall file an amended statement within said 30-day period with the Office of Court Administration.

(b) In the event that the employment of an attorney registered under this Part ceases with no subsequent employment by a successor employer, the attorney, within 30 days thereof, shall file with the Appellate Division department where registered a statement to such effect, stating the date that employment ceased. Noncompliance with this provision shall result in the automatic termination of the attorney's registration under this Part;

(c) Noncompliance with the provisions of section 468-a of the Judiciary Law and the rules promulgated thereunder, insofar as pertinent, shall, 30 days following the date set forth therein for compliance, result in the termination of the attorney's rights under this Part.

§ 522.6 Subsequent admission on motion

Where a person registered under this Part subsequently seeks to obtain admission without examination under section 520.10 of the Rules of this Court, the provision of legal services under this Part shall not be deemed to be the practice of law for the purpose of meeting the requirements of section 520.10(a)(2)(i).

§ 522.7 Saving Clause and Noncompliance

(a) An attorney employed as in-house counsel, as that term is defined in section 522.1(a), on the effective date of this Part, shall within 90 days of the date thereof, file an application in accordance with section 522.2. Attorneys employed as in-house counsel after the effective date of this Part shall file such an application within 30 days of the commencement of such employment;

(b) Failure to comply with the provisions of this Part shall be deemed professional misconduct,

provided, however, that the Appellate Division may upon application of the attorney grant an extension upon good cause shown.

§ 522.8 Pro bono legal services

Notwithstanding the restrictions set forth in section 522.4 of this Part, an attorney registered as in-house counsel under this Part may provide pro bono legal services in this State in accordance with New York Rules of Professional Conduct (22 NYCRR 1200.0) rule 6.1(b) and other comparable definitions of pro bono legal services in New York under the following terms and conditions. An attorney providing pro bono legal services under this section:

(a) shall be admitted to practice and in good standing in another state or territory of the United States or in the District of Columbia and possess the good moral character and general fitness requisite for a member of the bar of this State, as evidenced by the attorney's registration pursuant to section 522.1(b) of this Part;

(b) pursuant to section 522.2(c)(2) of this Part, agrees to be subject to the disciplinary authority of this State and to comply with the laws and rules that govern attorneys admitted to the practice of law in this State, including the New York Rules of Professional Conduct (22 NYCRR Part 1200.0) and the rules governing the conduct of attorneys in the judicial department where the attorney's registration is issued;

(c) may appear, either in person or by signing pleadings, in a matter pending before a tribunal, as that term is defined in New York Rules of Professional Conduct (22 NYCRR 1200.0) rule 1.0(w), at the discretion of the tribunal, without being admitted pro hac vice in the matter. Prior to any appearance before a tribunal, a registered in-house counsel must provide notice to the tribunal that the attorney is not admitted to practice in New York but is registered as in-house counsel pursuant to this Part. Such notice shall be in a form approved by the Appellate Division; and

(d) shall not hold oneself out as an attorney admitted to practice in this State, in compliance with section 522.4(d) of this Part.

EXHIBIT B

Conference of Chief Justices

Resolution 4

In Support of Proposed Resolutions Endorsing Changes to the ABA Model Rules Regarding Practice by Foreign Lawyers

WHEREAS, the number of foreign companies with offices and operations within the United States has grown rapidly over the past decade and is expected to continue to increase; and

WHEREAS, the proportion of the United States population with family, property, estate and business interests abroad has increased substantially over the past decade; and

WHEREAS, the number of legal transactions and disputes involving foreign law and foreign lawyers is increasing as a result of these trends; and

WHEREAS, the American Bar Association Commission on Ethics 20/20 has developed proposed changes to the ABA Model Rules, reflecting the increased demand for carefully limited and regulated practice authority for foreign lawyers in the United States to serve as in-house counsel and through restricted *pro hac vice* admission; and

WHEREAS, the November 2012 versions of the Commission's proposals pending before the ABA House of Delegates consist of comprehensive regulatory models that would allow jurisdictions wanting to adopt such rules and procedures to do so in a manner that is protective of the public and the profession while meeting client needs; and

WHEREAS, the Conference of Chief Justices previously endorsed an earlier, less restrictive draft of those proposals in 2010; and

WHEREAS, multiple states already have amended their rules to permit foreign lawyers to work for their employers in the United States as in-house counsel and to gain admission *pro hac vice* and have done so without adverse effects;

NOW, THEREFORE, BE IT RESOLVED that the Conference of Chief Justices supports, in principle, the proposed changes to the Model Rules reflected in ABA 2013 Midyear Meeting Resolutions 107A - Model Rule 5.5 Inbound Foreign Lawyers; 107B - Model Rule for Registration of In-House Counsel; and 107C - Model Rule on Pro Hac Vice Admission, and urges their adoption by the ABA House of Delegates and consideration by the states.

Adopted as proposed by the CCJ Professionalism and Competence of the Bar Committee and the Task Force on the Regulation of Foreign Lawyers and the International Practice of Law at the Conference of Chief Justices 2013 Midyear Meeting on January 30, 2013.

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AMERICAN BAR ASSOCIATION

COMMISSION ON ETHICS 20/20

SECTION OF BUSINESS LAW
SECTION OF INTERNATIONAL LAW
TORT TRIAL & INSURANCE PRACTICE SECTION
STANDING COMMITTEE ON CLIENT PROTECTION
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY
STANDING COMMITTEE ON PROFESSIONAL DISCIPLINE
STANDING COMMITTEE ON PROFESSIONALISM
STANDING COMMITTEE ON SPECIALIZATION
TASK FORCE ON INTERNATIONAL TRADE IN LEGAL SERVICES
NEW YORK STATE BAR ASSOCIATION

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

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

Model Rule for Registration of In-House Counsel

GENERAL PROVISIONS:

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

- 18 1) A completed application in the form prescribed by the [registration authority];
- 19 2) A fee in the amount determined by the [registration authority];
- 20 3) Documents proving admission to practice law and current good standing in all
21 jurisdictions, U.S. and foreign, in which the lawyer is admitted to practice law.

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- 22 4) If the jurisdiction is foreign and the documents are not in English, the lawyer shall
23 submit an English translation and satisfactory proof of the accuracy of the
24 translation; and
25 5) An affidavit from an officer, director, or general counsel of the employing entity
26 attesting to the lawyer's employment by the entity and the capacity in which the
27 lawyer is so employed, and stating that the employment conforms to the
28 requirements of this Rule.

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

SCOPE OF AUTHORITY OF REGISTERED LAWYER:

- 34
35 B. A lawyer registered under this section Rule shall have the rights and privileges otherwise
36 applicable to members of the bar of this jurisdiction with the following restrictions:
37 1. The registered lawyer is authorized to provide legal services to the entity client or
38 its organizational affiliates, including entities that control, are controlled by, or are
39 under common control with the employer, and for employees, officers and
40 directors of such entities, but only on matters directly related to their work for the
41 entity and only to the extent consistent with Rule 1.7 of the Model Rules of
42 Professional Conduct [or jurisdictional equivalent provision in the jurisdiction];
43 and
44 2. The registered lawyer shall not:
45 a. Except as otherwise permitted by the rules of this jurisdiction, appear
46 before a court or any other tribunal as defined in Rule 1.0(m) of the
47 Model Rules of Professional Conduct [or jurisdictional equivalent]; or
48 b. Offer or provide legal services or advice to any person other than as
49 described in paragraph B.1., or hold himself or herself out as being
50 authorized to practice law in this jurisdiction other than as described in
51 paragraph B.1.; and
52 c. If a foreign lawyer, provide advice on the law of this or another U.S.
53 jurisdiction or of the United States except in consultation with a U.S. on
54 the basis of advice from a lawyer who is duly licensed and authorized to
55 provide such advice.
56

PRO BONO PRACTICE:

- 57
58 C. Notwithstanding the provisions of paragraph B above, a lawyer registered under this
59 section Rule is authorized to provide pro bono legal services through an established not-
60 for-profit bar association, pro bono program or legal services program or through such
61 organization(s) specifically authorized in this jurisdiction.
62

OBLIGATIONS:

- 63
64 D. A lawyer registered under this section Rule shall:
65 1. Pay an annual fee in the amount of \$ _____;
66 2. Pay any annual client protection fund assessment;

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- 67 23. Fulfill the continuing legal education requirements that are required of active
68 members of the bar in this jurisdiction;
69 34. Report within [] days to the jurisdiction the following:
70 a. Termination of the lawyer's employment as described in paragraph
71 BA.4.;
72 b. Whether or not public, any change in the lawyer's license status in
73 another jurisdiction, whether U.S. or foreign, including by the lawyer's
74 resignation;
75 c. Whether or not public, any disciplinary charge, finding, or sanction
76 concerning the lawyer by any disciplinary authority, court, or other
77 tribunal in any jurisdiction, U.S. or foreign.
78

LOCAL DISCIPLINE:

- 80 E. A registered lawyer under this ~~section~~ Rule shall be subject to the [jurisdiction's Rules of
81 Professional Conduct], [jurisdiction's Rules of Lawyer Disciplinary Enforcement], and
82 all other laws and rules governing lawyers admitted to the active practice of law in this
83 jurisdiction. The [jurisdiction's disciplinary counsel] has and shall retain jurisdiction
84 over the registered lawyer with respect to the conduct of the lawyer in this or another
85 jurisdiction to the same extent as it has over lawyers generally admitted in this
86 jurisdiction.
87

AUTOMATIC TERMINATION:

- 88 F. A registered lawyer's rights and privileges under this Rule ~~section~~ automatically terminate
89 when:
90 1. The lawyer's employment terminates;
91 2. The lawyer is suspended or disbarred from practice in any jurisdiction or any
92 court or agency before which the lawyer is admitted, U.S. or foreign; or
93 3. The lawyer fails to maintain active status in at least one jurisdiction, U.S. or
94 foreign.
95
96

REINSTATEMENT:

- 97 G. A registered lawyer whose registration is terminated under paragraph F.1. above, may be
98 reinstated within [~~xx~~] months of termination upon submission to the [registration
99 authority] of the following:
100 1. An application for reinstatement in a form prescribed by the [registration
101 authority];
102 2. A reinstatement fee in the amount of \$ _____;
103 3. An affidavit from the current employing entity as prescribed in paragraph A.4.
104
105

SANCTIONS:

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

EXHIBIT C

Summary of State Foreign Lawyer Practice Rules (4/29/15*)

Prepared by Professor Laurel Terry (LTerry@psu.edu) based on implementation information contained in charts prepared by the ABA Center for Professional Responsibility dated 4/28/2015 and 4/28/15 available at

http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/recommendations.authcheckdam.pdf and

http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/state_implementation_selected_e20_20_rules.authcheckdam.pdf

*This document (or an updated version) is available online on an ABA webpage and my webpage: see <http://tinyurl.com/laurelterrymap>

There are five methods by which foreign lawyers might *actively* practice in the United States: 1) through a license that permits only limited practice, known as a foreign legal consultant rule [addressed in MJP Report 201H]; 2) through a rule that permits temporary transactional work by foreign lawyers [addressed in MJP Report 201J]; 3) through a rule that permits foreign lawyers to apply for pro hac vice admission [ABA Resolution #107C (Feb. 2013)]; 4) through a rule that permits foreign lawyers to serve as in-house counsel [ABA Resolutions #107A&B (Feb. 2013)]; and 5) through full admission as a regularly licensed lawyer in a U.S. jurisdiction. (The ABA does not have a policy on Method #5 although there are a number of foreign lawyers admitted annually; information about state full admission rules is available in NCBE's annual COMPREHENSIVE GUIDE TO BAR ADMISSIONS. See also NCBE Statistics.)

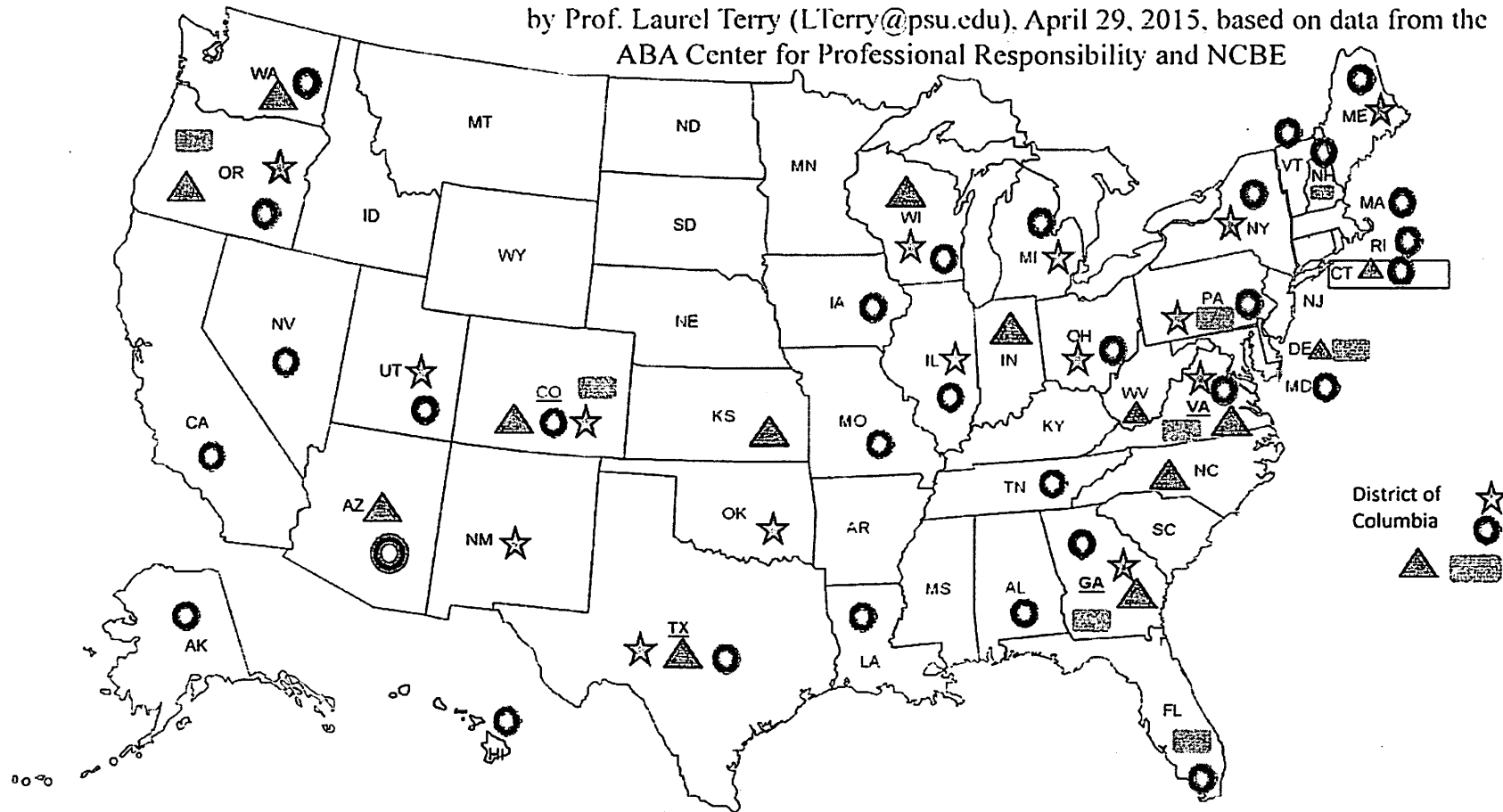
In 2015, the Conference of Chief Justices [CCJ] adopted a Resolution that urged states to adopt explicit policies on issues 1-4 and on the issue of "association." States that are considering whether to adopt rules regarding these five methods of foreign lawyer admission might want to consider the model provided in International Trade in Legal Services and Professional Regulation: A Framework for State Bars Based on the Georgia Experience, available at <http://tinyurl.com/GAtoolkit>. The CCJ endorsed this "Toolkit" in 2014.

Jurisdictions with FLC Rules	Explicitly Permit Foreign Lawyer Temporary Practice	Jurisdictions that Permit Foreign Lawyer Pro Hac Vice	Jurisdictions that Permit Foreign In-House Counsel	Since 2010 has had a foreign-educated full-admission applicant
33	10	16	15	32
<u>AK, AZ, CA, CO, CT, DE</u> (Rule 55.2), <u>DC, FL, GA, HI, ID, IL, IN, IA, LA, MA, MI, MN, MO, NH, NJ, NM, NY, NC, ND, OH, OR, PA, SC, TX, UT, VA, WA</u>	<u>CO, DC</u> (Rule 49(c)(13)), <u>DE</u> (RPC 5.5(d)), <u>FL, GA, NH, NM</u> (includes transactional matters), <u>OR, PA, VA</u>	<u>CO, DC</u> (Rule 49), <u>GA</u> (Rule 4.4), <u>IL, ME, MI, NM, NY, OH</u> (Rule XII), <u>OK</u> (Art. II(5)), <u>OR, PA, TX</u> (Rule XIX), <u>UT</u> (appellate courts only; see Utah Rule of Appellate Procedure 40; cf. Rule 14-806), <u>VA, WI</u>	<u>AZ, CO</u> (205.5), <u>CT, DC, DE</u> (Rule 55.1), <u>GA, IN</u> (Rule 6(2)), <u>KS, NC, OR</u> (allowed on a temporary basis under Rule 5.5(c); further study underway); <u>TX, VA</u> (Part 1A), <u>WA, WI, WV</u>	<u>AL, AK, AZ, CA, CO, CT, DC, FL, GA, HI, IL, IA, LA, ME, MD, MA, MI, MO, NV, NH, NY, OH, OR, PA, RI, TN, TX, UT, VT, VA, WA, WI</u>
<u>ABA Model FLC Rule (2006)</u>	<u>ABA Model Rule for Temporary Practice by Foreign Lawyers</u>	<u>ABA Model Pro Hac Vice Rule</u>	<u>ABA Model Rule re Foreign In-House Counsel and Registration Rule</u>	No ABA policy; Council did not act on <u>Committee Proposal</u> ; see state rules
ABA Commission on Multijurisdictional Practice <u>web page</u>	State Rules—Temporary Practice by Foreign Lawyers (ABA <u>chart</u>)	Comparison of ABA Model Rule for Pro Hac Vice Admission with State Versions and Amendments Since August 2002 (ABA <u>chart</u>)	In-House Corporate Counsel Registration Rules (ABA <u>chart</u>); Comparison of ABA Model Rule for Registration of In-House Counsel with State Versions (ABA <u>chart</u>); State-by State Adoption of Selected Ethics 20/20 Commission Policies (ABA <u>chart</u>)	NCBE <u>COMPREHENSIVE GUIDE TO BAR ADMISSIONS</u>

*Note: As the map on the back of this page shows, five jurisdictions—Colorado, the District of Columbia, Georgia, Oregon, and Virginia—have rules for all 5 methods; two jurisdictions have rules on 4 methods (PA, and TX); and 12 jurisdictions have rules on 3 methods (AZ, CT, DE, FL, IL, MI, NH, NY, OH, UT, WA, and WI). [Prior editions of the map erroneously included Pennsylvania among the "five method" states.]

Jurisdictions with Rules Regarding Foreign Lawyer Practice


by Prof. Laurel Terry (LTerry@psu.edu), April 29, 2015, based on data from the ABA Center for Professional Responsibility and NCBE



LEGEND (see back page for additional information)

Yellow shading = has a foreign legal consultant rule

 = rule permits temporary practice by foreign lawyers (also known as FIFO or fly-in, fly-out)

 = rule permits foreign pro hac vice admission

 = rule permits foreign in-house counsel


 = has had at least one foreign-educated applicant sit for a bar exam between 2010 and 2013.

EXHIBIT D

**NEW YORK STATE BAR ASSOCIATION
NEW YORK CITY BAR ASSOCIATION
NEW YORK COUNTY LAWYERS' ASSOCIATION**

**PROPOSED RULES FOR
LICENSING OF IN-HOUSE COUNSEL**

NOVEMBER 2010

**JOINT REPORT OF THE
NEW YORK STATE BAR ASSOCIATION
ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
NEW YORK COUNTY LAWYERS' ASSOCIATION**

**THE NEW YORK COURT OF APPEALS SHOULD ADOPT
RULES ADMITTING IN-HOUSE LAWYERS
WHO ARE LICENSED AND IN GOOD STANDING ELSEWHERE**

Introduction

The New York State Bar Association (NYSBA), the Association of the Bar of the City of New York (City Bar), and the New York County Lawyers' Association (NYCLA) respectfully submit this report (hereafter, the "Joint Report") to the Court of Appeals. Together, we ask the Court to promulgate admission rules for in-house counsel by adopting proposed new Part 522 of the Rules of the Court of Appeals (to be codified at Title 22 New York Rules and Regulations ("NYCRR") § 522.1 et seq.). We hope this united effort, by three important bar associations in New York, will persuade the Court that the time has come for New York to adopt such rules.

The rules we propose would permit lawyers in good standing admitted in another U.S. jurisdiction (hereinafter, "out-of-state lawyers") or in a non-U.S. jurisdiction (hereinafter, "foreign lawyers") to practice in-house in New York without passing the New York bar exam and without meeting practice requirements otherwise required for admission on motion.¹

Appendix A contains the proposed rules, which also give New York disciplinary jurisdiction over these lawyers, oblige them to meet CLE and other requirements, and expand the availability of pro bono services. The rules will aid New York-admitted lawyers who seek similar admission in other jurisdictions that require reciprocity. The rules will also generate additional revenue in annual bar registration and other fees.

¹ The proposed rule would also extend to foreign lawyers practicing in-house who are admitted in jurisdictions other than common law jurisdictions. The current rules for admission on motion extend only to lawyers admitted in common law jurisdictions. 22 NYCRR §520.10(a)(1)(iii).

Summary of Recommendations

Law practice for in-house lawyers is increasingly national and global in scope. Recognizing this trend, forty-four states plus the District of Columbia have already adopted rules identical or similar to the ones we propose. As set forth in more detail below, the NYSBA, the City Bar, and NYCLA urge the Court to join these jurisdictions by adopting the proposed rules.

The new rules will reinforce New York's competitive advantage in attracting large companies, businesses, and non-profit and other entities that may now be reluctant to locate here because of possible unauthorized-practice-of-law ("UPL") consequences for their legal staff. The rules would also bring any currently unlicensed in-house counsel into compliance while, at the same time, enhance the New York Courts' and disciplinary agencies' power to regulate out-of-state lawyers who are already here (or in the future come here) but operate (or would operate) under the radar.² We respectfully submit that employers who have an on-going employment relationship with their in-house lawyers are in a position to evaluate the competence and quality of their in-house lawyers and, under our proposed rules, registered in-house counsel would not be permitted to provide legal services to the general public. Moreover, most employers large enough to need in-house counsel are in any event sophisticated consumers of legal services.

Background

This Joint Report represents a united effort by three major bar associations to bring New York in line with the overwhelming majority of other jurisdictions that have adopted admission rules for in-house counsel. Each of our Associations has independently studied these issues, met or conferred separately with our relevant constituencies, and adopted this Joint Report. We believe that the New York Court of Appeals should act on this issue now. The process through which we have come to this joint effort is itself indicative that the time is ripe for this important change. A brief word about that process follows.

For several years, the Committee on Standards of Attorney Conduct of the NYSBA ("COSAC") has studied admission rules for in-house counsel. Spearheaded by the late Steven

² Anecdotal evidence suggests that some in-house lawyers already practice in New York without a New York license. The proposed rules would eliminate this anomaly and enable the Courts and the disciplinary systems to identify and regulate these in-house lawyers.

Krane, former NYSBA president and past chair of COSAC, the NYSBA House of Delegates recommended in 2003 and again in 2008 that New York adopt a disciplinary rule that would include a safe-harbor for practice by in-house counsel admitted elsewhere.³

The City Bar, too, has studied these issues for years. As noted, the City Bar supported a disciplinary rule like M.R. 5.5(d).⁴ Most recently, in June 2010, the City Bar adopted the Report of its Committee on Professional Responsibility entitled *Proposed Rule Authorizing the Practice of Law in New York by In-House Counsel Licensed in Other States*. Appendix B contains a full copy of the Report, which makes a proposal that is consistent with this Joint Report.

NYCLA too has participated in the debate and review of an in-house counsel rule and other provisions related to multi-jurisdictional practice. In June 2010 the Executive Board of NYCLA voted to endorse the principles contained in our proposed new Part 522 of the Rules of the Court of Appeals. The NYCLA Board also voted specifically to endorse the proposal by the ABA Commission on Ethics 20/20 recommending that the ABA amend its model registration rule to include foreign lawyers practicing in-house in the United States, a recommendation that the rules we propose incorporates.⁵

Discussion

A. The proposed rules will align New York with the overwhelming majority of U.S. jurisdictions, and enable the Courts to regulate lawyers who already practice here but escape review.

As noted, forty-four states plus the District of Columbia have already adopted rules permitting practice by out-of-state lawyers employed by an entity.⁶ Like the rules we propose,

³ Proposed NYRPC 5.5(d), as approved by the NYSBA House of Delegates in 2003 and 2008 provides: "A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in New York State 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." ABA M.R. 5.5(d) is identical to that proposed rule. The City Bar supported a similar change.

⁴ See Letter from E. Leo Milonas to A. Vincent Buzard, Secretary, New York State Bar Association, May 27, 2003.

⁵ See discussion *infra* at 4-6.

⁶ Based on telephone conversations on July 8, 2010, by Barbara S. Gillers with John A. Holtaway, Lead Senior Counsel, Client Protection and Policy Implementation, American Bar Association. *See also*

the rules of these other jurisdictions empower the adopting states to monitor, regulate, and discipline in-house counsel who are otherwise beyond their reach. We are aware of no adverse consequences following the adoption of these rules in those jurisdictions.

Seven of the forty-five jurisdictions that have adopted rules similar to the ones we propose also permit in-house practice by foreign lawyers.⁷ Only New York and five other states have not adopted either Model Rule 5.5(d)(1) or a registration rule for in-house counsel.⁸ As recently as December 2009, the NYSBA Ethics Committee called for action regarding in-house lawyers, noting the absence of any clear law in New York. See NY State Op. 835 entitled “Multijurisdictional Practice by Corporate Counsel.”

New York should be in the vanguard, not the backwater, of these trends. The rules adopted in the vast majority of U.S. jurisdictions reflect the reality of law practice in the 21st Century, particularly for cross-border and global entities and their lawyers, who move frequently between affiliates. New York’s outlier status undermines the State’s position as a business and non-profit capital of the world. The rules may inhibit entities and their lawyers from locating here because of the UPL implications. For those already here, the current regime invites disregard of our Rules of Professional Conduct. These lawyers are able to ignore the rules and escape discovery. They are not regulated because, until an incident arises, there is no way for the courts and disciplinary counsel to identify them. The proposed rule will make these lawyers

http://www.abanet.org/cpr/mjp/in-house_rules.pdf.

⁷ These states are: Arizona, Connecticut, Delaware, Georgia, Virginia, Washington, and Wisconsin. See http://www.abanet.org/cpr/mjp/8_and_9_status_chart.pdf. In addition, a Working Group of the ABA Commission on Ethics 20/20 has recommended that the ABA Model Rule for Registration of In-House Counsel be amended to include foreign lawyers. See Memo, June 1, 2010, from Jamie S. Gorelick and Michael Traynor, Co-Chairs, ABA Commission on Ethics 20/20, to “ABA Entities, Courts, Bar Associations (state, local and international) Law Schools, Individuals and Entities”, re “Memoranda and Templates for Comment – Inbound Foreign Lawyer Issues.”

⁸ The other five states without any in-house counsel rule are: Hawaii, Mississippi, Montana, Texas, and West Virginia. Of these, Mississippi has Rule 5.5 under consideration. Texas has an express policy authorizing in-house counsel to perform many significant legal services without a local license. Based on telephone conversation on July 8, 2010 between Barbara S. Gillers and John A. Holtaway, *see fn 6 supra*. See also Chart re State Implementation of ABA MJP Policies at <http://www.abanet.org/cpr/mjp/recommendations.pdf> dated April 12, 2010 Texas Board of Law Examiners *Policy Statement on Practice Requirements for Rule XIII* at: http://www.ble.state.tx.us/atty_us/lawpolicy.

accountable, and empower our courts and disciplinary agencies to properly monitor, regulate, and sanction them.

B. The proposed rules reinforce good lawyering, will protect the public and the integrity of the court system, and will generate fees.

The proposed rules require in-house lawyers to register and, among other things, to meet the same CLE requirements as all other members of the New York bar.⁹ The rules would give the public the same information it now has about other members of the bar, who are also required to register. The rules will generate revenue by requiring in-house lawyers to pay the same fees that all other members of the New York bar must pay. The rules present little risk to clients because in-house lawyers would not be able to provide legal services to the general public, and employers, who are by and large sophisticated consumers of legal services, are able to assess the competence and quality of their in-house lawyers.

In particular, we submit that the fact that the proposed rules apply only to in-house counsel justifies relaxing the current requirements for admission on motion to eliminate the practice and common-law-jurisdiction requirements.¹⁰ Foreign companies who have in-house counsel and a significant presence in the United States frequently wish to have the advice of some of their home-country lawyers, including junior lawyers, to assist their U.S. operations. The companies who hire these lawyers or bring them to the United States are both fully aware of the background and training of their employees and fully capable of evaluating the company's needs. They do not need the protection of the practice and training requirements of the ordinary admission-on-motion rules.

C. The Court of Appeals clearly has power to adopt the proposed rules.

The Court of Appeals has inherent, implicit and plenary power over the regulation of attorneys in New York. Judiciary Law § 53(2) in particular specifies that the Court of Appeals “may make such provisions as it shall deem proper *for admission to practice as attorneys and*

⁹ The provisions of the rule are modeled on the ABA Model Rule for Registration of In-House Counsel, adopted by the ABA House of Delegates in August 2008. Appendix C contains a copy of the ABA Model Rule for Registration of In-House Counsel and the Report submitted to the ABA House of Delegates.

¹⁰ 22 NYCRR § 520.10(a)(1) and (2).

counselors, of persons who have been admitted to practice in other states or countries.” See N.Y. JUD. LAW § 53(2) (2010) (emphasis added).

Judiciary Law § 90 specifically addresses the power of the Court of Appeals to admit out-of-state lawyers and foreign lawyers without taking the regular bar examination. Section 90 (b) says, “[U]pon the application, *pursuant to the rules of the court of appeals, of any person who has been admitted to practice law in another state or territory or the District of Columbia . . . or in a foreign country, to be admitted to practice as an attorney and counselor-at-law in the courts of this state without taking the regular bar examination, the appellate division . . . shall admit him . . .*” See N.Y. JUD. LAW § 90(b) (2010) (emphasis added).¹¹ Section 90 also requires that at least one other jurisdiction in which the applying lawyer is admitted “would similarly admit an attorney or counselor-at-law admitted to practice in New York state to its bar without examination.” See N.Y. JUD. LAW § 90(b) (2010). Our proposed rule contains such a reciprocity requirement, which would extend to those jurisdictions that would permit a New York lawyer to practice as an in-house lawyer either under a registration procedure or a general law or rule or policy permitting lawyers admitted elsewhere to practice in the jurisdiction. See Proposed Rule § 522.1(b).

Exercising these powers, the Court of Appeals has already adopted rules for admitting out-of-state lawyers and common-law-admitted foreign lawyers to practice in New York as part of the Court’s rules governing admission of attorneys generally. The rules appear at 22 NYCRR Part 520, and are entitled “Rules of the Court of Appeals for the Admission of Attorneys and Counselors at Law” (hereinafter referred to as the “General Admission Rules”).

The General Admission Rules specifically provide for the admission of out-of-state and foreign lawyers without passing the bar exam, at § 520.10. In particular, these rules require proof of admission in a U.S. or common-law jurisdiction (§ 520.10(a)(1)(i)), reciprocity (§ 520.10(a)

¹¹ Section 90(b) reads: “Upon the application, pursuant to the rules of the court of appeals, of any person who has been admitted to practice law in another state or territory or the District of Columbia of the United States or in a foreign country, to be admitted to practice as an attorney and counselor-at-law in the courts of this state without taking the regular bar examination, the appellate division of the supreme court, if it shall be satisfied that such person is currently admitted to the bar in such other jurisdiction or jurisdictions . . . , possesses the character and general fitness requisite for an attorney and counselor at law and has satisfied the requirements of section 3-503 of the general obligations law, *shall admit him to practice . . .*” (emphasis added).

(1)(iii)), and practice for at least five of the preceding seven years (§ 520.10(a)(2)(i)).¹² These rules also give the Appellate Divisions discretion to impose character and fitness requirements (§ 520.10(d)). Part 520 states further that the Court of Appeals may “vary the application of or waive any provision of [these] rules” (§ 520.14).¹³

Lawyers admitted under current Part 520 are, and lawyers who would be admitted under new Part 522 would be, *admitted lawyers in New York* and thus come under all provisions of the Judiciary Law, including § 468-a, except, of course, they could only practice while employed in-house.

Judiciary Law §468-a requires “[e]very attorney and counselor-at-law admitted to practice [in New York to] file a biennial registration statement with the administrative office of the courts” See N.Y. JUD. LAW § 468-a (1) (2010) (emphasis added). Admitted and registered attorneys are also required to pay a biennial registration fee of \$350. See N.Y. JUD. LAW § 468-a (4)(2010). The statute says further that “[s]uch fee shall be required of every attorney who is admitted and licensed to practice law in this state whether or not the attorney is engaged in the practice of law in this state or elsewhere.” See N.Y. JUD. LAW § 468-a (4)(2010) (emphasis added). Thus, once a lawyer is admitted to practice here under the Court of Appeals rules, he or she is required by act of the legislature to pay the annual registration fee.¹⁴ The registration rules for in-house lawyers that we propose build on these rules. They would become 22 NYCRR Part 522, would bring registered in-house lawyers under the Judiciary Law,

¹² Under § 522.9 of the proposed rule, if an in-house counsel later applied to be admitted upon motion in order to engage in private practice, practice as in-house counsel under the proposed rule would be deemed practice in a qualifying jurisdiction for purposes of the five-of-the-last-seven-year requirement, as long as the applicant was admitted in a “reciprocal” jurisdiction.

¹³ The Court of Appeals has also adopted rules for licensing foreign legal consultants, which appear at 22 NYCRR Part 521. These rules set forth standards for admission as a foreign legal consultant, which include good standing in qualified foreign bars, practice for at least three of the preceding five years, and “good moral character and general fitness.” See § 521.1(a)(1) – (5) (2010).

¹⁴ The registration rules for in-house counsel adopted by other jurisdictions also require payment of attorney registration fees. Some also require payment of other fees, e.g., application fees. See ABA Center for Professional Responsibility Policy Implementation Committee Chart on In-House Corporate Counsel Rules, as of April 12, 2010 at http://www.abanet.org/cpr/mjp/in-house_rules.pdf (e.g., Alabama: \$725 application fee; annual fee of \$350; California: \$550 to apply, \$363 for moral character check, \$390 annual State Bar Fee; Connecticut: \$1,000 filing fee and payment of annual registration fee and annual payment to client security fund; Florida: \$1,300 application fee and annual dues of \$265; Oregon: \$750 application fee and annual dues of \$416).

including § 468-a, and would require them to pay the same fees that apply to all lawyers admitted on motion, including application fees (*see, e.g.*, § 520.10(c)).

Conclusion

Accordingly, the New York State Bar Association, the Association of the Bar of the City of New York, and the New York County Lawyers' Association urge the Court of Appeals to adopt proposed new Part 522, which sets forth admission rules for in-house counsel.

Dated: October 22, 2010

Respectfully submitted,

Stephen P. Younger, President, New York State Bar
Association

Samuel W. Seymour, President Association of the
Bar of the City of New York City

James B. Kobak, President, New York County
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**Appendix A: [Proposed] Part 522. Rules of the Court of Appeals
for the Licensing of In-House Counsel**

§ 522.1 General regulation as to licensing

(a) A lawyer admitted to the practice of law in another jurisdiction who has a continuous presence in New York and is employed as a lawyer by a single organization, 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 in the state or if currently so employed then within 180 days of the effective date of this rule, by submitting to the New York State Office of Attorney Registration the following:

(1) A completed application in the form prescribed by the Office of Attorney Registration setting forth information showing that the lawyer has met the requirements of this Part and possesses the good moral character and general fitness requisite for a member of the New York bar. The character and fitness requirement may be met by an affidavit from an officer, director, or general counsel of the employing entity attesting to the applicant's good moral character and general fitness to practice law in New York;

(2) A registration fee in the same amount and according to the same schedule as required by other members of the New York bar;

(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.

(b) Registration and law practice under this Part is only permitted if one other jurisdiction where the lawyer is admitted would similarly permit an attorney or counselor-at-law admitted to practice in New York State without examination to engage in practice as described in § 522.1(a). This requirement of reciprocity is satisfied when the other jurisdiction would permit a New York lawyer to practice as an in-house lawyer under any registration procedure or general law or rule or policy permitting lawyers admitted elsewhere to practice as an in-house lawyer in the jurisdiction.

(c) A lawyer seeking to register under this Part may practice in-house during the 180-day period identified in (a) above and, if all materials identified in (a)(1)-(4) are timely submitted, until the lawyer's registration becomes effective. Any lawyer whose registration is denied must cease practicing law in New York.

§ 522.2 Scope of practice

A lawyer registered to practice as an in-house lawyer under this Part shall have the rights and privileges otherwise applicable to members of the New York bar with the following restrictions:

(a) The registered lawyer is authorized to provide legal services to the single 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 to the extent consistent with the New York Rules of Professional Conduct; and

(b) The registered lawyer shall not:

(i) Except as otherwise permitted by the rules and law of New York, appear before a court or any other tribunal as defined in Rule 1.0(m) of the New York Rules of Professional Conduct, or

(ii) Offer or provide legal services or advice to any person other than as described in this Part, or hold himself or herself out as being authorized to practice law in New York other than as described in this Part.

§ 522.3 Pro bono practice

Notwithstanding the provisions of § 522.2 above, a lawyer registered under this Part and admitted in any U.S. jurisdiction is authorized to provide pro bono legal services through an established not-for-profit bar association, *pro bono* or legal services program, or through such other organization(s) as are specifically authorized to provide pro bono representation in New York.

§ 522.4 Rights and obligations

In addition to the obligations set forth in § 522.1 and elsewhere in this Part, a lawyer registered under this Part shall:

(a) Fulfill the continuing legal education requirements that are required of active members of the New York bar;

(b) Report to the Office of Attorney Registration the occurrence of any of the following events within 30 days of such occurrence:

(i) Termination of the lawyer's employment as described in § 522.1(a)(4);

(ii) Whether or not public, any change in the lawyer's license status in another jurisdiction, including by the lawyer's resignation;

(iii) Whether or not public, any disciplinary charge, finding, or sanction concerning the lawyer by any disciplinary authority, court, or other tribunal in any jurisdiction.

§ 522.5 Disciplinary provisions

A registered lawyer under this Part shall be subject to the New York Rules of Professional Conduct and all other laws and rules governing lawyers admitted to the active practice of law in New York. The Disciplinary Committees, Grievance Committees, Committees on Professional Standards, and any other relevant bodies of the Appellate Division where the in-house lawyer practices, resides, commits acts in, or has offices in, as described in Parts 603.1, 691.1, 806.1, and 1022.19 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 they have jurisdiction over lawyers generally admitted in New York.

§ 522.6 Automatic termination

A registered lawyer's rights and privileges under this section automatically terminate when:

- (a) The lawyer's employment as described in § 522.1(a)(4) terminates;
- (b) The lawyer is suspended or disbarred from practice in any jurisdiction or any court or agency before which the lawyer is admitted; or
- (c) The lawyer fails to maintain [current admission] [active status] in at least one jurisdiction.

§ 522.7 Reinstatement

A registered lawyer whose registration is terminated under § 522.6 of the Part may be reinstated within three months of termination upon submission to the Office of Attorney Registration of the following:

- (a) An application for reinstatement in a form prescribed by the Office of Attorney Registration;
- (b) A reinstatement fee in the amount of \$ _____; and,
- (c) An affidavit from the current employing entity as prescribed in § 522.1(a)(4) of this Part.

§ 522.8 Sanctions

A lawyer who practices as described in § 522.1(a) without registering as required by this Part shall be:

- (a) Subject to professional discipline in this jurisdiction in the same manner and to the same extent as members of the bar of New York;
- (b) Ineligible for admission on application or on motion in this jurisdiction for a period of two years unless good cause is shown for the failure to register;

(c) Referred by the Office of Attorney Registration to the Appellate Division; and

(d) Referred by the Office of Attorney Registration to the disciplinary authority of the jurisdictions of licensure.

§ 522.9 Subsequent admission on motion

Where a person admitted under this Part subsequently seeks to obtain admission without examination under § 520.10, practice under this Part shall be deemed to be practice in a jurisdiction meeting the requirements of § 520.10(a)(2)(i) if the person is admitted in a jurisdiction that meets the requirements of § 520.10(a)(1)(iii).

**Appendix B: Report of the Association of the Bar of the City of New York
Committee on Professional Responsibility**

**ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
COMMITTEE ON PROFESSIONAL RESPONSIBILITY
PROPOSED RULE AUTHORIZING THE PRACTICE OF LAW
IN NEW YORK BY IN-HOUSE COUNSEL LICENSED IN OTHER STATES**

June 2010

Summary of Issue

The Committee recommends that the Court of Appeals adopt a rule of practice that would allow attorneys licensed to practice law in other states, and who are employed by a client-employer in New York (“In-house Counsel”), to practice law in this State without being admitted to the Bar of the State of New York. Forty three other states and the District of Columbia have already adopted rules of professional conduct that are the substantial equivalent of ABA Model Rule 5.5(d)(1),¹⁵ or taken some other comparable step.

Substantial changes to the rules relating to multijurisdictional practice, including rules which would impact the responsibilities of In-house Counsel, have been proposed in New York and twice been refused. However, the proposals that were previously rejected would have made a number of different and material changes to the rules relating to multi-jurisdictional practice in New York. The proposal suggested herein, by contrast, is far narrower, limiting authorization to practice in New York solely to In-house counsel. In the view of this Committee, such a narrow proposal would be more well received -- not as an addition to the Rules of Professional Conduct (the “RPC”), but rather as a Rule to be adopted by the Court of Appeals, to be placed within its current Rules in Part 520 (“Rules for the Admission of Attorneys and Counselors at Law”) as a new Rule 520.16, as follows:

¹⁵ ABA Model Rule 5.5(d)(1) provides:

(d) 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. . . .

[Proposed] Section 520.16 Legal Services for Employer

(a) A person admitted to practice law in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that are provided to such person's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission. Such persons shall be entitled to the rights and subject to the obligations set forth in the Rules of Professional Conduct and those arising from other conditions and requirements that apply to a member of the bar of this State under the rules of court governing members of the bar.

(b) A person providing legal services under this Rule shall be subject to professional discipline in the same manner and to the same extent as members of the bar of this State.

Discussion

As of October 2009, 43 states plus the District of Columbia have enacted either ABA Model Rule 5.5(d)(1) or some other rule allowing In-house counsel to practice without passing the local bar exam and going through the normal admission process. *See* http://www.abanet.org/cpr/mjp/in-house_rules.pdf. The reasons for adopting such a rule are several:

- In-house counsel are often relocated from one State to another, and the inability to practice in New York without substantial delay, effort and expense will adversely affect not only such In-house counsel but also their employer;
- The absence of such a rule puts New York at a competitive economic disadvantage vis a vis other states;
- Allowing the free-flow of talented lawyers into New York will enhance New York as a place for large businesses to locate their headquarters and other major offices;
- Under the proposed rule, although In-house counsel would be admitted to practice in another State, they would “be subject to professional discipline in the same manner and to the same extent as members of the bar of this State,” and so would be subject to New York’s disciplinary rules and authority;

- Any employer large enough to need to hire In-house counsel would be sophisticated enough to evaluate what such counsel is (and isn't) competent to do in the context of the employer's needs; and
- The proposed rule bars the In-house counsel from providing services to anyone other than the employer, so there is little risk that unsophisticated clients will be harmed by the Rule.

Moreover, anecdotal evidence suggests that numerous In-house counsel are already working in New York, without being admitted to the New York Bar, arguably in contravention of RPC 5.5(a) ("A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction") and applicable Rules of the Court of Appeals. It is likely that such lawyers, and perhaps their employers, simply have failed to give consideration to the applicable rules or have assumed that they are in compliance because the practice of out-of-state lawyers working as In-house counsel in New York is commonplace. In our view, the status quo promotes disrespect for the law.

We are aware of one principal objection that is sometimes made against adopting a rule such as that proposed here. That is, it is argued that such a rule will undesirably increase competition for jobs in New York, to the disadvantage of those lawyers already admitted here. There is no question that there is some truth to this assertion. However, the Committee believes that this concern is far out-weighed by the benefits to New York of: (i) allowing the highest quality lawyers to work here as In-house counsel, (ii) making it easier for large businesses to do business in New York; and (iii) eliminating the problem that many In-house counsel face, in which they must choose between leaving (or not coming to) New York, or practicing here under a cloud of ethical ambiguity.

Conclusion

In sum, for the reasons stated, we propose that the New York Court of Appeals adopt (new) Rule 520.16, as set forth above, authorizing the practice of law in New York by In-house counsel who are otherwise licensed to practice in a state outside of New York.