

AMERICAN BAR ASSOCIATION

SECTION OF INTERNATIONAL LAW STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY STANDING COMMITTEE ON PROFESSIONAL DISCIPLINE TASK FORCE ON INTERNATIONAL TRADE IN LEGAL SERVICES

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

1 RESOLVED, That the American Bar Association amends the black letter of Rule 5.5 of
2 the ABA Model Rules of Professional Conduct as follows (insertions underlined,
3 deletions ~~struck through~~):

RULE 5.5: UNAUTHORIZED PRACTICE OF LAW; MULTIJURISDICTIONAL PRACTICE OF LAW

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

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

- 11 (1) except as authorized by these Rules or other law, establish an office or
12 other systematic and continuous presence in this jurisdiction for the
13 practice of law; or
14 (2) hold out to the public or otherwise represent that the lawyer is admitted to
15 practice law in this jurisdiction.

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

- 19 (1) are undertaken in association with a lawyer who is admitted to practice in
20 this jurisdiction and who actively participates in the matter;
21 (2) are in or reasonably related to a pending or potential proceeding before a
22 tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer
23 is assisting, is authorized by law or order to appear in such proceeding or
24 reasonably expects to be so authorized;
25 (3) are in or reasonably related to a pending or potential arbitration,
26 mediation, or other alternative resolution proceeding in this or another
27 jurisdiction, if the services arise out of or are reasonably related to the
28 lawyer's practice in a jurisdiction in which the lawyer is admitted to
29 practice and are not services for which the forum requires pro hac vice
30 admission; or

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

(d) A lawyer admitted in another United States jurisdiction or in a foreign jurisdiction, and not disbarred or suspended from practice in any jurisdiction or the equivalent thereof, or a person otherwise lawfully practicing as an in-house counsel under the laws of a foreign jurisdiction, may provide legal services through an office or other systematic and continuous presence in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates, are not services for which the forum requires pro hac vice admission; and when performed by a foreign lawyer and requires advice on the law of this or another U.S. jurisdiction or of the United States, such advice shall be based upon the advice of a lawyer who is duly licensed and authorized by the jurisdiction to provide such advice; or

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

(e) For purposes of paragraph (d),

(i) the foreign lawyer must be 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 and discipline by a duly constituted professional body or a public authority, or,

(ii) the person otherwise lawfully practicing as an in-house counsel under the laws of foreign jurisdiction must be authorized to practice under this rule by, in the exercise of its discretion, [the highest court of appellate jurisdiction].

FURTHER RESOLVED, That the American Bar Association amends the ABA Model Rule for Registration of In-House Counsel and the Commentary (deletions ~~struck through~~, additions underlined), dated February 2016.

Model Rule for Registration of In-House Counsel

GENERAL PROVISIONS:

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

1) A completed application in the form prescribed by the [registration

authority];

- 2) A fee in the amount determined by the [registration authority];
- 3) Documents proving admission to practice law and current good standing in all jurisdictions, U.S. and foreign, in which the lawyer is admitted to practice law.
- 4) If the jurisdiction is foreign and the documents are not in English, the lawyer shall submit an English translation and satisfactory proof of the accuracy of the translation; and
- 5) 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.

For purposes of this Rule, a "foreign lawyer" 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 and discipline by a duly constituted professional body or a public authority. For purposes of this Rule, the [state's highest court of appellate jurisdiction] may, in its discretion, allow a lawyer lawfully practicing as in-house counsel in a foreign jurisdiction who does not meet the above requirements to register as an in-house counsel after consideration of other criteria, including the lawyer's legal education, references, and experience.

SCOPE OF AUTHORITY OF REGISTERED LAWYER:

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

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

PRO BONO PRACTICE:

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

OBLIGATIONS:

D. A lawyer registered under this Rule shall:

1. Pay an annual fee in the amount of \$_____;
2. Pay any annual client protection fund assessment;
3. Fulfill the continuing legal education requirements that are required of active members of the bar in this jurisdiction;
4. Report within [____] days to the jurisdiction the following:
 - a. Termination of the lawyer's employment as described in paragraph A.5)4.;
 - b. Whether or not public, any change in the lawyer's license status in another jurisdiction, whether U.S. or foreign, including by the lawyer's resignation;
 - c. Whether or not public, any disciplinary charge, finding, or sanction concerning the lawyer by any disciplinary authority, court, or other tribunal in any jurisdiction, U.S. or foreign.

LOCAL DISCIPLINE:

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

AUTOMATIC TERMINATION:

F. A registered lawyer's rights and privileges under this Rule automatically terminate when:

1. The lawyer's employment terminates;
2. The lawyer is suspended or disbarred or the equivalent thereof in any jurisdiction or any court or agency before which the lawyer is admitted, U.S. or foreign; or
3. The lawyer fails to maintain active status in at least one jurisdiction, U.S. or foreign.

REINSTATEMENT:

G. A registered lawyer whose registration is terminated under paragraph F.1. above, may be reinstated within [____] months of termination upon submission to the [registration authority] of the following:

1. An application for reinstatement in a form prescribed by the [registration authority];
2. A reinstatement fee in the amount of \$_____;
3. An affidavit from the current employing entity as prescribed in paragraph A.5)4.

SANCTIONS:

H. A lawyer under this Rule who fails to register shall be:

1. Subject to professional discipline in this jurisdiction;
2. Ineligible for admission on motion in this jurisdiction;
3. Referred by the [registration authority] to this [jurisdiction's bar admissions authority]; and
4. Referred by the [registration authority] to the disciplinary authority or to any duly constituted organization overseeing the lawyer's profession, or that granted authority to practice law in the jurisdictions of licensure, U.S. and/or foreign.

Comment

[1] Paragraph A of this Rule provides that the [state's highest court of appellate jurisdiction] may, in its discretion, allow someone who does not meet the Rule's other definitional requirements of a foreign lawyer, but who is lawfully practicing as in-house counsel in their home foreign jurisdiction, to register. The exercise of such discretion by the court may be necessary, because some foreign jurisdictions may not permit otherwise qualified in-house counsel to be members of or admitted to the bar. Lawyers in such foreign jurisdictions who are employed as in-house counsel may be required to relinquish any bar membership or admission while so employed or they may never have obtained such admission or membership status.

[2] Paragraph F of this Rule sets forth three circumstances that result in automatic termination of in-house counsel's registrations status. In situations where a court has exercised its discretion pursuant to Paragraph A of this Rule, a registered foreign in-house counsel lacking bar admission or licensure in that individual's home country cannot "fail to maintain active status" as set forth in Paragraph F(3). There is no active status in existence. Absent the circumstances set forth in Paragraph F(2), the triggering event to terminate registration status of such foreign in-house counsel would be the termination of employment of that individual by the employer as set forth in Paragraph F(1).

REPORT

The Regulation of Foreign Lawyers, and in Particular Foreign In-House Counsel, in the U.S.: Proposals for a Better and More Comprehensive Framework

I. Introduction

Several ABA Model Rules address the licensing of or authorization for practice by foreign lawyers in the U.S. These ABA policies are conditioned on those lawyers being able to certify that they are 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 are subject to effective regulation and discipline by a duly constituted professional body or a public authority.”¹ As such, the ABA policies dealing with foreign in-house counsel de facto exclude over 70% of foreign lawyers, particularly lawyers from civil law jurisdictions, who are either not required or not even legally allowed to be members of the bar when practicing as in-house counsel. For example, a lawyer admitted to the practice of law in France, upon going in-house, has to surrender her bar admission status, and consequently, does not fall under the current ABA definition of foreign lawyer. As a result, U.S. corporations are constrained in their hiring of legal talent from the majority of countries around the world, and foreign-based companies are equally constrained from seconding foreign lawyers from such countries to work in the U.S. Because these in-house lawyers do not meet the requirements for being authorized to practice as and being registered as foreign in-house lawyers in the U.S., the state supreme courts cannot effectively regulate them and U.S. client employers cannot rely on the protection of the attorney-client privilege for the legal advice they receive from these employed lawyers.

II. Abstract

The ABA has had a long-standing practice of recognizing the importance and value associated with the practice of foreign law and allowing foreign legal practitioners to engage in practice, on a limited basis, in the U.S. Indeed, as early as 1993, the ABA House of Delegates approved the adoption of the Model Rule for the Licensing of Legal Consultants (currently the ABA Model Rule for the Licensing and Practice of Foreign Legal Consultants) to support the work of foreign lawyers in this country. As of October 6, 2015, 32 states and the District of Columbia had adopted a rule authorizing and regulating the practice of foreign legal consultants.²

¹ The ABA Model Rule for Temporary Practice by Foreign Lawyers, Rule 5.5(d) of the ABA Model Rules of Professional Conduct, the ABA Model Rule for Registration of In-House Counsel, the ABA Model Rule on Pro Hac Vice Admission, and the ABA Model Rule for the Licensing and Practice of Foreign Legal Consultants can be viewed at http://www.americanbar.org/groups/professional_responsibility/policy.html.

² *Id.*

Between August 2012 and February 2013, following a three and one-half year study of how globalization and technology are transforming the practice of law and how the regulation of lawyers, including foreign lawyers, should be updated in light of those developments, the ABA Commission on Ethics 20/20 submitted ten Resolutions for adoption by the House of Delegates.

Specifically regarding foreign lawyers, the Commission examined the practice authority of foreign-trained lawyers in the U.S. who are asked to advise clients on foreign or international law issues. As the Commission noted in its report, "one important practical effect of globalization is that clients regularly expect lawyers in firms of all sizes to handle matters that involve multiple jurisdictions, domestic and international."³ The Commission further recognized that "clients are encountering an increasing number of legal issues and problems that implicate foreign or international law and for which the assistance of foreign lawyers can be valuable."⁴

The Commission went on to propose three related Resolutions that, with appropriate client protections, would allow clients to utilize the expertise of foreign counsel. One Resolution proposed to add foreign lawyers to the ABA Model Rule on Pro Hac Vice Admission so as to provide authorization for them to appear *pro hac vice* (subject to a number of limitations). A second Resolution sought to add authorization for foreign lawyers to serve as in-house counsel from a continuous and systematic presence in the U.S. via amendments to Model Rule of Professional Conduct 5.5, and a third Resolution sought companion amendments to the ABA Model Rule for the Registration of In-House Counsel. The House of Delegates adopted all of these Resolutions, which were developed with the goal of responding to the increasing number of foreign companies with substantial operations and offices in the U.S., as well as U.S. companies with substantial operations abroad, which often find that the foreign legal advice they want of lawyers from non-U.S. jurisdictions can be offered more efficiently and effectively if those lawyers relocate to a corporate office in the U.S.

In urging adoption of these Resolutions, the Ethics 20/20 Commission noted that foreign lawyers (including foreign legal consultants) are already engaged as in-house counsel within the U.S., but are subject to little oversight. Accordingly, the Commission concluded that adding foreign lawyers to both Model Rule 5.5 (to authorize foreign lawyers to serve as in-house counsel from a continuous and systematic presence in the U.S.) and the Model Rule for the Registration of In-House Counsel would achieve the benefit of ensuring that those lawyers are identifiable, subject to monitoring, and accountable for their conduct. These Resolutions were also aimed at ensuring that the foreign lawyers are subject to the professional conduct rules of the jurisdiction where they are employed, contribute to the client protection fund, are subject to sanctions if they

³ ABA Commission on Ethics 20/20 Introduction and Overview in Report to ABA House of Delegates, February 2013, p.3 citing Emile Loza, *Attorney Competence, Ethical Compliance, and Transnational Practice*, 52 The Advocate, no. 10, 2009 at *28, available at <http://isb.idaho.gov/pdf/advocate/issues/adv09oct.pdf> in footnote 8)

⁴ ABA Commission on Ethics 20/20 Introduction and Overview in Report to ABA House of Delegates, February 2013, p.5.

fail to register or do not comply with the professional conduct rules, and comply with continuing legal education requirements.

All these Resolutions have one element in common: they utilize the definition of foreign lawyer as used in longstanding ABA policy, including the ABA Model Rule for the Licensing and Practice by Foreign Legal Consultants, which a number of state supreme courts have adopted. Under such definition, a foreign lawyer is "a member in good standing of a recognized legal profession in a foreign country, the members of which are admitted to practice as attorneys or counselors at law or the equivalent, and are subject to effective regulation and discipline by a duly constituted professional body or a public authority."⁵ However, this definition does not account for the unique way in which foreign lawyers are permitted to practice in-house in most foreign countries. Thus, the goal of regulating these foreign lawyers as authorized U.S. in-house lawyers is not being maximized because in many of these in-house foreign lawyers do not meet the criteria under the current rules. A recent informal survey conducted by the Litigation Committee of the ABA Section of International Law of 70 jurisdictions across the world, from Europe to Asia to Africa and the Americas, shows that, in many countries, in-house counsel are not admitted to practice (or admitted to the bar) as we traditionally view practice licensure in the U.S., and therefore they are not subject to regulation and discipline by a professional body or a public authority in the way that their U.S. counterparts are. At the same time, many of these jurisdictions impose comparable, if not more stringent, educational requirements than those required in the U.S. for lawyers to be authorized to practice, whether in-house or in private practice.⁶ As a result, there is a need to address, in the current versions of Model Rule 5.5 and the Model Rule for Registration of In-House Counsel, this discreet but very real issue that is unique to foreign in-house counsel and their clients.

Model Rule 5.5 (d) is where the limited practice authority for in-house counsel (foreign and domestic) who have a systematic and continuous presence in the U.S. office of their employer is provided. As noted in Comment [17] to Model Rule 5.5, such in-house counsel may also be subject to registration requirements. Not all jurisdictions that have adopted the provisions of Model Rule 5.5(d), however, require registration as provided for in the Model Rule for Registration of In-House Counsel. Further, the registration requirements set forth in the Model Rule for Registration of In-House Counsel are intended to apply to those situations where in-house counsel is practicing via a systematic and continuous presence in the jurisdiction, not a temporary (fly-in-fly-out) presence.

⁵ See: <http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/201h.authcheckdam.pdf>.

That same definition is adopted for the licensing of Foreign Legal Consultants in New York. In support of his application as a foreign lawyer, the candidate must, under both the ABA Rule and the NY State Rule, produce certain evidence of his or her status as a foreign lawyer, in the form of "a certificate from the professional body or public authority in such foreign country having final jurisdiction over professional discipline, certifying as to the applicant's admission to practice and the date thereof, and as to his or her good standing as such attorney or counselor at law or the equivalent." See: https://www.law.northwestern.edu/career/llm/documents/NY_FLC_rules.pdf.

⁶ See Report "The Regulation of In-House Counsel Across International Markets", March 2015.

This Report supports amending ABA Model Rule 5.5 and the ABA Model Rule for Registration of In-House Counsel to include language specifying that the court of highest appellate jurisdiction may, in its discretion, allow foreign in-house lawyers who do not meet the ABA definition of foreign lawyer because they cannot be “members of the bar” to be able to practice as in-house counsel in the U.S. and to be so registered. These courts possess the inherent authority to regulate the practice of law and the legal profession, as long recognized by the ABA, and such an exercise of discretion would be within their purview. The proposed amendments would not only bring these foreign lawyers under the regulatory umbrella, but they also would offer better protection for the advice provided by these foreign lawyers to U.S.-based clients and, thus, to clients relying on such advice. One of the cornerstones is the protection afforded to their communications by the attorney-client privilege. This protection is engrained in the status of an attorney, whether such attorney practices in private practice or in-house, or whether such attorney has obtained all licensing requirements. This privilege belongs to the client and protects his communications with his attorneys in connection with the giving of legal advice. It is important to allow these foreign lawyers to become authorized U.S. lawyers so that there is no question that the privilege applies.

III. The Intrinsic Limitations of the ABA Definition of Foreign Lawyer With Regard to Foreign In-House Counsel

A. In-House Counsel and the Fluctuating Concept of "Admission to Practice"

As noted above, the definition of a foreign lawyer provides that the individual must be:

*"a member in good standing of a recognized legal profession in a foreign country, the members of which are **admitted to practice** as attorneys or counselors at law or the equivalent and are subject to effective regulation and discipline by a duly constituted professional body or a public authority".⁷*

In a number of foreign countries, unlike the U.S. model, the legal profession is not unified. Different professions of the law cohabitate and there is not a one-way path to becoming a lawyer. A number of countries do not allow members of the bar to practice in-house and remain members of the bar during that time, while a large majority of in-house legal practitioners started their career in-house and never took a bar exam or engaged in law firm practice. As such, they never went through the process of a formal admission after taking a bar exam, the way it is typically done in the U.S., and yet they are all considered lawyers in these foreign jurisdictions. These lawyers derive their authority to practice law as lawyers not from bar admission, or bar membership, but from the law directly. The survey that was compiled in support of this Resolution shows that the requirement that a foreign lawyer be admitted as such to practice, and produce a certificate of good standing in the bar from his country of origin as a condition to being eligible to practice and be registered as a foreign in-house lawyer in the U.S., would de facto exclude approximately 70% of foreign lawyers, mostly from civil law jurisdictions, from the benefit of such protection and regulation.

⁷ *Supra* note 1.

B. Regulation and Discipline of Foreign In-House Lawyers

Under the ABA definition, a foreign lawyer must also be subject to effective regulation and discipline by a duly constituted professional body or a public authority.

Because in many foreign countries in-house lawyers are not members of the bar in the same way they are in the U.S., they are not subject to regulation and discipline in the same way either. In countries where the profession of lawyer is unified, such as the UK and most common law jurisdictions, all lawyers, whether employed in private practice or in-house, are members of a single body and subject to regulation and discipline. In others, such as France, Italy or Sweden, only lawyers in private practice are members of the bar. . Lawyers employed in-house would typically be members of a national association of in-house lawyers, such as AFJE in France, or another foreign equivalent, which has restrictive conditions for admitting members and recognizing the legal status of an in-house legal practitioner, as well as a code of ethics by which lawyers must abide. They often do not, however, have the authority to regulate or discipline these lawyers. Neither does the national bar organization, if such organization, as in France, does not have the statutory authority to regulate lawyers other than those employed in private practice. And yet, the legal status of all these lawyers, whether they work in private practice or in-house, is recognized by the law of the foreign country, and so is their ability to give legal advice and draft legal documents.

In its current drafting, the ABA definition of foreign lawyer, which links the status of a lawyer to his or her regulation or discipline by a duly constituted professional body, as is the case in the U.S., is again too restrictive with regard to the unique position of foreign in-house counsel, and fails to account for the fact that the vast majority of foreign in-house practitioners are not regulated or disciplined as such by a duly established organization such as the bar, even though they are subject to a number of duties and laws, such as the duty to maintain confidentiality, by virtue of their status as lawyers. If these lawyers, who cannot be members of the bar, were to breach those duties, they could be subject to prosecution and sanctions. These sanctions, however, would be imposed by the courts, not a bar, and come directly from the law, not from a duly established professional body. The strict interpretation of the ABA definition would exclude de facto all lawyers who are currently employed as in-house attorneys in most foreign countries, who are most likely to apply for authorization to practice as foreign in-house lawyers in the U.S.

C. The Proposed Amendments to Model Rule of Professional Conduct 5.5 and to the Model Rule for Registration of In-House Counsel

For the reasons set forth above, the Section of International Law recommends that Model Rule 5.5 and the Model Rule for Registration of In-House Counsel be amended as follows (additions are in underlined and deletions ~~struck through~~):

Model Rule 5.5(e):

For purposes of paragraph (d) only, the foreign lawyer must be 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 the foreign lawyer or foreign in-house counsel must be ~~are~~ subject to effective regulation and discipline by a duly constituted professional body or a public authority, or, in its discretion, are otherwise authorized by [this highest court of appellate jurisdiction] to practice in this jurisdiction as an in-house counsel.

Model Rule For the Registration of In-House Counsel (at the end of Paragraph A):

For purposes of this Rule, a “foreign lawyer” 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 and discipline by a duly constituted professional body or a public authority. For purposes of this Rule only, the [state’s highest court of appellate jurisdiction] may, in its discretion, allow a lawyer lawfully practicing as in-house counsel in a foreign jurisdiction who does not meet the above requirements to register as an in-house counsel after consideration of other criteria, including the lawyer’s legal education, references, and experience.

In particular, where the lawyer is not, in the foreign jurisdiction, allowed to be or remain (as applicable) a member of the bar while practicing in-house, the court, in looking to the legal education, references and experiences of the applicant for registration status, may consider the following criteria in determining whether to grant the request:

- (a) The legal education (i.e. foreign equivalent of a U.S. JD degree) of the individual;
- (b) The professional experience of the individual, including the number of years that the individual has worked as in-house counsel;
- (c) The individual’s passing of the foreign jurisdiction’s bar examination;
- (d) The individual’s prior admission to the foreign bar, or other duly constituted authority;
- (e) The individual’s disciplinary record (including prosecution or sanctions as described above), if any, while admitted to the foreign bar or during the course of the individual’s employment as in-house counsel;
- (f) The individual’s eligibility to join or rejoin the foreign bar upon ceasing to be employed in-house; and
- (g) The individual’s understanding of the Model Rules of Professional Conduct.

To further explain why the language regarding the courts’ discretion is being added to enhance clarity for those seeking practice authorization under the Registration Rule or for those seeking to enforce it, the Section proposes a new Comment [1]. That new Comment states:

[1] Paragraph A of this Rule provides that the [state’s highest court of appellate jurisdiction] may, in its discretion, allow someone who does not meet the Rule’s other definitional requirements of a foreign lawyer, but who is lawfully practicing as in-house counsel in their home foreign jurisdiction, to register. The exercise of such discretion by the court may be necessary, because some foreign jurisdictions may not permit otherwise qualified in-house counsel to be members of or admitted to the bar. Lawyers in such foreign jurisdictions who are employed as in-house counsel may be required to relinquish any bar membership or admission while so employed or they may never have obtained such admission or membership status.

In addition, the Section proposes amending Section F of the Model Rule for Registration of In-House Counsel that addresses when registration status automatically terminates. The Section proposes that paragraph F(2) read as follows to ensure consistency with Model Rule 5.5(d):

F. The registered lawyer’s rights and privileges under this Rule automatically terminate when:

1. The lawyer’s employment terminates;
2. The lawyer is suspended or disbarred or the equivalent thereof in any jurisdiction; or
3. The lawyer fails to maintain active status in at least one jurisdiction, U.S. or foreign.

To further clarify when the registration status would automatically terminate for in-house counsel granted registration status pursuant to the court’s discretion, the Section proposes new Comment [2], which states:

[2] Paragraph F of this Rule sets forth three circumstances that result in automatic termination of in-house counsel’s registrations status. In situations where a court has exercised its discretion pursuant to Paragraph A of this Rule, a registered foreign in-house counsel lacking bar admission or licensure in that individual’s home country cannot “fail to maintain active status” as set forth in Paragraph F(3). There is no active status in existence. Absent the circumstances set forth in Paragraph F(2), the triggering event to terminate registration status of such foreign in-house counsel would be the termination of employment of that individual by the employer as set forth in Paragraph F(1).

D. The Proposed Amendments Also Afford Better Protection of the Attorney-Client Privilege

Amending the current model rules on the authorization and registration of foreign in-house lawyers in the U.S. also would offer better protection to the advice provided by these foreign lawyers to their U.S.-based clients.

One of the cornerstones of the licensing of lawyers in the U.S. is the protection afforded to their communications by the attorney-client privilege. This protection is engrained in the status of an attorney, whether such attorney practices in private practice or in-house. Such privilege equally should extend to the advice given by foreign in-house lawyers in the U.S. so that U.S.-based clients relying on such advice can confidently seek out such advice without fear of their communications with those foreign lawyers being subject to disclosure.⁸

Such a privilege, with some variations in the scope and degree of protection, also attaches to the communication of foreign lawyers with their clients in their home jurisdiction. However, longstanding case law, in Europe in particular, has questioned such privilege attaching to legal advice given by in-house lawyers, the argument being advanced by the European Court of Justice being that in-house counsel, by virtue of their employment relationship and exclusive affiliation to one client only, i.e. their employer, lacks the independence that would otherwise be expected of lawyers giving advice to a number of clients on a non-exclusive basis. There are a number of political calls at the national and EU level to put an end to this situation, which severely undermines both the authority of in-house counsel and the protection of clients relying on such advice in Europe. This also poses a number of very practical risks for U.S. lawyers, particularly U.S.-based in-house counsel involved in communications with EU-based in-house counsel, including the risk U.S. lawyers take that their communications will be subject to an order of disclosure by a court of law in the EU, without the ability of these lawyers to successfully claim the protection of the attorney-client privilege before such court. Likewise, a U.S. in-house counsel who provides legal advice to an EU-based client or in-house colleague, knowing that such legal advice may not be subject to the attorney-client privilege in the EU, may not be able to claim the protection of the U.S. attorney-client privilege.

The issue of the lack of privilege for in-house counsel communications in the EU is not an issue that is linked to the lawyer's regulated status in countries where in-house lawyers are also members of a bar. It is an issue that is linked to their employment status. Therefore, when foreign in-house lawyers come to the U.S. to practice and start giving legal advice to U.S.-based clients, it may very well be argued in case of an EU dispute that these foreign lawyers' legal advice may not be subject to the attorney-client privilege and may be ordered to be disclosed.

⁸ This is not to suggest that in every jurisdiction a lawyer must be licensed in order for the privilege to apply. The Standard Rule of the Federal Rule of Evidence defines a "lawyer" as a person licensed to practice law *in any state or nation*. Moreover the privilege extends not only to lawyers but to confidential communications with *persons reasonably believed by the client to be authorized to practice law in any state or nation*, Standard 503(a)(2). Many states, including Florida, California, Arkansas, Oregon, Idaho, Delaware, and Texas have adopted this rule. For instance, Florida Statute ("Fla. Stat.") 90.502 expressly regulates the lawyer-client privilege: "(1) For purposes of this section:

(a) *A "lawyer" is a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation.*

(...) This subsection does not affect the qualification and admission of lawyers to practice in Florida, which is regulated and administered by the Florida Bar." Notably, the adoption of this rule is not universal across the U.S. Thus, it is suggested that the Model Rules be amended to broaden the categories of foreign lawyers who may serve as in-house counsel so that there is no issue that the lawyer participating in the communication is a lawyer for purposes of determining the application of the privilege.

Conversely, if some of the obligations those lawyers derive from being licensed and registered as in-house lawyers in the U.S. are that they: are subject to the professional conduct rules of the jurisdiction where they are employed, contribute to the client protection fund, are subject to sanctions if they fail to register or do not comply with the professional conduct rules, and comply with continuing legal education requirements, one could also argue that one of the key benefits a registered and properly licensed foreign in-house lawyer would gain from such status is the ability for their client to claim the benefit afforded to their foreign in-house lawyer's legal advice by the U.S. rules on the attorney-client privilege.

IV. Conclusion

For the reasons highlighted in this Report, it is recommended that Model Rule 5.5 and the ABA Model Rule for the Registration of In-House Counsel be amended to include the discretion of a court of highest appellate jurisdiction to license to practice in the U.S. a foreign in-house lawyer, who otherwise, due to his or her country's rules, would not fall under the current definition of foreign lawyer. Allowing such discretion will ensure not only that such competent and trained foreign in-house lawyers are legally able and, as a result, encouraged to seek registration in the U.S., but also that U.S.-based clients would effectively receive the full benefit of these regulations and the freedom to choose the foreign in-house lawyer who best fits their needs, including better protection of the attorney-client privilege.

Respectfully Submitted,

Lisa J. Savitt
Chair, ABA Section of International Law

February 2016

GENERAL INFORMATION FORM

Submitting Entity: Section of International Law

Submitted By: Lisa Savitt, Chair, Section of International Law

1. Summary of Resolution(s).

Under Model Rule 5.5 (d), a foreign lawyer is "a member in good standing of a recognized legal profession in a foreign country, the members of which are admitted to practice as attorneys or counselors at law or the equivalent, and are subject to effective regulation and discipline by a duly constituted professional body or a public authority." However, this definition does not account for the unique way in which foreign lawyers are permitted to practice in-house in most foreign countries.

This Report supports amending ABA Model Rule 5.5 and the ABA Model Rule for Registration of In-House Counsel to include language specifying that the court of highest appellate jurisdiction may, in its discretion, allow foreign in-house lawyers who do not meet the ABA definition of foreign lawyer because they cannot be "members of the bar" to be able to practice as in-house counsel in the U.S. and to be so registered. These courts possess the inherent authority to regulate the practice of law and the legal profession, as long recognized by the ABA, and such an exercise of discretion would be within their purview. The proposed amendments would not only bring these foreign lawyers under the regulatory umbrella, but they also would offer better protection for the advice provided by these foreign lawyers to U.S.-based clients and, thus, to clients relying on such advice. One of the cornerstones is the protection afforded to their communications by the attorney-client privilege.

2. Approval by Submitting Entity.

The Council of the Section of International Law approved this recommendation and resolution at its Meeting on October 20, 2015.

3. Has this or a similar resolution been submitted to the House or Board previously?

No.

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?

Several ABA Model Rules address the licensing of or authorization for practice by foreign lawyers in the U.S. These ABA policies are conditioned on those lawyers being able to certify that they are 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 are subject to effective regulation and discipline by a duly constituted professional body or a public authority." As such, the ABA policies dealing with foreign in-house counsel de facto exclude over 70% of foreign lawyers, particularly lawyers from civil law jurisdictions, who are either not required or not even legally allowed to be members of the bar when practicing as in-house counsel. In particular, this Report supports amending ABA Model Rule 5.5 and the ABA Model Rule for Registration of In-House Counsel to include language specifying that the court of highest appellate jurisdiction may, in its

discretion, allow foreign in-house lawyers who do not meet the ABA definition of foreign lawyer because they cannot be “members of the bar” to be able to practice as in-house counsel in the U.S. and to be so registered. The court, looking to the legal education, references and experiences of the applicant for registration status, may consider the several criteria in determining whether to grant the request. Thus, the Section proposes to add a new Comment specifying that grant of discretion to the courts is necessary because some foreign jurisdictions may not permit otherwise qualified in-house counsel to be members of or admitted to the bar. In addition, the Section proposes amending Section F of the Model Rule for Registration of In-House Counsel that addresses when registration status automatically terminates. To further clarify when the registration status would automatically terminate for in-house counsel granted registration status pursuant to the court’s discretion, the Section proposes new Comment setting forth three circumstances that result in automatic termination of in-house counsel’s registrations status. Amending the current model rules on the authorization and registration of foreign in-house lawyers in the U.S. also would offer better protection to the advice provided by these foreign lawyers to their U.S.-based clients.

5. If this is a late report, what urgency exists which requires action at this meeting of the House?

N/A.

6. Status of Legislation. (If applicable)

N/A.

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

If this recommendation and resolution are approved by the House of Delegates, Model Rule 5.5 and the ABA Model Rule for the Registration of In-House Counsel will include the discretion of a court of highest appellate jurisdiction to license to practice in the U.S. a foreign in-house lawyer, who otherwise, due to his or her country’s rules, would not fall under the current definition of foreign lawyer. Allowing such discretion will ensure not only that such competent and trained foreign in-house lawyers are legally able and, as a result, encouraged to seek registration in the U.S., but also that U.S.-based clients would effectively receive the full benefit of these regulations and the freedom to choose the foreign in-house lawyer who best fits their needs, including better protection of the attorney-client privilege.

8. Cost to the Association. (Both direct and indirect costs)

N/A.

9. Disclosure of Interest. (If applicable)

N/A.

10. Referrals.

This Resolution and Report was developed by a joint working group comprised of representatives from the following entities: Task Force on International Trade in Legal Services (ITILS); Standing Committee on Professional Discipline; Standing Committee on Ethics and Professional Responsibility; Business Law Section; Litigation Section; National Organization of Bar Counsel; Tort Trial and Insurance Practice Section, Judicial Division, and the Section of Legal Education and Admissions to the Bar. The Standing Committee on Professional Discipline, the Standing Committee on Ethics and Professional Responsibility, and ITILS agreed to co-sponsor in time for the filing deadline.

Further referrals are being undertaken to the following entities: Litigation Section, Business Law Section, National Organization of Bar Counsel, Tort Trial and Insurance Practice Section, Judicial Division, Section of Legal Education and Admissions to the Bar.

11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address)

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12. Contact Name and Address Information. (Who will present the report to the House? Please include name, address, telephone number, cell phone number and e-mail address.)

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EXECUTIVE SUMMARY

1. Summary of the Resolution

This Report supports amending ABA Model Rule 5.5 and the ABA Model Rule for Registration of In-House Counsel to include language specifying that the court of highest appellate jurisdiction may, in its discretion, allow foreign in-house lawyers who do not meet the ABA definition of foreign lawyer because they cannot be “members of the bar” to be able to practice as in-house counsel in the U.S. and to be so registered.

2. Summary of the Issue that the Resolution Addresses

Under Model Rule 5.5 (d), a foreign lawyer is "a member in good standing of a recognized legal profession in a foreign country, the members of which are admitted to practice as attorneys or counselors at law or the equivalent, and are subject to effective regulation and discipline by a duly constituted professional body or a public authority." However, this definition does not account for the unique way in which foreign lawyers are permitted to practice in-house in most foreign countries. This Report supports amending ABA Model Rule 5.5 and the ABA Model Rule for Registration of In-House Counsel to include language specifying that the court of highest appellate jurisdiction may, in its discretion, allow foreign in-house lawyers who do not meet the ABA definition of foreign lawyer because they cannot be “members of the bar” to be able to practice as in-house counsel in the U.S. and to be so registered. These courts possess the inherent authority to regulate the practice of law and the legal profession, as long recognized by the ABA, and such an exercise of discretion would be within their purview. The proposed amendments would not only bring these foreign lawyers under the regulatory umbrella, but they also would offer better protection for the advice provided by these foreign lawyers to U.S.-based clients and, thus, to clients relying on such advice. One of the cornerstones is the protection afforded to their communications by the attorney-client privilege.

3. Please Explain How the Proposed Policy Position will address the issue

With the proposed resolution, Model Rule 5.5 and the ABA Model Rule for the Registration of In-House Counsel will include the discretion of a court of highest appellate jurisdiction to license to practice in the U.S. a foreign in-house lawyer, who otherwise, due to his or her country’s rules, would not fall under the current definition of foreign lawyer. Allowing such discretion will ensure not only that such competent and trained foreign in-house lawyers are legally able and, as a result, encouraged to seek registration in the U.S., but also that U.S.-based clients would effectively receive the full benefit of these regulations and the freedom to choose the foreign in-house lawyer who best fits their needs, including better protection of the attorney-client privilege.

4. Summary of Minority Views

None.