NEW YORK STATE BAR ASSOCIATION

REPORT OF COMMITTEE ON STANDARDS OF ATTORNEY CONDUCT

PROPOSED RULES FOR LICENSING OF IN-HOUSE COUNSEL

JULY 2010

The Committee is solely responsible for the contents of this report. Unless and until adopted in whole or in part by the House of Delegates of the New York State Bar Association, no part of the report should be attributed to the Association.

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 over 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,

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[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.

Six 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

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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 already 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/recommedations.pdf dated April 12, 2010., and 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 off 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 by the legislature to pay a biennial registration fee of $350. *See* N.Y. JUD. LAW § 468-a (4)(2010). The Legislature 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

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[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).

the Judiciary Law, 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:

Respectfully submitted,
[Stephen P. Younger, President NYSBA
Samuel W. Seymour, President City Bar
James B. Kobak, President NYCLA]

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 in order 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.

§ 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 program or legal services program or through such 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 Rules 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 Fourth Departments rules], 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 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 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.

Appendix C: ABA Model Rule for Registration of In-House Counsel and Supporting Report

112A

AMERICAN BAR ASSOCIATION

ADOPTED BY THE HOUSE OF DELEGATES

AUGUST 11-12, 2008

RECOMMENDATION

RESOLVED, That the American Bar Association adopts the Model Rule for Registration of In-House Counsel dated August 2008, for those jurisdictions that elect to impose registration requirements on lawyers practicing therein under Model Rule 5.5(d).

Model Rule for Registration of In-House Counsel

GENERAL PROVISIONS:

A. A lawyer admitted to the practice of law in another United States jurisdiction who is employed as a lawyer and has a continuous presence in this jurisdiction by an organization as permitted pursuant to Rule 5.5(d)(1) of the Model Rules of Professional Conduct, 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 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 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.

SCOPE OF AUTHORITY OF REGISTERED LAWYER:

B. A lawyer registered under this section 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 equivalent provision in the jurisdiction]; and
    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.

PRO BONO PRACTICE:

C. Notwithstanding the provisions of paragraph B above, a lawyer registered under this section 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 organization(s) specifically authorized in this jurisdiction.

OBLIGATIONS:

D. A lawyer registered under this section shall:
   1. Pay an annual fee in the amount of $_____;
   2. Fulfill the continuing legal education requirements that are required of active members of the bar in this jurisdiction;
   3. Report within [___] days to the jurisdiction the following:
      a. Termination of the lawyer's employment as described in paragraph B.4.;
      b. Whether or not public, any change in the lawyer's license status in another jurisdiction, 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.

LOCAL DISCIPLINE:

E. A registered lawyer under this section shall be subject to the [jurisdiction's Rules of Professional Conduct] 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 section automatically terminate when:
   1. The lawyer's employment terminates;
   2. The lawyer is suspended or disbarred from practice in any jurisdiction or any court or agency before which the lawyer is admitted; or
   3. The lawyer fails to maintain active status in at least one jurisdiction.

REINSTATEMENT:

G. A registered lawyer whose registration is terminated under paragraph F.1. above, may be reinstated within [xx] 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.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 the [jurisdiction's bar admission authority]; and
4. Referred by the [registration authority] to the disciplinary authority of the jurisdictions of licensure.

112A

REPORT

The Council of the Section of Legal Education and Admissions to the Bar, at its meeting of December 1-2, 2006, approved the Model Rule for Registration of House Counsel (Rule) for use by jurisdictions adopting or intending to adopt amended Model Rule 5.5(d) of the Model Rules of Professional Conduct. Rule 5.5(d) now excludes from the definition of unauthorized practice of law the provision of legal services by in-house counsel admitted in one jurisdiction and practicing in another jurisdiction, when the lawyer is providing legal services solely to the lawyer's employer. Rule 5.5(d) states:

> 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.

Rule 5.5(d) applies to lawyers who are in-house corporate lawyers, government lawyers, and others who are employed to render legal services to the employer. The provision assumes that the in-house lawyer can establish an office or other "systematic presence" in the jurisdiction and forgo local licensure without unreasonable risk to the client or others because the employer is able to assess the lawyer's qualifications and the quality of the lawyer's work.

Model Rule 5.5, Comment [17], states that lawyers who establish an office or continuous presence in the state "may be subject to registration or other requirements, including assessments for client protection funds and mandatory continuing legal education." In an effort to create a regulatory model useful to states that might wish to follow the registration approach, the Bar Admission Committee drafted, and the Council of the Section has approved for submission to the House, this Rule.

PURPOSE OF REGISTRATION RULE

The Council recognizes that in addition to client security fund assessments and continuing legal education requirements, registration would make an in-house counsel's status known to the public. Local public records would be available to verify that such lawyers are licensed by another state and in good standing. Furthermore, a lawyer who practices pursuant to this rule is subject to the disciplinary authority of the local jurisdiction. (*See* Rules 5.5 and 8.5, ABA *Model Rules of Professional Conduct*.)

The Registration Rule would provide a mechanism for jurisdictions to identify and monitor in-house counsel who are practicing in the jurisdiction. The Rule also provides sanctions for those who fail to register.

TIMING OF REGISTRATION

Paragraph A of the Registration Rule anticipates that the adopting jurisdiction would designate a time period within which the lawyer must register after he or she

establishes the office or "continuous presence" in the jurisdiction. The Council recognizes that following the adoption of the Rule those already engaged in an in- house counsel practice would have to come into compliance with the registration system. Each adopting jurisdiction could select the number of days or months within which those lawyers subject to this provision would need to register.

SPECIFIC FILING REQUIRMENTS

The lawyer subject to the registration requirement would pay a fee in an amount determined by the jurisdiction and submit three types of essential documents:

> **An application in a form prescribed by the jurisdiction, requesting information such as name, address, employer's name and address, status of license in another state or states**. No "character and fitness" questions would be asked because a background investigation is not part of the registration process. If there is some reason to doubt the authenticity or accuracy of the documentation, good standing or employment, the prospective registrant would have the burden of resolving all questions to the satisfaction of the registering authority.
>
> **Proof of admission and proof of current good standing in all jurisdictions where licensed.** An individual who is not in good standing in one or more jurisdictions would be required to disclose this issue whether the status is due to disbarment or because the lawyer is not current with annual registration fees or CLE requirements. Disclosure of the nature and extent of any license restrictions, regardless of how minor, would be required.
>
> **A sworn statement of an authorized individual from the employing entity attesting that the registering lawyer is employed by the entity and the employment is consistent with the requirements of the rule.** This provision requires a specific attestation that the lawyer is working exclusively for the employer, that the employer is engaged in a lawful enterprise, and that the employment takes place in the state of registration.

SCOPE OF AUTHORITY

Paragraph B describes what the registered lawyer would and would not be permitted to do under the authority of this registration. The registered lawyer could practice law in the state except that the lawyer could not represent anyone other than the employer and subsidiaries under common control. The lawyer could also represent employees, officers and directors of the employer or its subsidiaries on matters that arise from the work for these entities and so long as the representation complies with the jurisdiction's conflict of interest rules. For example, if an employee has been subpoenaed by name to testify at an administrative hearing about matters within the scope of his or her employment, the lawyer could counsel the employee about the subpoena and testimony and, if consistent with the rules of the administrative agency, represent the employee at the hearing. The lawyer could not appear before a court or other tribunal unless permitted by law or rule.

This provision prohibits registered lawyers from engaging in occasional representation of friends, relatives or employees of the employer and assures that the only permitted client is the employer. The provision also would prohibit the registered lawyer from appearing in court or other tribunal under the auspices of this registration, even if on behalf of the employer unless they are admitted *pro hac vice* or by some other exception to the local licensure law.

PRO BONO PRACTICE

Paragraph C authorizes and encourages registered lawyers to participate in authorized pro bono programs and to provide legal services to clients of those programs. By limiting pro bono representation to clients of authorized programs, the Rule removes any impediment to full participation by in-house counsel in pro bono legal work while assuring that participation in such programs occurs with adequate oversight.

OBLIGATIONS

The Rule requires payment of an annual fee and completion of whatever continuing legal education requirement the jurisdiction would impose. In addition, the registered lawyer has three obligations:

To report any change in the lawyer's employment;

To report any change in the lawyer's licensing status in any other licensing jurisdiction; and

To report any professional charge, finding or sanction arising in any jurisdiction.

The lawyer must inform the registering authority of any termination of the employment relationship upon which the registrant's status rests. Because the registration status assumes that registered lawyers are in good standing in their state or states of licensure, they bear the burden of reporting any change in that status. By requiring the registered lawyer to report "any change in the lawyer's licensing status," the Rule requires that the lawyer must report any lapse in good standing in a law license for reasons other than professional discipline. Similarly, by stating that the lawyer must report "any professional charge, finding or sanction", the lawyer must report the filing of a complaint, not just the final disposition of a professional discipline complaint.

LOCAL DISCIPLINE

In paragraph E, the Council intends that the Rule give the disciplinary counsel jurisdiction over registered lawyers' professional conduct, whether the conduct arises from the in-house counsel practice or from any other aspect of practice. This authority exists concurrently with that of disciplinary counsel in other states of licensure.

AUTOMATIC TERMINATION

Paragraph F provides that three events can result in *automatic* termination of the registration and thus the lawyer's right to practice as in-house counsel in the state. These are the loss of qualifying employment, whether voluntary or involuntary; suspension or disbarment from any jurisdiction or from any federal court or agency before which the lawyer had been admitted to practice; and the failure to maintain active status in at least one jurisdiction.

REINSTATEMENT

By paragraph G's reinstatement provision, the Council sought to permit the lawyer to move from one in-house counsel position to another without beginning the registration process anew. The "application for renewal" described in paragraph G.1-3 could be no more than a short submission identifying the new qualifying employer, assuring the payment of a fee, and providing for an affidavit from the new employer assuring compliance with the registration requirements. The jurisdiction could specify a reasonable period of time, perhaps 3 to 6 months, during which a registered lawyer could transfer the registration from one qualifying employer to another. Failure to transfer the registration within the stated period would result in the termination of the registration status, requiring the lawyer to begin the process anew.

SANCTIONS

The Committee concluded that a provision would be necessary so that a lawyer who is required to register under this provision but fails to do so would be subject to sanctions. The jurisdiction in which in-house counsel practices without registration could sanction such counsel by subjecting him or her to professional discipline. Although Model Rule 5.5 exempts in-house counsel from prosecution for unauthorized practice, the jurisdiction adopting a registration requirement would subject the in-house counsel who fails to comply with the registration rule to prosecution for unauthorized practice. The Rule would prohibit in-house counsel who fail to register from being admitted on motion without examination in the jurisdiction. In-house counsel who fail to register will be referred to the appropriate authorities in the jurisdictions of registration and licensure.

CONCLUSION

By this Rule, the Council proposes a straightforward registration process that neither creates a *de facto* licensing process nor places an undue burden on in-house counsel or on states' bar regulatory systems. The Rule will encourage in-house counsel to come forward and register and that registration will inure to the benefit of the bar as well as to the benefit of the public.

The Council respectfully requests that the House of Delegates approve the Model Rule.

Respectfully submitted,

Ruth McGregor, Chairperson

August 2008

GENERAL INFORMATION FORM

Submitting Entity: Section of Legal Education and Admissions to the Bar

Submitted By: Ruth McGregor, Chairperson

1. Summary of Recommendation(s).

That the House approve the Model Rule for Registration of In-House Counsel.

2. Approval by Submitting Entity.

Final Approval by the Council of the Section of Legal Education and Admissions to the Bar is expected at its meeting of June 7, 2008.

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

No.

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

The Rule is meant for consideration and use by jurisdictions intending to adopt amended Rule 5.5(d) of the Model Rules of Professional Conduct. Model Rule 5.5, Comment [17] states that lawyers who establish an office or continuous presence in the state "may be subject to registration or other requirements, including assessments for client protection funds and mandatory continuing legal education." In an effort to create a regulatory model useful to states that might wish to follow this approach, the Bar Admission Committee of the Section drafted, and the Council of the Section has approved for submission to the House, this Rule.

5. What urgency exists which requires action at this meeting of the House?

This Model Rule has been under consideration by the Committee for several years and is now ready for consideration at the August 2008 meeting of the House.

6. Status of Legislation. (If applicable.)

None.

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

None.

8. Disclosure of Interest. (If applicable.)

None.

9. Referrals.

The following groups were offered opportunities to comment on the proposed Model Rule: Deans of ABA-approved law schools, presidents of universities with ABA-approved law schools, chief justices of state supreme courts, bar admissions authorities, deans of unapproved law schools, and leaders of organizations interested in the law school approval process (including the Association of American Law Schools, the National Conference of Bar Examiners, the Law School Admissions Council, the National Association for Law Placement, the Conference of Chief Justices, and the National Conference of Bar Presidents). The proposed Model Rule and the memo soliciting comment also were posted on the Section's website, and have been circulated to the Chairs of all ABA entities.

10. Contact Person. (Prior to the meeting.)

Hulett H. Askew, Consultant on Legal Education 312-988-6744
American Bar Association
321 N. Clark
Chicago, IL 60610; askewh@staff.abanet.org

11. Contact Person. (Who will present the report to the House.)

Jose Garcia Pedrosa, Esq., Section Delegate 305-243-5813
National Parkinson Foundation, Chief Operating Officer
1501 N.W. 9th Avenue
Miami, FL 33136; jgp@parkinson.org

Sidney S. Eagles, Jr., Esq., Section Delegate 919-755-8771
Smith Moore LLP
2800 Two Hannover Square, BB&T Building
Raleigh, NC 27601; sid.eagles@smithmoorelaw.com

EXECUTIVE SUMMARY

Summary of the Recommendation

That the House adopt the Model Rule for Registration of In-House Counsel.

Summary of the Issue that the Recommendation Addresses

Model Rule 5.5, Comment [17] states that lawyers who establish an office or continuous presence in the state "may be subject to registration or other requirements, including assessments for client protection funds and mandatory continuing legal education." In an effort to create a regulatory model useful to states that might wish to follow this approach, the Bar Admission Committee drafted, and the Council of the Section has approved for submission to the House, this Rule.

Explanation of How the Proposed Policy Addresses the Issues

The Registration Rule would provide a mechanism for jurisdictions to identify and monitor in-house counsel who are practicing in the jurisdiction. In addition to requiring registered lawyers to participate in continuing legal education and support client protection funds, the Rule would also provide for sanctions for those who fail to register.

Summary of Minority Views or Opposition

None.