



NEW YORK STATE BAR ASSOCIATION  
One Elk Street, Albany, New York 12207 • PH 518.463.3200 • WWW.NYSBA.ORG

DAVID P. MIRANDA  
President, New York State Bar Association

Heslin Rothenberg Farley & Mesiti P.C.  
5 Columbia Circle  
Albany, NY 12203  
518/452-5600  
FAX 518/452-5579  
dpm@hrfmlaw.com

November 10, 2015

John W. McConnell, Esq.  
Counsel  
New York State Unified Court System  
Office of Court Administration  
25 Beaver Street  
New York, New York 10004

**Re: Proposed Part 523 of the Rules of the Court of Appeals and  
Proposed Amendments to Part 522 of the Rules of the Court of Appeals**

Dear John:

I am pleased to enclose a report prepared by our Committee on Standards of Attorney Conduct and approved by our House of Delegates on November 7, 2015 with respect to (1) the proposed rules governing temporary practice in New York by lawyers admitted in other jurisdictions and (2) the proposed amendments of the rules governing licensing of in-house counsel to permit foreign lawyers to be licensed.

With respect to temporary practice, as you know in 2012 our Association submitted a report to you recommending the adoption of rules governing temporary practice in New York. We are gratified that these rules are being considered by the Court and support their adoption. In addition, our report responds to the questions posted in the Request for Comment issued by the Court.

With respect to in-house counsel, we note that in 2010 our Association submitted a proposal for licensing of in-house counsel, and that proposal included licensing of foreign lawyers. I am pleased to advise that our Association supports the current licensing proposal.

We commend the report to you for the Court's consideration and would be pleased to provide any additional information you may require or be of other assistance.

Respectfully submitted,

David P. Miranda

# **NEW YORK STATE BAR ASSOCIATION**

## **NEW YORK STATE BAR ASSOCIATION COMMENTS ON PROPOSED CHANGES TO THE RULES OF THE COURT OF APPEALS THAT WOULD (1) PERMIT TEMPORARY PRACTICE BY OUT-OF-STATE AND FOREIGN LAWYERS AND (2) ALLOW FOREIGN LAWYERS TO REGISTER UNDER THE IN-HOUSE COUNSEL RULE**

November 9, 2015

## **Table of Contents**

### **I. Introduction**

### **II. Discussion**

### **III. Which Foreign Lawyers Should Be Covered by these Rules?**

#### **A. Who Is a Foreign Lawyer?**

#### **B. Recommended Modifications**

##### **1. Definition of Foreign Lawyer**

##### **2. A New Provision to Accommodate Certain Foreign In-House Counsel**

### **IV. Questions Posed in the September 4<sup>th</sup> OCA Memo**

#### **A. Question One: Should the Rule Contain a Definition of “Temporary Practice”?**

#### **B. Question Two: Should the Rule Include a Registration Requirement?**

#### **C. Question Three: Should There Be Additional Disciplinary Procedures?**

#### **D. Question Four: Should the Rule Apply to Candidates Applying for Admission to the New York Bar?**

#### **E. Question Five: Should the Rule Apply to Registered In-House Counsel and Licensed Legal Consultants?**

### **V. The In-House Counsel Amendments**

### **VI. Conclusion**

## Executive Summary

This report recommends that:

- The proposed Temporary Practice Rule should be modified by replacing “admitted and authorized to practice law in another jurisdiction” with the definition of foreign lawyer that is currently in New York’s Rule on Licensing Legal Consultants and is proposed for the In-House Counsel Registration Rule. This change would avoid potential ambiguity and align the Temporary Practice Rule with ABA Model Rules, such rules elsewhere, and the other New York rules addressing foreign lawyers which, among other things, require that the foreign lawyer be subject in their home countries to some kind of formal admission system and “effective regulation.”
- The following phrase should be added to the opening paragraph of the proposed Temporary Practice Rule: “or a person otherwise lawfully practicing as an in-house counsel under the laws of a foreign jurisdiction” (see *infra* at pp. 10-11).
- The Temporary Practice Rule should not define “temporary practice.”
- The Temporary Practice Rule should not include a registration requirement.
- No additional disciplinary procedures or bodies are necessary for the enforcement of the Temporary Practice Rule.
- The Temporary Practice Rule should not apply to candidates applying for admission to the New York bar. Lawyers permitted to practice pending admission would be seeking to establish a continuous and permanent presence in New York. By contrast, temporary lawyers do not seek to establish a permanent and continuous presence. While policy considerations may overlap, there are sufficient differences between bar applicants and temporary lawyers to warrant separate rules. The NYSBA’s 2012 recommendation for a rule permitting practice pending admission would recognize these differences. The NYSBA would be pleased to submit a supplemental report in light of developments since 2012.

- The Temporary Practice Rule should not apply to registered in-house counsel from other states or to licensed foreign legal consultants because these lawyers can practice temporarily in New York based on their home-state or home-country status. If the Court adopts the In-House Counsel Amendments, it will not be necessary to specifically apply the Temporary Practice Rule to registered foreign in-house counsel either.
- The In-House Counsel Amendments published for comment on September 24, 2015 should be adopted. The Court should then consider ways to make this rule apply to in-house counsel from European and other jurisdictions who are not effectively regulated as “lawyers” in their home jurisdictions but who are otherwise sufficiently qualified to be registered in-house counsel in New York.

## **I. Introduction**

The New York State Bar Association (“NYSBA”) respectfully submits these comments in response to two proposals issued in September 2015 by the Office of Court Administration (“OCA”). One proposes a new Court of Appeals Rule, to be adopted as 22 NYCRR § 523, which would permit temporary practice by out-of-state and foreign lawyers (the “Temporary Practice Rule”). The second proposes amendments to the Court of Appeals Rule on Registration of In-House Counsel, set forth at 22 NYCRR § 522. The amendments (hereinafter referred to as the “In-House Counsel Amendments”) would permit foreign lawyers to register.<sup>1</sup>

The NYSBA applauds these major steps forward for the courts and the legal profession in New York. The Temporary Practice Rule will enhance New York’s role as a center of world commerce “by permitting lawyers from other jurisdictions to appear in this state to work on transactional or short-term litigation-related matters (so-called ‘fly-

---

<sup>1</sup> On September 4, 2015, the Office of Court Administration (“OCA”) issued a memo seeking comments on the proposed new 22 NYCRR § 523 (the “September 4<sup>th</sup> OCA Memo”). On September 21, 2015, OCA issued an amended version of proposed 22 NYCRR § 523 (the “September 21<sup>st</sup> OCA Memo”), clarifying that “subsections (a) through (d) of section 523.2 set forth separate and disjunctive conditions under which temporary practice may occur.” We believe the September 4<sup>th</sup> OCA Memo made clear that these subsections should be read in the disjunctive, as they are under ABA M.R. 5.5(c), but welcome the clarification. On September 24, 2015, OCA issued a memo seeking comment on proposed amendments to 22 NYCRR § 522, which would permit foreign lawyers to register under the in-house counsel rule (the “September 24<sup>th</sup> OCA Memo”).

in, fly-out’ events).”<sup>2</sup> The proposed In-House Counsel Amendments will open in-house practice to many foreign lawyers, as it has been open to out-of state lawyers since April 2011 to salutary effect.

New York has long been a worldwide hub of complex dispute resolution and sophisticated commercial transactions. With the development of globalization and technology, New York’s prominence has only increased. It is thus right and fitting that New York be a leader in opening the doors of its legal profession to out-of-state and foreign lawyers, so long as the courts and the public are protected in the process. The September 2015 proposals accomplish both goals. We commend these initiatives, which make major contributions to the law governing lawyers in New York. In this report, we address OCA’s request for comments.<sup>3</sup>

## **II. Discussion**

Under the Temporary Practice Rule, a lawyer who is “*admitted and authorized to practice law* in another jurisdiction within or outside the United States who is not disbarred or suspended from practice in any jurisdiction. . . .” may provide services in New York “if the services arise out of or are reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is *admitted to practice . . .*”<sup>4</sup> This standard works well for lawyers from other states. We have long supported extending a temporary practice privilege to our colleagues from around the United States. We believe the Temporary Practice Rule is clear and well-crafted to accomplish this goal.

The principal issue raised by both the Temporary Practice Rule and the In-House Counsel Amendments, however, is how New York should define “foreign lawyer.” In general, we support rules that will open New York to a wide range of foreign practitioners, so long as the public and the courts are protected. Broad rules on foreign lawyers will bring even more international legal business to New York. They will create good-will across the legal profession worldwide. They will also open opportunities to New York lawyers as global trade increases because allowing more foreigners to work here will tend to encourage a general lessening of barriers elsewhere.

---

<sup>2</sup> See September 4th OCA Memo at 1.

<sup>3</sup> See, September 4<sup>th</sup> OCA Memo at 1-2; September 24<sup>st</sup> OCA Memo at 1.

<sup>4</sup> See Proposed 22 NYCRR § 523.2 (Scope of Temporary Practice – General); § 523.2(c) & (d) (emphasis added).

The Temporary Practice Rule is “modeled principally on (1) a draft rule recommended by the NYSBA in 2012 . . . and (2) American Bar Association (ABA) Model Rule (‘M.R.’) 5.5 permitting the temporary practice of law by attorneys licensed in other U.S. jurisdictions under certain prescribed circumstances. . . .”<sup>5</sup> But the Temporary Practice Rule does not include the definition of foreign lawyer that is contained in ABA M.R. 5.5 or in other ABA Rules allowing practice by foreign lawyers. The ABA definition requires that a foreign lawyer “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 *are subject to effective regulation and discipline by a duly constituted professional body or a public authority.*”<sup>6</sup>

The In-House Amendments, by contrast, do adopt the ABA definition of “foreign lawyer.”<sup>7</sup> Under the In-House Amendments a foreign lawyer must be “a member in good standing of a recognized legal profession in a foreign (non-U.S.) jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent and subject to effective regulation by a duly constituted professional body or a public authority.”<sup>8</sup> New York’s current rule on licensing foreign legal consultants also contains this definition.<sup>9</sup>

In general we support this approach. The Court could reasonably choose to define foreign lawyer differently in the Temporary Practice Rule because the Rule’s purpose is

---

<sup>5</sup> ABA M.R. 5.5(d) also permits lawyers “admitted . . . in a foreign jurisdiction, and not disbarred or suspended from practice in any jurisdiction . . .” to serve as in-house counsel.

<sup>6</sup> See ABA M.R. 5.5(d) (emphasis added). See also ABA Model Rules on Foreign Legal Consultants and Registration of In-House Counsel. The full text of the ABA Model Rule for the Licensing and Practice of Foreign Legal Consultants and a chart showing which states have adopted the rule are available at <http://bit.ly/19KqAkA> (last visited October 6, 2015). A redlined version of the Model Rule for Registration of In-House Counsel as amended as amended in 2013 is available at <http://bit.ly/1rjlrV> (last visited October 6, 2015). A state-by-state chart describing in-house counsel regulations is at <http://bit.ly/1tWIGTI> (last visited October 6, 2015).

<sup>7</sup> September 24<sup>th</sup> OCA Memo, *passim*.

<sup>8</sup> In-House Counsel Amendments at § 522.1(b)(1)(a). The ABA Model Rule for Registration of In-House Counsel, as amended in 2013, contains the same definition. See <http://bit.ly/1rjlrV> (last visited October 6, 2015). The ABA uses the same definition of foreign lawyers for M.R. 5.5, the Model Rule for Temporary Practice by Foreign Lawyers, the Model Rule for In-House Registration and the Model Rule for the Licensing and Practice of Foreign Legal Consultants. Most jurisdictions adopting a rule permitting practice by foreign lawyers use the same or a similar definition. See discussion *infra* at pp 8-9.

<sup>9</sup> See, 22 NYCRR § 521.1(a)(1) (to qualify for licensed legal consultant status, a lawyer 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”).

unique. The Temporary Practice Rule contemplates the brief, intermittent, and occasional provision of services in New York by a foreign lawyer. By contrast, the In-House Counsel Amendments permit a foreign lawyer to establish a permanent and continuous presence in New York. Still, we suggest some modifications, as detailed below.

### III. Which Foreign Lawyers Should Be Covered By These Rules

#### A. Who Is a Foreign “Lawyer”?

Foreign lawyers practice under a variety of regimes. Some foreign jurisdictions permit legal practice without formal admission to the bar. For example, in Mexico, lawyers (*abogados*) obtain a practice certificate (*cedula*) from the Government to practice by completing a five-year law degree program and registering with the Ministry of Education (Art. 25 of the Ley General de Profesiones), but they are not members of any bar association (*colegios de profesionistas*).<sup>10</sup> The registration with the Ministry of Education and the *cedula* is a filing, rather than a formal admission process that might involve, *e.g.*, an examination of a candidate’s background, character and fitness. In some countries practitioners who consider themselves lawyers are not subject to professional regulation at all. Rather, their conduct --- if improper --- would be controlled only through broadly focused civil and criminal laws that govern non-lawyers as well. Our review of available resources also suggests that --- while most foreign countries require some type of study in order to be authorized to practice law --- many foreign countries require undergraduate degrees only. Many countries also do not conduct any character and fitness investigations. By some counts, fewer than 1/3 of the countries worldwide that authorize the practice of law have any formal organization governing the legal profession.<sup>11</sup>

Finally, in some countries --- notably in France, other countries in the European Union, and elsewhere --- in-house counsel are not treated as lawyers at all. They are not

---

<sup>10</sup> See, *El restablecimiento de la colegiación obligatoria de la abogacía en México: un paso necesario*, available at <http://www.abogacia.es/2014/09/19/el-restablecimiento-de-la-colegiacion-obligatoria-de-la-abogacia-en-mexico-un-paso-necesario/> (last visited October 7, 2015) advocating the reintroduction of the compulsory bars and reestablishing the compulsory association of lawyers.

<sup>11</sup> This summary is based on conversations with European lawyers, people affiliated with the ABA, charts prepared in connection with ABA deliberations on related issues, and a review of the *Summary of State Foreign Lawyer Practice Rules* by Laurel Terry dated 4/28/15 [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mjp\\_8\\_9\\_status\\_c\\_hart\\_authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mjp_8_9_status_c_hart_authcheckdam.pdf) (last visited October 6, 2015) and the links cited therein.

members of the bar. The attorney-client privilege does not attach to their communications with their corporate clients.<sup>12</sup> By contrast, other countries --- including some countries in Europe (e.g. Denmark, Ireland, Portugal, Spain the U.K. and Germany) ---- allow in-house counsel to be members of the bar.<sup>13</sup>

Against this potpourri of regulatory and licensing regimes (or lack of thereof) the challenge for New York is to adopt rules that will accommodate the needs of an increasingly global and cross-border profession, yet protect the public and the courts in New York. We believe the proposals largely do this --- but suggest some small modifications.

## **B. Recommended Modifications**

### **1. Definition of Foreign Lawyer**

As noted, the Temporary Practice Rule permits practice by any lawyer from outside the U.S. who is “admitted and authorized to practice law in another jurisdiction.”<sup>14</sup> This phrase is ambiguous and hard to apply. As noted above, in some countries a person is never formally “admitted” but may be authorized to practice law without taking a bar exam or completing a legal education or submitting to a character investigation --- and may also not be subject to effective regulation. Most importantly, since we understand a key assumption underlying the Temporary Practice Rule to be that the home jurisdiction will be primarily responsible for regulating such lawyers, the lack of effective regulation elsewhere creates a risk to the public here.<sup>15</sup>

---

<sup>12</sup> See, *Akzo Nobel Chemicals, Ltd. v. European Commission*, Case-550/07, [2010] <http://curia.europa.eu/juris/document/document.jsf?text=&docid=82839&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=37940> (last visited October 6, 2015) (in-house counsel lack sufficient independence to be members of the bar; the attorney-client privilege does not attach to communications between in-house counsel and their corporate clients; at least 19 of the 28 members of the European Union (Austria, Belgium, Bulgaria, Cyprus, the Czech Republic, Estonia, Finland, France, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Poland, Romania, the Slovak Republic, Slovenia, and Sweden) prohibit in-house counsel from becoming members of the bar.). See also, *Règlement Intérieur National de la Profession d’Avocat – RIN* [http://cnb.avocat.fr/Reglement-Interieur-National-de-la-profession-d-avocat-RIN\\_a281.html#1](http://cnb.avocat.fr/Reglement-Interieur-National-de-la-profession-d-avocat-RIN_a281.html#1) (last visited October 7, 2015) (in-house counsel cannot be members of the bar).

<sup>13</sup> See, *Akzo Nobel* and the opinion of Advocate General Kokott in *Akzo Nobel*, <http://www.acc.com/advocacy/upload/AG-Opinion-AKZO-042910.pdf> (last visited October 7, 2015).

<sup>14</sup> Proposed 22 NYCRR § 523.2 opening paragraph. See also, § 523.2(c) (permitting certain services related to the lawyer’s practice “in a jurisdiction in which the lawyer is *admitted*”); §523.2(d)(same).

<sup>15</sup> Even in Virginia --- the only jurisdiction of which we are aware that has adopted an “authorized to practice” standard --- the rule also provides that the lawyer must be authorized “by the *duly constituted and*

We recommend instead that the Temporary Practice Rule incorporate the definition of foreign lawyer that is already codified in New York’s Rule on Licensing Legal Consultants<sup>16</sup> and is proposed in the In-House Counsel Amendments. These provisions require that a foreign lawyer be

a member in good standing of a recognized legal profession in a foreign (non-U.S.) jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent and subject to effective regulation by a duly constituted professional body or a public authority.<sup>17</sup>

Jurisdictions that now allow temporary practice by foreign lawyers use a similar definition and require, at a minimum “admission” or a “license”, which, as we understand those terms, both assume a regulatory regime.<sup>18</sup> The advantage of this definition is that

---

*authorized governmental body* of any State or Territory of the United States or the District of Columbia, or a foreign nation.” Va. R. Prof. Conduct 5.5(d)(1) (emphasis added).

<sup>16</sup> 22 NYCRR § 521.1(a)(1).

<sup>17</sup> Proposed § 522(1)(b)(1).

<sup>18</sup> At least eight of the ten jurisdictions that allow temporary practice by foreign lawyers have adopted the same or a similar definition. See, e.g. Colorado Rule 205.2 [https://www.coloradosupremecourt.com/BLE/Forms/New%20Admission%20Rules%20\(9-1-14\).pdf](https://www.coloradosupremecourt.com/BLE/Forms/New%20Admission%20Rules%20(9-1-14).pdf) (last visited October 2, 2015) (to practice as a temporary attorney in Colorado, a foreign lawyer must be, *inter alia*, “a member of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as attorneys or counselors of law or the equivalent and are subject to effective regulation and discipline by a duly constituted professional body or a public authority”); <http://courts.delaware.gov/rules/DLRPCFebruary2010.pdf> (last visited October 2, 2015) (lawyer must be “admitted” in a foreign jurisdiction and “not suspended or disbarred”, which suggests an effective regulatory regime); D.C. App.R. 49(b)(12)(i) and (13) <http://www.dccourts.gov/internet/documents/rule49.pdf> (last visited October 2, 2015) (“is authorized to practice law by the highest court of a state or territory or by a foreign country, and is not disbarred or suspended for disciplinary reasons and has not resigned with charges pending in any jurisdiction or court.”); Florida Rule of Prof. C. 4-45(d) <https://www.floridabar.org/divexe/rrtfb.nsf/FV/AE4F324F9F246B2085257A2C00628278> (last visited October 2, 2015) (the foreign lawyer must be, *inter alia*, a “member in good standing of a recognized legal profession in a foreign jurisdiction whose members 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”); Georgia Rule of Prof. C. 5.5(e), (f) & (g) <http://www.gabar.org/barrules/handbookdetail.cfm?what=rule&id=129> (last visited October 2, 2015) (the foreign lawyer must be, *inter alia*, “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 a law or the equivalent and subject to effective regulation and discipline by a duly constituted professional body or public authority”); New Hampshire Supreme Court Rule 42C(b) <http://www.courts.state.nh.us/rules/scr/scr-42c.htm> (last visited October 2, 2015) (same); Oregon Rule Prof. C. 5.5(c), (d), and note following the rule <https://www.osbar.org/docs/rulesregs/orpc.pdf> (last visited October 2, 2015) (the foreign lawyer must be “admitted in another jurisdiction, and not disbarred or suspended from practice in any jurisdiction”; this provision inserted to permit “foreign-licensed lawyers” to practice temporarily in Oregon); Pennsylvania Rule 5.5(c) <http://www.pacode.com/secure/data/204/chapter81/s5.5.html> (last visited October 2, 2015) (“[a]

it is clear, nearly uniform throughout the jurisdictions that have adopted a rule permitting temporary practice by foreign lawyers, and provided as a model by the ABA in its rules addressing practice by foreign lawyers in the U.S. Lawyers inside and outside the U.S. will be able to better gauge what is permitted if this definition is adopted.

This well-accepted definition will benefit both lawyers and the courts. Analysis and interpretation will be available more broadly, as the contours of the definition develop through judicial interpretation. Lawyers and the courts will also benefit from what is likely to be more authority, clearer guidelines, and harmonized interpretation.

The limitation of this definition is that it may exclude from temporary practice in New York foreign “lawyers” who may be qualified by education and experience to practice here but are not formally “admitted” and may not be subject to an effective regulatory regime in their home countries. So, using this definition may exclude lawyers from countries like Mexico where, we understand, there is no formal admission and no effective regulatory apparatus.

## **2. A New Provision To Accommodate Certain Foreign In-House Lawyers**

We also recommend that the Temporary Practice Rule specifically include certain foreign in-house counsel --- from Europe and elsewhere --- who may not be considered “lawyers” in their home jurisdictions.<sup>19</sup> We see no reason why an in-house counsel from Montana would be allowed to continue to advise his or her employer on brief or sporadic visits to New York but an in-house counsel from France or Italy would not be able to do so, even though in-house counsel’s services are limited to work for their entity employer. The employers have an on-going and close relationship with their in-house lawyers. These employers are well positioned to evaluate the competence and quality of these lawyers, who would not in any event be providing legal services to the general public. As a consequence, these in-house services would involve little risk to the public, and would be beneficial to the large foreign companies, businesses, and other entities that do

---

lawyer admitted in another United States jurisdiction or in a foreign jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide [certain temporary] legal services”).

<sup>19</sup> See discussion *supra* at pp. 8 - 9.

business here and may from time-to-time need the temporary assistance in New York of their own in-house lawyers who are normally based in their home countries.<sup>20</sup>

We suggest inserting the phrase into the general paragraph under § 523.2: “or a person otherwise lawfully practicing as an in-house counsel under the laws of a foreign jurisdiction.” The provision would then read as follows (with new language underscored):

22 NYCRR § 523.2 A lawyer . . . who is not disbarred or suspended from practice in any jurisdiction, or a person otherwise lawfully practicing as an in-house counsel under the laws of a foreign jurisdiction, may provide on a temporary basis in this state legal services . . .

#### **IV. Questions Posed in the September 4<sup>th</sup> OCA Memo**

##### **A. Question One: Should the Rule Contain a Definition of “Temporary Practice”?**

The rule should not contain a definition of “temporary practice.”

“Temporary practice” is difficult to define, and highly fact specific. Perhaps for that reason, the temporary practice rules in every jurisdiction of which we are aware --- more than 40 --- do not define the term. Nor does ABA Model Rule 5.5. As stated in Comment [6] to M.R. 5.5:

There is no single test to determine whether a lawyer’s services are provided on a “temporary basis” in this jurisdiction, and may therefore be permissible under paragraph (c). Services may be “temporary” even though the lawyer provides services in this jurisdiction on a recurring basis, or for an extended period of time, as when the lawyer is representing a client in a single lengthy negotiation or litigation.

Leaving the term undefined allows for individual analysis based on the wide variety of circumstances in which temporary practice may occur, and also paves the way definitions through judicial interpretation in concrete cases. We thus recommend that the rule contain no definition of “temporary practice.”

##### **B: Question Two: Should the Rule Include a Registration Requirement?**

No registration requirement should be imposed. It would be a significant step backward, and frustrate the goals of the Temporary Practice Rule.

---

<sup>20</sup> As noted, however, (*see* Executive Summary, *supra*, at p.2; *see also infra* at pp. 15 - 16) we recommend that the in-house counsel registration rule retain the more broadly adopted definition for foreign lawyers who come to New York as in-house counsel on a continuous or permanent basis. New York has a significant interest in protecting the public by insuring that these lawyers are regulated well beyond the monitoring provided by their employer-clients.

The home jurisdiction authorities will retain primary responsibility for regulating lawyers practicing temporarily in New York under this rule. Most of these lawyers will practice in New York only for the short-term or intermittently. Many of them will “fly in and fly out” for a few days --- or even for one day a year --- to perform services related to a matter and client based elsewhere. Setting up new procedures and an agency to discipline them would impose significant burdens and expense --- on the lawyers from outside New York and on the New York disciplinary system --- with no measurable protection for the public.<sup>21</sup> The rule should contain no registration requirement.

### **C. Question Three: Should There Be Additional Disciplinary Procedures?**

No additional disciplinary procedures are needed. New York can discipline lawyers temporarily practicing in New York through the regular disciplinary machinery. And, as appropriate, the matter can then be sent to the lawyer’s home jurisdiction for review.

The Temporary Practice Rule makes clear that the New York Rules of Professional Conduct apply to temporary practitioners and that they can be disciplined by the New York authorities.<sup>22</sup> The rules of each Department clearly establish that disciplinary prosecutors have power to enforce these rules against any lawyer who commits misconduct in New York, regardless of where the lawyer is admitted to practice.<sup>23</sup> Other states that have adopted temporary practice rules have imposed

---

<sup>21</sup> Perhaps for these reasons, of the more than 40 jurisdictions that have adopted a temporary practice rule, including the 10 that embrace foreign lawyers, only a few have adopted some form of registration. *See, e.g. Connecticut R.P.C. 5.5(f)* <http://www.jud.ct.gov/publications/PracticeBook/PB.pdf> (last visited October 6, 2015) (requiring pre-and post-notifications and fees); *New Jersey RPC 5.5 (b) & (c) and NJR 1:20-1 (b) & (c)* (registration and fee required, but only for certain work); *New Mexico Rule and NMRA 24-106* (requiring registration fees for some services). Our review of these registration requirements reveals that they are cumbersome, uneven, and difficult to enforce. Most importantly they appear unnecessary. We have not heard reports of problems in the jurisdictions that do not have registration requirements.

<sup>22</sup> Proposed 22 NYCRR § 523.3 says: “A lawyer who practices law in this state pursuant to this Rule is subject to the New York Rules of Professional Conduct and to the disciplinary authority of this state . . . to the same extent as if the lawyer were admitted or authorized to practice in the state.” *See also* NY R.P.C. 8.5(a) (out-of-state lawyer may be subject to disciplinary authority of this state and home jurisdiction); NY R.P.C. 8.5(b)(1) (lawyer admitted *pro hac vice* in New York subject to New York discipline); NY R.P.C. 8.5(b)(2) (out-of-state transactional lawyer subject to New York discipline if particular conduct has “its principal effect” in New York).

<sup>23</sup> *See*, 22 NYCRR § 603.1 (First Department; “[t]his Part shall apply to all attorneys who are admitted to practice, reside in, *commit acts in* or have offices in this judicial department. . . .”) (emphasis added); 22 NYCRR § 691.1 (Second Department; same language); 22 NYCRR § 806.1 (Third Department; “[t]his Part shall apply to all attorneys who are admitted to practice, reside or have an office in, *or who are employed*

discipline on out-of-state lawyers who engage in misconduct within their borders.<sup>24</sup> No additional disciplinary procedures are necessary.

**D. Question Four: Should the Rule Apply to Candidates Applying for Admission to the New York Bar?**

In 2012 we recommended that New York adopt a rule permitting practice pending admission. We continue to believe New York should do so. Globalization, advances in technology, economic changes, and client demands have only intensified since then. There is even more cross-border practice today --- and a related need for lawyers to relocate from time to time.

A lawyer may need to relocate for many reasons beyond the lawyer's control. For example, a lawyer may need to move to New York in order to accommodate the needs of a client who has moved to a new jurisdiction. A lawyer may receive a job opportunity in, or may be transferred to, a jurisdiction other than the jurisdiction of original licensure --- often requiring relocation within a very short time. Lawyers sometimes have to relocate due to changes in personal circumstances, such as the relocation of a spouse or domestic partner, or due to military deployment. In a connected world, lawyers increasingly need to relocate during their careers, often more than once and frequently without sufficient notice to obtain bar admission before the move.

But we also believe that temporary practice pending admission is best established by a separate rule, not as part of new § 523. Lawyers who are permitted to practice pending admission seek to establish a continuous and permanent presence in New York. Indeed, practice pending admission may entail a continuous presence in New York for as long as a year.<sup>25</sup> By contrast, a temporary lawyer does not seek to establish a

---

*or transact business in, the third judicial department*) (emphasis added); 22 NYCRR § 1022.1 (“[t]his Part shall apply to all attorneys who . . . practice within the Fourth Department”).

<sup>24</sup> See, e.g., *See In re Gerber* 2015 WL 5016552 (N.D. 2015) (publicly admonishing a Minnesota lawyer who practiced law in North Dakota without securing temporary license to practice); *In re Kingsley*, 950 A.2d 659 (DE 2008) (disciplining an out-of-state lawyer for practice in Delaware without seeking temporary admission or other authorized status); *In re Parilman*, 947 N.E.2d 915 (Ind. 2011) (barring Arizona lawyer who solicited clients in Indiana in violation of Indiana Rules from practicing in Indiana, including “temporary admission”).

<sup>25</sup> For example, the process for admission without examination requires an applicant to prepare an application seeking personal and professional information that can take weeks or months to gather. See 22 NYCRR § 520.10(b). The process for seeking admission via the bar exam can take seven months or longer, in part because the bar exam is only given twice annually. Even then --- before formal admission -- - a person who passes the bar exam must file an application with the appropriate Character and Fitness

continuous and permanent presence in New York. While relevant considerations overlap, there are sufficient differences, in our view, to warrant separate attention.

We urge the Court to adopt a rule permitting practice pending admission, like the one we proposed in 2012. We would be pleased to submit an updated report that could examine the experience of other jurisdictions and developments in this area since 2012.<sup>26</sup>

#### **E. Question Five: Should the Rule Apply to Registered In-House Counsel and Licensed Legal Consultants?**

It is not necessary to make the Temporary Practice Rule cover lawyers registered in-house counsel from other U.S. jurisdictions or licensed legal consultants. These lawyers will be able to practice temporarily in New York based on their home-state or home-country status. For example, a foreign legal consultant in Missouri who is admitted in England will be able to practice temporarily in New York based on his or her admission in England. If the Court adopts the In-House Counsel Amendments, it will

---

Committee, submit to a personal interview, and attend a swearing-in ceremony. This time-consuming process can adversely affect the ability of a lawyer moving to New York in mid-career to represent existing clients effectively and can have adverse consequences on such a lawyer's career in a marketplace that requires an increasing amount of cross-border practice. A rule permitting practice pending admission would ease the disruptions for lawyers diligently pursuing admission.

<sup>26</sup> In particular, the ABA has adopted a model rule on practice pending admission. Some states have also adopted such rules. See, e.g., District of Columbia Court of Appeals Rule 49(c)(8) <http://www.dcappeals.gov/dccourts/docs/rule49.pdf> (last visited October 7, 2015) (out-of-state lawyers may practice from a principal office located in D.C. for a period not to exceed 360 days if other requirements are met; court has asked for comments by November 11, 2015, on proposed revisions regarding, *inter alia*, in-house attorneys); Missouri Supreme Court Rule 8.06, <http://www.courts.mo.gov/courts/ClerkHandbooksP2RulesOnly.nsf/0/e0bcf992eb92f9ae86256db7007379e?OpenDocument> (last visited October 7, 2015) (similar to the D.C. Rule); Colorado Court Rule 205.6 [http://www.courts.co.us/userfiles/file/Court\\_Probation/Supreme\\_Court/Rule\\_Changes/2014/2014\(09\)%20clean.PDF](http://www.courts.co.us/userfiles/file/Court_Probation/Supreme_Court/Rule_Changes/2014/2014(09)%20clean.PDF) (last visited October 7, 2015) (permits practice pending admission for up to 365 days); North Carolina Rule 5.5(e) <http://www.ncbar.com/rules/rules.asp?page=47> (last visited October 7, 2015) (practice pending admission permitted only upon application, if the lawyer is licensed in a state that has a reciprocal provision and other requirements are met). See also, Kansas Court Rule 710 <http://www.kscourts.org/rules/Rule-Info.asp?r1=Rules+Relating+to+Admission+of+Attorneys&r2=427> (last visited October 7, 2015) (permitting practice pending admission, with conditions); North Dakota Court Rule 6.1. <http://www.ndcourts.gov/court/notices/20130024/rule6.1.htm> (last visited October 7, 2015) temporary practice pending admission, with conditions). The full text of the ABA Model Rule on Practice Pending Admission can be found here: [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/model\\_rule\\_practice\\_pending\\_admission\\_authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/model_rule_practice_pending_admission_authcheckdam.pdf) (last visited October 8, 2015). The full text of such rules from other jurisdictions can be found here: [http://www.americanbar.org/groups/professional\\_responsibility/policy.html](http://www.americanbar.org/groups/professional_responsibility/policy.html) (last visited October 8, 2015).

not be necessary to apply the rule specifically to registered in-house counsel from foreign jurisdictions either. They will be able to practice based on their home-state admission.

## V. The In-House Counsel Amendments

The In-House Counsel Amendments permit foreign lawyers to register as in-house lawyers. This is a welcome step forward, and in-line with significant precedent. As the September 24<sup>th</sup> OCA Memo notes, and in addition to the ABA Model Rules discussed throughout this report:

- The Conference of Chief Justices has recommended that states amend their in-house registration rules to permit registration by foreign lawyers,
- Fifteen jurisdictions have adopted rules permitting registration by foreign in-house counsel; and
- The NYSBA, NYC Bar Association, and the New York County Lawyers' Association issued a joint report (in November 2010) recommending that New York adopt rules permitting registration as in-house counsel by out-of-state and foreign lawyers.<sup>27</sup>

The In-House Counsel Amendments adopt the same definition of foreign lawyer as is currently in the New York Rule on Licensing Legal Consultants. The proposed definition is also consistent with the ABA's definition of foreign lawyers, and the definition used by many of the jurisdictions that have already adopted rules permitting registration by foreign in-house counsel.<sup>28</sup> We support this approach to the registration

---

<sup>27</sup> September 24<sup>th</sup> OCA Memo at 1.

<sup>28</sup> See, e.g., *Connecticut Bar Examining Committee Rules* <https://www.jud.ct.gov/cbec/housecounsel.htm#qualify> (last visited October 2, 2015) (to register as an in-house counsel a lawyer must be "a member of the bar in good standing in another jurisdiction (state, DC, US territory or foreign country)"); *Georgia Rule Prof. C. 5.5(f) & (g)* <https://www.gabar.org/barrules/handbookdetail.cfm?what=rule&id=129> (last visited October 2, 2015) (the foreign lawyers 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"); *Iowa Rules on Admission to the Bar § 31.16(1)(d)* (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 are subject to effective regulation and discipline by a duly constituted professional body or a public authority"). Some rules specifically give their courts discretion to permit the registration of a foreign lawyer who does not meet a formal definition. See, e.g., *Delaware Rule 55.1* <http://courts.delaware.gov/forms/download.aspx?id=39368> (last visited October 2, 2015) (to practice in-

of in-house counsel who will have a continuous and permanent presence in New York and believe that New York should use the same definition each time it uses the term “foreign lawyer” is referenced in our rules. This definition protects the public because it excludes from continuous or permanent practice in New York anyone who is not “admitted to practice” and not “subject to effective regulation.”

However, and as set forth above, in-house counsel in many foreign jurisdictions, particularly in Europe, are not admitted to the bar and would apparently not qualify under this definition. We note that the ABA is currently studying ways to include in its in-house registration rules qualified in-house practitioners from Europe and elsewhere who are not called “lawyers” in their home countries and are not subject to any formal disciplinary or regulatory regimes. We think New York should consider such an addition as well. One possibility would be for New York to add language like the following to the In-House Registration Amendments: “The Appellate Divisions in each Department may, in their discretion, allow a lawyer lawfully practicing as in-house counsel in a foreign jurisdiction who does not meet all the requirements of this rule to register as an in-house counsel after consideration of other criteria, including the lawyer’s legal education, references and experience.” Other approaches may emerge. We expect to review the ABA’s work and make further recommendations on this question when that work is completed.

## **VI. Conclusion**

The NYSBA believes that the principles embodied by both the proposed Temporary Practice Rule and the proposed In-House Counsel Amendments are salutary and strongly endorses these initiatives by the Court. For the reasons stated in this Report, we offer the following specific recommendations and responses to the OCA's requests for comments:

- The proposed Temporary Practice Rule should be modified by replacing “admitted and authorized to practice law in another jurisdiction” with the definition of foreign lawyer that is currently in New York’s Rule on Licensing Legal Consultants and is proposed for the In-House Counsel Registration Rule. This change would avoid potential ambiguity and align the Temporary Practice

---

house “lawyers admitted to practice in a jurisdiction outside of the United States may apply individually to the Supreme Court for a Delaware Certificate of Limited Practice . . .”). We propose that the New York Courts study this option, among others.

Rule with ABA Model Rules, such rules elsewhere, and the other New York rules addressing foreign lawyers which, among other things, require that the foreign lawyer be subject in their home countries to some kind of formal admission system and “effective regulation”.

- The following phrase should be added to the opening paragraph of the proposed Temporary Practice Rule: “or a person otherwise lawfully practicing as an in-house counsel under the laws of a foreign jurisdiction” (see *supra* at pp. 10-11).
- The Temporary Practice Rule should not define “temporary practice.”
- The Temporary Practice Rule should not include a registration requirement.
- No additional disciplinary procedures or bodies are necessary for the enforcement of the Temporary Practice Rule.
- The Temporary Practice Rule should not apply to candidates applying for admission to the New York bar. Lawyers permitted to practice pending admission would be seeking to establish a continuous and permanent presence in New York. By contrast, temporary lawyers do not seek to establish a permanent and continuous presence in New York. While some policy considerations regarding bar applicants and temporary lawyers may overlap, there are sufficient differences to warrant separate rules. Our 2012 recommendation for a rule permitting practice pending admission would recognize these differences. The NYSBA would be pleased to submit a supplemental report in light of developments since 2012.
- The Temporary Practice Rule should not apply to registered in-house counsel from other states or to licensed foreign legal consultants because these lawyers can practice temporarily in New York based on their home-state or home-country status. If the Court adopts the In-House Counsel Amendments, it will not be necessary to specifically apply the Temporary Practice Rule to registered foreign in-house counsel either.
- The In-House Counsel Amendments published for comment on September 24, 2015 should be adopted. The Court should then consider ways to make this rule

apply to in-house counsel from European and other jurisdictions who are not effectively regulated as “lawyers” in their home jurisdictions but who are otherwise sufficiently qualified to be registered in-house counsel in New York.

Dated: November 9, 2015

Respectfully submitted,

David P. Miranda, President  
New York State Bar Association

**New York State Bar Committee on Standards of Attorney Conduct**

Roy D. Simon, *Chair*

Barbara S. Gillers, *Vice-Chair\**

Daniel R. Alonso, Esq.  
Robert A. Barrer, Esq.  
Prof. Anita Bernstein  
Dierdre A. Burgman, Esq.  
Justin Y. K. Chu, Esq.  
Peter V. Coffey, Esq.  
Anne Reynolds Copps, Esq.  
Brenda K. Dorsett, Esq.  
Vincent E. Doyle III, Esq.  
Gordon Eng, Esq.  
Kenneth L. Gartner, Esq.  
Francesca Giannoni-Crystal, Esq.\*  
Prof. Bruce A. Green\*  
Ralph L. Halpern, Esq.  
Kristie Halloran Hanson, Esq.  
Bonnie Host, Esq.  
Nicole Isobel Hyland, Esq.  
James B. Kobak, Jr., Esq.\*

Katie Mae Lachter, Esq.  
Steven G. Leventhal, Esq.  
David A. Lewis, Esq.  
Ellen Lieberman, Esq.  
Susan B. Lindenauer, Esq.  
Sarah Diane McShea, Esq.  
Ronald C. Minkoff, Esq.\*  
Joseph E. Neuhaus, Esq.\*  
Sandra S. O'Loughlin, Esq.  
Mark A. Popovsky, Esq.  
Seth Rosner, Esq.  
Philip H. Schaeffer, Esq.  
David M. Schrauer, Esq.\*  
Barton L. Slavin, Esq.  
Lawrence Spiegel, Esq.\*  
M. David Tell, Esq.  
Lawrence J. Vilaro, Esq.  
Prof. Ellen Yaroshefsky

\*Subcommittee Members



November 2nd, 2015  
John W. McConnell, Esq.  
Counsel  
Office of Court Administration  
25 Beaver Street, 11th Fl.  
New York, New York 10004

Dear Mr. McConnell,

This letter responds to your Memorandum dated September 24, 2015, inviting public comment on a proposed amendment of Part 522 of the Rules of the Court of Appeals that would permit foreign lawyers to register as In-House Counsel in the State of New York.

I am writing on behalf of AFJE, the French Corporate Counsel Association, and its 4,300 members, including over 600 General Counsel of some of the largest French international groups, a number of which have chosen New York as their U.S. headquarters. We very much welcome this long-awaited proposed amendment to Part 522, which goes in the direction of recognizing the importance of the practice of foreign law in the State of New York and facilitating the hiring of foreign legal counsel in support of NY-based companies' international legal operations.

We would however like to draw your attention to the fact that the ABA definition of "foreign lawyer", around which both the amended Rule 5.5 ("Unauthorized Practice of Law; Multijurisdictional Practice") and the Model Rule for Registration of In-House Counsel were designed, requires that a candidate for licensure as foreign in-house lawyer produce a certificate of good standing from the bar in her country of origin. However, in France as in many other countries around the world, mostly civil law jurisdictions, bar membership is reserved for lawyers who practice in law firms. A French lawyer who practices in-house cannot simultaneously be a member of the bar. Therefore, as currently drafted, the ABA definition of "foreign lawyer", which the Office of Court Administration proposes to use in support of its amendment of Part 522, precludes in-house lawyers from France but also from a majority of countries outside the US, to apply for registration as in-house counsel.

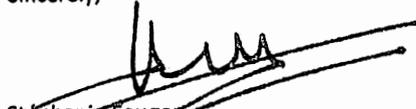
The ABA Section of International Law has therefore, on October 14, adopted an amendment to Model Rule 5.5 as well as to the model rule governing the registration of in-house lawyers, in order to permit foreign lawyers who are not members of the bar in their country to nonetheless be considered for the purpose of being registered as in-house counsel under the Rule. The adopted revised Rule includes some comments inviting the courts to exercise discretion and consider other criteria, such as the candidate's education and in-house experience as a lawyer, in lieu of bar membership when the applicant does not technically meet the requirement of bar membership.

As the Office of Court Administration prepares to amend Part 522 of the Rules of the Court of Appeals, we hope that it will consider amending the rule in a way that takes into account these proposed revisions to the ABA Rule. It would not only make sure that most foreign in-house lawyers can benefit from the rule, but also that NY-based clients have the most flexibility in hiring foreign legal talent of their choice.

From a regulation point of view it would also enable the New York Court of Appeals to regulate the practice of the majority of foreign in-house lawyers practicing in-house in NY State.

Stephan Grynwaic, Northern America ambassador of the AFJE ([stephan.grynwaic@gmail.com](mailto:stephan.grynwaic@gmail.com)) and myself remain at your disposal should you wish to discuss any of the above.

Sincerely,



Stéphanie Fougon  
President Association Française des Juristes d'Entreprise



**NEW YORK UNIVERSITY**

A private university in the public service

**School of Law**

40 Washington Square South  
New York, New York 10012-1099  
Tel: 212 998 6264  
Fax: 212 995 4658  
E-mail: [stephen.gillers@nyu.edu](mailto:stephen.gillers@nyu.edu)

**Stephen Gillers**

*Elihu Root Professor of Law*

VIA Mail and Email

September 28, 2015

John W. McConnell, Esq.  
Counsel, Office of Court Administration  
25 Beaver Street, 11<sup>th</sup> Floor  
New York, NY 10004

Dear Mr. McConnell:

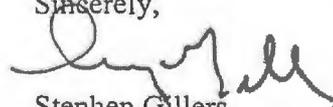
I am responding to the proposed amendment to Part 522, which would allow certain lawyers admitted in a foreign jurisdiction to practice in New York as in-house counsel. I was a member of the ABA 20/20 Commission, which added foreign lawyers to the model in-house counsel rule.

As I wrote in my letter to you of September 21, I support the inclusion of foreign lawyers in the New York in-house counsel rule. I urged in that letter that references to foreign lawyers in an amended in-house counsel rule, the New York pro hac vice rule, and the proposed temporary practice rule all adopt the ABA's definition of foreign lawyer. The New York Foreign Legal Consultant Rule has long done so and the proposed amendment to Part 522 would also do so. We should use the same definition each place foreign lawyers are referenced in our rules. Further, the definition of foreign lawyer, taken from ABA rules, protects the public. It would exclude anyone who, though legitimately able to claim that he or she is a lawyer elsewhere, is not "admitted to practice" and is not "subject to effective regulation."

I oppose retaining a reciprocity provision in Rule 522. I understand the reason some may wish to do this. It may be seen to encourage other jurisdictions to adopt in-house counsel rules that would benefit New York lawyers. But in fact reciprocity rules do not work. The persons paying the price are the prospective in-house lawyers who are admitted in a U.S. or foreign jurisdiction. They may earnestly wish that their home jurisdictions would adopt such a rule. But they have little influence. Nor do their clients have influence, yet they also lose the benefit of the rule.

Admission rules should not be used to create opportunities for local lawyers. There are other ways to do that. The only considerations should be the interests of clients and protection of the public.

Sincerely,

  
Stephen Gillers



1025 Connecticut Avenue, NW, Suite 200  
Washington, DC 20036-5425 USA  
tel +1 202.293.4103  
fax +1 202.293.4701  
www.acc.com

November 9, 2015

John W. McConnell, Esq.  
Counsel  
Office of Court Administration  
25 Beaver Street, 11<sup>th</sup> Floor  
New York, NY 10004

**Re: Proposed amendment of 22 NYCRR Parts 522 and 523 of the Rules of the Court of Appeals**

Dear Mr. McConnell:

The Association of Corporate Counsel (“ACC”), our New York chapters, and the 20 chief legal officers from the New York companies listed below are writing to express our strong support for the amendments to Parts 522 and 523 of the New York Court of Appeals rules that would allow foreign lawyers to practice as in-house counsel in the state of New York, both on a long-term (Part 522) and temporary (Part 523) basis.

There are currently 21 U.S. jurisdictions that allow foreign lawyers to either practice temporarily in the jurisdiction or permanently as in-house counsel.<sup>1</sup> Given New York’s position as a center of global commerce, New York’s absence from this group is conspicuous. The proposed amendments to Parts 522 and 523 present an opportunity to rectify this outlier status and reinforce New York’s commitment to being a business-friendly state. We also encourage the New York Court of Appeals to adopt a more inclusive definition of foreign lawyers under these rules so that lawyers from foreign jurisdictions where in-house counsel are not allowed to be admitted members of the bar (but who are authorized to provide legal services in-house) may practice in-house in New York.

**I. About ACC and its New York Chapters**

ACC is a global bar association that promotes the common professional and business interests of in-house counsel, with more than 40,000 members employed by over 10,000 organizations in more than 75 countries. For years, ACC has worked to remove unnecessary barriers within the United States and around the world that prevent in-house lawyers from working where their employers need to send them. ACC played a critical

<sup>1</sup> See, “Jurisdictions with Rules Regarding Foreign Lawyer Practice,” prepared on Oct. 13, 2015 by Prof. Laurel Terry, Dickinson School of Law, Pennsylvania State University. Available at: [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mjp\\_8\\_9\\_status\\_chart.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mjp_8_9_status_chart.authcheckdam.pdf). Also, on October 15, 2015, the Illinois Supreme Court entered an order amending its rules to allow foreign in-house counsel to practice in the state.

role in supporting the original version of ABA Model Rule 5.5(d), which allowed U.S. companies to employ in-house lawyers whose law licenses come from other U.S. states. ACC also worked with the ABA's Commission on Ethics 20/20 as it proposed amendments to the Model Rules, including the expansion of ABA Model Rule 5.5 to include foreign in-house lawyers.

ACC's three New York chapters represent Central and Western New York, Greater New York, and Westchester County (with part of Connecticut). These chapters have more than 2,300 in-house counsel members in New York representing leading local, national and international companies. The chapters are dedicated to serving the needs and interests of the in-house counsel community in New York by promoting education, diversity, and opportunities for in-house counsel to work on pro bono matters. The chapters have supported past efforts to expand the ability of lawyers licensed in other states to practice as in-house counsel in New York and provide pro bono services.

## **II. The Global Nature of New York's Economy Makes Foreign In-House Lawyers a Valuable Resource for New York Businesses**

No one needs to tell the state of New York about the global nature of today's business world and the need for lawyers to be able to cross international borders to serve their business clients. New York is home to 54 of the world's Fortune 500 companies, the most of any U.S. state. It is the third largest economy in the United States and if it were a country, it would have the 14<sup>th</sup> largest economy in the world. International trade is a fixture of the New York economy – according to the U.S. Department of Commerce, New York has over \$88 billion statewide in international exports, and more than 40,000 New York companies are involved in exporting goods out of the state.<sup>2</sup> As business issues cross borders, so do legal issues.

A rule that allows foreign in-house lawyers to freely serve their corporate employers in New York will enhance New York's stature as a center of global commerce. In 2010, three of New York's largest bar associations recognized the need for foreign lawyers to be admitted as in-house counsel in New York when they recommended that the New York Court of Appeals adopt a proposal similar to the Part 522 and 523 amendments currently under consideration. The bar associations noted that New York's outlier status on the issue "undermines the State's position as a business and non-profit capital of the world."<sup>3</sup>

The international nature of New York's economy is reflected in the issues faced by its in-house lawyers. Based on an analysis utilizing data from the 2015 ACC Global Census of in-house lawyers, 62 percent of respondents from New York reported having cross-border or multi-national work responsibilities. New York in-house lawyers also reported,

---

<sup>2</sup> "New York Exports, Jobs, and Foreign Investment," prepared by the Office of Trade and Economic Analysis, International Trade Administration, U.S. Department of Commerce. Available at: <http://www.trade.gov/mas/ian/statereports/states/ny.pdf>.

<sup>3</sup> "Proposed Rules for Licensing of In-House Counsel," November 2010, New York State Bar Association, New York City Bar Association, New York County Lawyers' Association, p. 4.

on average, having about a third of their workload involve cross-border or multi-national issues. ACC's general counsel members have told us that restrictions on bringing foreign in-house counsel to practice in the United States makes it harder for multi-national companies to leverage the full experience of their in-house legal departments. Foreign lawyers working for the company abroad will have different subject matter expertise than their U.S. counterparts, but unlike foreign outside counsel, will still have history with the company and familiarity with the company's risk profile and governance procedures. U.S. restrictions on foreign in-house counsel also mean that a company cannot bring its foreign lawyers to the United States so they can assist more closely on U.S. legal matters. Working on U.S. legal matters alongside the company's U.S. attorneys would help the foreign lawyers learn the U.S. laws that affect the company. As the foreign lawyers gain competence in the U.S. laws, they will be able to work on U.S. matters independently and carry that ability with them when they work abroad. We note that the New York proposal is especially well-suited for this type of educational experience because it does not limit foreign lawyers working on U.S. legal matters to doing so only "based upon the advice" of a lawyer who is licensed in the relevant U.S. jurisdiction to provide such advice.

### **III. The Proposed Amendments to Parts 522 and 523 Present Little Risk of Harm to the Public or the Legal Profession While Helping to Meet the Needs of New York Businesses**

In 2011, New York adopted a rule allowing a limited New York law license for in-house lawyers licensed in other U.S. states. We are unaware of any ill effects stemming from adoption of this rule, and in fact have heard from our New York members that clarity as to their practice status was a welcome change. We believe the same effects would be derived from the current proposals to extend Parts 522 and 523 to foreign lawyers. Because the limited license under Part 522 is only valid for in-house practice, the amendments would have no effect on legal services provided to the general public. Nor is there risk of harm to the companies employing the foreign in-house lawyer. Companies large enough to have foreign in-house lawyers are sophisticated consumers of legal services. They have an on-going employment relationship with the foreign lawyer and are able to evaluate the foreign lawyer's competence and quality of work.

Moreover, under both rules, a foreign lawyer would be subject to the disciplinary jurisdiction of New York. If the foreign in-house lawyer acted unethically, New York would be able to take disciplinary action against the foreign lawyer.

### **IV. The New York Court of Appeals Should Consider a Broader Definition of Foreign Lawyers Eligible Under the Rules**

While we commend New York for proposing these rules that recognize the international nature of corporate legal practice, we urge the Court of Appeals to consider adopting language that would allow a broader range of foreign lawyers to practice temporarily or register as in-house counsel in New York. Proposed Part 522.1(b)<sup>4</sup> applies to a foreign

---

<sup>4</sup> We focus on the language in Part 522.1(b) for this discussion, but we would make the same arguments with respect to Part 523, as that applies to lawyers "admitted and authorized to practice," (emphasis added).

lawyer who is:

A member in good standing of a recognized legal profession in a foreign (non-U.S.) jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent and subject to effective regulation by a duly constituted professional body or public authority.

The problem with this language is that it would exclude foreign in-house lawyers from jurisdictions where in-house lawyers are either not required or not permitted to hold law licenses. In these jurisdictions, in-house lawyers may not be admitted to practice and would not be regulated by a professional body or public authority. They would also be unable to satisfy the proof requirements found in Part 522.2, as they would not have the ability to obtain a certificate of good standing or letter from a grievance committee.

These requirements in the proposed rule would have a huge impact on the rule's applicability to foreign in-house lawyers. According to research conducted by the National Organization of Bar Counsel, more than 70% of the world's countries do not require in-house counsel to be members of the bar.<sup>5</sup> These are not jurisdictions with nascent corporate legal practices, but rather established and important global commerce partners such as France, Italy, China, Japan, India, and South Africa, to name just a few of the countries where in-house counsel are not even permitted to be members of the bar. The countries that do not require bar admission of in-house counsel still have stringent requirements for these lawyers. Generally, they are required to complete the same legal education requirements and often the same competency exams or apprentice requirements that lawyers in private practice must complete.

That is why the ACC endorses an approach to the admission of foreign in-house counsel that uses the language "authorized to practice." We would suggest the below change to the proposed language in Part 522.1(b):

A member in good standing of a recognized legal profession in a foreign (non-U.S.) jurisdiction, the members of which are admitted or authorized to practice as lawyers or counselors at law or the equivalent ~~and subject to effective regulation by a duly constituted professional body or public authority.~~

This change would make the rule applicable to vastly more foreign in-house lawyers.<sup>6</sup> The ACC recently proposed similar language in Illinois, and Illinois

---

<sup>5</sup> National Organization of Bar Counsel, "The Regulation of In-House Counsel – Overview of Research Trends," March 2015. Available at: <http://nobc.org/docs/Global%20Resources/In%20House%20Counsel%20-%20Research%20OverviewMarch2015.pdf>.

<sup>6</sup> To account for those jurisdictions that do not require a license to practice in-house we would also suggest changing the language in Part 522.1(b)(3) from "would similarly permit an attorney admitted to practice in this State to register as in-house counsel," to "would similarly permit an attorney admitted to practice in this State to *practice in the jurisdiction as in-house counsel.*"

recently adopted that language in its new Rule 5.5 and in-house registration rule. Illinois now allows lawyers “admitted or otherwise authorized to practice in a foreign jurisdiction,” to register as in-house counsel in Illinois. Illinois Rule 5.5(e) states that “the foreign lawyer must be a member in good standing of a recognized legal profession in a foreign jurisdiction.” In the commentary to Rule 5.5(e) it is recognized that “structure and procedures vary among foreign jurisdictions,” and that in considering the admission of a foreign lawyer from a jurisdiction where in-house counsel are not subject to regulation and discipline, “other attributes of the system must be considered to determine whether they supply assurances of an appropriate legal background.”

We think the approach adopted by Illinois strikes an ideal balance between the need for companies to be able to employ foreign lawyers from legal systems with different structures and the need for the state to have some assurance of the competence of foreign lawyers admitted under the rule. As New York’s proposed approach would exclude foreign lawyers from 70% of the world’s jurisdictions, we strongly urge New York to adopt a broader approach and use the “authorized to practice” language.

\* \* \*

Companies need a wide choice of foreign counsel to accommodate their expanding global needs. We urge New York to consider our modification to the proposed amendment to Part 522. If New York does not adopt our suggested modification, we still strongly support the proposed amendments to Parts 522 and 523. Making it easier for companies to employ in-house lawyers from foreign countries will greatly boost New York’s ability to compete on the global stage. We strongly urge the New York Court of Appeals to adopt the amendments to these rules.

Sincerely yours,



Amar D. Sarwal  
Vice President and  
Chief Legal Strategist  
Association of Corporate Counsel  
sarwal@acc.com

Mary L. Blatch  
Director of Government and  
Regulatory Affairs  
Association of Corporate Counsel

Brian Campbell  
President  
ACC Greater New York  
*and*  
*Vice President & General Counsel*  
DHI Group, Inc. (f/k/a Dice Holdings, Inc.)

Dobbyn Colm  
President  
ACC Westchester County NY/Southern Connecticut

David Mowry  
President  
ACC Central & Western New York

\* \* \*

Katherine Hughes  
*General Counsel*  
Affiliates Risk Management Services,  
Inc.

Laureen E. Seeger  
*Executive Vice President & General  
Counsel*  
American Express Company

Sabine Chalmers  
*Chief Legal & Corporate Affairs Officer*  
Anheuser-Busch InBev

Philip Calderone  
*Vice President, General Counsel &  
Secretary*  
Banfi Products Corporation

Shannon Green  
*General Counsel*  
Blue State Digital, LLC

Jennifer M. Daniels  
*Chief Legal Officer and Secretary*  
Colgate-Palmolive Company

John Huleatt  
*General Counsel*  
Community Products LLC

Jordan Breslow  
*General Counsel*  
Etsy, Inc.

Edward Pelta  
*Vice President, General Counsel &  
Secretary*  
Gleason Corporation

Coleman Gregory  
*SVP & General Counsel*  
Landesbank Hessen-Thuerigen Girozentrale

James A. Woehlke, Esq., CPA  
*COO and General Counsel*  
MBL Benefits Consulting Corp.

James M. Black II  
*Vice President, General Counsel & Chief  
Compliance Officer*  
Overseas Military Sales Corporation

Lisa Sofferin  
*General Counsel*  
R&P Pools, Inc. d/b/a Leisure Living

Leslie Park  
*General Counsel*  
Rainforest Alliance

Margaret J. O'Brien  
*General Counsel & Senior Vice  
President*  
Risk Strategies Company

Maxine Verne  
*Senior VP & General Counsel*  
SCOR Reinsurance Company

Deirdre Stanley  
*Executive Vice President & General  
Counsel*  
Thomas Reuters Corporation

Kashif Sheikh  
*Managing Principal & General Counsel*  
Westbrook Partners

Claudia Toussaint  
*SVP, General Counsel and Corporate  
Secretary*  
Xylem Inc.

**BOIES, SCHILLER & FLEXNER LLP**

30 SOUTH PEARL STREET • 11TH FLOOR • ALBANY, NY 12207 • PH. 518.434.0600 • FAX 518.434.0665

November 9, 2015

**VIA EMAIL**

Hon. Lawrence K. Marks  
Chief Administrative Judge  
NYS Unified Court System  
25 Beaver Street  
New York, NY 10004  
[lmarks@nycourts.gov](mailto:lmarks@nycourts.gov)

Re: Proposed amendments to a new Part 523, §523.2(a) of the Rules of the Court of Appeals regarding temporary practice; and Part 522, §522.1 (22 NYCRR Part 522 & Part 523)

Dear Judge Marks:

Your Advisory Committee on Civil Practice has reviewed the proposed amendments to the Rules of the Court of Appeals regarding temporary practice and appearance by an attorney not admitted to practice in New York. The Committee offers the following comment.

First, the Committee supports the proposed amendment to § 522.1.

Second, the Committee is opposed to the adoption of the proposed § 523 in its present form because it believes that the language is far too broad and uncertain. The proposed new section addresses four situations in which a lawyer admitted in a jurisdiction other than New York may be permitted to temporarily practice law in New York, as set forth in Exhibit "A" (9/21/15)(attached). The Committee found paragraphs (a) and (c) to be acceptable, but it felt (b) and (d) could be interpreted in ways that would make temporary practice potentially too broad. The Committee understood that the apparent purpose of sub-paragraph (b) is to allow counsel to associate with other counsel admitted to the state or admitted pro hac vice, but the language could be interpreted much more broadly. Moreover, the Committee felt that the current pro hac vice procedures work reasonably well and did not see the need for further expansion. Similarly, paragraph (d) allows out of state attorneys to practice in this state based upon a belief that their proposed New York practice is "reasonably related" to their practice in their own jurisdiction. That phrase, the Committee felt, is far too broad and ambiguous.

Third, the members recommend further study of elements of a registration proposal, including consideration of whether it would use the in-house counsel model, whether it would require a fee, whether it should be temporary, e.g., for a particular matter or particular periods of time, and whether it would be renewable. The Committee would be pleased to review a registration proposal if one is drafted.

We remain available to answer any further questions you may have and thank you for giving us the opportunity to comment on this proposal.

Sincerely,

A handwritten signature in cursive script, appearing to read "George F. Carpinello".

George F. Carpinello

cc: John W. McConnell, Esq.  
Holly Nelson Lütz, Esq.