



14 Vesey Street  
New York, NY 10007-2992  
(212) 267-6646 · www.nycla.org

Report of the New York County Lawyers' Association (NYCLA) Ethics Institute

to the

ABA Commission on Ethics 20/20 Working Group on In-House Foreign Lawyer Issues

This Report was approved by the Executive Committee of the New York County Lawyers' Association at its meeting on June 23, 2010.

The ABA Commission on Ethics 20/20 (the "Commission"), formed to review lawyer ethics rules and regulation across the U.S. in the context of a global marketplace for legal services, posed the following questions in its Preliminary Issues Outline of November 19, 2009:

1. Should the ABA include foreign lawyers within the scope of the ABA Model Rule for *Pro Hac Vice* Admission?
2. Should the ABA adopt a policy regarding registration of foreign lawyers practicing in-house in the U.S.?
3. Should the temporary practice provisions applicable to U.S. lawyers in Rule 5.5 of the ABA Model Rules of Professional Conduct be expanded to include non-U.S. lawyers?

The Commission's Working Group on Inbound Foreign Lawyers proposes "yes" responses to these three questions. For the reasons that follow,<sup>1</sup> the NYCLA Ethics Institute recommends that NYCLA likewise support affirmative responses to the three questions with the one exception noted below.

1. Pro Hac Admission. At least 13 states permit pro hac vice admission by foreign lawyers, but the ABA does not currently have a policy on the issue. In 2007, there were \$20 trillion in foreign-owned assets in the U.S. and \$17.6 trillion in U.S.-owned assets abroad. Foreign-born residents will, at some time, have family law, inheritance or business relationships with their country of origin requiring involvement of both U.S. and foreign lawyers. Under the proposed rule, clients would be protected by the presiding judge, as well as the requirement that local counsel be involved and bear responsibility.

The current ABA Model Rule on Pro Hac Vice Admission provides for the conditions under which an out-of-state lawyer can be admitted *pro hac*. As proposed, the current rule's

---

<sup>1</sup> Most of these arguments and facts are taken from the Commission's Explanatory Memo of June 1, 2010.

definition of “out-of-state lawyer” would be expanded to include not only lawyers admitted in a U.S. jurisdiction but also lawyers who are admitted and in good standing in a foreign jurisdiction. “Foreign jurisdiction” would be defined as a jurisdiction with a recognized legal profession, whose members are subject to “effective regulation and discipline by a duly constituted professional body or a public authority.” The New York Court of Appeals Rule on *pro hac* admission permits a court, in its discretion, to admit *pro hac* an attorney from a foreign country. 22 NYCRR §520.11(a). Such attorneys must (i) associate with a New York lawyer, who shall be attorney of record in the matter, and (ii) be familiar with New York’s ethics rules, as well as subject to the courts’ disciplinary authority. 22 NYCRR §520.11(c) and (d).

The Ethics Institute supports a “yes” vote to question 1 for the following reasons:

- The ABA rule as amended would provide the same protections as the current New York rule, requiring that the foreign lawyer be in good standing in his/her home jurisdiction and familiar with New York’s Rules of Professional Responsibility. Thus, the ABA would be “catching up” with New York practice.
- We can rely on the good judgment of the admitting judge to safeguard a client’s interests, including making the sponsoring and local lawyer responsible for the admitted lawyer’s misdeeds.

The primary objection raised by a minority of the Ethics Institute’s Board was that neither the New York nor the ABA rule provides sufficient protections, specifically with respect to a foreign lawyer, such as a lawyer from a civil law jurisdiction such as Columbia. In response, a majority of the Board reasoned that clients will be unlikely to hire civil law lawyers from Columbia to litigate in New York courts, that New York lawyers will be unlikely to sponsor a foreign lawyer from such a jurisdiction and that the judge would take those factors into account when ruling on a *pro hac* application.

*Exception:* We question the need, under the current rule, to put the “Lawyer Regulatory Authority” (which would now be called “Disciplinary Counsel”) on notice of a *pro hac* application (I.D.1 of the current rule). New York does not have such a requirement, and it seems an empty formalism that simply creates more paper for the receiving agency/body to file.

2. Registration of In-House Foreign Lawyers. ABA Model Rule 5.5(d) currently provides a safe harbor for in-house lawyers from another U.S. jurisdiction; the Commission proposes to expand that safe harbor to include in-house lawyers from a non-U.S. jurisdiction (using the same definition of foreign jurisdiction as in the *pro hac* rule). In contrast, New York does not currently provide such a safe harbor in its ethics rules for in-house lawyers not admitted in New York (regardless of whether admitted in another U.S. or non-U.S. jurisdiction).

Permitting a non-U.S. lawyer to work out of the office of an organization in the U.S. as such organization’s in-house legal counsel (without requiring admission) is reasonable because it does not present unreasonable risk to the organization or the public. The organization is presumably able to assess the lawyer’s qualifications and quality of work, and thus to decide whether the lack of admission in that U.S. jurisdiction will be an insurmountable challenge (e.g.,

if the lawyer will be only one member of a large legal department comprising New York-admitted attorneys). The public will not be at risk because the lawyer is not “hanging out a shingle” but rather solely representing the organization.

This expansion of the safe harbor makes sense for organizations, as their interests increasingly span borders and their local legal needs are dwarfed by international ones. It also increases the likelihood that, for reasons of reciprocity, U.S. lawyers will be welcomed as in-house counsel in non-U.S. jurisdictions.

3. Temporary practice provisions. ABA Model Rule 5.5 provides a safe harbor for lawyers from other U.S. jurisdictions to “provide legal services on a temporary basis in this jurisdiction” that are undertaken in association with local counsel, reasonably relate to a dispute or are otherwise a non-litigation matter that reasonably relates to the lawyer’s home jurisdictional practice.

This safe harbor is reasonable because one can easily imagine scenarios in which a European lawyer, for example, is representing a European client in a transactional matter that requires periodic visits to the U.S. (for negotiation or other discussions). U.S. lawyers can easily imagine the necessity of traveling abroad in similar circumstances for U.S. clients. Providing the safe harbor is enlightened self-interest: it increases the likelihood that non-U.S. jurisdictions will provide reciprocity, instead of reserving the right to sanction U.S. lawyers for temporarily “practicing” on their soil without being admitted there.