

## AUTHORS

Brian A. Zemil

## RELATED PRACTICES

Litigation

## ARCHIVES

2011 2007 2003  
2010 2006 2002  
2009 2005 2001  
2008 2004

## Articles

Summer 2011

### N.Y. Adopts Limited License for Out-of-State In-House Counsel

*Litigation News*

In-house counsel working in New York, but licensed in other U.S. states, may now register for a limited license to practice law in New York. New York joins a majority of states with rules establishing a means for in-house counsel to practice “in state” without going through the traditional licensure process, but it does not go as far as sponsoring bar associations requested.

#### Full-Time Employment Required

The new rules only permit registration for an attorney actively employed full time in New York by any “non-governmental corporation, partnership, associate or other legal entity.” Despite recommendations from three New York Bar Associations, the New York State Court of Appeals did not adopt rules as broad as ABA Model Rule 5.5(d)(1) (Unauthorized Practice of Law; Multijurisdictional Practice of Law). The model rule does not require full-time employment in the jurisdiction to provide services to the employer in the U.S. jurisdiction where the employer is located but the lawyer is not licensed.

#### Reciprocity Required and License Limited in Scope

The rule permits registration only if the lawyer is from a jurisdiction permitting an attorney admitted to practice in New York to register as in-house counsel in that jurisdiction. New York joins 45 other states that have similar reciprocity rules.

Under the New York rules, an in-house counsel who is licensed outside of New York is limited to rendering legal services to the counsel’s corporate employer and affiliates, and the officers, directors, and employees of each. The scope is further limited to matters within the scope of the in-house counsel’s employment.

An in-house lawyer admitted under this rule may not appear before a court or other tribunal, or make any appearance in a proceeding in which pro hac vice admission would be required. Although the New York State Bar Association, the New York City Bar Association, and the New York County Lawyers’ Association (collectively the Tri Bar) submitted a joint proposal to the New York State Court of Appeals, recommending that the New York rules permit in-house counsel licensed under the new rule to provide pro bono legal service, the court of appeals declined to adopt this proposal.

#### Unauthorized Practice of Law

According to the Tri Bar proposal, providing the limited license option to out-of-state in-house counsel was necessary to permit New York to relinquish its status as “the backwater” of multijurisdictional practice trends. The proposal pointed to “anecdotal evidence [that] suggests that numerous in-house counsel are already working in New York without a New York license.”

“The New York in-house rules solve the problem and potential risk of engaging in the unauthorized practice of law when in-house counsel advise their executives without the registration and licensure now available,” says Bruce A. Rubin, Portland, OR, chair of the Legal Ethics Subcommittee of the ABA Section of Litigation’s Committee on Corporate Counsel. According to Rubin, “The registration of in-house lawyers will ensure their compliance with [New York] CLE requirements, and the New York Rules of Professional Conduct. [This] will provide appropriate safeguards for the profession, and clients as well as their in-house lawyers will be subject to disciplinary enforcement.”

“Licensure will also reduce the risk of any potential privilege challenges and further promote client confidentiality,” says Sharon D. Sirott, Chicago, chair of the Judiciary Subcommittee of the Section of Litigation’s Ethics and Professionalism Committee. The concern is that the lawyer’s most thorough practices of law might impact a claim of privilege. Sirott believes that “the rule does not impose a significant burden on in-house counsel, especially when compared to seeking full admission to the New York bar.”

Rubin cautions, however, that, “It would be wise to examine whether and how licensure affects whatever liability insurance exists to protect both the in-house attorney and the corporation in the event of any unfortunate malpractice.” The corporation may or may not provide such coverage. If it does it may be a rider to a general E&O policy as opposed to a more traditional legal malpractice policy familiar to lawyers in private firms.

### **Foreign Licensed Attorneys Not Included**

The court of appeals also rejected the Tri Bar’s proposal for registration by attorneys licensed to practice only in foreign countries. Foreign country lawyers are already eligible for license in New York as foreign “legal consultants,” but they may not advise on U.S. law.

“New York’s rejection of foreign in-house counsel licensure prevents foreign attorneys situated in New York from advising their corporate employers on American law. A foreign licensed lawyer should not be forbidden to advise his company on U.S. law simply because his office is now in Manhattan and not Paris or Madrid,” says Stephen Gillers, New York City, member of the ABA Commission on Ethics 20/20. “Growth of cross-border, transnational legal practices will inevitably lead to further developments and efforts in the U.S. to regulate foreign lawyers,” Sirott notes.

Recently, the ABA Commission on Ethics 20/20 submitted a Draft Proposal for Amending Model Rule 5.5 and a Draft Resolution to amend Model Rule for Registration of In-House Counsel. Out for comment is whether the ABA should include foreign lawyers within the scope of both MRPC 5.5 and The Model Rule for Registration of In-House Counsel. The Commission says that the unified recommendation of the three New York Bar Associations “reflects the shared view that foreign lawyers should be permitted to serve as in-house counsel.”

According to the draft proposal, six jurisdictions allow temporary practice by foreign lawyers: Delaware, the District of Columbia, Florida, Georgia, Pennsylvania, and Virginia. The ABA Commission on Ethics recommends an amendment to Model Rule 5.5 to “allow foreign in-house counsel to work for their employer in a U.S. jurisdiction where they are not licensed without running afoul of the prohibition against the unauthorized practice of law.”

“There are important areas of ethical rules that are wildly different between foreign countries and the United States that should be addressed,” stresses Rubin. “Due to the prominent growth in international practice without regard to an attorney’s physical presence, borders are fading—though not irrelevant—as a useful and effective device as the basis for legal regulation,” agrees Gillers.