



Staff Memorandum

HOUSE OF DELEGATES Agenda Item #12

REQUESTED ACTION: Approval of the report and recommendations of the New York City Bar Association.

In 2010, the NYSBA Committee on Standards of Attorney Conduct, together with the New York City Bar Association and the New York County Lawyers Association, proposed a new Part 522 of the Rules of the Court of Appeals to permit in-house counsel admitted in other jurisdictions but working in New York to register and provide legal services to the lawyer's employer. The Court of Appeals adopted Part 522 in 2012 and amended the rules in 2013 to permit pro bono work by registered in-house counsel.

The attached report from the New York City Bar Association recommends amendments to part 522. The amendments would (a) Expand the grace period for filing an application from 30 to 90 days; (b) clarify that there is no residency requirement; (c) Permit registration by attorneys who are not employed full time in New York; (d) provide a one-time cure period for attorneys who have not complied with the rule; (e) limit the reciprocity provision to lawyers registered in other U.S. jurisdictions; (f) amend the requirement that foreign lawyers maintain active bar membership if their home jurisdiction prohibits the lawyers from doing so; and (g) allow foreign lawyers who are unable to provide required documentation due to their home jurisdictions' legal systems to apply for admission via affidavit.

The report was posted for comment in the Reports Community on February 11. No comments have been received.

Steven Fink, Chair of the NYC Bar's Professional Responsibility Committee drafting subcommittee, will present the report at the April 13 meeting.

REPORT BY THE PROFESSIONAL RESPONSIBILITY COMMITTEE

PROPOSED AMENDMENT TO NEW YORK COURT OF APPEALS PART 522 RULES FOR THE REGISTRATION OF IN-HOUSE COUNSEL¹

I. SUMMARY

The Professional Responsibility Committee of the New York City Bar Association proposes amendments to the New York Court of Appeals Part 522 (“Rules for the Registration of In-House Counsel”) in order to expand the grace period for filing of an application, to clarify that there is not a residency requirement and also to permit attorneys who are not “full time” in New York to register under the program. To encourage in-house counsel who are already delinquent under the current Part 522 to register, we also propose the announcement and provision of a cure period of 90 days in connection with announcing the changes.² Finally, we propose amendments to the foreign lawyer registration provisions of Part 522 in order to eliminate the reciprocity requirement for foreign lawyers and to permit foreign lawyers working in-house, under certain circumstances, to apply using an affidavit.

II. RATIONALE FOR THE PROPOSAL

We strongly support the in-house counsel registration program described in Part 522 because we believe it promotes accountability for applicants and awareness by courts. Before the program, in-house lawyers not admitted in New York faced a kind of limbo in which it was not clear whether their legal work, performed entirely within and for their New York employer organizations, nonetheless could be viewed as engaging in the unauthorized practice of law in New York. We believe that a few simple revisions could further the benefits of the program. Moreover, we believe that amendments clarifying admission requirements for foreign lawyers working in New York as in-house counsel will help to preserve New York’s position as the world’s preeminent center for the practice of law and international business.

a. Expand Grace Period from 30 to 90 Days

In-house counsel who move to the State from other jurisdictions may not learn about Part 522 until after they have begun work in New York, particularly in instances where their employers give them short notice that they will need to relocate to New York. Moreover, satisfying the requirement for certificates of good standing from foreign jurisdictions (where applicable) may

¹ This report has been reviewed and approved by the Committee on Standards of Attorney Conduct of the New York State Bar Association.

² The proposed language of the amendment is set forth in an appendix immediately following this report.

cause delay. For these reasons, we suggest providing more of a cushion. While leniency may be granted to those who apply on their 31st day (a day late), those who miss this deadline may in some cases decide simply not to apply out of the fear that applying late will result in a penalty or discipline. We see only upside to increasing the current grace period from 30 to 90 days. New York's 30-day application period is the shortest in the country among jurisdictions that specify a time period for registration of foreign in-house counsel.³

b. Clarify that There Is No Residency Requirement

We understand, anecdotally, that some clerks who review these applications have been reading a residence requirement into Part 522, even though there is no language supporting such a requirement. Thus, if an applicant were to list a home address outside of New York or the tri-state area, the applicant might not be permitted to register. We do not believe that the policy underlying the program is furthered when a residence requirement is imposed, as it necessarily excludes foreign lawyers working in-house in New York but who reside outside the tri-state area and thus permits fewer foreign lawyers working in some capacity as in-house counsel in the State to register.

c. Permit Attorneys Who Are Not Employed “Full Time” in New York to Register under the Program

We propose amending Part 522 to permit attorneys who practice as in-house counsel in New York on a part time basis to register under the rule. The current rule permits registration only by attorneys who are employed as in-house counsel full time in the State. “Part-time” applicants would include, for example, lawyers with childcare responsibilities or transitioning back into the workforce and in-house counsel who are not employed 100% of the year in New York (or perhaps do not know whether that will be the case) but nevertheless will be working here on a permanent and recurring basis. We see no reason why such lawyers should not be permitted to register and enjoy the legitimacy, accountability and safe harbor in-house counsel registration represents.

d. Provide a One-Time Cure Period of Three Months in Connection with Announcing the Changes

Announcement of the proposed changes would be a natural time to announce a one-time cure period for in-house counsel who are eligible but have not yet registered under Part 522. Encouraging such lawyers to register furthers the policy objectives of an in-house counsel registration requirement by fostering accountability on the part of foreign in-house counsel and awareness on the part of courts and the public. Furthermore, under this proposed amendment,

³ Six jurisdictions provide for 90-day grace periods. See AZ ST S CT r. 38(a)(4) (2017); CONNECTICUT BAR EXAMINING COMMITTEE AUTHORIZED HOUSE COUNSEL RULE 5, effective Jan. 1, 2008: <https://www.jud.ct.gov/CBEC/housecounsel.htm#Forms> (citing CONN. RULE OF SUPER. CT. § 2-15A(b)(1)(D) (2018)); ILL. S. CT. RULE 716(l) (2018); IOWA CT. RULE 31.16(1) (2017); KAN. S. CT. Rule 712(a)(1)(b) (2018). One provides for a 60-day grace period. WIS. S. CT. Rule 10.03(4)(f) (2018). While the majority of U.S. jurisdictions with registration requirements have not specified grace periods, we have no data on whether they apply one in practice. We believe that specifying a 90-day grace period will serve to encourage compliance with the Rule and is particularly appropriate for non-US lawyers moving to New York, in some instances on short notice. (All websites cited in this letter were last visited on January 31, 2019.)

part-time in-house counsel would be eligible to register. A cure period will give part-time in-house counsel already practicing in New York, but who have not yet registered, an opportunity to do so.

e. Limit the Reciprocity Requirement to Lawyers Registered in Other U.S. Jurisdictions

We propose limiting the reciprocity requirement in Part 522.1(b)(2) to apply only to lawyers registered and in good standing in another jurisdiction within the United States. Of the twenty-three (23) U.S. jurisdictions that permit foreign lawyers to practice as in-house counsel, New York is the only state that requires reciprocity from foreign jurisdictions as a condition for permitting in-house counsel to practice. New York’s reciprocity requirement makes compliance with the Rule impossible for in-house counsel from the many jurisdictions that do not permit in-house counsel to be members of their local bars or to maintain professional licenses during their employment as in-house counsel.⁴ At the same time, because membership in the local bar is not permitted in these jurisdictions, and is not required in a number of other jurisdictions even where it is permitted, New York lawyers may be employed as in-house counsel in many if not all of these jurisdictions and so the goal of a reciprocity requirement (ensuring that New York lawyers will not be precluded from working abroad) will be satisfied without imposing a formal requirement.⁵ Moreover, many international transactions are governed by New York law and so there is a demand for New York lawyers outside the United States. The opposite, however, cannot be said to be true. For example, if a Norwegian lawyer were to work as in-house counsel in New York and could only advise on Norwegian law, that in-house counsel would likely be of little utility. By limiting the reciprocity requirement to lawyers registered outside of New York, but inside of the United States, Part 522 will no longer prevent admission of otherwise qualified lawyers who have come from foreign jurisdictions to work and practice law in New York. Their emigration to serve as in-house counsel in New York supports New York’s efforts to both maintain and promote strength and diversity in its international business and legal practices.⁶

⁴ An informal survey conducted by the Litigation Committee of the ABA Section of International Law of 70 jurisdictions on four continents concluded that in “more than 70% of the researched countries . . . in-house counsel would not be able to obtain a certificate of good standing, because professional licenses and bar membership are prohibited for in-house counsel.” See Report “The Regulation of In-House Counsel Across International Markets,” March 2015. “The data also indicates that many jurisdictions impose comparable education requirements to the US in order for a lawyer to be admitted to the practice of law, and in many instances, in particular in Europe, impose rigorous training requirements for all lawyers.” While the ABA approach is to give the courts discretion in determining whether to permit registration by applicants from jurisdictions that do not provide reciprocity, we believe that a bright-line rule has the advantages of clarity and reducing the burden on the New York courts.

⁵ By way of example, Belgian lawyers working as in-house counsel cannot be active members of a Belgian bar association, but they must register with the Instituut voor Bedrijfsjuristen (IBJ)/Institut des juristes d’entreprise (IJE) (the “Institute”) as in-house counsel. March 1, 2000 – Act Creating an Institute of Corporate Jurists Art. 6 § 6 (2000). A New York lawyer is permitted to register with the Institute as in-house counsel and will receive all of the same benefits and oversight as a Belgian member. *Id.* at Art. 4 § 1(1). Similarly, a New York lawyer working in-house in England and Wales may register as a Registered Foreign Lawyer. Such registration is not required, but registration increases the scope of services that may be provided by such in-house lawyer. See Solicitors Regulation Authority Handbook, Rule 3.4(b) (Scope of Practice) (2017).

⁶ Alternatively, if there is not sufficient support to eliminate the reciprocity requirement altogether by way of amendment to the Rule, we propose an amendment that would permit foreign in-house counsel to establish reciprocity by affidavit in instances where their home jurisdiction has not promulgated any law or regulation that may be cited to confirm that New York lawyers may serve as in-house attorneys in that jurisdiction.

f. Amend the Requirement that Foreign Lawyers Remain Active Members of the Bar in Their Home Jurisdictions Where Laws in Those Jurisdiction Prevent It

In a number of jurisdictions in Europe—France, Italy, Sweden and Belgium, for instance— in-house counsel are not considered sufficiently independent to be members of the bar. In these countries, lawyers who are members of the bar must suspend their bar memberships while practicing in-house. Ultimately, if they have kept up with the various training and continuing education requirements for bar membership in these foreign jurisdictions, in-house lawyers are able to enter or reenter the bar as active members in good standing upon entering or returning to private practice. Accordingly, we believe that foreign lawyers in this position should not be barred from registration in New York. These lawyers should be equally qualified to practice in-house in New York as lawyers who can remain active members of the bar in their home jurisdictions. We also believe that these lawyers could be subject to effective discipline by New York should they fail to follow the New York Rules of Professional Conduct: they could be prevented from practicing in New York and sanctions here would no doubt impede their ability to practice as in-house counsel in foreign countries and to be admitted or readmitted to the bar in foreign countries.

g. Allow Foreign Lawyers Excluded by the Structure of Legal Oversight in Their Home Jurisdictions to Apply for Admission Via Affidavit

Where qualified foreign lawyers are unable to provide assurances, certifications and/or proof of good standing due to structural constraints within the legal systems of their home jurisdictions, New York should provide these individuals with an alternative mechanism for admission. We believe the best mechanism to accomplish this is to allow for admission using an affidavit, along with supporting documentation sufficient to establish that (a) the lawyer is unable to comply with provisions of Part 522 due to structural constraints within his home jurisdiction; and (b) the lawyer is in good standing in the lawyer's home jurisdiction, as required by Part 522, or the lawyer's bar membership has been suspended because the lawyer is working in-house, but may be reinstated upon a showing that the lawyer has an independent legal practice. This practice will help to ensure that foreign lawyers who, in fact, are well-qualified registration applicants are not rejected admission.

We respectfully urge adoption of these amendments to simplify, clarify and broaden the in-house counsel registration requirement which, in turn, will benefit foreign in-house counsel as well as New York State's residents and courts.

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APPENDIX

Part 522 with proposed new language double underlined and deletions struck through (the only proposed changes are in §§ 522.1, 522.2, 522.3(a), 522.5(a), 522.7(a) and 522.8)

Part 522 - Rules for the Registration of In-House Counsel

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§ 522.1 Registration of In-House Counsel

(a) In-House Counsel defined. An in-house counsel is an attorney who is employed full time or part time in this State by a non-governmental corporation, partnership, association, or other legal entity, including its subsidiaries and organizational affiliates, that is not itself engaged in the practice of law or the rendering of legal services outside such organization. An attorney is not required to reside in New York State or an adjacent state in order to register under this Part.

(b) In its discretion, and in accordance with Section 522.1(a), the Appellate Division may register as in-house counsel an applicant who:

- (1) (i) has been admitted to practice in the highest law court in any other state or territory of the United States or in the District of Columbia; or (ii) is a member in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent and subject to effective regulation by a duly constituted professional body or public authority where such an authority both exists and holds in good standing compliant members employed as in-house counsel; or (iii) where no such authority exists, or where such authority exists but suspends the membership of members employed as in-house counsel, is trained and licensed as a lawyer in a foreign jurisdiction and eligible to join the bar of such foreign jurisdiction, if such a bar exists, or is otherwise eligible to engage in the private practice of law in such jurisdiction, upon ceasing to be employed as in-house counsel.
- (2) is currently admitted to the bar as an active member in good standing in at least one other jurisdiction, within ~~or outside~~ the United States, which would similarly permit an attorney admitted to practice in this State to register as in-house counsel; ~~and~~ or (i) was admitted to the bar in at least one other jurisdiction outside the United States and either is a current

active member in good standing or has a bar membership that has been suspended because the applicant is employed as in-house counsel, but the applicant is eligible to again become an active member in good standing upon a showing that the applicant is no longer working as in-house counsel; or (ii) is otherwise trained as a lawyer and permitted to provide legal services in a foreign jurisdiction and eligible to join the bar of such foreign jurisdiction, if such a bar exists, or is otherwise eligible to engage in the private practice of law in such jurisdiction, upon ceasing to be employed as in-house counsel; and

- (3) possesses the good moral character and general fitness requisite for a member of the bar of this State.

§ 522.2 Proof required

An applicant under this Part shall file with the Clerk of the Appellate Division of the department in which the applicant resides, is employed or intends to be employed as in-house counsel:

(a) (i) a certificate of good standing from each jurisdiction in which the applicant is licensed to practice law; or, (ii) if the foreign jurisdiction in which the applicant is licensed to practice law does not issue such certificates, an affidavit along with relevant supporting documentation confirming that the applicant is trained as a lawyer and eligible to join the bar of such foreign jurisdiction, if such a bar exists, or is otherwise eligible to engage in the private practice of law in such jurisdiction, upon ceasing to be employed as in-house counsel;

(b) (i) a letter from each such jurisdiction's grievance committee, or other body entertaining complaints against attorneys, certifying whether charges have been filed with or by such committee or body against the applicant, and, if so, the substance of the charges and the disposition thereof; or, (ii) if the foreign jurisdiction in which the applicant is licensed does not provide such letters, an affidavit certifying whether charges have been filed with or by such committee or body against the applicant, and, if so, the substance of the charges and the disposition thereof;

(c) an affidavit certifying that the applicant:

(1) performs or will perform legal services in this State solely and exclusively as provided in section 522.4; and

(2) agrees to be subject to the disciplinary authority of this State and to comply with the New York Rules of Professional Conduct (22 NYCRR Part 1200) and the rules governing the conduct of attorneys in the judicial department where the attorney's registration will be issued; and

(d) an affidavit or affirmation signed by an officer, director, or general counsel of the applicant's employer, on behalf of said employer, attesting that the applicant is or will be employed as an attorney for the employer and that the nature of the employment conforms to the requirements of this Part.

(e) Documents in languages other than English shall be submitted with a certified English translation.

§ 522.3 Compliance

An attorney registered as in-house counsel under this Part shall:

(a) (i) remain an active member in good standing in at least one state or territory of the United States or in the District of Columbia or a foreign jurisdiction as described in section 522.1(b)(1); or, (ii) if the attorney has never obtained such membership by virtue of having spent the attorney's entire career as in-house counsel in a jurisdiction in which in-house counsel are not required or permitted to have such membership, or the attorney's membership in a foreign jurisdiction has been suspended because of the attorney's employment as in-house counsel, the attorney will remain eligible to join the bar of such foreign jurisdiction, if such a bar exists, or otherwise remain eligible to engage in the private practice of law in such jurisdiction upon ceasing to be employed as in-house counsel;

(b) promptly notify the appropriate Appellate Division department of a disposition made in a disciplinary proceeding in another jurisdiction;

(c) register with the Office of Court Administration and comply with the appropriate biennial registration requirements; and

(d) except as specifically limited herein, abide by all of the laws and rules that govern attorneys admitted to the practice of law in this State.

§ 522.4 Scope of legal services

An attorney registered as in-house counsel under this Part shall:

(a) provide legal services in this State only to the single employer entity or its organizational affiliates, including entities that control, are controlled by, or are under common control with the employer entity, and to employees, officers and directors of such entities, but only on matters directly related to the attorney's work for the employer entity, and to the extent consistent with the New York Rules of Professional Conduct;

(b) not make appearances in this State before a tribunal, as that term is defined in the New York Rules of Professional Conduct (22 NYCRR 1200.0 Rule 1.0[w]) or engage in any activity for which *pro hac vice* admission would be required if engaged in by an attorney who is not admitted to the practice of law in this State;

(c) not provide personal or individual legal services to any customers, shareholders, owners, partners, officers, employees or agents of the identified employer; and

(d) not hold oneself out as an attorney admitted to practice in this State except on the employer's letterhead with a limiting designation.

§ 522.5 Termination of registration

(a) Registration as in-house counsel under this Part shall terminate when:

- (1) the attorney ceases to be an active member in another jurisdiction or otherwise qualified under section 522.1(b)(2); or
- (2) the attorney ceases to be an employee of the employer listed on the attorney's application, provided, however, that if such attorney, within 30 days of ceasing to be such an employee, becomes employed by another employer for which such attorney shall perform legal services as in-house counsel, such attorney may request continued registration under this Part by filing within said 30-day period with the appropriate Appellate Division department an affidavit to such effect, stating the dates on which the prior employment ceased and the new employment commenced, identifying the new employer and reaffirming that the attorney will provide legal services in this State solely and exclusively as permitted in section 522.4. The attorney shall also file an affidavit or affirmation of the new employer as described in section 522.2(d) and shall file an amended statement within said 30-day period with the Office of Court Administration.

(b) In the event that the employment of an attorney registered under this Part ceases with no subsequent employment by a successor employer, the attorney, within 30 days thereof, shall file with the Appellate Division department where registered a statement to such effect, stating the date that employment ceased. Noncompliance with this provision shall result in the automatic termination of the attorney's registration under this Part;

(c) Noncompliance with the provisions of section 468-a of the Judiciary Law and the rules promulgated thereunder, insofar as pertinent, shall, 30 days following the date set forth therein for compliance, result in the termination of the attorney's rights under this Part.

§ 522.6 Subsequent admission on motion

Where a person registered under this Part subsequently seeks to obtain admission without examination under section 520.10 of the Rules of this Court, the provision of legal services under this Part shall not be deemed to be the practice of law for the purpose of meeting the requirements of section 520.10(a)(2)(i).

§ 522.7 Saving Clause and Noncompliance

(a) An attorney employed as in-house counsel, as that term is defined in section 522.1(a), shall file an application in accordance with section 522.2 within ~~30~~90 days of the later of commencement of such employment or the effective date of this amendment;

(b) Failure to comply with the provisions of this Part shall be deemed professional misconduct, provided, however, that the Appellate Division may upon application of the attorney grant an extension upon good cause shown.

§ 522.8 Pro bono legal services

Notwithstanding the restrictions set forth in section 522.4 of this Part, an attorney registered as in-house counsel under this Part may provide pro bono legal services in this State in accordance with New York Rules of Professional Conduct (22 NYCRR 1200.0) rule 6.1(b) and other comparable definitions of pro bono legal services in New York under the following terms and conditions. An attorney providing pro bono legal services under this section:

(a) shall be admitted to practice and in good standing in another state or territory of the United States or in the District of Columbia and possess the good moral character and general fitness requisite for a member of the bar of this State, as evidenced by the attorney's registration pursuant to section 522.1(b) of this Part;

(b) pursuant to section 522.2(c)(2) of this Part, agrees to be subject to the disciplinary authority of this State and to comply with the laws and rules that govern attorneys admitted to the practice of law in this State, including the New York Rules of Professional Conduct (22 NYCRR Part 1200.0) and the rules governing the conduct of attorneys in the judicial department where the attorney's registration is issued;

(c) may appear, either in person or by signing pleadings, in a matter pending before a tribunal, as that term is defined in New York Rules of Professional Conduct (22 NYCRR 1200.0) rule 1.0(w), at the discretion of the tribunal, without being admitted pro hac vice in the matter. Prior to any appearance before a tribunal, a registered in-house counsel must provide notice to the tribunal that the attorney is not admitted to practice in New York but is registered as in-house counsel pursuant to this Part. Such notice shall be in a form approved by the Appellate Division; ~~and~~

(d) shall not hold oneself out as an attorney admitted to practice in this State, in compliance with section 522.4(d) of this Part; and

(e) if registered under section 522.3(a)(ii), shall only provide such pro bono legal services under the direct supervision of a duly registered New York lawyer.