In-House Counsel Registration

New York Court of Appeals Adopts Provision Allowing for Registration of In-House Counsel Not Admitted to the New York Bar

SUMMARY

By order dated March 25, 2011, and released last week, the New York Court of Appeals adopted a new rule providing for in-house attorneys who are licensed in another United States jurisdiction, but not in New York, to register as in-house lawyers entitled to practice in the state without taking the New York bar exam. Under the new rules, a registered in-house attorney may provide legal services in New York for the attorney’s employer and its affiliates, but may not appear before a New York court or tribunal or provide individual legal services to the general public (including pro bono services and services for employees, officers, and directors of the attorney’s employer). Registered in-house attorneys will be subject to the New York Rules of Professional Conduct, as well as all other laws and rules governing New York attorneys, including continuing legal education (CLE) requirements and the payment of a $375 biennial fee. If a registered in-house counsel subsequently applies for admission to the New York bar on motion, however, time spent practicing as an in-house counsel does not count toward the prior-practice requirements for admission on motion.

The registration provision will take effect on April 20, 2011. Out-of-state attorneys who are currently employed as in-house counsel for a New York organization must apply for registration within 90 days of the effective date. Attorneys who become employed as in-house counsel for a New York organization after the effective date must apply for registration within 30 days of beginning employment.1

BACKGROUND OF RULE

The new rule, adopted as Part 522 of the Rules of the Court of Appeals, was proposed by the New York State Bar Association, the New York City Bar Association, and the New York County Lawyers Association.2 The Court of Appeals acted relatively quickly: the proposal was approved by the NYSBA
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House of Delegates on November 6, 2010 and forwarded to the Court shortly thereafter. The Bar Association proposal would have applied to lawyers licensed in any jurisdiction, but the provision as adopted applies only to lawyers licensed in another United States jurisdiction. In addition, while the proposal would have permitted attorneys to engage in some pro bono activities, Part 522 as adopted prohibits registered attorneys from providing any legal services in New York other than services provided to the attorney’s employer.

REGISTRATION REQUIREMENTS

In addition to the requirement that the applying lawyer be admitted and in good standing in a United States jurisdiction, the rule contains a reciprocity requirement: the lawyer must be admitted in at least one jurisdiction that would allow a New York attorney to register as an in-house counsel. The Bar Association proposal, which also included this requirement, suggested that this would not be an impediment for the vast majority of affected lawyers, because 44 states (not including New York) and the District of Columbia currently have a rule permitting lawyers to practice as in-house counsel without admission to the local bar. The states without such a provision are: Hawaii, Mississippi, Montana, Texas, and West Virginia.

To register, an attorney must submit to the Appellate Division of the department in which the attorney lives or works: (1) a certificate of good standing from each jurisdiction in which the attorney is licensed; (2) a letter from each jurisdiction’s grievance committee certifying whether disciplinary charges have been filed against the attorney (and, if so, the substance of the charges and the disposition); (3) an affidavit by the attorney certifying that the attorney will perform legal services in New York only for the attorney’s employer, and that the attorney will comply with the New York Rules of Professional Conduct; and (4) an affidavit or affirmation from the attorney’s employer stating that the attorney is employed as an in-house counsel for the employer. Notably, while the new Rule requires that applicants “possess the good moral character and general fitness requisite for a member of the bar of [New York],” it does not—unlike the rules governing admission to the bar on motion and licensure of Foreign Legal Consultants—contain any explicit requirement that a lawyer seeking registration as an in-house counsel submit affidavits or additional information attesting to the applicant’s good character and fitness.

An attorney’s in-house registration will terminate if the attorney ceases to be an active member of the bar in another jurisdiction, or if the attorney ceases to be employed as an in-house counsel. A registered in-house attorney who changes employers must submit an affidavit that identifies the attorney’s new employer and reaffirms that the attorney will continue to provide legal services in New York only to the attorney’s organizational employer. The attorney must also submit an affidavit or affirmation from the new employer, stating that the attorney will be employed by the employer and will provide legal services in New York only to the employer and its affiliates.
SCOPE OF PRACTICE
Registration permits an attorney to practice in New York only as an in-house counsel, defined in the rule as a full-time employee of a “non-governmental corporation, partnership, association, or other legal entity . . . that is not itself engaged in the practice of law or the rendering of legal services outside such organization.”9 A registered in-house lawyer may not appear before a tribunal in New York. Registered in-house attorneys may not hold themselves out as attorneys admitted to practice in New York (except on the employer’s letterhead with a “limiting designation”) or provide personal or individual legal services—for customers, shareholders, owners, officers, or employees of the attorney’s employer, or anyone else.10 A registered in-house lawyer may provide legal services to employees, officers, and directors of the employer, but only with regard to matters “directly related to the attorney’s work for the employer.”11 Notably, if an in-house attorney subsequently applies for admission to the bar on motion, the attorney’s time spent practicing as an in-house counsel under Part 522 is not deemed to be the “practice of law” for the purposes of the requirements that applicants for admission by motion have practiced in a jurisdiction in which they are admitted for “at least five of the seven years immediately preceding” the attorney’s application for admission.12

DISCUSSION
It has long been an open secret that some in-house counsel practice in New York without being admitted to the New York Bar. The adoption of Part 522 represents a long-overdue move to align New York with the vast majority of jurisdictions that permit out-of-state attorneys to practice as in-house counsel within the jurisdiction without taking the local bar examination. While the new rule offers no relief for non-U.S. lawyers who wish to work in-house in New York, it does permit a fairly painless path to a clearly sanctioned status in the state for U.S.-admitted lawyers.

Attorneys and employers should be mindful of the provisions regarding timing (registration must occur within 90 days of the effective date for attorneys currently employed, or subsequently within 30 days of commencing employment). If an in-house lawyer may later wish to gain full admission on motion, the lawyer should keep in mind that the time working in-house will not count to the requirement of practice in another jurisdiction in which the lawyer is admitted for five of the last seven years. For attorneys who can satisfy the requirements for admission on motion when they begin work in the state, it may be advisable to pursue admission on motion rather than registration, as the admission on motion may not be available to the lawyer after a few years of in-house practice in the state.

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ENDNOTES

1  22 NYCRR § 522.7 (2011).

2  Sullivan & Cromwell LLP partner Joe Neuhaus is chair of the Committee on Standards of Attorney Conduct, the New York State Bar Association committee that, together with committees of the City and County Bars, drafted the proposal.


5  The Texas Board of Law Examiners has issued a policy statement that allows non-Texas lawyers to practice in-house. See Texas Board of Law Examiners, Policy Statement on Practice Requirements for Rule XIII, available at http://www.ble.state.tx.us/atty_us/lawpolicy_0609.pdf.

6  22 NYCRR § 522.2 (2011).

7  Applicants for admission to the bar on motion must submit “such . . . satisfactory evidence of character and qualifications as the Appellate Division may require.” 22 NYCRR § 520.10(b)(4) (2011).

8  Applicants for licensure as Foreign Legal Consultants must submit “such . . . evidence as to the nature and extent of the applicant’s educational and professional qualifications, good moral character and fitness, and compliance with the requirements of the [rules governing practice by Foreign Legal Consultants] as [the] Appellate Division may require.” 22 NYCRR § 521.2 (2011).


11  Id.

12  22 NYCRR § 522.6 (2011); 22 NYCRR § 520.10(a)(2).
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