

Oregon State Bar
International Trade in Legal Services
Task Force Report
Part II

EXECUTIVE SUMMARY

The Oregon State Bar International Trade in Legal Services Task Force (“ITLS Task Force”) was tasked with reviewing regulations relating to the practice of law in Oregon to determine whether any “unnecessary barriers to trade” exist in contravention of free trade agreements to which the United States is a party.

The ITLS Task Force concludes as follows:

1. The current Admission Rule for House Counsel arguably stands as an unnecessary barrier to trade. It severely restricts the ability of foreign-licensed lawyers from being admitted to practice as house counsel in Oregon without any apparent consumer protection reasons.
2. Oregon RPC 8.5 determines when the Oregon RPCs should apply, as opposed to the rules of another jurisdiction, when the conduct at issue involves lawyers, clients or legal matters from multiple jurisdictions. Its application in the context of assessing conflicts of interests is particularly complicated and problematic in transnational practice.
3. The foreign legal consultant rule appears to be under-utilized, but the reasons are unclear. More information on this issue is needed.

The ITLS Task Force recommends:

1. Amend Oregon Supreme Court Admission Rule for House Counsel. Rules relating to admission may be formulated by either the Board of Governors or the Board of Bar Examiners, but ultimately must be adopted by the Oregon Supreme Court. See ORS 9.542. Prior to proposing this amendment, the Board may want to solicit comments from the membership, the Board of Bar Examiners, the Professional Liability Fund and any other stakeholders identified by the Board.
2. Direct the Legal Ethics Committee to formulate a formal ethics opinion that provides guidance in interpreting RPC 8.5, specifically, to make it clear that for conflict of interest purposes, when determining the “predominant effect” of transactional work under ABA Model Rule 8.5(b)(2), a lawyer can reasonably take into account an agreement entered into with the client’s “informed consent.”
3. Collect and monitor information about utilization of the foreign legal consultant rule and the barriers that exist to its utilization.

OSB TASK FORCE ESTABLISHMENT AND MISSION

In a Memorandum dated April 24, 2013, Michael E. Haglund, President of the Oregon State Bar, recommended to the OSB Board of Governors (“**OSB Board**” or “**Board**”) that it establish a Task Force on International Trade in Legal Services. Mr. Haglund explained that, as of 2010, Oregon ranked 22nd in the United States in foreign exports with \$17.6 billion in goods and services and that Oregon businesses and their lawyers are regularly involved in international trade and dealings with foreign lawyers, particularly in the Pacific Rim. Despite this, Oregon has not specifically studied or addressed the issues of lawyer regulation arising from globalization, cross-border practice and lawyer mobility. Mr. Haglund noted that the State Bar of Georgia and the Georgia Supreme Court adopted what appear to be fairly progressive and forward-looking regulations in this area and referenced a recent memorandum from the ABA Task Force on International Trade in Legal Services as a guide for pursuing a similar process here in Oregon.

At its meeting on May 13, 2013, the OSB Board unanimously voted to establish the OSB Task Force on International Trade in Legal Services (“**OSB ITLS Task Force**”) with the following mission:

“The Task Force shall study the impact of international developments on the legal profession including, but not limited to, the effect of the General Agreement on Trade in Services (GATS), the North American Free Trade Agreement (NAFTA), other free trade agreements having an impact on delivery of legal services, changes in the regulation of the legal profession in foreign countries that may have local impact, and all other events affecting the delivery of legal services across international borders. It shall consider these matters from the perspective of both outbound legal services delivered in foreign countries by member lawyers and inbound delivery of legal services in this state by foreign lawyers.”

Mr. Haglund appointed the following individuals to the OSB ITLS Task Force: Allan R. Abravanel (Perkins Coie LLP), John R. Bachofner (Jordan Ramis PC), Frederic E. Cann (Cann Lawyers PC), Kristie L. Gibson (Garland Nelson McCleery Wade), Dorothy E. Gilbert (K&L Gates LLP), Rene G. Gonzalez (Gonzalezlc), Michael L. Goodman (Nike, Inc.), M Christie Helmer (Miller Nash LLP), Sharlei Hsu (Smith Freed & Eberhard PC), Akana K. J. Ma (Ater Wynne LLP), Brendan R. McDonnell (K&L Gates LLP), Tim Myers (IPinfonomics LLC), Stuart Patterson (Hewlett-Packard Co.), and Alexander James Wall (Discover-e Legal LLC).

BACKGROUND

The OSB ITLS Task Force began its discussions with the premise underlying its formation, that is, free trade agreements have an effect on the delivery of legal services in Oregon and should be considered in developing lawyer regulation.

Data recently compiled by the Business Roundtable¹ shows the increasing importance of international trade to Oregon. International trade — exports and imports — supports nearly 490,000 Oregon jobs. Oregon exports tens of billions of dollars in goods and services annually. Customers in 203 countries around the world buy Oregon-grown and manufactured goods and services. Foreign-owned companies invest in Oregon and employ more than 40,000 Oregonians. Free trade agreements in particular have led to rapid export growth to partner countries. See www.brt.org/trade.

While many lawyers may be familiar with the General Agreement on Trade in Services (GATS) and the North American Free Trade Agreement (NAFTA) and their application to legal services, they may not know that the United States has negotiated 15 other international trade agreements that also apply to legal services. In her article, *From GATS to APEC: The Impact of Trade Agreements on Legal Services*, 43 Akron L Rev 875, 878 (2010), Penn State Dickinson School of Law Prof. Laurel S. Terry suggests that the routine inclusion of legal services in U.S. international trade agreements may be due to the significant role that such services play in the U.S. economy. She cites a 2009 U.S. International Trade Commission report that “described U.S. legal services as ‘very competitive in the global market,’ noting that they accounted for 54 percent of global revenue in 2007 and comprised 75 of the top 100 global firms ranked by revenue.” *Id.* at 880-881. Moreover, legal services facilitate other trade by, among other things, providing support for commercial transactions and buyer/seller relationships. *Id.* at 881.

These trade agreements are relevant to lawyer regulation because they contain a common clause requiring that parties to the treaty consider establishing “any necessary disciplines” to ensure that domestic regulation measures do not create unnecessary barriers to trade. While GATS does not override the states’ authority to regulate the practice of law within its borders, under the federal enabling legislation, the federal government arguably could compel the states to change their lawyer regulations to ensure that they do not interfere with trade agreement obligations. *Id.* at 916-917. Thus, there is general consensus that reviewing regulations relating to the practice of law for “unnecessary barriers to trade” is a prudent undertaking.

SCOPE OF PROJECT

Given the complexity and scope of the issues presented, the OSB ITLS Task Force concluded that the scope of its report and recommendations should be limited to the following six potential areas of practice by foreign lawyers physically present in Oregon (sometimes referred to herein collectively as the “**Foreign Practice Areas**” and individually as a “**Foreign Practice Area**”):

¹ Business Roundtable is an association of chief executive officers of leading U. S. companies working to promote sound public policy and a thriving U.S. economy through research and advocacy.

1. Temporary Transactional Practice by Foreign-Licensed Lawyers;
2. Foreign-Licensed In-House Counsel;
3. Permanent Practice as a Foreign Legal Consultant;
4. Temporary In-Court Appearances by Foreign-Licensed Lawyers, i.e., Pro Hac Vice Admission;
5. Full Licensure of Foreign-Licensed Lawyers as U.S. Lawyers; and
6. Multijurisdictional Delivery of Legal Services and Choice of Law.

Over the course of several meetings during the summer and fall of 2013, the OSB ITLS Task Force determined that its report and recommendations to the Board should address the following issues for each of the Foreign Practice Areas:

- A. What are the existing rules or law in Oregon that pertain to the specific Foreign Practice Area?
- B. In light of the impact of international developments on the legal profession, are there any issues or problems with the existing Oregon rules/law in light of the proposed ABA model rules?
- C. How have other states addressed the issues or problems?
- D. What are the recommendations of the OSB Task Force?
- E. If the recommendations involve a rule change or law change, what procedural steps are necessary to implement the change?
- F. Who may be impacted by the proposed rule or law change and how, including a description of any impact on consumer protection?

The OSB Task Force submitted the first installment of its report and its first recommendation relating to Temporary Transactional Practice by Foreign-Licensed Lawyers at the September 2014 Board of Governors meeting. The BOG adopted the Task Force recommendation to amend RPC 5.5(c) and presented the proposed amendment to the House of Delegates in November 2014. The House of Delegates approved the proposed amendment, and the Oregon Supreme Court adopted the RPC 5.5(c) as amended on February 10, 2015.

A summary of the OSB Task Force findings and recommendations related to the remaining foreign practice areas follows.

FOREIGN-LICENSED IN-HOUSE COUNSEL

A. Existing Rules

ORS 9.160 requires active membership in the Oregon State Bar to practice law in Oregon. Oregon Supreme Court Rules for Admission (“RFA”) 1.05(1)(a)(vi) defines the active practice of law as including “service as a house counsel to a corporation or other business entity.” Oregon RPC 5.5(b)(1) provides that a lawyer not admitted in Oregon may not establish an office or other systematic and continuous presence in Oregon for the practice of law. Thus, a lawyer licensed outside of the United States whose office is located in Oregon or who provides legal services to its employer in Oregon on a “systematic and continuous” basis must be admitted to practice in Oregon.

RFA 16.05 provides a process for obtaining a limited license to practice law in Oregon as “house counsel.” The applicant is not required to take the bar exam and need not have practiced law for a minimum period of time (as is required under the reciprocity admissions rule). In order to qualify for admission under this rule, however, the applicant must: 1) be admitted to practice law in another state, federal territory or commonwealth, or the District of Columbia; 2) present proof of graduation from an ABA-approved law school or a “satisfactory equivalent” as set forth in RFA 3.05; 3) provide proof of passage of a bar exam in a jurisdiction in which the applicant is admitted to practice; 4) provide proof of employment by a business entity authorized to do business in Oregon; 5) take and pass the Professional Responsibility Exam, and; 6) pass character and fitness to practice law requirements.

House counsel admission provides a limited license; a person so admitted must be employed by a business entity authorized to do business in Oregon and may only provide legal services to its employer. If employment with the business ends, the license is suspended. House counsel may not appear before a court or tribunal in Oregon, including any court-annexed arbitration.

B. Potential Problems with Current Rule

Notably, RFA 16.05 does not allow admission as house counsel to a lawyer who is only admitted in a jurisdiction outside of the United States. Thus, even if a foreign-licensed lawyer could show graduation from an ABA-approved law school or its substantial equivalent, that lawyer could not be admitted as house counsel in Oregon unless the lawyer was licensed in another United States jurisdiction. In effect, the house counsel admission rule is of no benefit whatsoever for a foreign-licensed lawyer. In order to provide legal services to its employer as house counsel in Oregon, a foreign-licensed lawyer would need to apply for full licensure in Oregon or become licensed in another United States jurisdiction before applying for the House Counsel License.

Requiring full licensure for foreign-licensed attorneys to serve as house counsel arguably creates an unnecessary barrier to trade. A foreign-licensed attorney may not have graduated

from an ABA approved law school or its substantial equivalent. Even if she did, she may not be admitted to practice in a jurisdiction where the Common Law of England exists as the basis of its jurisprudence. These requirements are intended to give lawyers a common base and level of knowledge of the laws of the United States in order to ensure that lawyers who practice in Oregon are competent to do so. Sophisticated business consumers of legal services who hire foreign-licensed lawyers, however, are not looking for someone knowledgeable about the laws of the United States. Instead, they are looking for lawyers who are knowledgeable about the laws of other countries. In-house foreign-licensed lawyers are usually part of a team of other in-house lawyers, some of whom are licensed in Oregon or other U.S. jurisdictions, and their expertise in foreign laws helps the business understand how the laws of multiple jurisdictions intersect. Consequently, such consumers are not likely to be concerned about or harmed as a result of foreign-licensed lawyers not having graduated from ABA accredited schools or not being admitted to practice in a common law country.

Oregon-based and multi-national companies are already hiring foreign-licensed lawyers to help solve complex international issues in commerce. In addition, foreign companies are relocating their lawyers from other countries to Oregon for a myriad of reasons including convenience, on-site expertise and cultural considerations. In other words, there is a business need for foreign-licensed in-house counsel to be located and practice out of Oregon-based corporate offices. Some businesses may not be aware of or following the current Oregon requirements for licensure of their foreign-licensed in-house counsel who are located in Oregon. Failure to do so not only implicates unlawful practice of law concerns, but could have unintended and dire consequences for a company's privileged communications. If a client has communications with a foreign-licensed lawyer who is required to be licensed in Oregon, but has not been, then such communications may not be considered privileged.

C. Other Approaches

ABA Model Rule 5.5(d) and (e) provide that foreign-licensed lawyers may provide legal services to their employers without obtaining a license to practice law in a United States jurisdiction, as long as the advice is based on the law of the jurisdiction in which they are licensed. The ABA also adopted a Model Rule for Registration of In-House Counsel who is providing services pursuant to these rules. The registration rule requires an application and registration fee along with documents proving admission to practice law and current good standing in all jurisdictions in which the lawyer is admitted and an affidavit from an authorized representative of the employing entity attesting to the lawyer's employment.

Washington liberally amended its In-House Limited Practice Exception (WA APR 8(f)) to allow lawyers admitted to practice in any United States or foreign jurisdiction to apply for a limited license to practice law as in-house counsel exclusively for a business entity. There are no CLE or MPRE requirements. Similar to the ABA Model Rule for Registration of In-House Counsel (and unlike Oregon's rule), there is no requirement that the foreign lawyer be licensed in the United States or have attended an ABA-accredited law school. Lawyers licensed as in-house

counsel cannot appear before a court or tribunal or offer legal services or advice to the public. The limited license is terminated at the end of employment with the employer.

Wisconsin chose a path similar to the ABA approach, providing for simple registration of Foreign In-House Counsel within 60 days of employment. They do not require passage of a general bar or ethics exam but such attorneys are subject to discipline. Georgia decided to only allow Foreign In-House Counsel to provide services only on a temporary basis unless licensed as a Foreign Licensed Consultant (FLC). Virginia and Texas both allow for admittance of foreign-licensed in-house counsel but Virginia does not require the residence, CLE requirements, or liability insurance as Texas requires.

D. ITLS Task Force Recommendations

The ITLS Task Force recommends that RFA 16.05 (Admission of House Counsel) be amended, in the manner provided in Appendix A, to provide a limited license for foreign attorneys admitted in another jurisdiction to practice, as house counsel for a business entity in Oregon. The proposed amendments to RFA 16.05 are similar to those enacted by the State of Washington.

The annual dues requirement would be the same for the limited house counsel license as it is for regular active members of the OSB. The ITLS Task Force recommends that house counsel license requirements include passage of the Professional Responsibility Exam and completion of a minimum number of continuing legal education credits, including an ethics component.

E. Possible Impacts

1. Effect on judicial administration.

The Board of Examiners would be impacted as they would need to administer its implementation and review and possibly revise RFA 3.05(3) entrance requirements as graduation from an ABA law school would no longer be required for House Counsel admission.

2. Effect on Oregon lawyers

A limited license for House Counsel will ensure that Oregon lawyers within a corporation are not assisting with the unlawful practice of law by employing foreign-licensed lawyers in-house. In addition, it would likely motivate foreign-licensed lawyers currently providing house counsel services in Oregon to become licensed. Foreign-licensed lawyers who obtain the Oregon House Counsel license would be considered a “lawyer” for the purposes of Oregon RPC 5.1 and 5.2. Foreign-licensed lawyers who do not obtain the House Counsel license, on the other hand, would not be considered a lawyer, but a “non-lawyer assistant” and would therefore need to be closely supervised as provided by Oregon RPC 5.3.

3. Effect on Oregon consumers

Businesses that are likely to hire foreign-licensed house counsel are typically large, sophisticated consumers of legal services. Consequently, the risk of harm to the employers of lawyers licensed as house counsel is small. For the individual consumer who may be confused by the house counsel limited license, it is important to note that a lawyer licensed as house counsel must identify the limited nature of his license; he may not hold himself out to the public as being authorized to provide legal services to anyone other than the business for which he works. This requirement provides some protection to the Oregon legal consumer.

In addition, a proposed amendment to RFA 16.05(7)(f) would ensure that only U.S. licensed lawyers admitted as House Counsel are authorized to provide pro bono legal services through a certified pro bono program. Certified pro bono programs typically provide training and supervision as well as professional liability insurance for their volunteers. Moreover, consumers could not be represented by foreign-licensed lawyers who may know little about Oregon law or courts.

One area of potential effect on Oregon consumers remains. While a lawyer employed by an organization represents the organization as such, she necessarily must communicate with its duly authorized constituents (e.g. officer, directors, employees) who act for the organization. See Oregon RPC 1.13(a). It is not uncommon for these constituents to seek advice from house counsel on personal matters. House counsel must be vigilant about reminding their employer's constituents of the restriction of their licensure in order to avoid inadvertently creating a lawyer-client relationship with those individuals and thereby violating their license restrictions.²

PERMANENT PRACTICE AS FOREIGN LEGAL CONSULTANT

A. Existing Rules

Pursuant to ORS 9.242 the Oregon Supreme Court has authority to adopt rules "permitting a person licensed to practice law in a foreign jurisdiction to advise on the law of that foreign jurisdiction in Oregon" without becoming an active member of the Oregon State Bar as required by ORS 9.160. The Supreme Court adopted RFA 12.05 pursuant to this authority, which allows a person licensed to practice law in a foreign jurisdiction to "advise on the law of that foreign jurisdiction in the state of Oregon" under certain circumstances.

RFA 12.05(2) allows licensure for those intending to practice as a foreign law consultant ("FLC") if the following qualifications are met: Licensure and activity as a lawyer for 5 of the last 7 years in a foreign jurisdiction and possessing the fitness and good moral character required

² Generally, an attorney-client relationship may be formed whenever it is reasonable under the circumstances for the potential client to look to the lawyer for advice. *In re Weidner*, 310 Or 757, 801 P2d 828 (1990).

for admission to practice as an attorney in the State of Oregon. In order to demonstrate they have satisfied these substantive qualifications, applicants are required to submit substantial background materials, in many cases similar to materials required of an Oregon Bar applicant. See RFA 12.05(3). In addition, FLCs must agree to be bound by the Oregon Rules of Professional Conduct and provide evidence of professional liability insurance in an amount either equivalent to that required for Oregon lawyers or as approved by the Board of Bar Examiners.

RFA 12.05(5) authorizes a licensed FLC to provide legal advice on the law of his or her foreign jurisdiction in the State of Oregon, subject to several limitations, including against: appearing in Oregon Court (with some exceptions); advising on United States real estate, trust & estate, or domestic relations issues, and; advising on United States law (including Oregon, Federal, or the laws of another state).

B. Potential Problems with Current Rule

While 60% of states license or register foreign legal consultants, actual utilization is quite limited to only a few states. The National Conference on Bar Examiners (NCBE) 2013 Statistics Guide lists 128 newly registered FLCs in the United States, with 60 in Florida, 26 in New York, 13 in California and the District of Columbia, and 8 in Texas.

Oregon is not included in the NCBE statistics. The Oregon Rule for Admission of Foreign Legal Consultants is very similar to the ABA Model Rule for the Licensing and Practice of Foreign Legal Consultants. The one notable difference is the requirement for professional liability insurance similar to the PLF. The ITLS Task Force is aware of no complaints regarding the Oregon requirements; however, only one applicant has completed the process in the last 15 years and there is speculation that the requirement for PLF-like insurance may be unrealistic.

The Texas Report identified several potential concerns with requirements similar to Oregon's (discussed in more detail below), including: (i) poor utilization by foreign lawyers, (ii) lack of clarity on privileges and immunities, particularly by in-house counsel, and (iii) cumbersome and expensive application processes.

C. Other Approaches

As noted above, 60% of states have FLC regulatory regimes. Oregon and Washington have based theirs on the ABA Model Rule; California declined to adopt the ABA's model rule and rely on a preexisting approach. The Texas Report is the most recent study of the subject we were able to identify and the history of FLC regulation that state is instructive.

In 2005, Texas modernized its approach to FLCs, by (i) modernizing and basing on the ABA Model Rule on Foreign Legal Consultants (albeit with some relatively minor changes); (ii) update the foreign practice requirements, including where such services have been provided and shortening the length of service requirements; (iii) giving greater certainty as to the eligibility of FLCs to have their communications treated as subject to applicable privileges; and

(iv) subjecting FLCs to the CLE regime and Texas professional rules and regulations. The Texas Report concluded that while these reforms “succeeded in raising awareness in the state of cross-border licensing issues, and the number of registered FLCs increased to some degree” due to “the burdensome nature of the current application and renewal process, as well as the limited scope the current rule provides to address the needs of in-house counsel, there is potential to increase the use of the FLC Rule in Texas.”

Therefore, the Texas report recommended 3 enhancements:

- Simplification application process by removal of foreign practice requirement and modification of proof required in support of the application for certification;
- Simplification of renewal process by removal of need for de novo application and review, instead, renewal is based on sworn compliance statements more akin to the process for renewal of a law license; and
- Clarification of scope and applicability to in-house counsel.

D. ITLS Task Force Recommendations

The Task Force is recommending no changes to the admission rule for foreign legal consultants at this time. The Task Force does recommend, however, monitoring the applications for admission under this rule and collecting information about what provisions appear to pose the greatest burden. Armed with this information, the Board of Governors may want to consider revisiting this rule in 3-5 years to determine whether revisions should be made at that time that are similar to those adopted in Texas and as described below.

E. Possible Impacts

Were the Board to decide to revise the admission rule for foreign legal consultants to align more closely with Texas, the Task Force sees a low probability of negatively impacting Oregon residents.

Most of the changes would merely simplify the application process and provide clarity about the status of a foreign legal consultant for privilege purposes. The one exception would be the malpractice insurance requirement. If this requirement were removed entirely, it could have a negative impact on consumers. On the other hand, if the requirement were simply changed to reflect the market availability of professional liability insurance, the burden on FLCs would be reduced while still providing protection to the public.

Additionally, in reviewing the analysis performed by other states, the Task Force found no evidence that foreign lawyers are inclined to face higher rates of bar complaints or sanctions. Whether the Oregon State Bar wishes to take as open an approach as proposed in the Texas Report, the Task Force could not identify any material consumer protection concerns arising from clarifying these rules.

PRO HAC VICE ADMISSION FOR FOREIGN-LICENSED LAWYERS

A. Existing Rules

Pro hac vice admission in Oregon is generally governed by rules promulgated by the Oregon Supreme Court, as authorized by ORS 9.241, which states that, “[s]ubject to those rules, an attorney who has not been admitted to practice law in this state may appear as counsel for a party in an action or proceeding before a court... if the attorney is associated with an active member of the Oregon State Bar.” UTCR 3.170 further provides the logistical requirements for obtaining pro hac vice admission of a foreign lawyer. It requires the lawyer to:

- (1) Show that the lawyer is in good standing in another state or country;
- (2) Certify that the lawyer is not subject to pending disciplinary proceedings in any other jurisdiction or provide a description of the nature and status of any pending disciplinary proceedings;
- (3) Associate with an active member in good standing of the Oregon State Bar ("local attorney") who must participate meaningfully in the matter;
- (4) Certify that the lawyer will: comply with applicable statutes, law, and procedural rules of the state of Oregon; be familiar with and comply with the disciplinary rules of the Oregon State Bar; and submit to the jurisdiction of the Oregon courts and the Oregon State Bar with respect to acts and omissions occurring during the out-of-state attorney's admission under this rule;
- (5) Be insured for his/her practice of law in Oregon;
- (6) Agree, as a continuing obligation, to notify the court or administrative body promptly of any changes in the out-of-state attorney's insurance or status;
- (7) Pay any fees required

Thus, the rule for pro hac vice admission of a foreign lawyer is already well-defined, and subject to oversight by the court in which that lawyer will be appearing. “[A]pppearance in Oregon Courts as pro hac vice counsel is a privilege not a right.” *Tahvili v. Washington Mut. Bank*, 224 Or App 96, 109 (2008) (citing ORS 9.241 and *Leis v. Flynt*, 439 U.S. 438, 442-443 (1979)).

B. Potential Problems

The Task Force sought records to determine the prevalence of pro hac vice admission in Oregon, whether the requirements for admission pose any unnecessary barriers to foreign lawyer, and whether there were any problems for consumers of services provided by lawyers admitted pro hac vice. While the number and originating jurisdiction of pro hac vice admissions are not currently tracked by the Oregon State Bar, the oversight of such admissions by judges, the meaningful participation of local counsel, and the requirement of insurance, appear to maintain proper consumer protection and quality control. In addition, because the current rule allows pro hac vice admission by lawyers from other countries, the rule does not appear to impose an unnecessary barrier to trade in legal services. Little anecdotal history could be located to suggest issues or problems to be corrected.

C. Other Approaches

Other states surveyed by the sub-committee had similar regulations or rules requiring application to a court for pro hac vice admission. All require local counsel participation, although the participation specified varies from state to state. Washington, like Oregon, imposes a requirement for meaningful participation by the local counsel. Some states limit the number of pro hac vice admissions that may be obtained by an attorney before they must apply for regular admission to practice in that state. As of August 2012, only fifteen states allowed lawyers from outside the United States to appear pro hac vice in their courts. Oregon is unique in its requirement for malpractice insurance.

D. ITLS Task Force Recommendations

The Task Force considered a number of possible changes, including minimum language proficiency, some educational equivalency certification, or greater specificity on “meaningful participation” in the rule. Ultimately, however, the Task Force concluded that no changes should be made to the current rules in place. The possible issues are well-served and flexible given the direct judicial oversight that presently exists. Judges ultimately have the discretion to determine the level of participation by the local attorney, and will naturally limit participation if problems develop.

Accordingly, the Task Force does not recommend any changes to the pro hac vice rules at this time.

E. Possible Impacts

None anticipated.

FULL LICENSURE OF FOREIGN-LICENSED LAWYERS

A. Existing Rules

ORS 9.220 provides the minimum requirements for an applicant for admission to practice law in Oregon. An applicant must be at least 18 years old, of good moral character and fit to practice law, and have the requisite learning and ability to practice law.

Oregon Rule for Admission 3.05 puts forth more detailed qualifications for applicants to be eligible to sit for the bar exam. Specifically, an applicant must meet the requirements of one of the following:

- 1) Be a graduate of an ABA-accredited law school, with either a JD or LLB degree; or
- 2) Be a graduate of any law school in the United States, and
 - a. Be admitted to practice in another state where the requirements of admission are substantially equivalent to those in Oregon, and
 - b. Have been actively, substantially and continuously engaged in the practice of law for at least three of the last five years; or
- 3) Be a graduate of a law school in a foreign jurisdiction that is equivalent to an ABA-certified law school, and

Be admitted to practice law in a foreign jurisdiction where the Common Law of England exists as a basis of its jurisprudence and where the requirements for admission to practice are substantially equivalent to those in Oregon.

B. Potential Problems

Applicants who attended law school in a foreign jurisdiction have the burden of showing that the school they attended is equivalent to an ABA-accredited school and that the admission requirements in their home jurisdiction are substantially equivalent to those in Oregon. Further, jurisprudence in their home jurisdiction must be based upon English Common Law, and they must be licensed in their home jurisdiction. These requirements might be considered unduly burdensome on attorneys from non-Common Law countries, effectively being a bias toward former English colonies being admitted. The Task Force believes, however, that this requirement is directly related to the required legal skill of interpreting cases; non-Common Law countries do not generally follow case precedents. Therefore, the Task Force believes that requirements that ensure adequate education in Common Law precepts are important. On the other hand, the purpose of the requirements of licensure in the jurisdiction where the applicant attended school and that licensing requirements in that jurisdiction be the same as in Oregon,

is unclear. Without a clear consumer protection purpose for these requirements, they may stand as an unnecessary burden to licensure in the United States by applicants who received their legal education outside of the United States.

C. Other Approaches

Only a small minority of States: Alabama, Alaska, Colorado, Hawaii, Nevada, New Hampshire, Utah, Vermont, Washington, West Virginia, and Wisconsin share Oregon's requirement of admission to a common law-based foreign jurisdiction.

D. ITLS Task Force Recommendations

The Task Force determined that the aforementioned requirements are all clearly supportive of the legislative intent to maintain the quality of licensed legal practitioners in Oregon. The second requirement bore some discussion, but ultimately the Task Force determined there was no compelling reason to change it as there does not appear to be a huge demand for full licensure in Oregon by foreign-licensed lawyers given the other options available for limited licensure and temporary practice.

E. Possible Impacts

None anticipated.

MULTIJURISDICTIONAL DELIVERY OF LEGAL SERVICES AND CHOICE OF LAW

A. Existing Rules

Oregon RPC 8.5 was adopted in 2005 in connection with the approval of certain amendments to Oregon RPC 5.5 ("Unauthorized Practice of Law; Multijurisdictional Practice") that relate to the multijurisdictional practice of law. It is modeled after ABA Model Rule 8.5. The comments to ABA Model Rule 8.5 affirm that many lawyers face severe conflict dilemmas by practicing in a global world. The lawyer may be licensed to practice in more than one jurisdiction with differing rules, or may be admitted to practice before a particular court with rules that differ from those of the jurisdiction or jurisdictions in which the lawyer is licensed to practice. Additionally, the lawyer's conduct may involve significant contacts with more than one jurisdiction.

Oregon RPC 8.5 sets forth the disciplinary authority of the Bar, and includes a group of guidelines to determine which laws and regulations will apply in exercising that disciplinary authority. A copy of Oregon RPC 8.5 is attached to this memorandum as Appendix B.

Oregon RPC 8.5(a) sets forth the disciplinary authority of the Oregon State Bar in several situations; the Oregon State Bar may seek to discipline:

- A lawyer admitted to practice in Oregon, regardless of where the conduct occurs; and
- A lawyer not admitted to practice in Oregon, if the lawyer provides or offers to provide legal services in Oregon.

In addition, Oregon RPC 8.5(a) notes that a lawyer may be subject to disciplinary authority in Oregon and another jurisdiction for the same conduct.

Oregon RPC 8.5(b) sets forth several guidelines for the choice of law in these circumstances, by seeking to resolve potential conflicts. Its premise is that minimizing conflicts between rules, as well as uncertainty about which rules are applicable, is in the best interest of both clients and the profession (as well as the bodies having authority to regulate the profession) and clarifies the disciplinary measures that the Bar may impose:

1. Conduct Before a Tribunal.

For a lawyer's conduct before a "tribunal," Oregon RPC 8.5(b)(1) provides that the law of the jurisdiction where the tribunal sits will apply (unless that law of that jurisdiction provides otherwise).

If appearing before a foreign tribunal, an Oregon lawyer must become knowledgeable about the ethics rules of the foreign jurisdiction in which the tribunal is located. Under this rule, therefore, if an arbitration tribunal seeking to resolve a dispute between two parties from the United States happens to be sitting in London or The Hague, an Oregon attorney appearing before that tribunal will be required to conform his or her behavior with the ethical norms of Great Britain and The Netherlands, unless rules of the tribunal provide otherwise. This compliance may be particularly difficult when the ethics rules are in a foreign language, when the lawyer's appearance is for only a brief period, or when the lawyer may be relying on local counsel to guide him or her in the proceeding.

The Commission considered a more sweeping proposal to change ABA Model Rule 8.5(b)(1) to make United States law the default choice of law for all international tribunals, but that proposal, and others that might have provided different automatic default choice of law rules, were rejected by the Commission and not considered by the ABA House of Delegates. The Task Force has not addressed any changes to the "tribunal rule," therefore, in our considerations.

2. Other Conduct.

For other conduct, Oregon RPC 8.5(b)(2) provides that the disciplinary rules of the jurisdiction in which the conduct occurred, or, if the "predominant effect" of the conduct is in a different jurisdiction, the rules of that jurisdiction, shall be applied to the conduct. A lawyer will not be subject to discipline, however, if the lawyer's conduct conforms to the rules of a

jurisdiction in which the lawyer reasonably believes the “predominant effect” of the lawyer’s conduct will occur. Determining the jurisdiction in which the “predominant effect” of an Oregon lawyer’s conduct occurs, and assessing whether the lawyer “reasonably believes” the accuracy of that choice, are challenging, since there is little guidance as to the meaning of those terms in the Oregon Rules of Professional Conduct.

B. Potential Problems with Current Rules

Pursuant to Comment [7] to ABA Model Rule 8.5, the Model Rule is intended to apply not only to the multistate practice of law, but also to transnational legal activity, unless international law, treaties or other agreements provide otherwise. Although Oregon has not adopted the comments to the ABA Model Rules, it is generally assumed that Oregon RPC 8.5 will apply to the transnational practice of law as well.

The ABA Commission proposed only one change impacting Rule 8.5. That proposed change, which was set forth in Resolution 107D presented to the ABA House of Delegates, called for the amendment of a comment to ABA Model Rule 8.5 to clarify the meaning of the term “predominant effect.” Resolution 107D was approved by the ABA House of Delegates on February 11, 2013.

Resolution 107D added a new sentence to comment [5] on the choice of law provisions of ABA Model Rule 8.5 to make it clear that for conflicts of interest purposes, when determining the “predominant effect” of transactional work under ABA Model Rule 8.5(b)(2), a lawyer can reasonably take into account an agreement entered into with the client’s “informed consent.” The amended version of comment [5] reads as follows (with the newly added text marked with underscoring):

[5] When a lawyer’s conduct involves significant contacts with more than one jurisdiction, it may not be clear whether the predominant effect of the lawyer’s conduct will occur in a jurisdiction other than the one in which the conduct occurred. So long as the lawyer’s conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect will occur, the lawyer shall not be subject to discipline under this Rule. With respect to conflicts of interest, in determining a lawyer’s reasonable belief under paragraph (b)(2), a written agreement between the lawyer and client that reasonably specifies a particular jurisdiction as within the scope of that paragraph may be considered if the agreement was obtained with the client’s informed consent confirmed in the agreement.

The new sentence that was added to comment [5] indicates, in essence, that for conflict of interests purposes only, if a lawyer and a client have reached an agreement on the governing conflicts rules, then the lawyer may take that agreement into account when evaluating whether he or she has a reasonable belief that the predominant effect of the conduct will be in a particular jurisdiction.

C. Other Approaches

In their original consideration of the ABA Model Rules, some states approved the rules (with or without modifications) and the related comments, while other states, like Oregon, adopted only the text of the Rules without the related comments. The ABA is now reporting that a number of states are considering changes, either to their rules or, if applicable, to the comments to their rules, following the approval by the ABA House of Delegates of the Commission proposals.

Only one state appears to have taken action on the comment change to ABA Model Rule 8.5 proposed by the Commission. On August 26, 2013, the Supreme Court of Delaware approved a change to the comment to Rule 8.5 of the Delaware Lawyers' Rules of Professional Conduct to incorporate the language. See: http://courts.delaware.gov/rules/DLRPC_rule%208-5.pdf.

D. ITLS Task Force Recommendations

The Task Force recommends that with respect to conflict of interest issues in the multijurisdictional practice of law, and the determination of the lawyer's reasonable belief under Oregon RPC 8.5(b) as to the jurisdiction in which the lawyer reasonably believes the predominant effect of his or her conduct to have occurred, a written agreement between the lawyer and the client that reasonably specifies the jurisdiction should be considered, if the agreement has been obtained with the client's informed consent confirmed in the agreement. This recommendation is consistent with the recent change recommended by the Commission and approved by the ABA House of Delegates with respect to ABA Model Rule 8.5.

The Task Force endorses the change approved by the ABA House of Delegates, although the change finally submitted by the Commission and approved by the ABA House of Delegates accomplished far fewer clarifications than what several legal commentators were advocating. We see a good deal of merit in some of these alternative proposals, but we have limited our recommendation to the one change approved by the ABA House of Delegates.

This recommendation is a preliminary, conservative response to a much broader problem arising from the provision of legal services by Oregon attorneys in foreign jurisdictions, and from similar activities by non-U.S. attorneys in Oregon. A jurisdiction outside of the United States, for example, may not have a conflicts of interest rule that relies on an analysis of the lawyer's "reasonable belief" of the "predominant effect" of the conduct taken, and may resort to entirely different rules to determine whether its ethical norms should govern the lawyer's behavior. Moreover, the proposed change only relates to conflicts of interest issues, and does not attempt to resolve other lawyer ethical duties, such as the duty of confidentiality, which may differ in foreign jurisdictions from the duty as it is interpreted in Oregon and elsewhere in the United States.

The Commission could have proposed to make a written agreement, delivered with the client's "informed consent," binding on the client with respect to issues of conflicts of interest. Instead, the Commission limited the impact of the agreement to be relevant in a determination of the lawyer's reasonable belief in paragraph (b)(2) of ABA Model Rule 8.5. While the Task Force might have favored a more forceful proposal that gave binding effect to a choice of law agreed to in a written agreement entered into by the client, the Task force is prepared to endorse the more restrained solution devised by the Commission, and approved by the ABA House of Delegates, that makes the written agreement relevant to a determination of the lawyer's reasonable belief.

The Task Force nonetheless submits this recommendation with the understanding that it is a step in a longer process of clarification and revision of the Oregon Rules of Professional Conduct that will be required to address changing patterns of practice in an increasingly globalized profession.

E. Possible Impacts

The primary purpose of this proposed change is to bring more certainty to the relationship between lawyer and client by defining more clearly the meaning of "predominant effect" under Oregon RPC 8.5(b)(2).

As the Commission noted in its report on this proposed change, one question is whether agreements on choice of law benefit lawyers at the expense of clients. The Commission concluded, and the Task Force concurs, that the proposal change has significant benefits for both parties. Under Oregon RPC 8.5(b)(2), if a conflict issue arises and the rules of two or more jurisdictions could reasonably apply, a lawyer can simply choose the jurisdiction that favors the lawyer without ever consulting the client. As long as that choice is "reasonable," the lawyer will face no disciplinary consequences, even if the lawyer's choice is ultimately deemed to be incorrect and even though the client was never consulted. Thus, an agreement not only provides the lawyer with greater confidence of the jurisdiction whose conflict rules will apply, but it also enables the client to participate in the choice.

The proposed change would also require the agreement to be entered into with the "informed consent" of the client, as defined under Oregon RPC 1.0(g):

"Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct. When informed consent is required by these Rules to be confirmed in writing or to be given in a writing signed by the client, the lawyer shall give and the writing shall reflect a recommendation that the client seek independent legal advice to determine if consent should be given.

The agreement will not bind third parties (such as other clients of the firm). For this reason, the proposed language makes clear that the agreement is only intended to provide guidance in determining a lawyer's reasonable belief under Oregon RPC 8.5(b)(2) in connection with the representation of the client entering into the agreement.

While the referral to this agreement might result in the application of non-U.S. conflict rules, which are sometimes more permissive than the conflict rules in the United States, this possibility already exists under Oregon RPC 8.5(b). For example, if the London office of a law firm is handling a transactional matter that is heavily centered in the United Kingdom, Oregon RPC 8.5(b)(2) suggests that the United Kingdom rules might apply to the firm's representation of that client.

In sum, the Task Force recommends the issuance of a formal ethics opinion by the Bar to put in place the proposed change to the comment to ABA Model Rule 8.5(b)(2) regarding the effect of agreements on choice of law in multijurisdictional transactions. We believe this change will bring more certainty and clarity to the representation of clients in multijurisdictional transactions, without sacrificing the interests of clients, the Bar or the public.

Appendix A

OREGON SUPREME COURT RULES OF ADMISSION

RULE 16.05

LIMITED ADMISSION OF HOUSE COUNSEL

An attorney employed by a business entity authorized to do business in Oregon, who has been admitted to practice law in another state, federal territory or commonwealth or the District of Columbia, or in any foreign jurisdiction, may be admitted to practice law as house counsel in this state, subject to the provisions, conditions and limitations in this rule, by the following procedure:

- (1) The attorney, if at least 18 years of age, may apply for admission to practice law as house counsel by:
 - (a) Filing an application as prescribed in Rule 4.15; and
 - ~~(b) Presenting satisfactory proof of graduation from an ABA approved law school with either a (1) Juris Doctor (J.D.) or (2) Bachelor of Law (LL.B.) degree; or satisfaction of the requirements of rule 3.05(3);~~
 - ~~(c)~~ Presenting satisfactory proof of ~~passage of a bar examination or~~ (i) admission to the practice of law in a jurisdiction in which the applicant is admitted to the practice of law and current good standing in any jurisdiction; and (ii) good moral character and fitness to practice; and
 - ~~(d)~~ Providing verification by affidavit signed by both the applicant and the business entity that the applicant is employed as house counsel and has disclosed to the business entity the limitations on the attorney to practice law as house counsel as provided by this rule.
- (2) The applicant shall pay the application fees prescribed in Rule 4.10.
- (3) The applicant shall be investigated as prescribed in Rule 6.05 to 6.15.
- (4) The applicant shall take and pass the Professional Responsibility Examination prescribed in Rule 7.05.
- (5) If a majority of the non-recused members of the Board considers the applicant to be qualified as to the requisite moral character and fitness to practice law, the Board shall recommend the applicant to the Court for admission to practice law as house counsel in Oregon.

(6) If the Court considers the applicant qualified for admission, it shall admit the applicant to practice law as house counsel in Oregon. The applicant's date of admission as a house counsel member of the Oregon State Bar shall be the date the applicant files the oath of office with the State Court Administrator as provided in Rule 8.10(2).

(7) In order to qualify for and retain admission to the limited practice of law as house counsel, an attorney admitted under this rule must satisfy the following conditions, requirements and limitations:

(a) The attorney shall be limited to practice exclusively for the business entity identified in the affidavit required by section (1)(d) of this rule, and except as provided in subsection 7(f) below regarding pro bono legal services, is not authorized by this rule to appear before a court or tribunal, or offer legal services to the public; Participating as an attorney in any arbitration or mediation that is court-mandated or is conducted in connection with a pending adjudication shall be considered an appearance before a court or tribunal under this rule.

(b) All business cards, letterhead and directory listings, whether in print or electronic form, used in Oregon by the attorney shall clearly identify the attorney's employer and that the attorney is admitted to practice in Oregon only as house counsel or the equivalent;

(c) The attorney shall pay the Oregon State Bar all annual and other fees required of active members admitted to practice for two years or more;

(d) The attorney shall be subject to ORS Chapter 9, these rules, the Oregon Rules of Professional Conduct, the Oregon State Bar's Rules of Procedure, the Oregon Minimum Continuing Legal Education Rules and Regulations, and to all other laws and rules governing attorneys admitted to active practice of law in this state;

(e) The attorney shall promptly report to the Oregon State Bar: a change in employment; a change in membership status, good standing or authorization to practice law in any jurisdiction where the attorney has been admitted to the practice of law; or the commencement of a formal disciplinary proceeding in any such jurisdiction.

(f) ~~The An~~ attorney admitted in another United States jurisdiction may provide pro bono legal services through a pro bono program certified by the Oregon State Bar under Oregon State Bar Bylaw 13.2, provided that the attorney has professional liability coverage for such services through the pro bono program or otherwise, which coverage shall be substantially equivalent to the Oregon State Bar Professional Liability Fund coverage plan.

(8) The attorney shall report immediately to the Oregon State Bar, and the admission granted under this section shall be automatically suspended, when:

(a) Employment by the business entity is terminated; or

(b) The attorney fails to maintain active status or good standing as an attorney in at least one jurisdiction; or

(c) The attorney is suspended or disbarred for discipline, or resigns while disciplinary complaints or charges are pending, in any jurisdiction.

(9) An attorney suspended pursuant to section (8)(a) of this rule shall be reinstated to practice law as house counsel when able to demonstrate to the Oregon State Bar that, within six months from the termination of the attorney's previous employment, the attorney is again employed as house counsel by a qualifying business entity, and upon verification of such employment as provided in section (1)(d) of this rule.

(10) An attorney suspended pursuant to section (8)(b) of this rule shall be reinstated to practice law as house counsel when able to demonstrate to the Oregon State Bar that, within six months from the attorney's failure to maintain active status or good standing in at least one other jurisdiction, the attorney has been reinstated to active status or good standing in such jurisdiction.

(11) Except as provided in sections (9) and (10) of this rule, an attorney whose admission as house counsel in Oregon has been suspended pursuant to section (8) of this rule, and who again seeks admission to practice in this state as house counsel, must file a new application with the Board under this rule.

(12) The admission granted under this section shall be terminated automatically when the attorney has been otherwise admitted to the practice of law in Oregon as an active member of the Oregon State Bar.

(13) For the purposes of this Rule 16.05, the term "business entity" means a corporation, partnership, association or other legal entity, excluding governmental bodies, (together with its parents, subsidiaries, and affiliates) that is not itself engaged in the practice of law or the rendering of legal services, for a fee or otherwise.

(14) For the purposes of this Rule 16.05, "tribunal" means all courts and all other adjudicatory bodies, including arbitrations and mediations described in Rule 16.05(7)(a), but does not include any body when engaged in the promulgation, amendment or repeal of administrative or other rules.

Appendix B

OREGON RULES OF PROFESSIONAL CONDUCT

RULE 8.5

DISCIPLINARY AUTHORITY; CHOICE OF LAW

(a) **Disciplinary Authority.** A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.

(b) **Choice of Law.** In any exercise of the disciplinary authority of this jurisdiction, the Rules of Professional Conduct to be applied shall be as follows:

(1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and

(2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.