
MEMORANDUM

TO: TEXAS SUPREME COURT ADVISORY COMMITTEE

FROM: AD HOC COMMITTEE ON REGISTRATION OF OUT-OF-STATE IN-HOUSE-COUNSEL – ROBERT LEVY AND KIM PHILLIPS

SUBJECT: PROPOSED RULE ON REGISTRATION OF OUT OF STATE IN-HOUSE COUNSEL

DATE: 10/30/2019

CC: SUSAN HENRICKS, ALLAN COOK; BOARD OF LAW EXAMINERS

We have reviewed the proposed new Rule 23 to the [Rules Governing Admission to the State Bar of Texas](#) providing for registration of out-of-state in house counsel and have consulted with Susan Henricks, Executive Director of the Texas Board of Law Examiners (BLE) and Allan Cook, General Counsel of the BLE. We offer the following comments and questions. (The BLE is amenable to considering changes in the proposed rule and will submit an updated draft following input from the TSCAC.)

The Texas Board of Law Examiners submitted the proposed rule to the Texas Supreme Court to establish a process to permit in-house attorneys not licensed in Texas to register with the State Bar of Texas. Currently the only procedures for Out of State attorneys to formally practice law in Texas are as follows:

- The [Texas Rules Governing Admission to the Texas Bar Rule 13](#) requires out of state attorneys must meet all the fitness to practice requirements for Texas attorneys and either:
 - sit for the Texas Bar or
 - waive into the bar (requiring at least 5 of 7 years of continuous practice).ⁱ
- The [Texas Government Code Section 82.0361](#) and [Texas Rules Governing Admission to the Texas Bar Rule 19](#) specifies the procedures and fees for out of state attorneys to appear *pro hac vice* in a Texas court.
- Foreign attorneys may become certified in Texas as a [Foreign Legal Consultant](#).

Notably, this proposed rule does not mandate that lawyers licensed in other jurisdictions must register in Texas as a condition to working in Texas as In-House-Counsel: to explicitly require registration would likely require amending either the Texas Bar Act or the Texas Disciplinary Rules of Professional Conduct. The preamble to the draft Rule states: “Registered In-House Counsel are permitted to lawfully provide legal services to Business Organizations in Texas without becoming a member of the State Bar of Texas.” The proposed Rule at §4(a) provides that attorneys seeking registration as In-House-Counsel may file with the Board, but its language does not mandate that out of state attorneys follow this process in order to be employed as In-House-Counsel for a corporation (or other business entity) in Texas.

Texas Ethics Opinions have addressed the issue of whether in house counsel performing legal work for their employers constitutes the unauthorized practice of law. (See e.g. [Texas Ethics Opinion 407](#), [Texas Ethics Opinion 516](#) and [Texas Ethics Opinion 531](#)) This arguably suggests that unregistered attorneys are not authorized to practice law in Texas courts, but this conclusion is not clear in applicable rules. The proposed rule does not include an enforcement mechanism; there is no sanction for failing to register other than termination of the registration (See §6).

This proposed rule will align Texas with a majority of states that have procedures for registration of out of state attorneys working in-house for corporations with offices or activities in other states. [See 2017 ABA List of In House Corporate Registration Rules](#). The [California](#), [Florida](#), [New Jersey](#), [New York](#) and [Pennsylvania](#) rules were used as a model as was the [2016 ABA Model Rule for Registration of In House Counsel](#).

The proposed Texas rule will apply to attorneys licensed in other states and arguably in other foreign jurisdictions (the current version of the rule does not clearly apply in all respects to counsel licensed in other countries). Therefore, attorneys licensed as attorneys in other countries can use this registration procedure. This could create concerns because the licensing requirements in some countries are materially different than those in the states; for example, many attorneys in Holland are classified as *juristen* or *advocaten*. Juristen do not have to specifically qualify for the legal bar in Holland. Advocaten study law and article with firms before qualifying and registering with the bar.

The Rule does not clearly require The Registration is intended to become effective when the registrant files their registration papers with the Board, even if the approval process is delayed. Attorneys who register under this rule will be able to apply for admission to the Texas Bar after 3 of 5 years of continuous registration (versus the current 5 out of 7 years for attorneys licensed in other states).

The following are additional questions and issues with the proposed rule:

1. The lack of an enforcement mechanism will create uncertainty as to whether registration is required or voluntary.
2. The rule should expressly state that it applies to lawyers licensed in other states and foreign jurisdictions. The current draft does not clearly reference both categories of lawyers in §1 (a).
3. Should the rule apply to out of state attorneys who are contractors (versus employees) of Texas sited corporations?
4. The proposal specifies certain legal activities that registered out of state attorneys may not perform. This carve-out is based on [Texas Government Code Section 83.001](#) which provides that only licensed attorneys may receive compensation for preparation of a legal instrument affecting title to real property, including deeds, deeds of trust, notes, mortgages, and transfers or release of lien. The current proposed rule requires Registered Out of State Attorneys to meet Texas CLE requirements even if their home state CLE requirements are less than Texas' requirements.
5. In §3, the Disclosure Rule, Registered Attorneys are required to state *in every communication outside of their employing company* that they are not licensed to practice law in Texas. This requirement arguable obligates the attorney to give the notification in any communication, including face to face discussions, telephone conversations, texts and emails to third parties (including communications to opposing counsel and to governmental agencies). This would be onerous and raises the question of the consequence of failure to properly disclose.

6. Section 5(a)(4) provides that the registration lapses after the individual relocates outside of the state for 180 days or more. This should be clarified to indicate consecutive days or 180 days within a 12 month period to avoid issues where in house counsel are working abroad on multiple short term assignments yet their residence continues to be in Texas.
 7. The Rule does not provide a specific requirement for when attorneys must seek registration. In §1(a)(3), a Registered In-House-Counsel is a lawyer who either resides in Texas or will reside within six months of application. The rule arguably enables an In-House-Counsel to defer registration.
 8. Section 2(a)(4) permits registered attorneys to participate in *pro bono* representation in Texas; the language should be clarified to be consistent with the recently passed [New Opportunities Volunteer Attorney program \(NOVA\) under Article XIII of the State Bar Rules](#).
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ⁱ In 2017, The Texas Supreme Court permitted temporary authorization for out of state attorneys to practice in Texas if related to Hurricane Harvey relocations.
<http://www.txcourts.gov/media/1438805/179099.pdf>