

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

Recommendation

The ITLS Task Force recommends that Oregon RPC 5.5 be amended to allow foreign-licensed lawyers to practice in Oregon on a temporary basis under the same terms and conditions as lawyers licensed in other U.S. jurisdictions.

Background

On May 13, 2013, at the suggestion of then-President Michael E. Haglund, the OSB Board of Governors established a Task Force on International Trade in Legal Services (“OSB ITLS Task Force”). The BOG charged the 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.”

The following individuals were appointed to the OSB ITLS Task Force: Allan R. Abravanel (Perkins Coie LLP), John R. Bachofner (Jordan Ramis PC), Frederic E. Cann (Cann Lawyers PC), Kritie 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.), Alexander James Wall (Discover-e Legal LLC).

OSB ITLS Task Force Mission and Scope

Given the complexity and scope of the issues presented, the OSB ITLS Task Force concluded that 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. Temporary Transactional Practice by Foreign-Licensed Lawyers;
2. Foreign-Licensed In-House Counsel;
3. Permanent Practice as a Foreign Legal Consultant;
4. Temporary Court Appearance by Foreign-Licensed Lawyers (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.

This report summarizes the Task Force findings and recommendations relating to Temporary Transactional Practice by Foreign-Licensed Lawyers so that the Board can make a decision about whether to include the Task Force’s proposed amendment to RPC 5.5(c) in the 2014 HOD agenda.

Temporary Transactional Practice by Foreign-Licensed Lawyers

A. Existing Rules

ORS 9.241 authorizes the Oregon Supreme Court to adopt rules allowing the temporary practice of law in Oregon by lawyers not licensed in the state. To that end, when the Court adopted the Oregon Rules of Professional Conduct in 2005, it included a temporary practice rule. Oregon RPC 5.5(c) allows lawyers licensed in another U.S. jurisdiction to provide legal services in Oregon on a temporary basis under certain circumstances. In addition, Oregon RPC 5.5(d) allows lawyers licensed in other U.S. jurisdictions to provide legal services in Oregon when federal law specifically authorizes them to do so. Out-of-state lawyers may not establish a “systematic or continuous presence” within Oregon, nor hold themselves out to the public as admitted to practice in Oregon unless that is, in fact, the case.

Notably, RPC 5.5(c) and (d) do not apply to or otherwise address temporary law practice by lawyers licensed outside of the United States.

B. Potential Problems with Existing Rule

There are problems with the current approach. Given the pervasive expansion of international business transactions noted above, and lawyers’ interests in supporting and advancing their clients’ objectives in such matters, the OSB ITLS Task Force believes that more lawyers from outside the United States will seek to visit Oregon to provide legal services to their clients and that Oregon lawyers have an interest in encouraging

such visits for the benefit of their clients. Although the OSB ITLS Task Force found no empirical evidence for this belief, its members recounted numerous examples from their own experiences of needing or wanting foreign lawyers to provide legal services on a temporary basis to their clients.

In one case, the general counsel of a company headquartered in France came to Oregon to provide legal assistance to its client in the purchase of a company in Oregon. The general counsel hired a local lawyer to handle the Oregon transaction, but it was vital for the Oregon lawyer to have the general counsel present to participate in negotiating and advising the client regarding the transaction. While one could argue that the French general counsel was not really practicing law in Oregon, task force members expressed concerns that the activities were not clearly authorized under current Oregon rules.

More importantly, the ITLS Task Force was unable to identify a good reason for this barrier to the provision of legal services by foreign lawyers. OSB ITLS Task Force members found it difficult to determine how a foreign-licensed lawyer would pose any more of a risk to consumers than an out-of-state lawyer would when providing services on a temporary basis as allowed under RPC 5.5(c).

Under both RPC 5.5(c)(1) and (2), any legal services provided by the out-of-state lawyer must be undertaken in association with a lawyer admitted to practice in Oregon. In those cases, the consumer is protected by virtue of the participation of a locally-licensed lawyer. Moreover, as noted in the section of this report on *pro hac vice* admission, UTCR 3.170 affords additional protections and oversight by the judiciary.

Under RPC 5.5(c)(3) and (4), any legal services provided must arise out of or be reasonably related to the lawyer's practice in the jurisdiction in which the lawyer is admitted. Although this phrase has not been interpreted in Oregon, the ABA Model Rule 5.5, Comment [14] says that:

A variety of factors evidence such a relationship. The lawyer's client may have been previously represented by the lawyer or may be resident in or have substantial contacts with the jurisdiction in which the lawyer is admitted. The matter, although involving other jurisdictions, may have a significant connection with that jurisdiction. In other cases, significant aspects of the lawyer's work might be conducted in that jurisdiction. The necessary relationship might arise when the client's activities or the legal issues involve multiple jurisdictions, such as when the officers of a multinational corporation survey potential business sites and seek the services of their lawyer in assessing the relative merits of each. In addition, the services may draw on the lawyer's recognized expertise

developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally-uniform, foreign, or international law.

In sum, where services arise under RPC 5.5(c)(3) and (4), clients are protected by virtue of the fact that they either have a past relationship with the lawyer or the lawyer has some expertise in the area of law at issue. The OSB ITLS Task Force believes that protection would not be any less were the lawyer licensed in a jurisdiction outside of the United States.

Under RPC 5.5(c)(5), legal services may be provided to the lawyer's employer or its organizational affiliates. Again, as noted by the ABA Model Rules commentary, provision of services in this context generally serves the interest of the employer and does not create an unreasonable risk to the client and others because the employer is well situated to assess the lawyer's qualifications and the quality of the lawyer's work. The risk is no different when considering the provision of such services by a foreign-licensed lawyer.

Finally, RPC 5.5(d) recognizes that federal law preempts state licensing requirements to the extent that the state requirements hinder or obstruct the goals of the federal law. See *Sperry v. Florida ex rel. Florida Bar*, 373 US 379 (1963). Thus, where federal law allows foreign lawyers to practice, Oregon could not prohibit it, notwithstanding the current rule.

C. OSB ITLS Task Force Recommendation

Because of the potential problems with the current rule, the OSB ITLS Task Force recommends that Oregon RPC 5.5(c) & (d) be amended to allow the temporary practice of law in Oregon by lawyers licensed in jurisdictions outside of the United States. Specifically, the OSB ITLS Task Force proposal is to remove the words "United States" from RPC 5.5(c) & (d). A copy of the proposed amendment is attached.

The effect of the proposed change would be to allow a lawyer licensed in any jurisdiction—rather than just a lawyer licensed in another U.S. jurisdiction—to temporarily practice in Oregon with the assistance of an Oregon lawyer in the circumstances described in RPC 5.5(c). In addition, foreign lawyers would be allowed to practice law in Oregon when federal law specifically allows the practice.

In many foreign countries, non-lawyers perform functions similar to those performed by lawyers here. This is also true where non-lawyers are allowed to be advocates in arbitration, both domestic and international. Those foreign quasi-lawyer professionals are outside the proposed modifications to this rule.

D. Other Approaches

ABA Model Rule 5.5 takes a narrower approach than what the ITLS Task Force recommends. The ABA Rule provides that:

(d) A lawyer admitted in another United States jurisdiction or in a foreign jurisdiction, and not disbarred or suspended from practice in any jurisdiction or the equivalent thereof, may provide legal services through an office or other systematic and continuous presence in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates; are not services for which the forum requires pro hac vice admission; and, when performed by a foreign lawyer a requires advice on the law of this or another jurisdiction or of the United States, such advice shall be based upon the advice of a lawyer who is duly licensed and authorized by the jurisdiction to provide such advice; or

(2) are services that the lawyer is authorized by federal law or other law or rule to provide in this jurisdiction.

(e) For purposes of paragraph (d), the foreign lawyer must be 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 are subject to effective regulation and discipline by a duly constituted professional body or a public authority.

In short, the ABA rule limits temporary practice by foreign lawyers to situations where either the services are provided to the lawyer's employer or organizational affiliates (similar to Oregon RPC 5.5(c)(5)) or where federal law specifically authorizes a foreign lawyer to provide legal services. Connecticut, Indiana, Kansas and Wisconsin have adopted rules that are the same or similar to the ABA rule. Arizona and Alabama allow practice by foreign lawyers only when authorized by federal law. Other jurisdictions (Colorado, Delaware, the District of Columbia, Florida, Georgia, Idaho, New Hampshire, North Carolina, Pennsylvania, and Virginia) have amended their Rule 5.5 as proposed by the ITLS Task Force.

E. Possible Impacts

If amended as proposed, RPC 5.5(c)(1) and (2) will continue to contemplate that foreign lawyers engaged in Oregon and non-Oregon domestic litigation will be assisted—if not supervised by—other Oregon lawyers. The proposed change will have

little effect on judicial administration because, not only will Oregon lawyers continue to have a substantive role, but the courts will continue to oversee the admission and participation of foreign lawyer in litigation *pro hac vice*.

The primary effect of the proposed change on Oregon lawyers will be to allow foreign lawyers to perform work in Oregon to the same extent as lawyers licensed in U.S. jurisdictions other than Oregon. They will be permitted to do so without associating local counsel, provided the services here are related to the foreign lawyer's "home" practice. While this change would increase competition for a narrow slice of legal services in Oregon, those services are not now reserved for Oregon lawyers. Consumers of the services at issue tend to be sophisticated clients who will largely benefit from the change because they will have more options for legal representation and for lawyers with the specialized knowledge necessary for the matter. Concerns about competence of foreign lawyers providing legal services in Oregon are largely addressed by the limitations of practice already imposed by RPC 5.5(c). Even so, the OSB ITLS Task Force recognizes that differences likely exist between admissions standards and ethical responsibilities in Oregon versus in foreign countries. The OSB ITLS Task Force did not study in any detail the professional liability, admissions, and ethical requirements for lawyers outside the United States; they therefore remain largely unknown and could be substantially different.

PROPOSED AMENDMENT TO RPC 5.5(C)

RULE 5.5 UNAUTHORIZED PRACTICE OF LAW; MULTIJURISDICTIONAL PRACTICE

- (a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.
- (b) A lawyer who is not admitted to practice in this jurisdiction shall not:
- (1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or
 - (2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.
- (c) A lawyer admitted in another ~~United States~~ jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:
- (1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;
 - (2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;
 - (3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternate dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission;
 - (4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice; or
 - (5) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission.
- (d) A lawyer admitted in another ~~United States~~ jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.

(e) A lawyer who provides legal services in connection with a pending or potential arbitration proceeding to be held in his jurisdiction under paragraph (c)(3) of this rule must, upon engagement by the client, certify to the Oregon State Bar that:

- (1) the lawyer is in good standing in every jurisdiction in which the lawyer is admitted to practice; and
- (2) unless the lawyer is in-house counsel or an employee of a government client in the matter, that the lawyer
 - (i) carries professional liability insurance substantially equivalent to that required of Oregon lawyers, or
 - (ii) has notified the lawyer's client in writing that the lawyer does not have such insurance and that Oregon law requires Oregon lawyers to have such insurance.

The certificate must be accompanied by the administrative fee for the appearance established by the Oregon State Bar and proof of service on the arbitrator and other parties to the proceeding.