

Foreign lawyers in Massachusetts: rules and regs

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American lawyers and U.S. law firms are increasingly doing business on a global basis and opening offices in foreign countries. This includes many well-known Boston firms and national firms with a significant Boston presence. The firms offer international expertise in commercial sales and intellectual property and represent many multi-national companies, international financial institutions, developers and

investors on cross-border transactions.

With such significant international experience and presence, Massachusetts firms hire foreign lawyers to provide the requisite expertise in the law of foreign jurisdictions. Boston firms that have offices in foreign cities rely on their foreign lawyers to advise the firms' Massachusetts clients on matters of foreign law.

As the American Bar Association Commission on Ethics 20/20 recently noted, there has been a major increase in "transnational legal practice driven by technology and globalization" and "the realities of 21st century

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legal practice have resulted in an increase in foreign lawyers seeking to provide legal services to their clients in the U.S. (as well as concurrent increase in the efforts by U.S. lawyers and law firms to do the same abroad)."

The practice of law in the U.S. is regulated on a state-by-state basis. Relatively little attention, however, has been given to the increasing globalization of the profession. Every jurisdiction, including Massachusetts, prohibits the unauthorized practice of law. Thus, two issues affect foreign lawyers: whether and to what extent foreign lawyers can provide advice on the law of their home jurisdictions to Massachusetts companies and residents; and whether a foreign lawyer who relocates to Massachusetts can work as an attorney more generally.

Foreign legal consultants

The regulation of foreign legal consultants in Massachusetts is governed by Supreme Judicial Court Rule 3:05, which requires that a foreign lawyer obtain a license as a FLC and strictly limits such practice in the commonwealth. A foreign lawyer who wishes to obtain a license from the clerk of the SJC for Suffolk County must demonstrate that he has been a "member in good standing of a recognized legal profession in a foreign country" for the previous five years and possesses good moral character and general fitness.



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The good-standing requirement must be met by a certificate from the professional or public authority in the foreign country with jurisdiction over the attorney as well as a letter of recommendation from one of the members of the executive body of such authority.

The moral character and fitness requirement must be demonstrated by affidavits from three "reputable persons" residing in the commonwealth, one of whom must be a member of the bar. The foreign lawyer also must intend to practice law in Massachusetts and maintain an office in the state for that purpose.

In considering any application, the Board of Bar Examiners may consider whether the lawyer's country of origin provides a reciprocal opportunity for Massachusetts lawyers to establish an office in the applicant's country of admission.

Rule 3:05 constrains a foreign lawyer's scope of practice. A foreign legal consultant may not appear in court or before any judicial officer (unless admitted pro hac vice); "prepare an instrument effecting the transfer or registration of title to real estate located" in the U.S.; prepare any will or trust instrument or any instrument relating to the administration of a decedent's estate in the U.S.; prepare any instrument dealing with marital relations or custodial arrangements for children; or render advice on the law of the commonwealth or the country.

Thus, FLCs may advise and consult only regarding the substantive and procedural law of their home country and other international law, and may prepare instruments for recordation and use only in non-U.S. jurisdictions.

Rule 3:05 provides that a duly licensed foreign legal consultant who acts in accordance with the rule's limitations will not be considered to be engaged in the unauthorized practice of law. The foreign lawyer is otherwise subject to the Massachusetts Rules of Professional Conduct.

Foreign lawyers practicing law generally

To practice law generally in the commonwealth, a lawyer must be admitted to practice with two exceptions for the temporary practice of law and in-house counsel. Neither of those exceptions includes protection for foreign lawyers not otherwise admitted in a U.S. jurisdiction other than Massachusetts.

SJC Rule 3:01 governs the admission of attorneys to the practice of law. A lawyer can be admitted to practice by written examination or by motion. An applicant who desires admission by written examination must sit for the bar exam.

Admission by motion, which does not require taking the Massachusetts bar exam, is governed by Rule 3:01, sections 6.1 and 6.2.

Section 6.1 permits a lawyer who has been "admitted as an attorney of the highest judicial court of any state, district or territory of the United States" to apply to the SJC on mo-

tion to be admitted in the commonwealth. Section 6.1 contains no provision for foreign lawyers not admitted as attorneys in the United States.

Section 6.2 governs Canadian lawyers and permits a person who has graduated from a law school in Canada and has been admitted in the Law Society of any Canadian province or territory to apply for admission in the commonwealth by motion. Section 6.2 contains no provision for foreign lawyers other than Canadian lawyers.

Thus, a foreign lawyer may not be admitted to practice in Massachusetts by motion unless he is admitted in another state or U.S. territory.

A lawyer may practice law temporarily, without admission, pursuant to the Rules of Professional Conduct, SJC Rule 3:07.

Rule 5.5, entitled "Unauthorized Practice of Law; Multijurisdictional Practice of Law" prohibits the unauthorized practice of law with two exceptions. Rule 5.5(c) governs ad hoc temporary practice related to specific proceedings or matters. Under that rule, a U.S. lawyer may provide legal services in Massachusetts "on a temporary basis" and "in association with a lawyer who is admitted to practice in this jurisdiction."

The temporary legal services must relate either to a pending proceeding before a tribunal (in which the lawyer must be authorized to appear); a pending alternative dispute resolution proceeding that is "related to the lawyer's practice in the jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission"; or are not matters before a tribunal or ADR proceeding but arise out of or are reasonably related to a lawyer's practice in the jurisdiction in which he is admitted to practice.

Rule 5.5(c) contains no provision for foreign lawyers.

Rule 5.5(d) governs in-house counsel. As it is currently written, Rule 5.5(d) permits a lawyer admitted in another U.S. jurisdiction to provide legal services to the lawyer's em-


ployer as long as the services are not those that require pro hac vice admission.

To deal with large multi-national corporations and their international presence, last year the ABA proposed a change to the Model Rules of Professional Conduct to permit foreign in-house counsel to work for their employers from an office in the U.S. Even if that change to the model rules is adopted, it remains to be seen whether the Massachusetts Rules of Professional Conduct, which track the model rules, will be similarly amended.

As it stands, Rule 5.5(d) contains no provision for foreign lawyers. A particularly murky area in which a foreign lawyer may find himself is when a foreign lawyer's services are required to advise on the law of the foreign jurisdiction, but FLC licensing is inappropriate.

Such may be the case, for example, when a client has a business deal in a foreign country, or when an issue of family law involves proceedings before tribunals both here and abroad. The foreign lawyer's presence in the commonwealth to advise concerning the law of his home jurisdiction may be necessary, but he cannot or does not wish to become licensed as a FLC either because of time constraints or because he does not intend to practice in Massachusetts on a continued basis.

In that circumstance, it is not clear whether a single or a limited number of trips to the commonwealth to meet with a client and advise about foreign law without the protections of a FLC certificate would be considered the unauthorized practice of law.

The boundaries are somewhat unclear, but may depend on an analysis of the extent of the foreign lawyer's contacts within the jurisdiction. Until Massachusetts addresses the issue, foreign lawyers must take care when advising Massachusetts clients to limit their contacts within the commonwealth, lest they be considered to be practicing law without leave. 

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