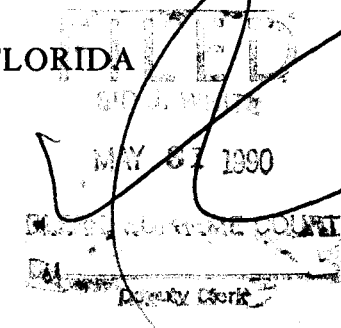
0176-4-9 6.24

IN THE SUPREME COURT OF FLORIDA



THE FLORIDA BAR,

IN RE: PETITION TO AMEND THE RULES REGULATING THE FLORIDA BAR -- 1-3.7; 3-5.1(G); 3-5.2; 14-1.1 AND CHAPTER 15.

CASE NO. 75,716

REPLY BRIEF OF THE FLORIDA BAR REGARDING PROPOSED CHAPTER 15 (Authorized House Counsel)

Lori S. Holcomb, Esq.
Assistant UPL Counsel
The Florida Bar
650 Apalachee Parkway
Tallahassee, FL 32399-2300
(904) 561-5839

Scott L. Baena, Esq.
Counsel for The Florida Bar
Stroock & Stroock & Lavan
3300 Southeast Financial Center
200 South Biscayne Boulevard
Miami, Florida 33131-2385
(305) 358-9900

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISIONS

STATUTES AND RULES

OTHER AUTHORITIES

STATEMENT OF THE CASE AND FACTS

This responsive brief addresses only proposed Chapter 15 (hereinafter referred to as the "Rule", "Rule 15" or the "proposed Rule") and not the other amendments to the Rules Regulating The Florida Bar (hereinafter the "Rules") proposed by The Florida Bar. Moreover, as this is a rule change proceeding, the merits of requiring a bar examination for licensure, a point raised by several of the objections, will not be addressed. Should the court desire a brief from The Florida Bar on this point, a supplemental brief will be filed. For the sake of consistency, The Florida Bar will use the record cites and abbreviations used by CSX Corporation ("CSX") and United Technologies Corporation ("UTC"). Any reference to the "Initial Brief" is to the initial brief of CSX and UTC filed on April 18, 1990.

CSX and UTC have not included a statement of the facts in their brief. Although there is a section entitled "background," it is merely further argument interspersed with an incomplete chronology of events. Accordingly, the following is a summary of the events leading up to the presentation of the proposed Rule to this Court.

Summary of Facts

In 1967, the Standing Committee on Unlicensed Practice of Law (hereinafter "the Standing Committee") issued Advisory Opinion 67-1, finding that one admitted to practice law in

another state but not in Florida may not render legal services to his employer. Special Report at A-1. The Standing Committee reasoned that an attorney admitted in a state other than Florida stands in the same position as a layman as far as the practice of law in Florida is concerned. Id. "Hence, though a person may have been, and still be, a member in good standing of the bar of a sister state, if he is not a member of The Florida Bar, his services rendered to and his acts on behalf of his employer, when they fall within the guidelines of the practice of law . . . constitute the unauthorized practice of law." Id. This opinion was reaffirmed by the Standing Committee in 1975. Special Report at A-2.

In 1984, the Standing Committee considered a proposal by the Corporation, Banking and Business Law Section to provide for corporate counsel affiliate status by amendment to the Integration Rule. Special Report at 3.[1/] The Standing Committee voted to disapprove the concept of corporate counsel affiliate status. Likewise, the Board of Governors of The Florida Bar did not approve the proposal. Special Report at 4.

[1/] The "analogy" to the affiliate status accorded to law professors advanced by CSX and UTC is totally inappropriate. The law professor affiliate status specifically provides that the professor may not practice law. In re: The Florida Bar, 425 So.2d 1 (Fla. 1982); Rule 1-3.9, Rules Regulating The Florida Bar. The amendment proposed in 1984 would have allowed the in-house counsel affiliate to practice law.

The Standing Committee next considered the issue again in 1989, as a request for a formal advisory opinion pursuant to Rule 10-7, Rules Regulating The Florida Bar. The question considered was whether it constituted the unlicensed practice of law for an attorney who is not a member of The Florida Bar to act as house counsel for his corporate employer in Florida by rendering legal services and advice to the corporate employer on corporate matters only.

A hearing was held on September 8, 1989, at which several individuals testified and/or supplied written testimony. Special Report at C-1.[2/] After the hearing the Standing Committee debated the issue and voted to decline to issue a formal advisory opinion. Special Report at 5. The primary reason for the Standing Committee's inaction was recognition that the question involved many and far reaching concerns which were beyond the scope of the Committee. The Standing Committee did not, however, rescind or abrogate its earlier findings that the conduct constituted the unlicensed practice of law. Special Report at 5.

Following the September, 1989 hearing, Steve Zack, President of The Florida Bar, appointed a Special Study Committee on Corporate Counsel (hereinafter the "Special Committee") to determine whether, in the Special Committee's judgment, The Florida Bar should permit non-Florida attorneys to act as house counsel in Florida without the requirement that the attorney pass

---

[2/] The testimony received by the Standing Committee was addressed to the question presented for formal advisory opinion and not the proposed Rule as suggested by CSX and UTC. Initial Brief, p. 7.

The Florida Bar examination. Special Report at 1. The Special Committee was comprised of Scott L. Baena (its Chairman) and Alan Dimond, both members of the Board of Governors, Ronald Carpenter, Chairman of the Florida Board of Bar Examiners, Joseph Boyd, Chairman of the Standing Committee, Henry Fox, Chairman of the Business Law Section of The Florida Bar and Patricia Blizzard, Chairwoman of the Corporate Counsel Committee of the Business Law Section. The Special Committee met on several occasions, primarily by telephone, before unanimously presenting the Special Report and the proposed Rule on authorized house counsel to the Board of Governors. Id.[3/] On January 26, 1990 the Board of Governors debated the Rule and voted to present it to this Court for adoption.

Notice of the presentation of the proposed Rule to this Court was published in The Florida Bar News on February 15, 1990. The Rule was filed with this Court on March 27, 1990 and notice soliciting comments was again published in The Florida Bar News. Comments were received from the Young Lawyers Division of The Florida Bar, the American Corporate Counsel Association (hereinafter also referred to as "ACCA"), and jointly by CSX and UTC, which various parties joined. On May 3, 1990, The Florida Bar was granted leave to file this brief in response to the comments filed with the Court.

[3/]The actions of the Special Committee are outlined in the Special Report filed with this Court. For the sake of brevity, The Florida Bar will not repeat those actions.

Summary of Argument

In order to practice law in Florida, one must be a member of The Florida Bar which ordinarily requires successful completion of The Florida Bar examination. Such requirement presently applies to attorneys admitted in other jurisdictions acting as house counsel in Florida.

Proposed Rule 15 would create a limited exception to the general licensure requirements by permitting the certification of house counsel to practice law (as limited in the proposed Rule) in Florida for a period of up to three years. The proposed Rule does not, of itself, engender a determination that the activities of house counsel, in all instances, constitute the unlicensed practice of law.

The proposed Rule would permit "business organizations" corporate employers to employ in and relocate to Florida attorneys admitted in states other than Florida. The proposed Rule thereby enhances interstate commerce and, therefore, does not violate the Commerce Clause of the United States Constitution. Similarly, the Privileges and Immunities Clause is not implicated by the proposed Rule as it does not impose residency as a precondition of certification.

The benefits of Rule 15 far outweigh any perceived burden and the Rule should be adopted by this Court as proposed.

ARGUMENT

I. THE PROPOSED RULE CREATES AN EXCEPTION TO THE REQUIREMENT THAT ATTORNEYS PRACTICING LAW IN FLORIDA BE MEMBERS OF THE FLORIDA BAR THEREBY BENEFITTING THE BUSINESS ORGANIZATIONS WHILE AT THE SAME TIME PROMOTING ACCESS TO LEGAL SERVICES

It is indisputable that in order to practice law in Florida, one must be a member of The Florida Bar regardless of admission to practice in other jurisdictions. In re: Petition of Florida State Bar Ass'n, 40 So.2d 902 (1949) (establishing the integrated bar); Rule 1-3.1, Rules Regulating The Florida Bar ("The members of The Florida Bar shall be composed of all persons who are admitted by this Court to the practice of law in this state . . ."); Rule 1-3.2(a), Rules Regulating The Florida Bar ("Members of The Florida Bar in good standing shall mean only those persons licensed to practice law in Florida . . ."). Membership in The Florida Bar, of course, requires successful completion of the bar examination and a favorable background investigation. Fla. Sup. Ct. Bar Admiss. Rules, Art. I §1, Art. III §2; Rule 2-2.1, Rules Regulating The Florida Bar. Neither the applicable rules nor decisional law create an exception to these fundamental notions in the case of persons coming within the definition of "authorized house counsel", as such term is defined in proposed Rule 15.

Opponents of proposed Rule 15 nonetheless argue that the Rule has the effect of determining that non-Florida Bar members are engaging in the unlicensed practice of law by acting as

"authorized house counsel" in Florida and that absent the proposed Rule, one need not be a member of The Florida Bar to engage in such a practice.[4/] The argument is ill-conceived and plainly incorrect.

[4/]To this end, CSX and UTC point to a "position statement" written by Pat Blizzard, Chairman of the Corporate Counsel Committee of the Business Law Section of The Florida Bar, and an Ethics Committee opinion that legal services performed by unlicensed house counsel are not the unlicensed practice of law. Ethics Opinion 70-44. Neither is authoritative inasmuch as determination of what constitutes the unlicensed practice of law is exclusively reserved to this Court and the Standing Committee. Chapter 10, Rules Regulating The Florida Bar. Indeed, the Ethics Committee recognized the limitation on its jurisdiction in its Ethics Opinion 70-44. ("Technically, this inquiry may be beyond this Committee's jurisdiction because it involves the proposed conduct of other than a member of The Florida Bar.")

It is also noteworthy that Mrs. Blizzard served as a member of the Special Committee which authored proposed Rule 15 and she voted in favor of the Special Report and the proposed Rule.

CSX and UTC also point to Opinion 67-1, an earlier Advisory Opinion issued by the Standing Committee. That opinion found that the activities of unlicensed attorneys acting as house counsel in Florida constituted the unlicensed practice of law. There is no significance to the contention by CSX and UTC that the effect of the Standing Committee's determination not to issue an opinion or to affirm its earlier Opinion 67-1 after the conclusion of its deliberations on the subject of house counsel in September, 1989, was to recede from Opinion 67-1. Opinion 67-1 has not been approved by this Court and, therefore, never had any binding effect. Its value is limited to research purposes only.

Parenthetically, CSX and UTC argue that there is no attorney-client relationship between house counsel and a corporation, but instead, the relationship is that of employer and employee. This statement is incorrect. An attorney acting as house counsel is bound by the same duties towards his or her client, the corporation, as is the attorney in the traditional law firm setting. Attorney/client confidentiality, privilege, honesty and integrity apply with equal force to the corporate attorney. Upjohn v. United States, 449 U.S. 383 (1981). Liability for malpractice also applies with equal force.

There are very few exceptions to the general requirement of bar admission. Such exceptions have, in each instance, been created by Court rule (e.g. Chapter 13 of the Rules governing authorized legal aid practitioners) or case law (The Florida Bar v. Moses, 380 So.2d 412 (Fla. 1980)). Proposed Rule 15 is just another instance in which The Florida Bar seeks to establish a limited exception. As such, the proposed Rule benefits attorneys not admitted to The Florida Bar, who would otherwise be unable to practice law in Florida, by conferring such practice privilege for a period of up to three years without the necessity of passing The Florida Bar examination.

That the activities which would be permitted under proposed Rule 15 constitute the practice of law ought not be in dispute.[5/] Contrary to the assertion of the opponents of the proposed Rule, the practice of law is not limited to appearances before the courts,

> the practice of law also includes the giving of legal advice and counsel to others as to their rights and obligations under the law and the preparation of legal instruments, including contracts, by which legal rights are either obtained, secured or given away, although such matters may not then or ever be the subject of proceedings in court.

State ex rel. The Florida Bar v. Sperry, 140 So.2d 587, 591 (Fla. 1962), judg. vacated on other grounds, 363 U.S. 379 (1963). It is therefore the character of the acts performed and not where they are performed that is controlling. Id.

5/See Application of Hunt, 155 Conn. 186, 230 A.2d 432 (Conn. 1967).

CSX and UTC point to "authority" from other states to support their contention that the activities of house counsel do not constitute the unlicensed practice of law. Initial Brief, p. 14, fn. 11. With the exception of the referenced New Jersey UPL Opinion, such authorities do not so conclude. Id.; Opinion 14, 98 N.J.L.J. Index 399 (N.J. Comm. on UPL, May 1, 1975).

In Application of Hunt, 155 Conn. 186, 230 A.2d 432 (1967), only the appearance of an unlicensed attorney in a federal matter was deemed to constitute the authorized practice of law. The referenced Tennessee Ethics Opinion does not state whether the inquiring attorney was a member of the Tennessee Bar and therefore, cannot be relied upon for the proposition that the practice does not constitute the unlicensed practice of law. Formal Ethics Opinion 84-F-74 (Bd. of Prof. Resp. of the Sup. Ct. of Tenn. 1984). Likewise, the rules from other states cited by CSX and UTC create an exception to the traditional requirement that attorneys successfully complete a bar examination to be licensed to practice law in those states. (Copies of these rules are included in the Appendix of the Special Report which has been filed with this Court).

As for the New Jersey opinion, the court fashioned a set of restrictions which are much like those contained in the proposed Rule. The opinion, however, makes a quantum departure from traditional notions of the attorney/client relationship by suggesting that corporate clients do "not require the same protection as the general public, which, when engaging counsel,

must often rely solely on the fact that the attorney is a licensed member of the bar." Opinion 14, supra. The distinction drawn is a dangerous one that ought not be followed.

The fact that the discipline areas in which corporations such as CSX and UTC require the services of house counsel involve federal matters, does not remove the performance of such services from the definition of the practice of law. Admittedly, to the limited extent that federal agencies allow attorneys admitted in any state to practice before them, the activities, albeit the practice of law, may be the authorized practice of law. State ex rel. The Florida Bar v. Sperry, 140 So.2d 587 (Fla. 1962), judg. vacated on other grounds, 363 U.S. 379 (1963); The Florida Bar v. Moses, 380 So.2d 412 (Fla. 1980). However, there is no basis to conclude that all activities of all house counsel are limited in such manner. It is just as, if not more, frequently the case that house counsel perform a variety of legal services which are without any such authorization, such as advising an employer on matters concerning worker's compensation, real estate and secured transactions, state and local taxation, product and other tort liability, to name a few. Keyes Co. v. Dade County Bar Assoc., 46 So.2d 605 (Fla. 1950); The Florida Bar v. Valdes, 464 So.2d 1183 (Fla. 1985). In all likelihood, the number of different activities performed by house counsel has an inverse relationship to the size of the corporate employer/client.

Ample support exists for the presumption that house counsel do not limit (or conceive of a limit on) their activities to the

authorized practice of law. The Special Report contains a report prepared for the American Corporate Counsel Institute, which was founded by one of the opponents of Rule 15, the American Corporate Counsel Association. Special Report at E-1. The report, entitled Corporate Law Department Trends and the Effect of the Current Bar Admission System: A Survey of Corporate Counsel, consists of a survey sent to all of the Fortune 1000 companies and to a sample of non-Fortune companies represented in the membership of ACCA. Amongst the survey results is the startling statistic that fifty-eight percent (58%) of those surveyed "indicated that it would be appropriate to provide advice to an out-of-state staff member on state law in that individual's jurisdiction even though the attorney providing that advice was not admitted to practice there." Id. at x (Emphasis added). Therein lies the problem addressed by the proposed Rule.

Because proposed Rule 15 would create a further limited exception to the general rule requiring admission to The Florida Bar, the argument advanced that there has been no finding of public harm to warrant the Rule is wholly inapposite. The notion of public harm is only applicable to the restriction of what may have formerly been an authorized activity and in deciding whether to prosecute for the unlicensed practice of law.[6/]

[6/] Although this Court has looked at the question of public harm in two formal advisory opinions brought to this Court for its approval, the effect of those opinions was the same as prosecutions for the unlicensed practice of law, i.e., the enjoining of an activity. The Florida Bar re: Advisory Opinion - HRS Nonlawyer Counselors, 518 So.2d 1270 (Fla. 1988); The Florida Bar re: Advisory Opinion - Nonlawyer Preparation of Notice to Owner

The opponents of proposed Rule 15 overlook that nothing therein contained requires certification thereunder. Thus, an attorney who is otherwise entitled to be certified as an "authorized house counsel" may simply choose not to seek such certification. The failure to apply for certification, of itself, will not give rise to an action for the unlicensed practice of law. Non-certified house counsel will continue to be free to argue that the legal activities performed by such attorneys does not engender the unlicensed practice of law. This would appear to be the course that attorneys employed by the opponents may decide to take; however, the proposed Rule has a much wider audience. Rejection of the proposed Rule would deprive all house counsel of the ability to obtain certification

---

[Footnote Continued] and Notice to Contractor, 544 So.2d 1038 (Fla. 1989). As the proposed Rule does not seek to enjoin any conduct which was formerly permissible, a finding of public harm is not essential to adoption of the Rule.

Although a finding of public harm is not required, the potential for public harm exists. The Initial Brief states that The Florida Bar has "conceded that there have never been any complaints about house counsel . . . ." Initial Brief, p. 35, fn. 27. This is simply untrue. The Chairman of the Special Committee, Scott Baena, did state that no one has ever been prosecuted; however, Mr. Baena was corrected by an ACCA representative, J.B. Harris, who advised that at least one prosecution has occurred. All unlicensed practice of law investigations are confidential. Rule 10-6, Rules Regulating The Florida Bar. Therefore, information regarding specific investigations was not supplied to the Special Committee. Initial Brief, p. C-5. Contrary to the unsubstantiated statement of CSX and UTC, there have been complaints to The Florida Bar regarding the activities of house counsel. Affidavit of Mary Ellen Bateman, UPL Counsel, Appendix A. While no one has been prosecuted in this Court, complaints have been investigated and cease and desist affidavits have been accepted by the Standing Committee. Id.

and to avoid any question or confrontation over their authority to engage in the activities which the Rule would authorize.

II. THE PROPOSED RULE DOES NOT VIOLATE THE COMMERCE CLAUSE OR THE PRIVILEGES AND IMMUNITIES CLAUSE OF THE UNITED STATES CONSTITUTION

Proposed Rule 15 is expressly intended to "facilitate the relocation to Florida" of house counsel admitted to the bars of other jurisdictions. Chapter 15, Rule 15-1.1. As such, it seeks to promote certain activities and legitimize the presence of non-Florida attorneys. Similarly, the proposed Rule provides a vehicle to avoid interruption of or interference with the hiring practices of non-Florida "business organizations" which have occasion to emigrate to or establish a presence in Florida. Thus, proposed Rule 15 hardly can be characterized as unfairly discriminating against or unduly burdening either non-Florida attorneys or non-Florida employers.

Furthermore, proposed Rule 15 makes no distinctions whatsoever based upon the residency of either an "authorized house counsel" or a "business organization". Indeed, a purpose of the Rule is to facilitate <u>transitory</u> relocation to Florida by either the attorney or the employer. Implicitly, therefore, the Rule contemplates that the attorney, the employer or both will remain non-residents of Florida but, nonetheless, the attorney will be able to take advantage of certification as "authorized house counsel" in Florida.

Accordingly, opponents of Rule 15 stretch the legal imagination by arguing that the Rule would violate the Commerce Clause (U.S. Const. art. I, §8) and the Privileges and Immunities Clause of the Constitution of the United States (U.S. Const. art. XIV, § 1).

1. The Proposed Rule Does Not Violate the Commerce Clause

Opponents of the proposed Rule argue that it will impede interstate commerce. The opposite is true. The proposed Rule actually encourages the transfer of non-Florida Bar members into the State of Florida by authorizing them to practice law for a period of up to three years without having to pass The Florida Bar examination. Moreover, as more fully discussed below, the "burden" of the proposed rule does not solely fall on multistate corporations. House counsel not admitted to The Florida Bar employed in Florida by any "business organization", whether from within or without the State of Florida, are subject to the proposed Rule. The Rule thereby creates a new option for all "business organizations" to hire attorneys without regard for the jurisdiction of their admission.

The conjured examples of ways in which the proposed rule will place a hardship on the multistate corporate employer are without merit. The suggestion that a corporate employer will suffer the loss of house counsel while studying for the bar examination is a preposterous misstatement since the examination need not be taken for a period of three years.

Moreover, house counsel is not even required to take the bar examination unless desirous of continuing to practice law in Florida beyond the three year certification period. The proposed Rule takes into account that the practice of house counsel for multistate corporations is very mobile. That contemporary phenomenon actually precipitated the Rule. The Rule virtually contemplates that the usual bar examination requirement will not come into play. Even if the taking of the bar examination was a requirement in all cases, which is not the case here, there would be no constitutional prohibition. Leis v. Flynt, 439 U.S. 438 (1979).

CSX and UTC similarly argue that the proposed Rule will pressure corporations to hire members of The Florida Bar. The converse is true. While corporations are currently restricted to hiring members of The Florida Bar, the proposed Rule relaxes the restriction and allows the corporate employer to hire an attorney admitted in any state, subject to certification. In the same vein, non-Florida Bar members will be able to transfer to Florida without the threat of prosecution for the unlicensed practice of law and having their conduct reported to their own bar association for possible disciplinary action.

As the proposed Rule benefits rather than burdens interstate commerce, it does not violate the Commerce Clause of the United States Constitution.

2. The Proposed Rule Does Not Violate the Privileges and Immunities Clause

The opponents of proposed Rule 15 misguidedly rely on a series of recent United States Supreme Court cases concerning various state bar admission rules which required that the individual applying for admission be a resident of the state. Barnard v. Thorstenn, 109 S.Ct. 1294 (1989) (rule preventing an individual from being admitted to practice in the Virgin Islands unless the individual was a resident of the Virgin Islands for one year prior to admission and intended to continue to reside and practice in the Virgin Islands after admission); Supreme Court of Virginia v. Friedman, 108 S.Ct. 2260 (1988) (rule requiring an individual to be a resident of Virginia if desiring to be admitted on motion without taking the bar examination); Frazier v. Heebe, 482 U.S. 647 (1987) (rule requiring residency in Louisiana in order to become a member of the United States District Court). In each instance, the challenged admission rule was held to be invalid because it specifically applied to non-residents.[7/] Unlike the rules challenged in those cases, however, proposed Rule 15 applies with equal weight to residents and non-residents alike and, therefore, the Privileges and Immunities Clause is not implicated.

[7/] The challenged rules in Barnard and Friedman were held to violate the Privileges and Immunities Clause because of their application to non-residents only. The challenged rule in Frazier was invalidated pursuant to the Court's supervisory power over the District Court and not by virtue of the Privileges and Immunities Clause.

The Privileges and Immunities Clause "was designed 'to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned'." Friedman, 108 S.Ct. 2264. Therefore, the Clause "is implicated whenever . . . a State does not permit qualified nonresidents to practice law within its borders on terms of substantial equality with its own residents." Id. at 2265. It therefore follows that if both residents and non-residents are treated equally, the Privileges and Immunities Clause is not violated.

As stated earlier, the proposed Rule applies equally to residents and non-residents alike. In fact, the word "residency" does not even appear in the Rule. There is no requirement that the individual reside in Florida in order to take advantage of the proposed Rule, just as there is no requirement that an individual reside in Florida in order to be a member of The Florida Bar. A Florida citizen and a citizen of any other state are therefore on the same footing under the proposed Rule and may both be certified to act as "authorized house counsel".

Rather than supporting the argument that the proposed Rule is unconstitutional, the cases cited in opposition support adoption of the Rule. Although the cases found that residency requirements for admission to a bar are suspect, the Supreme Court never disputed a state's authority to require a bar examination. A state's imposition of a bar examination requirement, even in the case of attorneys admitted to practice

elsewhere, simply does not violate the Constitution. Leis v. Flynt, 439 U.S. 438, 443 (1979) ("The Constitution does not require that because a lawyer has been admitted to the bar of one State, he or she must be allowed to practice in another.")

The proposed Rule does not exceed such permissible bounds by requiring an "authorized house counsel" to successfully complete Florida's bar examination if, after the transitory period of three years after certification, that attorney determines to extend his or her stay in Florida.

III. THE RULE AS PROPOSED SHOULD BE ADOPTED BY THE COURT

The opponents of Rule 15 raise six elements of the Rule which they find objectionable and which they propose, as an alternative to rejection of the Rule altogether, ought be jettisoned. The Florida Bar does not agree.

(1) No prior certification.

Under the proposed Rule, an applicant for certification as "authorized house counsel" may not have been previously so certified. Chapter 15, Rule 15-1.2(a)(10). Such proscription is inextricable from the very purpose of the Rule itself. That is, the Rule is principally intended to overcome a long standing barrier to employment in Florida by two classes of attorneys:

> Those who, by virtue of the corporate policies of their employer, may be "rotated" to Florida for a limited period with no expectation of remaining in Florida on a permanent basis and those sent to Florida by their employers or who secure employment in Florida on

> relatively short notice and thus, without the ability to gain admission to The Florida Bar in advance of relocation.

Special Report at 6 (Emphasis added).

Thus, the proposed Rule is only intended to provide a basis for an attorney's presence and practice in Florida for an extended but nonetheless transitory period of time.[8/]

Proponents of Rule 15 do not question that house counsel have and will, absent enactment of Rule 15, commit the unlicensed practice of law in Florida but recognize that many house counsel find themselves in such untenable situations because corporate facts of life often dictate that the only alternative to mandatory relocation to another jurisdiction is to resign.

Once here, and lawfully practicing law, if Rule 15 is enacted, the relocated house counsel ought have sufficient time to conduct his or her employer's business before being relocated again or, if it is determined that the house counsel shall remain

---

8/Such relief, in fact, exceeds what was sought by the Senior Counsel of one of the opponents of Rule 15. By letter dated August 25, 1989, from Richard C. Keene, Senior Counsel of CSX Transportation, to Lori Holcomb, Assistant UPL Counsel, Mr. Keene wrote: "In cases of multi-state corporations, or of corporate relocations as a result of mergers, acquisitions, and similar economic restructuring, any [proposed rule on house counsel] should provide a further temporary exception for attorneys relocating within the State of Florida as a result of such corporate economic restructuring for a period of at least one year from that relocation. The one year term is necessary because the attorney will most likely require some form of bar review preparation, and must take the bar examination, which is only given twice a year, and which requires a plethora of irrelevant paper to be filed in advance." Special Report at C-1 (Emphasis added).

in Florida on a more permanent basis, to apply for, prepare for and pass The Florida Bar examination.

Successive or multiple certifications under Rule 15 would not further the interests it seeks to promote. Rather, such a system would subvert traditional notions of attorney regulation by a state bar association.

(2) No prior failure of The Florida Bar examination.

The limitation that an applicant not have failed The Florida Bar examination within ten years prior to application for certifications as an authorized house counsel (Chapter 15, Rule 15-1.2(a)(3)) is a reasonable means of ensuring the competence of an attorney. Such a limitation has previously been approved by the Court in its enactment of Chapter 13 of the Rules governing authorized legal aid practitioners.[9/]

Although the opponents of the proposed Rule argue that corporate employers do not require the same protection against incompetent attorneys as does the general public, such a distinction cannot be countenanced. In the first place, even assuming arguendo that the opponents are capable of evaluating and dealing with incompetent house counsel, it is presumptuous to suggest that all employers of house counsel are likewise capable. Rule 15 is not limited in application to monolithic, financially capable and sophisticated employers such as United Technologies and Martin-Marietta.

9/Chapter 13, Rule 13-1.2 (a)(2), Rules Regulating The Florida Bar. In fact, Chapter 13 imposes a 15 year prior practice requirement.

Furthermore, when the argument is carried to its most illogical extreme, licensing and discipline of attorneys is altogether unnecessary since every law firm and client can terminate the services of a lawyer and, if damaged, sue for negligence, etc. There is absolutely no merit to such dangerous thinking.

The Florida Bar has the inherent right and responsibility to ensure that those practicing law in the State of Florida are competent to do so. It makes a significant gesture and deviation by recognizing at all the bar affiliation of a non-Florida Bar attorney under proposed Rule 15; however, it thinks it unwise to abdicate its responsibilities altogether by disregarding its own experience with an applicant (i.e., an applicant's prior failure to pass The Florida Bar examination).

(3) Indication of jurisdictional limitations on stationery, letterheads and business cards.

Proposed Rule 15 requires that the jurisdictional limitations of the authorized house counsel be indicated on all written communications and appear on all stationery, letterhead and business cards. Chapter 15, Rule 15-1.3(c). Such a requirement is hardly "unnecessary, illogical and unworkable", as suggested by CSX and UTC, since it is reasonably intended to avoid any misapprehension by the recipient of such printed material of the status of the attorney or any potential for misrepresentation by the attorney of the permissible activities in which he or she may engage. This aspect of the Rule is wholly consistent with Rules

4-7.1 and 4-7.6 of the Rules Regulating The Florida Bar and further, embodies existing requirements.[10/] The Florida Bar v. Kaiser, 397 So.2d 1132 (Fla. 1981).

The objection to this requirement is particularly suspect since it is reasonable to expect an "authorized house counsel" to use stationery and business cards in communications with persons other than the corporate employer. Thus, when this objection is coupled with the central objection of opponents of Rule 15 that corporate employers do not need any protection from their attorney/employees, the seriousness and reasonableness of the position of the opponents is called into question. The objections raise the specter of wholly unregulated attorneys situated in Florida, doing whatever they please to whomever they please.

(4) "Employed in Florida" Requirement.

Certification under proposed Rule 15 is available only to those attorneys employed in the State of Florida exclusively by a "business organization." Chapter 15, Rule 15-1.2(a)(7). The notion of employment is far more important to the Rule than, for example, residency since it is presumed that the attorney applicant will only be in Florida for a relatively short period. Whether one is "employed in Florida" is a relatively simple

---

10/Ethics Opinion 70-44 is instructional in that it specifically relates to the business cards of corporate attorneys practicing law in the State of Florida but not admitted to The Florida Bar. The Opinion would require that such a business card include the words "not admitted to practice in Florida" or other similar disclaiming verbiage.

determination although, admittedly, the requirement is susceptible to evasion through dishonesty.

The principle of place of employment is not intended to require certification of attorneys who come into this jurisdiction to perform activities which the Court has already concluded, in The Florida Bar v. Savitt, 363 So.2d 559 (Fla. 1978), do not engender the unlicensed practice of law; to-wit:

> . . . [t]ransitory professional activities "incidental" to essentially out-of-state transactions; and professional activities that constitute "coordinating-supervisory" activities in essentially multi-state transactions in which matters of Florida law are being handled by members of The Florida Bar, . . . [to] give legal advice concerning a right or obligation governed by federal law, . . . [to] give legal advice in regard to matters related primarily to federal administrative agency practice, . . . [and to] give legal advice on the law of jurisdictions other than Florida to non-Florida clients in transactions with persons residing in Florida or with business enterprises having their principal place of business in Florida; . . . .

363 So. 2d at 560-561 (citations omitted).

(5) Two-year prior practice requirement.

Several of the opponents of proposed Rule 15 argue that the requirement that an applicant for certification has been engaged in the active practice of law for not less than two of the four years immediately preceding application for certification is burdensome and not supported by any legitimate rationale, and tends to unfairly discriminate against young lawyers. Chapter 15, Rule 15-1.2(a)(1). This requirement, however, is but one more example of The Florida Bar's efforts to ensure that

attorneys practicing law in the State of Florida without admission to The Florida Bar have demonstrated--by experience--their ability to conduct themselves in a competent and ethical manner in jurisdictions where they are admitted to practice law. That is clearly an appropriate objective inasmuch as the applicant seeks more favorable treatment than any other class of attorneys from outside the State of Florida and, for that matter, more favorable treatment than a person who is willing to comply with the conventional means of licensure by sitting for The Florida Bar examination.

Some of the expressed concerns are ameliorated by the four year period in which the two years of active practice must be achieved. For example, the attorney who leaves the practice of law for a teaching sabbatical or due to pregnancy or child-rearing responsibilities can still meet the requirement if such leave does not exceed two of the four years preceding application for certification.

As for an attorney with less than two years of active practice experience already in the employ of a "business organization" in the State of Florida at the time of adoption of Rule 15, regrettably, termination of employment may become necessary; however, if that attorney is desirous of certification under proposed Rule 15, it might be presumed that he or she has been committing the unlicensed practice of law. Such a situation should not have occurred in the first instance and an attorney in that situation is therefore, hard-pressed to complain that Rule

15 fails to rectify his or her intentional transgression of the existing rules and opinions of this Court. Rule 15 is not intended to be a grant of general amnesty.

(6) Three year limitation on certification.

It is doubtful that any bar association or authority with jurisdiction over the admission of attorneys to practice law would agree with the notion advanced by opponents of proposed Rule 15 that a bar examination is no more than a "meaningless calisthenic" or an "onerous burden".[11/] The practice of law is not akin to a fraternity nor is a bar examination a ritualistic form of hazing initiates. This Court's Rules Relating to Admission to The Bar unequivocally state "All individuals who seek the privilege of practicing law in the State of Florida shall submit to The Florida Bar Examination."[12/] There can be no clearer statement of this Court's view of the importance of its bar examination.

Furthermore, not all bar examinations are alike. In Florida, the subject matter upon which an applicant is tested generally emphasizes Florida law. In fact, Florida does not even recognize "scores achieved by applicants on the Multistate Bar Examination administered by an admitting jurisdiction other than the State of Florida. . . ."[13/]

[11/] Initial Brief, pp. 18 and 19.

[12/] Rules of the Supreme Court Relating to Admissions to The Bar, Article I §1.

[13/] Id., Article VI §3(c).

Once again, Rule 15 is intended to permit transitory relocation of non-Florida Bar attorneys to Florida. The three year limitation on certification is a rational point of cleavage at which the employment of the certified attorney in Florida should no longer be regarded as transitory. At that point it is appropriate to impose that the certified attorney comply with the pertinent rules regulating admission to the Bar as we do in respect of all others who desire to practice law in this state.

The objections raised to this aspect of the proposed Rule, as well as the alternative suggested by opponents of the Rule[14/], reveal their true agenda: Reciprocal admission to the bars of the various states. While The Florida Bar does not discredit such motive, it does not subscribe to the same view. More importantly, consideration of Rule 15 does not present the appropriate forum for the debate of these views.

CONCLUSION

Proposed Rule 15 is a thoughtful solution to a contemporary problem. The Rule creates a sensible framework in which corporate counsel and their employers can deal with commercial exigencies which necessitate emigration to Florida for a relatively short period of time. It balances the obligation of The Florida Bar to regulate the competence and conduct of those

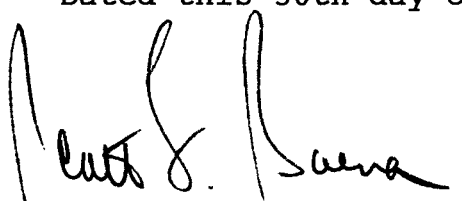
---

14/Initial Brief, p. 39; Comments of the American Corporate Counsel Association, p. 10.

engaged in the practice of law and the legitimate business interests of house counsel and their corporate employers.

Accordingly, The Florida Bar respectfully urges that Rule 15 be approved and adopted by this Court.

Dated this 30th day of May, 1990.



Scott L. Baena, Esq.
Counsel for The Florida Bar
Stroock & Stroock & Lavan
3300 Southeast Financial Center
200 South Biscayne Boulevard
Miami, Florida 33131-2385
Florida Bar No. 186445

Lori S. Holcomb, Esq.
Assistant UPL Counsel
The Florida Bar
650 Apalachee Parkway
Tallahassee, FL 32399-2300

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 31st day of May, 1990, a true copy of the foregoing Reply Brief of The Florida Bar Regarding Proposed Chapter 15 (Authorized House Counsel) was furnished to:

Talbot D'Alemberte, Esq.
Steel Hector & Davis
4000 Southeast Financial Ctr.
200 South Biscayne Boulevard
Miami, Florida 33131-2398

DuBose Ausley, Esq. and
Timothy B. Elliott, Esq.
Ausley, McMullen, McGehee,
Carothers & Proctor
Post Office Box 391
Tallahassee, FL 32302

John M. Farrell, Esq.
Steel Hector Davis Burns
& Middleton
1200 Northbridge Center
515 North Flagler Drive
West Palm Beach, FL 33401

Nancy A. Nord, Esq.
Executive Director
American Corporate Counsel
Association
1225 Connecticut Avenue, N.W.
Washington, D.C. 20036

Lawrence A. Salibra, III
Chairman
ACCA Litigation Committee
100 Erieview Plaza
Cleveland, OH 44114

Robert M. Rhodes, Esq.
Adalberto Jordan, Esq.
Steel Hector & Davis
4000 Southeast Financial Center
Miami, FL 33131-2398

Ladd H. Fassett, Esq.
Warlick, Fassett, Divine
& Anthony, P.A.
Post Office Box 3387
Orlando, FL 32802-3387

Warren W. Lindsey, Esq.
Muller, Kirkconnel, Lindsey
& Snure, P.A.
Post Office Box 2728
Winter Park, FL 32790

Robert C. Palmer, III, Esq.
Post Office Box 1832
Pensacola, FL 32598-1832

Henry P. Trawick, Jr., Esq.
Post Office Box 4019
Sarasota, FL 34230

Stanley James Brainerd, Esq.
General Counsel
Florida Chamber of Commerce
136 S. Bronough Street
Tallahassee, FL 32301

Thomas C. Garwood, Jr., Esq.
Garwood & McKenna, P.A.
322 East Pine Street
Orlando, FL 32801

Wayne D. Clance, Esq.
General Counsel
Florida Dept. of Commerce
107 West Gaines Street
Suite 510H
Tallahassee, FL 32399-2000

George E. Lane, Esq.
Senior Counsel
Harris Corporation
1025 W. NASA Boulevard
Melbourne, FL 32919

By: _____
Scott L. Baena, Esq.