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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

IN RE: PETITION TO AMEND THE

RULES REGULATING THE FLORIDA BAR

CASE NO: 79,288

INTERNATIONAL LAW SECTION

Original

REPLY IN SUPPORT

PROPOSED FOREIGN LEGAL CONSULTANCY RULE

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INTRODUCTION[1]

Since 1989 the International Law Section has proposed and diligently worked to achieve a foreign legal consultancy rule for the State of Florida. The proposed rule before this Court was drafted and approved mindful of the Court's admonition that:

> "The single most important concern in the Court's defining and regulating the practice of law is the protection of the public from incompetent, unethical, or irresponsible representation." The Florida Bar v. Moses, 380 So.2d 412, 417 (Fla. 1980).

The proposed rule seeks to protect the public by establishing a regulatory system whereby foreign lawyers may only give advice and perform services to the public with respect to the laws of their jurisdiction provided they meet or exceed the standards set forth in the rule. The rule requires that the foreign legal consultant: (a) be admitted to practice for five of the seven years immediately preceding the application to this Court; (b) has engaged in the practice of law of the foreign country for not less than five of the seven years; (c) is admitted to practice in a foreign country whose professional disciplinary system for attorneys is generally consistent with that of this Court; (d) has not been disciplined by courts of any jurisdiction for at least ten

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[1] Attached as an Appendix to this Reply is the International Law Section's "Report of the Ad Hoc Committee for the Formation of a Foreign Legal Consultancy Program in the State of Florida." This document was submitted to the Board of Governors in October, 1990, when the Foreign Legal Consultancy Rule was first proposed. It contains useful background and explanations for the underlying purposes for the rule and the specific requirements contained therein.

years; and (e) has not been denied admission to practice before the courts of any jurisdiction for at least fifteen years. (Rule 16-1.2) If these and other requirements are met, this Court may certify the person as a foreign legal consultant to render legal services in the State of Florida limited to those regarding the laws of the foreign country, and not including those activities considered the traditional practice of Florida or Federal law. (Rule 16.1-3) The proposed rule also specifies a series of requirements for recommendations and other proof of good standing, professional qualifications and good moral character. (Rule 16-1.4) Any foreign legal consultant certified by this rule is required to abide by the rules of professional conduct, and must disclose to clients and to the public the limited nature of the certification. Id. The foreign legal consultant becomes subject to discipline by this Court and termination or withdrawal of certification. (Rule 16-1.5)

The Board of Bar Examiners (the "Board") opposes this rule, and seeks to have this Court disapprove the rule entirely. For the reasons discussed below, we believe that the rule should be adopted.

ARGUMENT

The Board's Brief does not present a reasoned position on the issue before this Court. The Board's Brief is internally inconsistent in several aspects. For instance, the Board complains that the proposed rule does not require a foreign legal consultant

to meet requirements equivalent to those of applicants for admission to The Florida Bar. ("The proposal has no provisions requiring a foreign legal consultant to graduate from law school, pass a bar examination or attend a continuing legal education course."--Brief at 3.) Having taken the position that only foreign lawyers who are "as good as" Florida lawyers are competent to be foreign legal consultants, the Board then claims that the rule is unnecessary because members of the public can now contact <u>any</u> foreign lawyers in their jurisdiction and obtain legal advice on their jurisdiction by long-distance communication. ("With the innovative long distance communication devices available today, there is no need to create a special class of lawyers to provide access to competent foreign legal advice."--Brief at 3.)

The Board similarly takes an inconsistent position regarding the investigation required of the candidates for certification. On the one hand, the Board complains that "the proposal has no provisions requiring an investigative determination of good moral character," (Brief at 3) while on the other hand the Board is "grateful" that the rule does not require it "to conduct character investigations" of candidates. (Brief at 2)

The Board's Brief is premised on the erroneous assumption that anyone seeking to be certified as a foreign legal consultant should be treated no differently than someone seeking admission to The Florida Bar. This is directly contrary to the fundamental concept of foreign legal consultants. Under the proposed rule, a foreign legal consultant is <u>not</u> authorized to practice law in Florida, is

specifically prohibited from doing so, and is specifically required to make disclosure of such prohibition to the public and to clients.[2] Consequently, foreign legal consultants need not be treated as though they were seeking to be admitted to practice as Florida lawyers.

What is being addressed by the proposed rule is the present problem of individuals who are not qualified to offer advice on the laws of a foreign jurisdiction misrepresenting their qualifications and abilities or providing incompetent, unethical or irresponsible representation. The benefit to be gained by this rule is that it provides assurances to the public that someone certified as a foreign legal consultant has met certain standards. Currently, there is no process in this state to encourage qualified foreign lawyers to come here and offer their services, and weed out the unqualified.

Contrary to the underlying assumption of the Board's Brief, this benefit can be achieved without limiting who may render advice and services regarding the laws of a foreign jurisdiction only to those qualified to be Florida lawyers. As this Court recently recognized in The Florida Bar re: Amendments to the Rules Regulating the Florida Bar (Chapter 15), _____ So.2d _____, 16 F.L.W. S.743 (Fla. Nov. 14, 1991), safeguarding against the

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[2] The Board still complains that "the proposal will also likely encourage foreign legal consultants to engage in prohibited conduct by advising clients on legal matters besides the laws of their respective countries." It is hard to imagine how the rule could be written more clearly on this point.

unlicensed practice of law should be achieved by the least burdensome alternatives, especially by those which do not hinder commerce. While that opinion dealt with a proposed rule on licensing house counsel, this Court's observations are equally applicable to the proposed rule on foreign legal consultants.

When the foreign consultancy rule was first considered by the Board of Governors in October, 1990, the proposed rule provided for implementation by the Board of Bar Examiners. Because the Board of Bar Examiners opposed the rule, the President of The Florida Bar appointed a committee to address the concerns expressed by the Board and other concerns expressed by the members of the Board of Governors.[3] The committee attempted to address all of the concerns and rewrote several provisions of the rule to assure a greater degree of protection for the public. (The earlier version of the rule may be found in the Appendix to this Reply.) The Board of Bar Examiners, however, has continued to oppose the rule, and apparently would oppose any rule.

The Board "suggests" that the motivation behind this proposed rule is "to create the opportunity for Florida lawyers to open up offices in foreign countries with little or no screening." (Brief at 12-13) The Board is wrong. It is true that the proposed rule now contains a reciprocity provision (Rule 16-1.2(c)) which would

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[3] Among those concerns was that the rule as then drafted did not contain a "reciprocity" provision, permitting foreign lawyers to become certified in this state only if the foreign jurisdiction offered Florida lawyers an equal opportunity to practice Florida law in that jurisdiction.

offer an opportunity for Florida lawyers to seek to practice Florida law in other jurisdictions. There is nothing unseemly about this, and in fact, according to the General Counsel of the United States Department of Commerce such a provision may facilitate trade and commerce. (See Appendix to our initial comments.) However, to say that this is the "primary motivation" behind the rule is to ignore the history of this proposed rule and to insult the sponsors of the proposed rule. In October, 1990, the proposed rule which was considered by the Board of Governors did not contain such a reciprocity provision. (See Appendix.) When the committee established by the President of The Florida Bar considered objections by the Board of Bar Examiners, it also considered objections by those who insisted that a reciprocity provision should be included in the rule. The committee recommended that the Board of Governors approve this proposed rule with a reciprocity provision. The Board of Bar Examiners, while expressing its opposition to the proposed rule in its May 29, 1991 letter, said nothing about the reciprocity provision.[4]

The Board suggests that there is no need for this rule because the public can now contact foreign lawyers abroad for legal advice on foreign law. The Board's own example illustrates the fallacy of this argument: "Lawyers constantly communicate with experts by

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[4] Should this Court believe that a reciprocity provision is inappropriate, the Court should delete it. We see nothing in the Board's Brief which demonstrates to us that a reciprocity provision is contrary to the best interests of the public, and therefore we continue to sponsor it.

long-distance communication. It would be highly impractical to operate a law office by requiring only face-to-face communications between a lawyer and an expert." (Board Brief at 9) The Board apparently fails to recognize that it is just as "impractical" to operate a law office by prohibiting face-to-face communications between a lawyer and an expert. It is thus just as impractical to prohibit face to face communications with qualified foreign legal consultants.

We agree with the Board that the type of background investigation of foreign legal consultants described in detail in the Board's Brief is "either impossible or cost prohibitive." None of the dozen other jurisdictions which have adopted a foreign legal consultancy rule have required such a background investigation, apparently recognizing that to do so would make the foreign legal consultancy rule an empty promise to the public. We continue to believe that the restrictions in the proposed rule are sufficient to protect the public.

CONCLUSION

The choice before this Court is between the status quo, an entirely unregulated marketplace in which the public has no means of assuring itself of the quality of the foreign lawyers with whom it deals, and a foreign legal consultancy rule, modeled after the best features of rules of a dozen other states, which will offer benefits to the public. To the International Law Section, the choice is a simple one.

For all of the foregoing reasons, and for the reasons set forth in the Section's initial comments, the Court should adopt the proposed rule.

Respectfully submitted on behalf of the
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished to Thomas A. Pobjecky, Esq., General Counsel, Florida Board of Bar Examiners, 1300 East Park Avenue, Tallahassee, Florida 32399-1750, and to John F Harkness, Jr., Esq., Executive Director of the Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300 by mail this 5th day of May, 1992.

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INTERNATIONAL LAW SECTION
THE FLORIDA BAR

REPORT OF THE AD HOC COMMITTEE FOR THE FORMATION OF A FOREIGN LEGAL CONSULTANCY PROGRAM IN THE STATE OF FLORIDA

I- INTRODUCTION

In the spring of 1989, the Florida Bar's Standing Committee on the Unlicensed Practice of Law ("UPL Committee") was asked to render an advisory opinion on whether it constitutes the unauthorized practice of law for a foreign lawyer to give legal consultation in Florida on the law of such attorney's jurisdiction of admission.

The International Law Section was consulted by the UPL Committee and identified this issue as a crucial one for the Florida Bar. Following a meeting of its Executive Council, the Section concluded that adoption of a foreign legal consultancy rule would be an appropriate and viable response to the needs of the local economy and the Florida Bar./[1]

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[1]/ The Standing Committee on the Unlicensed Practice of Law (UPL Committee) held a public hearing in Orlando, Florida on June 15, 1989 and received testimony from several individuals. On July 7, 1989, the International Law Section considered the same issue at an Executive Council meeting in Miami, Florida. At that meeting the International Law Section formed a special ad hoc committee, headed by Nelson Slosbergas Esq., to study the viability of a foreign legal consultancy rule to regulate and license foreign attorneys practicing in Florida. In view of the activities of the International Law Section, the UPL Committee informally deferred its deliberations on the issue pending receipt of a report by the International Law Section. This Report and the enclosed Foreign Legal Consultancy Rule represent the response of the International Law Section and are respectfully submitted to the Florida Bar Board of Governors, the UPL Committee and the Board of Bar Examiners.

To draft such a rule, the chairman of the International Law Section, George Harper Esq., established an Ad Hoc Committee for the Formation of a Foreign Legal Consultancy Rule in the State of Florida ("the committee")./[2] The committee's task was made easier by the existence of foreign legal consultancy rules in other jurisdictions./[3]

The committee submitted the proposed rule to an executive council meeting of the International Law Section, held on September 8, 1989 in Tampa. After making several minor modifications to the rule, the Section unanimously recommended its adoption by the Board of Governors for submission to and approval by the Supreme Court. In so doing, the Section agreed with the committee's conclusion that qualified foreign attorneys should be permitted to provide legal advice in Florida on the laws of their countries, under certain prescribed conditions, and following a rigorous investigation process and credentials evaluation procedure.

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[2]/ Active members of the committee included Nelson Slosbergas (Chairperson); George Harper (Chairperson: Executive Council); Andrew Joshua Markus; Larry Rifkin; Sarah Lea Tobocman and Eugenio Hernandez. Messrs. David S. Willig and Michael J. Liberatore also participated.

[3]/ These jurisdiction include New York, California, Michigan, Hawaii, the District of Columbia, New Jersey, Alaska, Texas and Wisconsin. The committee reviewed the rules of New York, the District of Columbia, California, Hawaii, Michigan and Texas.

II- REASONS FOR ADOPTING THE PROPOSED LEGAL CONSULTANCY RULE

Florida law has not conclusively determined whether a foreign attorney who practices the law of his country in Florida can avoid engaging in the unauthorized practice of law. See e.g., The Florida Bar v. Savitt, 363 So. 2d. 559 (Fla. 1978).[4]/

A foreign legal consultancy rule is the best means for resolving this uncertainty. As a center of international commerce, Florida can gain from the adoption of a rule. This follows from the nature of international commerce, which requires readily available and reliable information on the application and effect of foreign law. The demands of business competition make it impractical to require the public to secure such legal services by travelling to a foreign country or corresponding by means of facsimile machine, mail or by phone with law firms in the foreign country. Because Florida attorneys have not, and cannot be expected to develop expertise in foreign law or to obtain a license to practice law in such jurisdictions, foreign attorneys should be permitted to meet the needs of the local economy within a framework of strict regulation.

A foreign legal consultancy rule will also promote the interest of the Florida bar in several ways. First, it will enable Florida law firms to gain access to specialized foreign legal services. It could also enable Florida attorneys to practice Florida law in other countries, since adoption of foreign legal consultancy rules has encouraged foreign countries to grant reciprocal rights to American attorneys./[5]

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[4]/ The question of the unauthorized practice of law as it applies to the practice of foreign law by foreign attorneys is similarly unclear in a number of other states, such as New York and California, which have adopted comprehensive and favorable regulatory systems for foreign legal consultants in response.

[5]/ For this reason, the United States Trade Representative championed passage of a foreign legal consultancy rule in California as a way to ensure permission for American attorneys in that state to practice in Japan.

A program for licensing foreign attorneys should also assist in attracting new business and investment to the State of Florida. If competent foreign counsel can introduce investors to American businessmen, arrange for Florida lawyers to perform necessary U.S. legal work and analyze the ramifications of such investments under the laws of the foreign country the likely result will be an economic benefit to the Florida economy.

The committee recognizes that any proposal for licensing foreign attorneys must address two potential problem areas: the unauthorized practice of law and the quality of the legal services delivered. Whenever possible, the committee adopted (and in some cases went beyond) the most stringent licensing requirements contained in the consultancy rules of sister jurisdictions. The committee's objective was to fashion a rule which would allow the licensing of foreign legal consultants in Florida while providing maximum protection to the public by allowing only competent foreign attorneys to render services in the state and by guarding against the possibility of the unauthorized practice of Florida law. The result is a proposed licensing program with a rigorous investigatory process, one in which foreign consultants must adhere to the Florida Rules of Professional Conduct, renew their licenses on an annual basis, prove their professional qualifications and good character, provide some evidence of liability coverage when requested and subject themselves to continuing regulation after receiving a license.

III- FOREIGN LEGAL CONSULTANCY RULE: COMMITTEE COMMENTS

Section 1.

Section 1 is drawn from the foreign legal consultancy rules of sister jurisdictions. It recognizes the right of a foreign attorney to secure licensing as a foreign legal consultant, subject to compliance with the provisions of the rule. It further stipulates that the foreign attorney need not take the Florida bar exam.

A proposal to require each applicant to take and pass the ethics portion of the Florida bar exam was rejected. This decision was in keeping with all other foreign legal consultancy programs in the United States, none of which requires a foreign attorney to pass an ethics exam. These rules instead require the applicant to read the Rules of Professional Conduct and file an affidavit stating that the applicant has reviewed the rules and understands them. The proposed Florida rule contains a similar provision [see Section 6(A) of the proposed rule and page 15 of this report].[6/]

The absence of an examination requirement is justified on other grounds. First, an examination on Florida law would, by definition, bear no relation to the activities of a foreign consultant. Second, an examination measuring the knowledge of the foreign attorney on the laws of such attorney's home jurisdiction would be unworkable and contrary to notions of comity. The committee believes that a determination of fitness to practice in the home jurisdiction should be controlling.

[6/] It was also felt that an ethics exam requirement would ultimately deter many applicants from participating in the program. Balancing this likelihood against the perceived benefits of such an exam, it was concluded that requiring an exam would ultimately do more harm than good by diminishing the pool of competent foreign attorneys available to service the legal needs of the Florida economy and the Florida bar. An ethics exam was also deemed impractical from an administrative viewpoint, since much of the exam presupposes some acquaintance with American legal concepts and terminology, the understanding of which is not necessarily relevant to the scope of practice of the legal consultant. These factors, together with the conviction that the affidavit procedure required by jurisdictions with foreign legal consultancy programs would prove sufficient to ensure an understanding of the Rules of Professional Conduct, persuaded the Executive Council of the International Law Section to exempt foreign attorneys from an ethics exam requirement.

The proposed Florida rule structures the actual practice requirement as five of the past seven years (and not seven of the past seven years) in recognition of the fact that many of today's international practitioners suspend for relatively short periods of time their practice of law in order to engage in related activities, such as an investment banking or private business, or because of illness or personal emergencies. The committee did not wish to close the licensing program to such attorneys.

Nor was it the intent of the committee to require that the experience requirement be fulfilled solely within the geographical boundaries of the home country. The committee recognizes that the nature of international practice is such that an attorney is often called upon to work outside the home jurisdiction. It would be a strange result to deny a consultancy license to such an attorney for practicing the law of his country in another jurisdiction, since it is precisely the qualified and competent foreign attorney who is most sought after to work abroad. A Swiss attorney dispatched to his firm's Italian office for six years would thus have sufficient experience to qualify as a foreign legal consultant in Florida if the attorney's work in Italy was predicated on such attorney's admission to practice in Switzerland. In this regard, the committee agrees with the reasoning of the Hawaii Ad Hoc Committee on Foreign Legal Consultants, when it stated in its committee report: "A primary reason for not requiring that actual practice be in the country of license as a lawyer is that it is no longer difficult for a lawyer based in the foreign country to stay abreast of legal developments in his or her home jurisdiction ... in this age of rapid jet travel and instantaneously electronic communication" [Report of the Hawaii Ad Hoc Committee on Foreign Legal Consultants, p.12].

Section 2.

In clause (A) (1) and throughout the rule, the committee purposely included the term "or the equivalent" in recognition of the fact that in many jurisdictions "lawyer" or "attorney" is not the exclusive designation for such a professional. In fact, an array of different terms exists and the committee believed it best not to attempt to list all such terms.

Clause (A) (3) and Clause (B) highlight the fundamental requirements that an applicant be a member in good standing in his home jurisdiction and possess the good moral character required for the practice of law in the State of Florida. These requirements are perhaps the most important prerequisites for obtaining a license and are expected to be the subject of rigorous investigation and corroboration by the Florida Board of Bar Examiners.

Clause (C) of Section 2 sets a minimum age requirement of 26 which, in the committee's view, is normally the youngest age at which a lawyer in most countries can graduate and acquire the five years of experience required under this rule. The age requirement also reflects the committee's belief that general life experience and emotional maturity are more likely to be found in an applicant over the age of 26.

With respect to Section (D), it is important to note that the Florida rule has no residency requirement. The committee concluded that actual residency in the State of Florida would have little bearing on the delivery of competent foreign legal services. The committee also felt that a residency requirement would do little to enhance the foreign attorney's accountability to the public, as the rule already contains provisions as to liability coverage [Section 6 (C) (3)] and designation of an agent for service of process [Section 6 (C)(3)].

A better alternative to actual residency is the rule's requirement that the foreign attorney maintain an office in the state for the rendering of foreign legal services, as set out in Section (D). This language is intended to force the foreign consultant to be more than a transitory practitioner in the state of Florida. It also permits an active foreign practitioner to travel outside the jurisdiction without fear of forfeiting the license granted under this rule for failure to maintain actual residency.

Under Section (D), the committee intends that an applicant will be eligible for a license if he already maintains an office, works within or is associated with an existing law firm with offices in the State of Florida, or can show that he has or shortly will obtain an occupational license to open such an office. This "office" requirement will, in the committee's opinion, ensure the foreign legal consultant's accessibility to the public by providing for a fixed location where the foreign

legal consultant can be contacted at all times. More importantly, the requirement is expected to help prevent the practice of foreign law by transient foreign legal consultants since only serious foreign attorneys committed to establishing a sustained presence in the state will be able to obtain a license.[7]/

Section 3.

The committee suggests setting the application fee at $700.00, an amount which corresponds to the highest fee currently charged under existing foreign legal consultancy rules (Texas). The committee believes that such a fee will guarantee that the program of foreign legal consultancy becomes self-funding.

Under Section 3, an applicant must establish his educational qualifications by submitting proof of his diploma, name(s) of school(s) of law attended and dates of study. Also required is information concerning all courts and bar associations before which the applicant has made an application to practice, as well as full disclosure of any licensing examinations taken and the dates thereof. Finally, the applicant must disclose whether he has ever been the subject of any disciplinary proceeding or investigation. All information and documentation submitted by the applicant is then to be investigated by the Florida Board of Bar Examiners.

To guard against fraudulent filing of documents, the rule requires the applicant to file authenticated certificates from the licensing authority in the home jurisdiction certifying that the applicant is admitted to practice and is in good standing. This document must be accompanied by the official seal

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[7]/ After much debate, the committee also decided upon this formulation as a measure of protection for the public in curbing the potential abuse of foreign legal consultants drifting into the practice of Florida or United States law. Cf. 8 C.F.R., section 292.1 (a) (6), which provides in substance that a non-U.S. attorney "who does not maintain an office in the U.S., who resides outside the Unites States and is licensed to practice law and is in good standing in a court of general jurisdiction of the country in which he resides, and who is engaged in such practice" may represent others in proceedings before the Immigration and Naturalization Service.

(if any) of such regulatory body. It must state whether any professional charges or complaints involving the applicant are on record and the status of such matter. The committee believes that the requirement of authentication and an official seal will go a long way to prevent fraud and to assure full disclosure of the applicant's professional standing.

The committee also deemed it prudent to require either a letter of recommendation from an executive member of the bar association (or equivalent) of the applicant's jurisdiction of admission or a similar letter from a judge of the highest court of law in such country. With respect to this last requirement, the committee departed from the traditional requirement under other state consultancy rules, which merely require a letter of recommendation from a judge of <u>any</u> court of general jurisdiction in the home country. Requiring a letter from the highest court of law, it was felt, would make such a letter of recommendation more trustworthy.

If he is unable to secure such a letter of recommendation, the applicant is given the option of submitting a letter from an executive member of the bar association of his home jurisdiction, which alone will suffice to satisfy the filing requirement of this clause. The applicant should nevertheless aspire to submit both letters of recommendation to the Board of Bar Examiners.

Clauses 4 and 5 are intended to establish further evidence of the applicant's professional qualifications. The chosen method is the filing of letters of evaluation prepared by attorneys from the home jurisdiction and from the State of Florida. The letters must comment on the applicant's moral character. In the unlikely event that the applicant cannot secure letters of recommendation from attorneys in Florida, it is the committee's expectation that the Florida Board of Bar Examiners will consider whether under Section 4 (discussed below) the applicant is deserving of a hardship waiver.

The committee is mindful that the proposed licensing program is a new concept, and that the Board of Bar Examiners will need discretion to develop a workable system for investigating applicants. Consequently, in clause 6 and following the lead of other foreign legal consultancy programs, the proposed rule vests discretion in the Board of Bar Examiners to require any further information or documentation it deems necessary. Corroboration of such information and documentation may be carried out directly by the Board's own investigation unit or by outside parties retained for this purpose by the Board.

Clause (C) of Section 3 was included to emphasize the ultimate authority of the Supreme Court to decide on licensing any applicant under this rule.

Section 4.

The committee chose to follow the lead of every other jurisdiction having foreign legal consultancy rules by including a hardship waiver provision. The rationale of this section is to complement the Board's discretion to require more information or documentation from an applicant by also vesting discretion in the Board to waive any requirement herein, whenever appropriate. Essentially, this provision is designed to recognize the peculiar circumstances of certain individuals who, despite technical non-compliance with other provisions in this rule, otherwise satisfy the Board that they are qualified to receive a license.

Section 5.

Section 5 defines the very limited scope of practice of a foreign legal consultant under this rule. In drafting this section, the committee drew heavily on the language from other foreign legal consultancy rules but altered the language of these rules in certain respects in order to clarify the permissible activities of a foreign consultant. The committee also added a new clause not found in any foreign legal consultancy rule as a further safeguard against the unauthorized practice of law (clause H, discussed below).

The central principle behind Section 5 is that a foreign legal consultant may only provide consultation on the laws of the jurisdiction in which such legal consultant is licensed. The strict prohibition against engaging in the practice of law of Florida or in any other U.S. jurisdiction is actually a two part prohibition. The applicant is barred from engaging in the substantive practice of law of any U.S. jurisdiction, including that of Florida. He is also prohibited from engaging in any activity which could with reasonable prior certainty be construed as the practice of the law of any jurisdiction in which he is not licensed to practice.

Regarding the substantive practice of U.S. or Florida law, clauses (A) through (E) list prohibited activities. In Section (A), the foreign legal consultant is barred from appearing in a court of law. To further this objective, the committee saw fit to add the phrase "or other judicial officer or before any federal, state, county or municipal governmental agency, quasi-judicial or quasi-governmental authority" to prohibit a foreign legal consultant from appearing or representing clients in Florida courts or before any administrative tribunal, unless such legal consultant could independently appear before such court or administrative tribunal by force of any rule or procedure relating to admission pro hac vice or pursuant to any administrative rule. The committee finds this language to be especially necessary in order to foreclose the possibility that a foreign legal consultant will appear before immigration panels or other administrative bodies, unless otherwise authorized by administrative rule. Nothing in this clause, however, is intended to interfere with a foreign attorney's right to appear in any proceeding as an expert witness on the laws of the jurisdiction in which he is admitted to practice.

Clause (B) is intended to bar the foreign legal consultant from preparing any instrument affecting title to real or personal property located in the United States, except where the instrument affecting title of any such property is governed by the law of a jurisdiction in which the foreign legal consultant is admitted to practice. Thus, a foreign legal consultant from France could prepare a transfer document regarding a cottage in Brittany, a stock transfer instrument concerning the shares of a French company or a collateralized loan agreement governed by French law.

Clause (C) is designed to remove the foreign legal consultant from involvement in U.S. estate planning or the preparation of wills or trusts.

Clause (D) is intended to bar the foreign legal consultant from providing services involving domestic relations, divorces, prenuptial agreements, custody proceedings or any such related activities. Clause (C) and (D) are <u>not</u> intended to prohibit the foreign legal consultant from preparing or otherwise engaging in the same activities if the focus of the representation centers on the laws of the jurisdiction in which the foreign legal consultant is admitted to practice.

Clause (E) is a prohibition against the rendering of "legal advice" by foreign consultants on U.S. or Florida law.

Clauses (F), (G) and (H) speak more directly to the unauthorized practice of law. Clause (F) prohibits the foreign legal consultant from representing in any way that he is authorized to practice the law of Florida or any U.S. jurisdiction. Clauses (G) and (H) establish a mechanism for putting the public on notice of the limited scope of activities of the foreign legal consultant. Clause (G) follows the lead of other foreign legal consultancy rules by regulating the use of titles. The clause makes clear that the foreign legal consultant may only hold himself out as "Foreign Legal Consultant, Not Admitted To Practice Law in Florida". The language "Not Admitted To Practice Law In Florida" was added by the committee because it was felt that the term "foreign legal consultant" alone would not put the public on notice that the foreign legal consultant is not authorized to practice law in this state.

Clause (H) is a totally new addition to foreign legal consultancy rules, adopted by the committee to afford additional protection to the public. The proposed rule requires that each consultant use a standard written retainer agreement stating, in bold print, that the foreign legal consultant is not admitted to practice law in the State of Florida. Attached to this report as Enclosure A is the committee's suggested language for such a retainer agreement. This enclosure was in large part based upon proposed Rule 10.1.1(B) of the Unlicensed Practice of Law Standing Committee, for disclosure on forms completed with the assistance of non-lawyers. The committee believes that the restrictions contained in clauses (A) through (G) should provide an effective deterrent against unauthorized practice of law.[8]/ Further safeguards are discussed below.

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[8]/ By including this provision in the proposed rule, the committee does not suggest that a foreign lawyer is in any sense unworthy of trust or unlikely to discharge his ethical responsibilities in a satisfactory manner. Rather, the retainer agreement concept is intended only to ensure that written rather than oral notice is given to clients of the foreign legal consultant concerning the limited scope of practice of the foreign attorney. Utilizing a retainer agreement to provide such notice is an effective way to prevent misconceptions about the foreign attorney's permissible scope of professional activities.

In drafting the rule, the committee also studied a proposal to require formal association between the foreign attorney and a member of the Florida Bar. According to this idea, the foreign attorney would be less likely to engage in the practice of Florida law if a Florida attorney were "present" to oversee the foreign attorney's activities, thereby affording an additional form of protection to the public.

The committee believes that to include such a proposal would be unworkable. It is doubtful that a Florida attorney could "police" the activities of the foreign attorney without scrutinizing the work product of the foreign attorney, screening his phone calls and restricting his contact with other individuals. No attorney would consent to accepting such an impractical function and becoming a de facto surety for the foreign attorney.

Additionally, the committee believes that the association idea would inure to the benefit of large law firms, which could afford to form such an association, at the expense of smaller firms which would be unlikely to have the resources to afford a consultant of their own. The result would be a reduced pool of foreign consultants to serve the public and the bar.

The committee has also concluded that forced association would inhibit the full development of the foreign legal consultancy program, since Florida firms with no in house legal consultant would be reluctant to refer their cases and legal work to a consultant associated with a competitor. As stated earlier, the committee's objective was to draft a rule that would, to the maximum degree practicable, protect the public while at the same time provide a workable basis for attracting competent foreign legal consultants, for the ultimate benefit of the State of Florida. The idea of forced association would defeat that purpose.

Section 6.

Section 6 focuses on the regulatory mechanism for foreign legal consultants. Here, the overriding objective was to protect the public by ensuring that foreign legal consultants will understand and adhere to the ethical standards required of Florida bar members.

Clause (A) of Section 6 requires the foreign legal consultant to comply with the Rules of Professional Conduct in force in the State of Florida. Consequently, the foreign consultant will be subject to complying with duties of confidentiality; refraining from conflicts of interest; and accounting for client funds through the use of a client trust account.

The committee also wished to leave no doubt that the foreign consultant has a continuing obligation to meet the requirements for licensing under this rule. For that reason, clause (A) explicitly states that the credentials of the foreign legal consultant are subject to continuing review by the Florida Bar. Further, the consultant is directly subject to the disciplinary jurisdiction of the Florida Bar to the same extent as the Florida bar member.

Clause (C) is designed to ensure compliance with the Rules of Professional Conduct and to protect the public from malpractice. Subsection 1 requires the foreign legal consultant to show that he has read and understood the Rules of Professional Conduct by filing a form or affidavit with the Supreme Court to that effect. In subsection 2, the consultant is required to provide documentary proof of liability coverage. This can be done in one of two ways: the attorney may petition the Supreme Court to set a level of professional liability insurance, or the applicant may independently post a bond, letter of credit or other financial guaranty in an amount of $50,000.00.

Subsection 2 was adopted after long discussion and following market research on the availability of malpractice insurance for foreign attorneys in the Unites States. While the committee remains committed to the idea of requiring liability coverage, it notes no corresponding requirement on Florida attorneys. It is also aware that malpractice insurance for foreign attorneys is apparently unavailable at this time.

In this regard, members of the subcommittee contacted several insurance carriers and were informed that no insurance was currently being underwritten for foreign attorneys because of the limited numbers of such attorneys and the difficulty of assessing the risk involved. In the case of California, which requires liability coverage in the amount of $50,000.00, the result is that only one legal consultant has been licensed under the program, and that attorney was only able to qualify by

posting a letter of credit with the state. In Texas, where liability coverage of at least $500,000.00 is required, no consultants have been licensed under that program. In New York, where "appropriate evidence of professional liability insurance" is required, the committee learned that in many instances the regulatory authorities have simply refrained from demanding coverage, especially where the applicant is a reputable and experienced foreign attorney.

Subsection 2 is a response to this current situation. The committee concluded that the best policy would be to give the foreign consultant the option of filing a letter of credit or bond of $50,000.00 in lieu of such professional liability insurance. The letter of credit or bond could be posted through either a domestic or foreign financial institution, provided that such institution is authorized to do business in the United States. The committee chose the $50,000.00 figure in the belief that $50,000.00 would be an accessible amount, even if it required a 100% cash outlay by the applicant. Requiring any amount above $50,000.00 would, in the committee's opinion, effectively deter any foreign attorney from serving as a legal consultant.

The committee expresses its hope that some insurance coverage for foreign attorneys will eventually be underwritten. If this comes to pass, the foreign legal consultant will have the option of acquiring an amount of professional liability insurance (if any) that the Supreme Court of Florida prescribes in his case, or securing a bond/letter of credit for $50,000.00.

The actual language chosen for Subsection 2 combines language of the New York rule and language prepared by the committee. The proposed rule asks for the Supreme Court of Florida to review the specific circumstances of each foreign legal consultant and determine what amount of liability insurance, if any, should be set. In choosing this language, the committee envisions that the Supreme Court may find it convenient to consider the following factors before deciding on the amount of coverage to be required:

i) The experience of the foreign legal consultant;
ii) The capital investment of the foreign legal consultant in Florida (the office of the foreign legal consultant);
iii) Whether the foreign legal consultant is a member or partner of a foreign firm and the international reputation of such firm; and
iv) The availability and cost of such insurance.

Subsection 3 stipulates that the foreign legal consultant shall name the Secretary of State as agent for service of process. The provision is designed to make it easier for the public to initiate proceedings against the foreign legal consultant and to avoid service of process problems in the event the foreign legal consultant is not physically available to be served. This requirement is a precondition to licensing and, in the committee's opinion, is an essential procedural protection for the public. It is also a uniform requirement in most foreign legal consultancy rules.

Section 4 establishes an affirmative obligation for the foreign legal consultant to notify the Florida Bar of any circumstances affecting the attorney's underlying right to practice in the home jurisdiction. While it is the foreign legal consultant who is obligated to provide such information, the Florida Bar may at any time reinitiate an investigation of the qualifications of the foreign attorney, either by requiring the filing of updated documentation or by initiating a separate investigation. Section 4 reflects this point by putting the foreign legal consultant on notice of the fact that his status as a legal consultant in Florida is dependent upon his continued good standing in the jurisdiction of admission.

Section 7

Section 7 is a fairly unusual provision. No other state except Texas requires annual certification and payment of renewal fees. Essentially, this section requires that the foreign legal consultant submit on an annual basis a sworn statement that the consultant is still in good standing in the home jurisdiction. As mentioned above, such a statement is subject to corroboration at the discretion of the Florida Bar.

The annual certification must also be accompanied by an annual renewal fee, which the committee thought prudent to tie to the annual renewal fee charged to Florida bar members. It is expected that such a renewal fee will be sufficient to cover the cost of administering the legal consultancy program in its entirety.[9/]

[9/] The committee also entertained and rejected the idea of including a reciprocity provision in the rule. This decision was made primarily to ensure as large a pool of foreign attorneys as possible to service the needs of the local economy and the Florida Bar. A reciprocity provision, it was felt, would undercut this objective. Reciprocity was also deemed to be impractical for administrative reasons, since at the very core of determining whether reciprocity exists is the Herculean task of ascertaining whether a "practical opportunity" for the practice of law in the foreign country by American attorneys exists. Such a task, it was concluded, would be both unnecessary and incapable of precise evaluation. It also bears mentioning that a reciprocity provision could conceivably contravene ongoing multilateral negotiations on the subject of trade in services (GATT).

DRAFT FLORIDA FOREIGN LEGAL CONSULTANCY RULE

Proposed Retainer Agreement Disclosure

The language below shall appear on the requisite written retainer agreement for services rendered in Florida by a foreign legal consultant licensed in this state, as provided in Section 5 (h) of the proposed Foreign Legal Consultancy Rule:

1. Before a foreign legal consultant assists, counsels or otherwise provides services to a person, the foreign legal consultant is required to provide in this retainer agreement the following disclosure which shall be incorporated as a part of said retainer agreement.

2. The retainer and disclosure shall be signed by both the foreign legal consultant and the client with one copy for the client and the other copy to be retained in the client file maintained by the foreign legal consultant. The foreign legal consultant's signature affirms that the foreign legal consultant has read the disclosure to the client or caused such disclosure to be read to the client in a language which the client understands. The disclosure shall contain the following provisions:

i) _____, the foreign legal consultant party to this agreement, told me that he/she is not admitted as an attorney in the State of Florida, may not give advice or represent me in court in the State of Florida, and cannot tell me what my rights and remedies are under Florida law or how to testify in court.

ii) Further, that as a foreign legal consultant licensed in this state, the aforementioned foreign legal consultant is not licensed to advise on the law of the United States, the State of Florida or that of any other state, subdivision, commonwealth or territory of the United States or the District of Columbia and that the practice of the person licensed as a foreign legal consultant is limited to the laws of the foreign country where such person is admitted to practice as an attorney or counselor at law or equivalent.

iii) _____ I can read English

_____ I cannot read English but this notice was read to me by _____ in _____, a language which I understand.

_____
Client Signature

_____
Foreign Legal Consultant Signature

FOREIGN LEGAL CONSULTANCY RULE

16-1.1 Licensing of Foreign Legal Consultants

A person who is admitted to practice in a foreign country as an attorney or counselor at law or the equivalent and who is licensed by the Supreme Court of Florida under the provisions of this rule may render services as a legal consultant in the State of Florida, without examination, to the extent allowed by this rule.

16-1.2 Eligibility

In its discretion, the Supreme Court of Florida or the Florida Board of Bar Examiners may license to practice as a foreign legal consultant, without examination, an applicant who:

A. For a period or not less than 5 of the 7 years immediately proceeding the date of application:

1. has been admitted to practice in a foreign country as an attorney or counselor at law or the equivalent;

2. has engaged in the practice of law of such country; and

3. has remained in good standing as an attorney or counselor at law or the equivalent in that country throughout said period.

B. possesses the good moral character and general fitness required for admission to practice in this state;

C. is over 26 years of age; and

D. maintains an office in the state for the rendering of services as a foreign legal consultant.

16-1.3 Applications

A. Every applicant for a license as a foreign legal consultant shall file with the Florida Board of Bar Examiners a sworn and notarized typewritten English application in duplicate, setting forth the applicant's name and age, place of residence, the character and term of the applicant's law study, as well as the name of each institution of law the applicant attended and the degree if any awarded to the applicant by such institution. The applicant shall set forth the names of all courts or other licensing authorities to which the applicant has made application to practice, the dates the applicant has taken examinations and the dates the applicant has been admitted to practice as an attorney or counselor at law or equivalent or as a foreign legal

consultant. The application shall set forth whether the applicant has been the subject of any investigation or proceeding for professional misconduct or whether the applicant has ever been rejected upon an application to practice before any court or other licensing authority. A filing fee of $700.00 shall accompany each application.

B. The application shall be accompanied by the following documents, together with duly authenticated English translations if they are not in English:

1. A duly authenticated certificate from the authority having final jurisdiction over professional discipline in the foreign country in which the applicant is admitted to practice and which shall be accompanied by the official seal, if any, of such authority, and which shall certify:

a. the authority's jurisdiction in such matters;

b. the applicant's admission to practice in such foreign country and the date thereof and the applicant's good standing as an attorney or counselor at law or the equivalent therein;

2. A duly authenticated document from the authority having final jurisdiction in which said consultant has been

licensed as a foreign legal consultant, indicating any charge or complaint that has ever been filed against the applicant with such authority, if any, and the substance of each such charge or complaint and the adjudication or resolution thereof.

3. A letter of recommendation signed by and with the official seal, if any, of one of the members of the executive body of such authority or from one of the judges of the highest court of law of such foreign country, certifying to the applicant's professional qualifications.

4. A letter of recommendation from at least two attorneys or counselors at law or the equivalent admitted in and practicing in such foreign country, setting forth the length of time, when, and under what circumstances they have known the applicant and their appraisal of the applicant's moral character.

5. A letter of recommendation from at least two members in good standing of the Florida Bar, setting forth the length of time, when and under what circumstances they have known the applicant and their appraisal of the applicant's moral character.

6. Such other evidence as to the applicant's educational and professional qualifications, good moral character

and general fitness and compliance with the requirements of this rule as the Florida Board of Bar Examiners may require.

C. The statements contained in the application and supporting documents shall be investigated by the Florida Board of Bar Examiners, which shall report the results of its investigation to the court, together with its recommendations thereon. Prior to the grant of any license, the court shall be satisfied of the good moral character and general fitness of the applicant to practice as a foreign legal consultant.

16-1.4 Hardship Waiver

Upon a showing that strict compliance with the provisions of Sections 16-1.2 (A) or 16-1.3 (B) of the rule would cause the applicant unnecessary hardship, or upon a showing of exceptional professional qualifications to practice as a foreign legal consultant, the Florida Board of Bar Examiners may in its discretion waive or vary the application of such provisions and permit the applicant to make such other showing as it deems necessary or proper.

16-1.5 Scope of Practice

A person licensed as a foreign legal consultant under this rule may render legal services in the State of Florida regarding the laws of the country in which such person is admitted to practice as an

attorney, counselor at law or equivalent. The foreign legal consultant shall not, however, conduct any activity or render any services constituting the practice of the law of the United States, the State of Florida or that of any other state, commonwealth or territory of the United States or the District of Columbia including, but not limited to, the restrictions that such person shall not:

A. appear for another person as attorney in any court or before any magistrate or other judicial officer or before any federal, state, county or municipal governmental agency, quasi-judicial or quasi-governmental authority in the State of Florida, or prepare pleadings or any other papers in any action or proceedings brought in any such court or before any such judicial officer, except as authorized in any rule or procedure relating to admission pro hac vice, or pursuant to administrative rule;

B. prepare any deed, mortgage, assignment, discharge, lease, agreement of sale or any other instrument affecting title to (1) real property located in the United States of America, or (2) personal property located in the United States of America except where the instrument affecting title to such personal property is governed by the law of a jurisdiction in which the foreign legal consultant is admitted to practice as an attorney or counselor at law or the equivalent.

C. prepare:

1. any will or trust instrument affecting the disposition of any property located in the United States of America and owned by a resident thereof;

2. any instrument relating to the administration of a decedent's estate in the United States of America;

D. prepare any instrument in respect of the marital relations, rights or duties of a resident of the United States of America or the custody or care of the children of such a resident;

E. render professional legal advice on the law of the State of Florida or the United States of America or any other state, subdivision, commonwealth or territory of the United States of America or the District of Columbia (whether rendered incident to the preparation of a legal instrument or otherwise);

F. in any way represent that such person is admitted to the Florida Bar or is licensed as an attorney or foreign legal consultant in another state, territory or the District of Columbia, or as an attorney or counselor at law or the equivalent in a foreign country, unless so licensed;

G. use any title other than "Foreign Legal Consultant, Not Admitted to Practice Law in Florida," provided that such person's authorized title and firm name in the foreign country in which such person is admitted to practice as attorney or counselor at law or the equivalent may be used if the title, firm name, and the name of such foreign country are stated together with the above-mentioned designation; or

H. render any legal services for a client without utilizing a written retainer agreement which shall specify in bold type that the foreign legal consultant is not admitted to practice law in the State of Florida nor licensed to advise on the laws of the United States or the District of Columbia and that the practice of the foreign legal consultant is limited to the laws of the foreign country where such person is admitted to practice as an attorney or counselor at law or the equivalent.

16-1.6 Disciplinary Provisions.

A. Each person licensed to practice as a foreign legal consultant under this rule is expressly subject to the Rules of Professional Conduct and to continuing review of such person's qualifications to retain any license granted hereunder, and shall be subject to the disciplinary jurisdiction of this court and the Florida Bar.

B. Section A, above, shall not be construed to limit in any way concurrent disciplinary procedures to which the foreign legal consultant may be subject in the country of admission (or its equivalent).

C. Each person licensed to practice as a foreign legal consultant under this rule shall execute and file with the clerk, in such form and manner as the court prescribes:

1. a statement that the foreign legal consultant has read, and made a commitment to observe the Rules of Professional Conduct; and

2. either

a. an undertaking or appropriate evidence of professional liability insurance, in such amount as the Supreme Court of Florida may prescribe, to assure such foreign legal consultant's proper professional conduct and responsibility; or

b. an appropriate undertaking in the amount of $50,000.00 in the form of a bond, letter of credit or other financial guaranty instrument issued by a reputable financial institution authorized to do business in the United States

of America or any state therein for the purpose of assuring the foreign legal consultant's proper professional conduct and responsibility; and

3. a duly acknowledged instrument in writing setting forth such foreign legal consultant's address within the State of Florida and designating the Secretary of State as such consultant's agent upon which process may be served, pursuant to applicable Florida Statutes, with like effect as if served personally upon such consultant, in any action or proceeding thereafter brought against such consultant arising out of or based upon any legal services rendered or offered to be rendered by such consultant within or to the residents of the State of Florida, whenever after due diligence service cannot be made upon such consultant at such address; and

4. a commitment to notify the court of any resignation or revocation of such foreign legal consultant's admission to practice in the foreign country of admission, or in any other state or jurisdiction in which said consultant has been licensed as an attorney or counselor at law or equivalent or as a foreign legal consultant, or of any censure,

suspension, or expulsion in respect of such admission.

16-1.7 Annual Certification and Renewal Fees.

A. A person licensed as a foreign legal consultant under this rule shall submit on an annual basis to the Florida Bar a sworn statement attesting to the foreign legal consultant's continued good standing as an attorney or counselor at law or equivalent in the foreign country in which such person is admitted to practice.

B. The foreign legal consultant shall also include with the above-mentioned sworn statement an annual renewal fee equivalent to the renewal fees paid by the Florida Bar members and such other evidence as the Florida Bar shall deem necessary to determine the continuing qualifications of the foreign legal consultant under this rule.