

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

COMMENTS ON THE

PROPOSED FOREIGN LEGAL CONSULTANCY RULE

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TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES	ii
INTRODUCTION AND BACKGROUND TO RULE	1
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. The proposed rule protects the public by establishing a regulatory system for an unregulated and unsettled area of the law	4
II. The proposed rule promotes the interests of the State of Florida and its residents	7
III. The proposed rule is designed to protect the public while filling the need to deliver foreign law expertise	11
CONCLUSION	15
CERTIFICATE OF SERVICE	18
<hr/> <u>APPENDIX</u>	
A. Letter of Wendell Wilkie, II, General Counsel of the United States Department of Commerce to Scott Baena of the Rules and Bylaws Committee of the Board of Governors of The Florida Bar (May 24, 1991)	A-1

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<u>The Florida Bar re: Amendment to the Rules Regulating The Florida Bar</u> <u>1-3.7; 3-5.1(g), 3-5.2; 14.1 and Chapter 15, 16 FLW S.743 (November 14, 1991)</u>	9
<u>The Florida Bar v. Liggió-Mendez</u> 279 So.2d 251 (Fla. 1973)	5
<u>The Florida Bar v. Neadel</u> 297 So.2d 305 (Fla. 1974)	5
<u>The Florida Bar v. Savitt</u> 363 So.2d 559 (Fla. 1978)	4
 <u>STATUTES</u>	
<u>The Florida International Bank Act ("FIBA")</u> Florida Statutes 663 (1977)	15

INTRODUCTION AND BACKGROUND TO RULE

This Brief is submitted by the International Law Section of The Florida Bar in support of the proposed Foreign Legal Consultancy Rule. The Section has been very active in support of the rule since its inception and offers these comments as additional argument as to why the proposed foreign legal consultancy rule should be adopted by this Court.

Discussion of a foreign legal consultancy rule in Florida started in the spring of 1989 when The Florida Bar's Standing Committee on the Unlicensed Practice of Law (the "UPL Committee") was asked to render an advisory opinion on whether it constituted the unauthorized practice of law for a foreign lawyer to give legal consultation in Florida on the law of such lawyer's jurisdiction of admission. Given the increasing internationalization of Florida's economy, the issue had become an important and timely one. The UPL Committee held a public hearing on the issue on June 15, 1989, receiving testimony from several individuals, but deferred its deliberations until the International Law Section concluded studying the matter and reported on it to the UPL Committee.

The International Law Section determined 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. An ad hoc committee of the Section proceeded to prepare

a draft of a proposed rule. The Section's Executive Council, at a meeting on September 8, 1989, unanimously recommended adoption of the proposed rule by the Florida Bar Board of Governors, for submission to and approval by the Court.

After extensive revisions and consultation with other Bar groups and the Board of Bar Examiners, the proposed foreign legal consultancy rule, in its final form, was submitted to and accepted by the Board of Bar Governors at its meeting on May 30, 1991.

SUMMARY OF ARGUMENT

I. Whether foreign lawyers are permitted under the laws of Florida to give legal advice in Florida on the laws of their jurisdiction of admission is unsettled. The proposed foreign legal consultancy rule would resolve this uncertainty by regulating this practice and making foreign legal consultants accountable in Florida, thereby ensuring the protection of the public and the integrity of the Florida Bar.

II. Florida has made a concentrated effort in recent years to attract foreign investment and business, and its economy has increasingly benefitted from international commerce. The proposed foreign legal consultancy rule would promote these goals and objectives by aiding the delivery of legal services regarding foreign law which are necessary to international trade and investment. Without such a rule, Florida will be at a disadvantage in the international marketplace.

III. The proposed foreign legal consultancy rule draws on the best features of similar rules in several other states. It is designed to ensure the maximum protection of the public while filling the public's need for the delivery of foreign legal services.

ARGUMENT

I.

THE PROPOSED RULE PROTECTS THE PUBLIC BY ESTABLISHING A REGULATORY SYSTEM FOR AN UNREGULATED AND UNSETTLED AREA OF THE LAW

No Florida court has definitively resolved the issue of whether a foreign attorney may lawfully give legal advice in Florida on the laws of his or her jurisdiction of admission. The most analogous cases deal with out-of-state attorneys and whether such attorneys' activities constitute the unauthorized practice of law.

Any discussion of the ability of non-Florida Bar members to practice law in Florida usually focuses on The Florida Bar v. Savitt, 363 So.2d 559 (Fla. 1978), the principal case involving the issue of what out-of-state attorneys can do to avoid engaging in the unauthorized practice of law. Savitt dealt with a dispute between The Florida Bar and a New York law firm setting up an office in Florida in which the partner in charge of supervising such office was not admitted to practice law in Florida. The case, which was actually a settlement agreement between the parties, recognized that there are certain types of conduct which do not constitute the unauthorized practice of law and which may, therefore, be carried out by out-of-state attorneys in Florida. One such authorized activity includes "giving 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, provided that matters of Florida law, if any,

are handled by members of The Florida Bar, and provided that, if the lawyer giving the legal advice is not a member of The Florida Bar, the lawyer is in Florida on a transitory basis..." 363 So.2d 559, at 561.

If Savitt were applicable in the context of foreign attorneys, it would seem that foreign attorneys may render legal advice in Florida on the laws of their home countries only on a transitory basis and only to non-Florida clients. This result is unduly restrictive and impractical because it would require all foreign lawyers seeking to give advice on their laws frequently to travel back and forth to Florida, in order to satisfy the "transitory basis" requirement. This result is harmful to the public because, on its face, it permits non-residents to hire Florida-based foreign lawyers, but prohibit Florida residents and Florida corporations from exercising that same privilege.

Several other Florida cases have dealt with the offering of advice or legal services as to foreign law which are unquestionably prohibited and clearly the unauthorized practice of law. In The Florida Bar v. Neadel, 297 So.2d 305 (Fla. 1974), and The Florida Bar v. Liggio-Mendez, 279 So.2d 251 (Fla. 1973), this Court enjoined Florida residents, not members of The Florida Bar, from engaging in the practice of obtaining 24-hour divorces in the Dominican Republic for Florida clients. The enjoined individuals were not licensed to practice law in the Dominican Republic, or anywhere else, and the purpose of such individuals' practices was to affect personal and property rights in Florida. The individuals' conduct was clearly the unauthorized practice of law in Florida.

Although these two cases assist in defining what clearly constitutes the unauthorized practice of foreign law, they do not address the more complicated question of whether the activities of a foreign attorney who is properly licensed and trained in the laws of a foreign country may lawfully render legal advice in Florida on the laws of that attorney's jurisdiction of admission.

The current state of Florida law concerning the giving of legal advice by foreign attorneys on the laws of their own jurisdictions is thus unsettled. The potential for harm to the public is much greater in such an uncertain and largely unregulated environment, in that the possibility of unskilled and unethical foreign attorneys rendering legal advice is substantial.

A foreign legal consultancy rule would provide a regulatory system which would protect the public from incompetent or unethical foreign attorneys by setting a certain standard for the conduct of such attorneys and by strictly circumscribing the activities in which such attorneys may engage. Rather than not regulating foreign attorneys at all or requiring them to render services only on a transitory basis, as under Savitt, such attorneys should be encouraged to establish more permanent ties to Florida within the framework of the strict requirements of the proposed foreign legal consultancy rule. A more permanent, regulated, presence in Florida of foreign attorneys would also make such attorneys accountable for their actions, which current law does not.

II.

THE PROPOSED RULE PROMOTES THE INTERESTS OF THE STATE OF FLORIDA AND ITS RESIDENTS

The world economy has increasingly become international and interdependent in the past few years, due to rapidly changing developments in communication, travel and technology. International trade is expanding at an ever-increasing pace and businesses around the world are finding that in order to survive and prosper, they must operate internationally.

Florida, in particular, has seen its economy become increasingly international in character and prosper from foreign commerce. The state is one of the world's fastest growing markets, due, in large part, to the explosion of international growth the state has experienced as a major economic hub of the southeastern United States. Its unique position, geographically and strategically, as the gateway between North and South America has helped make Florida an international crossroads for business and tourism, not only with Latin America but with Europe as well.

In 1990, Florida's international trade totalled over \$30.6 billion, with world exports of over \$15.5 billion and world imports over \$15.1 billion. Foreign investment in Florida is increasing at a 22% compounded rate and major international corporations are moving their headquarters to Florida in increasing numbers. State officials estimated in 1990 that

there were more than 740 international companies in Florida, representing more than 49 countries. In addition, more than 76 consuls and honorary consuls, representing 55 countries, are now established in Miami, a definite indication that Florida is an international attraction for foreign business and investment.

Florida and its business leaders have made a concerted effort to attract this international business and investment to the state by establishing trade missions in many countries as well as other programs designed to lure new foreign investment. The Florida Bar has also tried to adopt activities conducive to international business and law, sponsoring international seminars, such as the annual Doing Business in Latin America seminar, as well as other international programs.

The proposed foreign legal consultancy rule will serve to advance this interest in promoting foreign investment in Florida. International transactions often require lawyers versed in the laws of foreign nations; Florida investors with business projects abroad, as well as international investors seeking opportunities in Florida, are often in need of, and would benefit from having, legal consultants well versed in foreign law readily available to advise on questions arising in such transactions.

In a world where the demands of business competition and quickening pace of trade require fast, reliable advice, it is highly impractical and often detrimental to secure adequate foreign legal services by travelling to the foreign country or by long distance

communication. Because Florida attorneys have not and cannot be expected to develop foreign law expertise or to obtain a license to practice in foreign jurisdictions, foreign attorneys should be permitted to meet the needs of the local economy within the framework of strict regulation. A foreign legal consultancy rule would thus ensure that persons in Florida could have access to competent foreign legal advice from attorneys well trained in the laws of a particular country, thereby encouraging foreign investment and facilitating economic activity in the state. Without such a rule, international investors may be less likely to choose Florida as a place to invest.

In promoting international trade and investment, the proposed foreign legal consultancy rule coincides with this Court's desire to further commerce. In The Florida Bar re: Amendment to the Rules Regulating The Florida Bar, 1-3.7; 3-5.1(g), 3-5.2; 14.1 and Chapter 15, 16 FLW S.743 (Fla. November 14, 1991), this Court rejected the authorized house counsel rule proposed by The Florida Bar because the proposed rule "was not drafted to meet the legitimate needs of business in a modern economy." 16 FLW S.743. This Court commended The Florida Bar's efforts in guarding against the unauthorized practice of law but the Court's concern was that the rule would hinder commerce. The proposed foreign legal consultancy rule, in contrast, is drafted in response to the needs of the local economy and will serve to stimulate commerce, while at the same time satisfying the concerns over the unauthorized practice of law by foreign attorneys.

Not only will the adoption of a foreign legal consultancy rule benefit Florida, it will benefit the rest of the country by contributing to the easing of trade barriers. The federal government has asked various states to consider, for ease-of-trade purposes, adopting foreign legal consultancy rules, and to reciprocate with other nations. The U.S. Department of Commerce, through its General Counsel, Mr. Wendell Willkie II, wrote to Mr. Scott Baena of the Rules and Bylaws Committee of the Board of Governors of The Florida Bar, on May 24, 1991, that "as our economy becomes more internationalized, the role of lawyer as trade facilitators becomes more important. Barriers to the provision of legal services by foreign lawyers should be removed, to the extent possible, while ensuring that the interests of citizens are protected;" such letter is attached to these Comments as Exhibit A.

As of this date, eleven states have adopted foreign legal consultancy rules and several more are considering such programs. New York and California, two international states in direct competition with Florida for foreign investment and trade, have had foreign legal consultancy rules for several years. Without such a rule, Florida will be at a disadvantage in the international marketplace.

III.

THE PROPOSED RULE IS DESIGNED TO PROTECT THE PUBLIC WHILE FILLING THE NEED TO DELIVER FOREIGN LAW EXPERTISE

In drafting the foreign legal consultancy rule, the objective was to fashion a rule permitting the licensing of foreign legal consultants, thus fulfilling an increasing need in Florida, while at the same time providing maximum protection to the public. The proposed foreign legal consultancy rule achieves this objective of balancing these competing interests by permitting foreign legal consultants to render legal advice on the laws of their own jurisdiction within the framework of a regulatory system which allows only competent foreign attorneys to render services in Florida and which reduces the possibility of the unauthorized practice of law.

To ensure that only competent attorneys are licensed as foreign legal consultants, the rule provides for a rigorous application process. Applicants for such licensure must provide a certificate of good standing from their respective bar association (which must state whether any complaint or charge has been filed against the applicant, thus putting The Florida Bar on notice of potential problems), as well as several letters of recommendation, including two from members of The Florida Bar in good standing.

The rule does not require that the applicant take any type of exam to determine such applicant's competency or ethical standards. An examination on Florida law bears

no relation to the practice of a foreign legal consultant and an examination measuring the applicant's knowledge of the laws of the applicant's home country or ethical standards would be unworkable and contrary to the doctrine of comity. A determination by the entity governing the practice of law in the applicant's home country of the applicant's fitness to practice and letters of recommendation should be sufficient to assure the competency of applicants. In addition, applicants must have practiced foreign law five of the preceding seven years, a standard designed to ensure a high degree of competency.

The proposed foreign legal consultancy rule strictly circumscribes the activities of a foreign legal consultant, limiting his or her practice solely to the rendering of legal advice on the laws of his or her own country. A foreign legal consultant may not appear in court or before any other government agency; may not prepare any instrument related to real or personal property in the U.S.; may not prepare any will or trust instrument affecting property in the U.S.; may not prepare any instrument related to the marital relations of a U.S. resident; and may not render any kind of advice on the laws of the U.S. or any of its jurisdictions.

The foreign legal consultant is also strictly prohibited from representing in any way that he or she is authorized to practice Florida or U.S. law. The public is alerted to the limited nature of such foreign legal consultant's practice by the rule's requirement that the foreign legal consultant may only use the title "Foreign Legal Consultant, Not Admitted to Practice Law in Florida" on his or her letterhead or business cards, although such

consultant is permitted to use the title and firm name used in the country of admission as long as the above-mentioned designation is also used.

In addition, the proposed rule imposes several other strict requirements: the foreign legal consultant must provide the client with a written retainer agreement which expressly states the limitations on the consultant's practice and the foreign legal consultant must provide the client with a letter listing the activities in which the foreign legal consultant may not engage. These safeguards ensure that the public is on notice as to the foreign legal consultant's limitations, thereby protecting the citizens of Florida and reducing the possibility of the unauthorized practice of law by the foreign legal consultant.

In order to protect the public further, the proposed foreign legal consultancy rule imposes the same standards for conduct on such foreign attorneys as The Florida Bar imposes on Florida Bar members. A foreign legal consultant must sign a statement that he or she has read and is familiar with the Rules of Professional Conduct adopted by the Supreme Court of Florida and that he or she agrees to abide by such rules. A foreign legal consultant is thus bound, as are Florida attorneys, by the rules governing conflict of interest, trust accounts, attorney/client privilege, etc.

The proposed foreign legal consultancy rule also makes foreign legal consultants accountable in Florida for their actions. In order to be licensed under the rule, a foreign legal consultant must expressly submit himself or herself to the jurisdiction of the Supreme

Court for disciplinary purposes, thus providing maximum accountability. In addition, the foreign legal consultancy rule requires that the foreign legal consultant name the Secretary of State for service of process, which facilitates the commencement of legal proceedings and alerts the Bar to any disciplinary issues involved. Foreign legal consultants will thus be on notice that they face consequences in Florida (and in their home country since the rule authorizes The Florida Bar to notify the entity governing the practice of law in the respective country of the foreign legal consultant of any disciplinary action taken against the consultant) if they do not abide by the requirements of the foreign legal consultancy rule.

The proposed rule also provides that the foreign legal consultant must furnish the Bar, annually, with a sworn statement attesting to the foreign legal consultant's continuing good standing as an attorney in the foreign country in which the consultant is admitted to practice. The rule gives The Florida Bar jurisdiction annually to review the qualifications of the foreign legal consultant to render foreign law advice in Florida, ensuring continuing protection of the public even after the consultant is licensed under the rule.

The fee for applying for foreign legal consultant licensure, as well as the annual renewal fee required by the rule, was established as the means for recovering the costs of the application process and of the administration of the rule, thus making it a self-funding program. The applicant shoulders the burden of providing the documentary proof of the attorney's license and fitness to practice.

CONCLUSION

Florida stands to gain a great deal from the increasing globalization of the world economy and the attendant increase in international business. In order to sustain the growth of such international business and investment, and thus its economy, Florida should continue to take a leading role in welcoming investment and business from abroad and provide the infrastructure necessary for such growth. Having foreign attorneys available to render legal advice on the laws of foreign nations, which is increasingly required in the international transactions taking place in Florida and by Floridians, can be of immeasurable assistance in meeting the challenge of Florida's economic future.

Business persons abroad will find it much easier to invest in Florida if competent foreign counsel in Florida analyze the ramifications of such investment under the laws of the home country. Foreign legal consultants will also facilitate the activities of Florida residents interested in business abroad. The requirements of international business have thus created a demand for the delivery of foreign and international legal services which will be filled by a foreign legal consultancy rule.

Florida has traditionally not been restrictive in permitting foreign providers of services, even in highly regulated industries such as banking, to establish operations in Florida under regulated conditions. The Florida International Bank Act ("FIBA"), Florida Statutes 663 (1977), permitted foreign banks to operate here and Florida's economy has thrived as a result. FIBA achieved a balance among the competing interests of foreign bankers in establishing operations in Florida and the interest of the state in protecting its citizens.

Florida should follow this tradition and welcome foreign attorneys to give consultation in this state on the laws of their jurisdictions under regulated conditions, as this too will improve the state's economy. The foreign legal consultancy rule achieves the same balance in the legal context as FIBA does in banking by permitting consultation by foreign attorneys in Florida on the laws of their home countries within the context of a regulatory system, designed to ensure the maximum protection for the public in Florida.

For the reasons set forth in these Comments, this Court should adopt the proposed Foreign Legal Consultancy 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 comments of the International Law Section regarding the proposed Foreign Legal Consultancy Rule has been express mailed this 27th day of February, 1992, to John F. Harkness, Jr., Executive Director of The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300.

By : Kyle Lewis Weigel
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**GENERAL COUNSEL OF THE
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MAY 24 1991

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Rules and Bylaws Committee
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Dear Mr. Baena:

It is our understanding that on May 28, 1991, the Florida Board of Governors will consider a proposed "Foreign Legal Consultancy Rule" that would enable foreign lawyers to engage in a limited scope of practice in Florida. We applaud and encourage your efforts.

Currently, at least 11 states, covering a large proportion of the international business and legal activity in the United States, have legal consultant rules that permit foreign lawyers to advise on international law and the law of their country of origin. In addition, a number of jurisdictions, including the District of Columbia, Hawaii, New Jersey, and New York, permit legal consultants to advise on U.S. federal and state law if the advice is based on advice received from a member of the local bar. The rule proposed by your Committee is very similar to the rules of New York and the District of Columbia. Your proposed rule is more restrictive in that it requires the foreign legal consultant to utilize a written retainer disclosing the permitted scope of his/her practice and to provide clients with a letter listing the activities he/she is prohibited from undertaking.

The Department of Commerce strongly supports the adoption of rules by states to allow foreign legal consultants to provide advice in that state with respect to international law and the law of their country of origin. As our economy becomes more internationalized, the role of lawyers as trade facilitators becomes more important. Barriers to the provision of legal services by foreign lawyers should be removed, to the extent possible, while ensuring that the interests of citizens are protected.

The adoption of foreign legal consultant rules by more states assists the U.S. Government in encouraging other countries, such as Japan and France, to provide opportunities for U.S. lawyers to engage in similar practice in those countries.

If we can be of further assistance in your efforts to adopt a foreign legal consultant rule, please contact us.

Yours truly,

Wendell L. Willkie, II

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