IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR RE:
PETITION TO AMEND RULES REGULATING THE FLORIDA BAR and THE FLORIDA RULES OF JUDICIAL ADMINISTRATION

CASE NO. SC04-135

THE FLORIDA BAR BUSINESS LAW SECTION'S COMMENT ON THE FLORIDA BAR'S PETITION TO AMEND THE RULES REGULATING THE FLORIDA BAR and THE FLORIDA RULES OF JUDICIAL ADMINISTRATION

The Florida Bar (the "Bar") has filed a petition authorized by the Board of Governors, pursuant to Rule 1-12.1 of the Rules Regulating The Florida Bar and Rule 2.130 of the Rules of Judicial Administration. The petition proposes amendments to those rules that "deal with the issue of multijurisdictional practice of law."[1] The Business Law Section of The Florida Bar files this Comment on the Bar's proposed amendments.

I. Summary of The Business Law Section's Position

The Florida Bar Business Law Section[2] wholeheartedly agrees with the goal of facilitating the multijurisdictional practice of law. It applauds many of the proposals the Bar has made to advance this goal, especially where the Bar has followed the recommendations proposed by the American Bar Association (ABA),[3] as developed by its Multijurisdictional Practice (MJP) Commission. Unfortunately, the Bar has failed to follow the ABA MJP Commission's recommendations in two key areas: out-of-state attorney representation of clients in non-international arbitrations and the *pro hac vice*

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[1] Bar Petition at 2.

[2] The Florida Bar Website provides that: "The purpose of the Business Law Section of The Florida Bar is to provide an organization within the Florida Bar open to all members in good standing who have a common interest in corporation, banking, business, bankruptcy and related areas of law, as well as to provide a forum for the discussion and exchange of ideas leading to the improvement of the laws relating to these areas of law." It currently has approximately 4,300 members and has a history of active involvement in the development of the law, especially as it applies to business and business lawyers in Florida.

[3] The Bar Petition includes the ABA recommendations at Appendix B to Appendix E. Additional ABA materials were not included with the Bar Petition but should be reviewed by this Court before ruling in this matter. They can be found at http://w3.abanet.org/cpr/mjp-home.html.

court admission of out-of-state attorneys. The Business Law Section disagrees with the Bar's proposals in these two areas.[4] The Executive Council of the Business Law Section voted to file this Comment with this Court detailing its opposition to these proposed amendments.

A. Non-International Arbitrations

[4] The Business Law Section participated in the proceedings held to formulate the proposals before this Court to the extent it was permitted to do so. The Business Law Section believes that the Bar did not welcome its disagreement with the proposals being developed by the Florida MJP Commission nor did it allow the Business Law Section to effectively state its case to the full MJP Commission during the proposal development process.

With regard to non-international arbitrations, the Bar has proposed allowing out of state lawyers to appear in only three (3) arbitrations in a one-year period.[5] While this is an improvement over present requirements,[6] it is more restrictive than the ABA proposal[7] significantly more burdensome and restrictive than the Bar proposal for international arbitrations,[8] and it does not allow out of state lawyers to engage in genuinely multijurisdictional practice[9] in Florida.

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[5] Proposed 1-3.10 (2), Appendix B to Bar Petition.

[6] The Bar argues that the proposed arbitration rule enlarges the currently available choice of counsel. "The only choice currently available to a party in arbitration is which member of The Florida Bar that person will retain." Bar Petition at 26.

[7] *See* Bar Petition, Exhibit B to Exhibit E at Report 201B, Proposed Rule 5.5 Comment 12 (interpreting paragraph (c)(3)).

[8] "The comment to 4-5.5 sets forth a presumption regarding the number of appearances in arbitration proceedings. The specific language reads 'For the purpose of this rule, a lawyer who is not admitted to practice law in Florida who files more than 3 demands for arbitration or responses to arbitration in separate arbitration proceedings in a 365-day period shall be presumed to be providing legal services on a regular, not temporary, basis, however, this presumption shall not apply to a lawyer appearing in international arbitrations as defined in the comment to rule 1-3.11.'" Bar Petition at 20.

[9] The phrase "genuinely multijurisdictional practice" is used in this Comment to express the concept that it should be proper, in some circumstances, for an out of state lawyer to come to Florida regularly without engaging in prohibited practice. For example, if a New York CEO is regularly deposed in Florida in connection with an allegedly defective product manufactured by his company, why should he not be allowed to bring his New York licensed lawyer to his deposition in Florida, even if such depositions occur in various Florida cases, perhaps 12 times in a one year period? The CEO's counsel will know the issues involved better than anyone, having represented the CEO in depositions around the country on the same issues, she will know all the other cases as well, and the CEO will know and trust her. The Bar would be hard pressed to persuasively argue that it was protecting that CEO, or some important Florida interest, by

B. Pro Hac Vice Admission

With regard to *pro hac vice* admission, the Bar proposes taking a step *backwards* by making the *pro hac vice* admission *more* restrictive than it currently is. Those proposals run counter to the very purpose of the reforms proposed in this proceeding.[10] The Bar concedes that the purpose of the proposed *pro hac vice* rules is to "tighten"[11] the rule by further limiting appearances by out of state lawyers *pro hac vice*.[12] The Bar apparently fails to appreciate the irony of its

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refusing to allow him to be represented by his chosen counsel. But that is the type of restriction imposed by the Bar's proposals, in both the non-international arbitration and litigation contexts.

[10] These amendments are allegedly being advanced by the Bar to help better accommodate multijurisdictional practice. "The amendments fall within three categories: the multijurisdictional practice of law, reciprocal discipline and *pro hac vice* admission. Taken as a whole, the amendments open the door to a limited, temporary practice that is now closed." Bar Petition at 4. The *pro hac vice* proposals actually close the door to practice that is now permitted.

[11] This is the word actually used by the Bar to explain its *pro hac vice* proposal. Bar Petition, Appendix C, Commentary to Proposed Rule 1-3.10(a)(2).

[12] While both the present rule and the proposed amendments permit three admissions per year, the amendments are designed to permit fewer actual appearances per year because (1) the proposals would delete the phrase "and unrelated" from the rule, thus changing the present practice of counting all related proceedings as a single case, and (2) the proposals would delete the proviso ("provided, however, that the court shall have the discretion to allow other appearances upon a showing that the appearances are not a "general practice or that denial will work a substantial hardship on the client") that currently allows the courts discretion to permit more than three *pro hac vice* admissions per year in cases where the admission involves genuine multijurisdictional practice and in cases where such admission is necessary to avoid a substantial hardship on the client.

offering proposals to eliminate provisions of its existing rules that accommodate multijurisdictional practice in a rulemaking proceeding being brought to better accommodate multijurisdictional practice.[13] The Bar has also not recommended adoption of an ABA proposal that would protect out of state associates assisting the *pro hac vice* admitted lawyer.[14]

The *pro hac vice* admission rules are extremely important to multijurisdictional practice because, given Florida's stringent admission requirements and its lack of reciprocal admission on motion with any other

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[13] "Commission II is recommending the language [of Rule of Judicial Administration 2.061] allowing the judge to exercise discretion be deleted. The Commission is also recommending that the language 'and related' be deleted as the term is too difficult to define and open to abuse. The same changes are made to Rule 1-3.10." Bar Petition, Exhibit E at 20. The idea that the concept of "related" proceeding should be deleted because it is "too difficult to define" shows just how far the Bar had to reach to come up with "reasons" for tightening *pro hac vice* practice in the face of a national trend moving in the other direction.

[14] "Commission II declined to adopt a paragraph of the ABA's comment which would have extended the authorization to an associated lawyer who does not expect to appear *pro hac vice* or to subordinate lawyers. Commission II felt that this language was too broad." Commission II Report at 10. The purpose of this ABA recommendation is clear and clearly necessary. "For example, pro hac vice admission would not be required for lawyers who did not appear in court but who confined their role to giving advice to the in-state lawyer responsible for the matter or to assisting in the preparation of the case for trial." Client Representation in the 21st Century, Report of the Commission on Multijurisdictional Practice. http://w3.abanet.org/cpr/mjp/final_mjp_rpt_121702.pdf [hereinafter "ABA MJP Report"] at 48. Why should such a lawyer have to move for admission *pro hac vice* or remain open to UPL prosecution? What study of this recommendation did the Bar do that convinced it that this protection for young associates working at a partner's direction in some remote jurisdiction was "too broad"?

jurisdiction, they are the key to allowing clients engaged in Florida litigation to utilize counsel of their choice. "[C]lients have a special interest in being able to use lawyers with whom they have previously formed client-lawyer relationships. Such clients have had the ability to assess the lawyer's prior work, to develop trust in that lawyer, and to educate that lawyer on client affairs, objective and priorities. Clients ought not to be deprived of the ability to use such lawyers in proceedings in other jurisdictions. Likewise, parties should generally be able to use a lawyer with special experience or expertise."[15] "Today, no state categorically excludes out-of-state lawyers and there is general agreement that, as a practical matter, lawyers cannot serve clients effectively unless accommodations are made for multijurisdictional law practice, at least on a temporary or occasional basis. For example, every jurisdiction permits *pro hac vice* admission of out-of-state lawyers appearing before a tribunal, although the processes and standards for *pro hac vice* admission differ."[16]

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[15] ABA MJP Report *supra* note 14 at 46.

[16] *Id*. at 8. While a client does not have a constitutional right to the counsel of his choice, *Leis v. Flynt*, 439 U.S. 438 (1979), leave to appear *pro hac vice* is a practice to be encouraged, not tightened, in light of the realities of the present day. *Flynt*, 439 U.S. at 441. ("We do not question that the practice of courts in most States is to allow an out-of-state lawyer the privilege of appearing upon motion, especially when he is associated with a member of the local bar. In view of the high mobility of the bar, and also the trend toward specialization, perhaps this is *a practice to be encouraged*." (Emphasis added).

The American Bar Association Multijurisdictional Practice Commission ("ABA MJP Commission") has recommended that the states adopt a Model Rule on *pro hac vice* admission.[17] Development of that Model Rule was part of a cooperative effort with the ABA Section of Litigation, the ABA Section of Tort and Insurance Practice and the International Association of Defense Counsel.[18]

> This rule seeks to provide a framework, to provide standards to guide the discretion of the court, and to address ancillary issues not dealt with in traditional *pro hac vice* practice. Lawyers who appear on behalf of clients in courts of different states, and their clients, would benefit from the elimination of unduly restrictive provisions that exist in a few states and from increased consistency of practice from state to state.[19]

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[17] ABA MJP Report *supra* note 14 at 41-48 (Recommendation 6).. A copy of the proposed Model Rule is Report 201F in Appendix B to Appendix E of the Bar Petition.

[18] ABA MJP Report *supra* note 14 at 46.

[19] *Id*.

The Bar specifically rejected the Model Rule.[20] It has instead proposed making the Florida *pro hac vice* rules *even more restrictive than they now are*, and thus more inconsistent with the ABA's proposed Model Rule.

The Business Law Section respectfully requests that this Court adopt Florida rules based on the ABA's proposed rules on out of state attorney participation in non-international arbitrations and *pro hac vice* admission of out of state attorneys, or at a minimum, that this Court not retreat from the *pro hac vice* rules that are currently in place.

II. A Short History of the Problem that the ABA Multijurisdictional Practice Commission Was Established to Address, According to Commentators

To understand the importance of making the changes that the ABA MJP Commission has recommended, rather than those being advanced here by The Florida Bar, this Court must more fully understand the issue. The Bar's Petition fails to provide a good overview of the nature and significance of the problems that the ABA MJP Commission was formed to address and

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[20] "Commission I reviewed the model rule and declined to recommend its adoption. Commission I felt that the existing Florida rule offered more protection." Report of the Special Commission on the Multijurisdictional Practice of Law 2002 at 19. "Protection" indeed, but from what, or is it from whom? Commission II followed Commission I's lead, *id*. at 20, and the Board of Governors also declined to recommend adoption of the Model Rule. Curiously, Recommendation 6 of Commission I was that it "supports the concept of a model *pro hac vice* rule but does not endorse the adoption of the rule proposed by the ABA." Was it in favor of a nationwide rollback of *pro hac vice* practice? Bar Petition, Appendix A to Appendix E.

that its recommendations were designed to solve. Multijurisdictional practice is currently at the top of the bar regulatory agendas of many courts and bars all around the nation.[21] That is not just a coincidence. The problems raised by the differing state rules governing multijurisdictional practice cause lawyers and their clients real difficulties in the daily practice of law and solutions to those problems need to be found.

"Lawyers in the United States are not licensed to practice on a national basis, but are ordinarily licensed by the highest court of an individual state to practice law within that particular jurisdiction. The state-based licensing process originated more than two centuries ago when the principal work of this country's lawyers involved representing clients in litigation."[22] "Lawyers tended to be generalists, capable of providing whatever legal services a client needed. Some, but not all, of this work was exclusively reserved for lawyers. As the nature of legal practice changed, lawyers increasingly rendered assistance, such as negotiating business agreements, that could be provided by nonlawyers as well."[23]

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[21] For a current summary of the status of the implementation of the recommendations of the ABA Commission on Multijurisdictional Practice see http://w3.abanet.org/cpr/jclr/jclr_home.html (with links to charts).

[22] Bruce A Green, Assisting Clients With Multi-State and Interstate Legal Problems: The Need to Bring the Professional Regulation of Lawyers Into the 21st Century, at http://www.abanet.org/cpr/mjp-bruce_green_report.html (March 2000). Bruce Green served as the Reporter to the ABA Commission on Multijurisdictional Practice.

[23] *Id*.

"Understandings have differed about the extent to which a law license gives lawyers exclusive authority to render services outside the courtroom. Even in a single state at a given time, there has almost invariably been some uncertainty about precisely what services comprising the 'practice of law' are within the exclusive province of lawyers. Even so, by the early twentieth century, it came to be understood that, in general terms, a state license to practice law permitted a lawyer to offer a range of services, including but not limited to courtroom advocacy, and that those who were not licensed or who were licensed in a different jurisdiction could not render certain of these services within the particular state."[24]

Unlicensed Practice of Law ("UPL") restrictions protect the licensed lawyer's private interests from encroachment by unlicensed practitioners.[25]

[24] *Id*. This Court has recognized that "any attempt to formulate a lasting, all encompassing definition of the 'practice of law' is doomed to failure." The *Florida Bar v. Brumbaugh*, 355 So.2d 1186, 1191-92 (Fla. 1978).

[25] Robert D. Weldon, Defining "The Practice of Law"- Untying the Gordian Knot, Wash. St. Bar News, Jan 2001, at 41, available at http:www.wsba.org/barnews/2001/01/welden.htm. "Critics have charged that the unacknowledged purpose of restrictions on the practice of law within a state by persons who have not been licensed within that state is to institute and protect a monopoly for the benefit of lawyers licensed there." Carol A. Needham, Splitting Bar Admission into Federal and State Components: National Admission for Advice on Federal Law, 45 U. Kan. L. Rev. 453, 454 (1997)(hereinafter "Needham, Splitting"). *See, e.g.*, Chesterfield Smith, Time for a National Practice of Law Act, 64 A.B.A. J. 557 (Apr. 1978)("Many of the states that have erected fences against out-of-state lawyers have done so primarily to protect their own lawyers from professional competition."). Such a protectionist rationale is neither substantial or legitimate. *Supreme Court of New Hampshire v. Piper*, 470

The primary reason currently given by courts and lawmakers for the regulation of UPL is to protect consumers.[26] "[W]hile UPL rules were originally intended to prevent unlicensed and unschooled individuals from practicing law and victimizing the public, those rules have also been applied to prevent lawyers from practicing in states where they are not admitted – even where the lawyers have acted with their clients' knowledge and consent."[27] The assumption underlying UPL enforcement against out-of-state lawyers is

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U.S. 274, 285 n.18 (characterizing such a reason as "economic protectionism" and "not 'substantial'"); *Enquire Printing & Publishing Co. v. O'Reilly*, 477 A.2d 648, 651 (Conn. 1984)(a litigant's right to be represented by out-of-state counsel "should be respected by the court, unless some legitimate state interest is thwarted" by *pro hac vice* admission and opining that the protection of in-state attorneys from competition "is not, of course, a legitimate state interest.") This Court has explicitly rejected the view that UPL enforcement is protectionist. "The reason for prohibiting the practice of law by those who have not been examined and found qualified is frequently misunderstood. It is not done to aid or protect the members of the legal profession either in creating or maintaining a monopoly or closed shop." *The Florida Bar v. Sperry*, 140 So.2d 587, 595 (Fla. 1962) *vacated on other grounds* 373 U.S. 379 (1963). For a more nuanced voice on the role of protectionism in lawyer regulation, see generally Stephen Gillers, Lessons From the Multijurisdictional Practice Commission: The Art of Making Change, 44 Ariz. L. Rev. 685 (2002). Professor Gillers, who is Vice Dean and a Professor of Law at New York University School of Law, served on the Commission.

[26] *See, e.g., Chandris, S.A. v. Yanakakis*, 668 So.2d 180, 184 (Fla. 1995)(*citing The Florida Bar v. Brumbaugh*, 355 So.2d 1186, 1192 (Fla. 1978).

[27] Ronald C. Minkoff, One License For Life: A Paradigm for Multijurisdictional Practice, 11 NO. 3 Prof. Law. 1 (2000). "These statutes and rules for the most part make no distinction between law practice by people never trained in the law and lawyers admitted in another jurisdiction. They accord no weight to the preference of a client to be represented by a particular lawyer admitted elsewhere, no matter how close and longstanding the lawyer-client relationship, how experienced the out-of-state lawyer, or how closely related the current matter is to the other matters on which the out-of-state lawyer has previously represented or is currently representing

that lawyers who have not fulfilled bar admission requirements in the state are not competent to practice in the state and, unless stopped, will cause clients harm.[28]

This assumption was more likely to be true when UPL laws were first passed than it is today. When most UPL laws were passed, during the period from 1870 to 1920, the practice of law was much different than it is today.[29] "At that time, the stringent requirements were easily justified because most client matters did not extend beyond the licensing state's boundaries, and lawyers could not easily learn the law of another

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the client." Robert A. Creamer, Registration Revisited: A Practical Proposal For the Multijurisdictional Morass, 2000 Prof. Law. 7, at first paragraph, Section V.

[28] This Court, in *Chandris*, noted that the reason that out of state practitioners were excluded from Florida was "to protect the public from being advised and represented in legal matters by unqualified persons over whom the judicial department can exercise little, if any, control in the matter of infractions of the code of conduct which, in the public interest, lawyers are bound to observe." 668 So.2d at 184. There is some debate about whether an out-of-state lawyer should be assumed to be incompetent. *See* Gillers *supra* note 25 at 699 ("Invalid, however, is a position that would drive policy on the assumption that out-of-state lawyers are less able, less honest, or less willing to limit their work to matters within their competence. This is a position for which there is no empirical support and which should not be recognized as a valid basis for stringent rules that interfere with otherwise legitimate client choices and the usual deference to private ordering."); Needham, Splitting *supra* note 25 at 468 ("the fact that an out-of-state lawyer has demonstrated his qualifications to the satisfaction of the bar admissions committee in another state should be given some weight in evaluating his qualifications.")

[29] Christine R. Davis, Approaching Reform: The Future of Multijurisdictional Practice in Today's Legal Profession, 29 Fla. St. U. L. Rev. 1339, 1344 (2002). "Most UPL statutes originated at a time when commerce and law practice were mostly local, legal education was often accomplished through apprenticeship arrangements, admission to practice was far less rigorous and standard than today, and regulation of the legal profession was sometimes sporadic and might differ markedly from state to state." Creamer *supra* note 27.

jurisdiction."[30] At that time, few would have questioned the competence of a locally licensed lawyer over an out-of-state competitor.

Times have changed. "[B]usiness and the economy are increasingly becoming global in structure, with little respect for national boundaries, let alone those of individual states."[31] Innovations in telecommunications and transportation have made keeping in touch with distant clients almost as easy as communicating with clients in the same community. For their own part, lawyers' reputations, at least in some specialties, have also spread beyond the otherwise confining web of state lines. Many lawyers with a national or regional reputation are as likely to receive calls for legal services from prospective clients in distant states as from the lawyer's own jurisdiction."[32] Lawyers today commonly have the tools necessary to find the law at their desktop, using services like Westlaw and Lexis. This has given new reality to the old principle that "[l]awyers are considered competent to know and apply the laws of many other states in their practice."[33]

"Multijurisdictional practice has become the norm, rather than the exception."[34] "For a growing number of lawyers, this means that law practice has become a career consisting of collecting frequent-traveler

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[30] C. Davis, *supra* note 29 at 1344.

[31] William T. Barker, The Interstate Practice of Law: Are You Crossing The Line? 67 Def. Couns. J. 436 (2000)(hereinafter "Barker, Crossing").

[32] Charles W. Wolfram, Sneaking Around in the Legal Profession: Interjurisdictional Unauthorized Practice by Transactional Lawyers, 36 S. Tex. L. Rev. 665, 668 (1995)(footnote omitted).

[33] Wolfram, *supra* note 32 at 673. "Because of the operation of choice of law rules – a necessary adjunct of a federalist organization of the states – lawyers often find that they must work with the law of a jurisdiction in which they are not admitted to practice." *Id.* For UPL purposes, the key is where the advice is being provided, not what law the lawyer is interpreting. "Once a person has been admitted to practice in a state, that lawyer is allowed to give legal advice regarding the law of any jurisdiction, as long as he is physically located within the borders of the state in which he is licensed while he gives the advice." Needham, Splitting *supra* note 25 at 454.

[34] Carol A. Needham, Multijurisdictional Practice Regulations Governing Attorneys Conducting a Transactional Practice, 2003 U. Ill. L. Rev. 1331 (2003)(hereinafter "Needham, 2003") *Accord* Creamer, *supra* note 27 at 7 ('[M]any thoughtful observers believe that multijurisdictional practice is so common that it now is the norm and not the exception.")

awards as lawyers criss-cross the country and globe to serve their clients' legal needs."[35] In addition, it is possible for lawyers to practice virtually in far away jurisdictions without leaving their office.[36]

"Lawyers now commonly practice in states where they are not admitted."[37] This occurs when they "take depositions, document transactions or advise clients in jurisdictions where they are not admitted."[38] "[L]awyers who engage in multistate practice have relied on a combination of custom and the infrequency of challenges to permit continuation of their practices. The leading commentator on the subject has aptly characterized this approach as 'sneaking around.'"[39] However, "it would be impractical for a multistate practitioner to operate in full compliance with the most rigid interpretations of laws which were never designed to deal realistically with practice of this sort."[40]

"Some form of nonadmitted practice is a practical necessity for transactional lawyers … called upon to assist in matters that have aspects involving jurisdictions where they are not admitted generally. They typically must respond quickly, leaving no time for even an expedited temporary admission process, and there is no ready equivalent to *pro hac vice* admission that serves most litigation needs."[41] Thus, "as an attorney, it is easy to run afoul of the jurisdictional limits of your license."[42] "If given

[35] Wolfram *supra* note 32 at 669.

[36] Or, as Professor Gillers has stated it; "[i]n favor of the rules authorizing cross-border practice are the interests of clients, the increasing uniformity and accessibility of the law in all states, and technological developments that permit lawyers to practice 'virtually' anywhere without leaving their home jurisdiction." Gillers, supra note 25 at 686.

[37] William T. Barker, How Could NonAdmitted Practice Be Regulated? 13 N.O. Prof. Law. 2 (2002)(hereinafter "Barker, Nonadmitted.")

[38] Daniel J. McAuliffe and Teresa Voss, Transactions Go Global: Can Lawyers Follow? Business Law Today, Jan/Feb 2003.

[39] William T. Barker, Extrajurisdictional Practice of Law By Lawyers, 56 Bus. Law. 1501, 1502 ((2001)(hereinafter "Barker Extrajurisdictional")(referring to Professor Charles Wolfram as the "leading commentator").

[40] *Id.* at 1504.

[41] Barker, Nonadmitted, *supra* note 37.

[42] Brian P. Kane, Into the Lion's Den; Taking Your License to Practice Law on the Road, 44-MAY Advocate (Idaho) 14. "Lawyers who violate UPL restrictions are subject "to sanction (in some states, criminal sanction) for practicing in a state where they are not licensed. Besides being enforced

full force, the UPL laws, in conjunction with the current system of state licensing, would have the practical effect of limiting lawyers to practicing only within the confines of, at most, a few states. States generally require out-of-state lawyers to pass the state's bar examination to be licensed. Not only do the bar examinations differ from state to state, but states have registration fees and, to some extent, non-uniform CLE requirements, all of which would make 50 state bar registrations costly and time-consuming."[43]Some states allow the option of admission by motion or upon passing a shorter examination to lawyers in active practice elsewhere for a specified period of time, but the requirements are not uniform and can still be burdensome.[44]

"The effort to restrict multijurisdictional law practice runs entirely counter to the edifice on which the late twentieth century American – and global – economic expansion has been built; namely the inexorable movement towards the removal of barriers to free trade."[45] Regulatory reform is necessary because "much of the case law in this area has taken a much more parochial view, a view increasingly at odds with the realities of practice in a globalizing world."[46]

Even though they are justified on the basis they protect the public, "current UPL laws do not take clients' needs into consideration. In reality, we do not live or do business in isolation within strict geopolitical boundaries. Even personal matters now transcend state or national lines. Thus, the current state of the law creates a tension between the right of the client to choose his counsel and the right of the state to control the activities

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directly, these provisions may be invoked in disciplinary rules that forbid lawyers from engaging in, or assisting others in, the unauthorized practice of law and may be invoked by clients against their former lawyers in civil actions or in the context of disqualification motions." Green *supra* note 22.

[43] *Id.*

[44] *Id.*

[45] Anthony E. Davis, Multijurisdictional Practice By Transactional Lawyers – Why The Sky Is Falling, 11NO. 2 Prof. Law. 1, 24 (2000).

[46] Barker, Crossing, *supra* note 31at 436. Or, as Professor Needham has said, "In light of the realities of legal practice today, when a single transaction might involve assets in a number of different states, changes in the definition of the unauthorized practice of law as applied to out-of-state lawyers are needed. Carol A. Needham, The Multijurisdictional Practice of Law and the corporate Lawyer: New Rules For a New Generation of Legal Practice, 36 S. Tex. L. Rev. 1075, 1082 (1995)(footnote omitted).

of lawyers practicing within its boundaries."[47] "[I]t is more cost-effective for the client to have a single expert handle related legal issues in various states, rather than requiring the company to retain separate counsel in each state and educate each of them regarding the company's unique business concerns."[48] A client who has established a relationship with a particular lawyer should be able to have that lawyer represent him, wherever the client's work takes the lawyer."[49]

But as Professor Charles Wolfram, widely acknowledged as the leading commentator on this issue, has explained, "the states have been by and large quite restrictive about admitting out-of-state lawyers so that they can confidently carry on in-state practice. The reasons given for the restrictions are probably largely pious eyewash. The real motivation, one strongly suspects, has to do with cutting down the economic threat posed for in-state lawyers – those who make the in-state rules on local practice – by competition with out-of-state lawyers. Most of the justifications assert, somewhat implausibly, that the process of local admission is necessary to assure competence to deal with issues of local law and to enable local bar disciplinary agencies and courts to discipline the lawyer in the event of misconduct. In short the claimed motivation is consumer protection."[50]

Sophisticated business clients are being "protected" by placing their chosen expert counsel at risk as they conduct the clients' interstate business. "[W]e have created a system in which competent lawyers chosen by their clients for their expertise in a particular field must question whether they are

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[47] C. Davis, *supra* note 29 at 1346-47.

[48] Needham, 2003, *supra* note 34 at 1343.

[49] *Id*. at 1376.

[50] Wolfram, *supra* note 32 at 678. "Different segments of the practicing bar generally have quite different views on needed reforms. Lawyers in big firms and corporate law departments usually favor considerably liberalizing of unauthorized practice laws to permit enhanced multijurisdictional practice by lawyers irrespective of where they are admitted to practice. But many other lawyers, especially many in small firms, are opposed to much if any liberalizing of these unauthorized practice rules." Quintin Johnstone, Multijurisdictional Practice of Law: Its Prevalence and Risks, 74 Conn. B.J. 343, 344-45 (2000)(This is borne out in a comparison of the limited presence of large firm lawyers on Florida's Multijurisdictional Jurisdictional Practice Commissions and the more substantial presence of large firm lawyers on the ABA Multijurisdictional Practice Commission, with the recommendations of the Florida and ABA Commissions).

violating unauthorized practice of law provisions as they perform even the most routine legal work."[51] "Although most state rules are somewhat similar in requiring a license to practice law, most states differ substantially as to what constitutes UPL. As a result, most lawyers are not aware that they could be violating the law. For example, states conflict as to whether the practice of law is unauthorized when a lawyer not licensed within the state is practicing purely federal law."[52] "If the lawyer meets a client in a particular state or places a telephone call to a client who is located in a particular state, is the lawyer necessarily practicing law "in" that state? In general, it is unclear how UPL laws apply in light of changes in clients' legal needs and evolutions in law practice. Lawyers have expressed concern that, if UPL provisions are applied restrictively and unrealistically (as the literal language may appear to dictate), the laws will impede lawyers' ability to meet clients' multi-state and interstate legal needs efficiently and effectively."[53]

"Present doctrine relies far too heavily on a perceived need to employ draconian measures to warn out-of-state lawyers from the field of in-state law practice. Courts should instead recognize that interstate practice runs along a continuum from the plainly offensive through the uncertain to what everyone would concede is legitimate and desirable."[54] The problem is compounded by sporadic enforcement and the fact that courts rarely construe these provisions.[55] The bottom line has been, as Professor Charles Wolfram has stated it, "[a] very large, yet undetermined number of lawyers are flouting at least the literal terms of the 'thou shalt not' of legal codes….Yet, professional discipline for out-of-state unauthorized practice is minimal…."[56] At least, that was the case when he wrote his famous "Sneaking Around in the Legal Profession" article, a few years before the California Supreme Court decided the *Birbrower* case[57] in 1998.[58]

[51] Needham, 2003, *supra* note 34 at 1332.

[52] C. Davis, *supra* note 29 at 1348 (footnotes omitted).

[53] Green, *supra* note 22.

[54] Wolfram supra at 32 at 709.

[55] Green, *supra* note 22. "Although state law on multijurisdictional law practice differs considerably in detail from state to state, in most every state it is similar in several respects: much of it is very vague and ambiguous, it has seldom been enforced, and noncompliance is extensive." Johnstone, *supra* note 50 at 348.

[56] Wolfram, *supra* note 32 at 686.

[57] *Birbrower v. Montalbano, Condon & Frank, P.C. v. Superior Court of Santa Clara County*, 949 P.2d 1 (Cal. 1998). "*Birbrower* held that New York lawyers who made three trips to California of a few days each, while

"[T]he *Birbrower* decision was a conceptual torpedo. Launched, it caused a great deal of disruption, not only because of its apparent hostility to cross-border practice … but because it offered no help on how to rebuild from the confusion it spawned. Maybe it's just too hard for judges to know these things ahead of time, but then how is the lawyer, whose fee and license are at risk, supposed to know?"[59] "The uncertainties of interstate practice are both real and substantial, and they reflect poor state policy. The justifications for providing broad permission to genuinely interstate law practice are powerful; any argument against such practice either must ignore the present realities and desirability of interstate dealings by clients or be rooted in concern for the completive advantage of local lawyers that ill serves a vibrant national economy."[60]

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working on an impending arbitration for a California client, engaged in the 'extensive' practice of law in California. As a result, the lawyers could not enforce their fee agreement as written. This decision was surprising because the California court had, in other contexts, been pleasingly enlightened about the nature of modern law practice. It was doubly surprising because, in a footnote, the court gratuitously wrote that the lawyers would not have been saved even had they associated with California counsel on the matter (they had not). And it was most surprising, indeed startling, because in an aside not strictly necessary for its holding, the court emphasized, though briefly, that a lawyer may be guilty of unauthorized practice "in" California by practicing virtually in California by e-mail, fax, phone or satellite from the lawyer's home jurisdiction, depending on the degree of virtual presence." Gillers, *supra* note 25 at 687 (footnotes omitted). "California now specifically authorizes out-of-state lawyers to represent clients in arbitrations." ABA MJP Report *supra* note 14 at 9.

[58] Needham, 2003, *supra* note 34 at 1336. "[T]here is now real concern within the bar nationally that unauthorized practice laws are real threats to multijurisdictional practice, not just laws that lawyers can ignore." Johnstone, *supra* note 50 at 350.

[59] Gillers *supra* note 25 at 688 (footnote omitted).

[60] Wolfram *supra* note 32 at 713.

III. The Process of Reform

After the *Birbrower* decision, the American Bar Association began to seriously address the problems raised by multijurisdictional practice. The first ABA entity to consider these problems was the Ethics 2000 Commission. That Commission was created to conduct a comprehensive evaluation of the ABA Model Rules of Professional Conduct and to recommend changes to those rules.[61] Testimony at the public hearings of the Ethics 2000 Commission had raised the issue of amending Model Rules 5.5 and 8.5 to accommodate multijurisdictional practice.[62] It also considered revisions to those rules.[63] However, the Ethics 2000 Commission had a very full plate, and it decided to "isolate the issue of multijurisdictional practice and allow the MJP Commission to take the leading role in making recommendations regarding the proposed amendments to Model Rules 5.5 and 8.5."[64]

Then-ABA President Martha Barnett appointed the Commission of Multijurisdictional Practice ("ABA MJP Commission").[65] The ABA MJP Commission included Alan Dimond of Miami, a Past-President of The Florida Bar. The ABA MJP Commission studied the problems posed by multijurisdictional practice in great depth and with the purpose of proposing rules that could realistically be adopted in the individual states. "From the outset, the ABA MJP Commission recognized the importance of engaging in an objective and comprehensive inquiry and of encouraging as many others as possible to lend assistance. To stimulate discussion, the ABA MJP Commission began by issuing a series of background papers that identified examples of multijurisdictional practice, described relevant regulatory interests, and listed some of the enhancement and reforms that others had proposed. The Commission invited testimony and written submissions by state and local bar associations, ABA entities, and other representative organizations of the legal profession and the public, and solicited the views and experiences of law firms, government and in-house corporate law offices and individuals. The Commission conducted public hearings in

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61 Ethics 2000 Chair's Introduction and Executive Summary of Changes available at http://www.abanet.org/cpr/e2k-intro_and_summary_changes.html.

62 Needham, 2003, *supra* note 34 at 1333.

63 *Id.*

64 *Id.*

65 C. Davis *supra* note 29 at 1341.

Atlanta, Chicago, Dallas, Kansas City, Miami, New York and San Diego, and individual commissioners spoke at bar association meetings and other programs throughout the country."[66] No witness who appeared before the Commission testified "that things were just fine as they are."[67] "The need for change was a constant theme."[68]

The ABA MJP Commission issued interim[69] and final reports[70] making a series of recommendations that were adopted by the ABA House of Delegates on August 12, 2002. Those recommendations proposed amendments to the Model Rules of Professional Conduct to make those rules more accommodating of multijurisdictional practice. The states were then expected to consider amending their rules to conform to the Model Rules.

Florida, like many other states, is now considering the ABA recommendations. Two different presidents of The Florida Bar appointed two Multijurisdictional Practice Commissions to study the matter, referred to here and in the Bar's Petition as "Commission I" and "Commission II." These two commissions made their own recommendations, which depart significantly from the ABA recommendations, to The Florida Bar Board of Governors. The Board of Governors approved the Florida Commission II recommendations,[71] and sent them to this Court.

IV. The Proposed *Pro Hac Vice* Amendments And the Proposed Non-International Arbitration Rule Should Not Be Adopted in Their Present Form

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[66] ABA MJP Report *supra* note 14 at 1. Alan Dimond, a Past-President of The Florida Bar, participated as a member of the Commission.

[67] Gillers *supra* note 25 at 692.

[68] *Id*.

[69] To review a copy, follow the links at http://w3.abanet.org/cpr/mjp-home.html.

[70] To review a copy, follow the links at http://w3.abanet.org/cpr/mjp-home.html.

[71] Bar Petition at 1.

There are a number of reasons that the proposed *pro hac vice* and non-international arbitration amendments should not be adopted in their present form. They would be unconstitutional. They show an unhealthy distrust of the courts. They play favorites. And last, but most importantly, they are not good for the clients we serve.

The Business Law Section agrees with many of the concerns expressed by others about the proposed three matters per year limits in the arbitration and *pro hac vice* rules,[72] the insensitivity of the proposals to business realities,[73] and concerns about the adoption process.[74] However, the

[72] The American Arbitration Association (AAA) has criticized the limit of three arbitrations per year in Florida as "too low a number. Letter of Eric Tuchman to Lori Holcomb and Ruth Kingsolving, August 22, 2003, Bar Petition, Appendix D, letter at 2. The AAA explains "[a] non-Florida lawyer could represent a party in three separate Florida arbitrations that quickly settle before any hearing takes place, which is the experience of the AAA in a sizable percent of cases, without ever traveling to Florida." *Id.* For this reason, merely setting the limit at three "does not account in any way for how meaningful each representation is." *Id.* The Association of Corporate Counsel has stated that "[t]he selection of a pre-determined number of allowed visits as a limitation on client choice and cross-border practice in this narrow practice setting smacks of an intention to force clients to hire more Florida licensed arbitration lawyers for no better reason than their preferred counsel has already exceeded his quota of allowed visits per year." Letter of Paul L. Matecki to The Board of Governors of The Florida bar, December 3, 2003, Bar Petition, Appendix D, letter at 3.

[73] The Securities Industry Association (SIA), the principal national trade association of the North American Securities Industry with more than 600 member firms in the United States and Canada, objects to the rules on the basis that the Bar's "recommendations fail the Florida Supreme Court's requirement that Florida Bar Rules be drafted 'to meet the legitimate needs of business in a modern economy.' *In re Amendments to Rules Regulating The Florida Bar (I)*, 593 So.2d 1035, 1036 (Fla. 1991)." Letter from Kathy

Business Law Section's position is broader than the concerns that others have expressed. The proposed limits on appearances by out of state lawyers are not only bad policy. They are illegal.

A. Unconstitutional Irrebuttable Presumptions

The proposed *pro hac vice* amendments and the proposed non-international arbitration rules are based on irrebuttable presumptions that, at least in some cases, will dictate conclusions that are incorrect. The *pro hac vice* proposals state: "Non-Florida lawyers shall not be permitted to engage in a general practice before Florida courts. For the purposes of this rule more than 3 appearances within a 365-day period in separate representations *shall be presumed to be a 'general practice.'*"[75] The proposed non-international arbitration rule provides: "Non-Florida lawyers shall not be permitted to engage in a general practice pursuant to this rule. In all arbitration matters except international arbitration, a lawyer who is not

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M. Klock to The Florida Bar Board of Governors, November 21, 2003, Bar Petition, Appendix D. letter at 1.

[74] The Chair of The Florida Bar Judicial Administration Rules Committee has notified the Bar that it "has several serious concerns regarding the changes to Florida Rule of Judicial Administration 2.061 proposed by the Special Commission." Letter of Sanford Solomon (Chair of The Florida Bar Judicial Administration Rules Committee) to Lori Holcomb, June 30, 2003, Bar Petition, Appendix D, letter at 1. These concerns are addressed in more detail later in the Comment.

[75] Proposed Rule 1-3.10(a)(2), Rules Regulating the Florida Bar (emphasis added). A similar change is proposed for the Florida Rule of Judicial Administration. 2.061.

admitted to practice law in this jurisdiction who files more than 3 appearances within a 365-day period in separate arbitration proceedings *shall be presumed to be a 'general practice.'*"[76]

Both proposals are clearly intended to create irrebuttable presumptions that more than three appearances per year is the "general practice" of law in Florida. Under the new proposals, if an out of state lawyer files a fourth motion to appear *pro hac vice*, after he or she has been admitted three times in a 365-day period in other matters, that motion *must* be denied based on an irrebuttable presumption that the lawyer is engaging in the "general practice" of law in Florida, even if that is not in fact true. Likewise, if an out of state lawyer has filed more than three appearances in separate arbitrations in a 365-day period, that lawyer is presumed to be engaged in the "general practice" of law in Florida, even if that is not true. The intent to create strict and completely irrebuttable presumptions in the

[76] Proposed Rule 1-3.11(d), Rules Regulating the Florida Bar (emphasis added). A parallel change is proposed for the Florida Rules of Judicial Administration.

proposed rules is also clear from the language that the Bar is proposing to delete from the current *pro hac vice* rules.[77]

The main problem with irrebuttable presumptions is that the conclusions they compel may be at odds with the facts. A presumption requires that a certain conclusion be drawn *every* time a given set of facts is encountered. Sometimes, that conclusion is not appropriately drawn from the facts. When the conclusion compelled by the presumption is not correct, and the presumption is irrebuttable, no one is allowed to complain, and injustice results. Here, the proposed rules contain irrebuttable presumptions. If the rules are adopted, out of state lawyers engaged in genuinely multijurisdictional practice who seek to come to Florida more than three times in a year in the genuinely multijurisdictional service of their clients' interests will be excluded from the state after their third appearance in a year, even if *all* their matters have been genuinely multijurisdictional and they have never engaged in "general practice" in Florida.

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[77] The rules currently allow the exclusion of related cases from the three case limit and give the court discretion to allow more than three appearances "upon a showing that the appearances are not a 'general practice' or that the denial will work a substantial hardship on the client." Rule 1-3.10(a)(2), Rules Regulating the Florida Bar; Rule 2.061, Florida Rules of Judicial Administration. The Bar proposes that this Court delete such language.

If adopted, the irrebuttable presumptions created by the proposed rules would be unconstitutional under the Due Process Clause.[78] The full history of federal irrebuttable presumption jurisprudence is not essential here,[79] but suffice it to say that, for a time, the United States Supreme Court used that doctrine to strike down many statutes that created irrebuttable presumptions (primarily during the early days of the Burger Court) until the Court "put forward a general rule of law that seems to replace the exacting irrebuttable

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[78] This Court has recognized the problems with irrebuttable presumptions in its own jurisprudence. *Gallie v. Wainwright*, 362 So.2d 936 (Fla. 1978); *Markham v. Forgg*, 458 So.2d 1122, (Fla. 1984)(finding that "constitutionality . . . under the Due Process Clause must be measured by determining (1) whether the concern of the legislature was reasonably aroused by the possibility of an abuse which it legitimately desired to avoid; (2) whether there was a reasonable basis for a conclusion that the statute would protect against its occurrence; and (3) whether the expense and other difficulties of individual determinations justify the inherent imprecision of a conclusive presumption.") and this Court has used the doctrine to strike down portions of offending statutes. *See, e.g.*, *Recchi America Inc.v. Hall*, 692 So.2d 153 (Fla. 1997)(striking down portion of a statute that denied workers' compensation for workplace injury upon positive blood test for drug or alcohol use, presuming causality).

[79] S*ee* Bruce L. Ackerman, The Conclusive Presumption Shuffle, 125 U. Penn L. Rev. 761 (1977)(attempting to categorize and harmonize the cases); Note, The Irrebuttable Presumption Doctrine in the Supreme Court, 87 Harv. L. Rev. 1534 (1974); Mary Anne Case, Are Plain Hamburgers Now Unconstitutional? The Equal Protection Component of Bush v. Gore as a Chapter in the History of Ideas About Law, 70 U. Chi L. Rev. 55 (2003)(arguing that *Weinberger v. Salfi*, 422 U.S. 749 (1975) "definitively swung the pendulum" away from the old irrebuttable presumption doctrine and towards Chief Justice Rehnquist's "vision of equal protection and due process focused on the dangers of individualized discretion", "a direction that it kept swinging until the arc reached a peak in Bush v. Gore.")

presumption analysis with a far more deferential set of standards."[80] The more relaxed standards announced in *Weinberger v. Salfi* were stated by the Court as follows:

> The question is whether Congress, its concern having been reasonably aroused by the possibility of an abuse which it legitimately desired to avoid, could rationally have concluded both that a particular limitation or qualification would protect against its occurrence, and that the expense and other difficulties of individual determinations justified the inherent imprecision of a prophylactic rule.[81]

The irrebuttable presumptions proposed by the Bar do not even meet these more relaxed standards. Applying the *Weinberger* analysis here, and substituting this Court, as rule maker, for Congress in that analysis, it is clear that the proposed *pro hac vice* and non-international arbitration rule amendments contain irrebuttable presumptions that do not meet the second part of the *Weinberger* test.[82] Thus, even though this Court could rationally conclude that the *pro hac vice* and non-international arbitration participation limitations in the proposed rules would protect against the concerns that the

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[80] *Black v. Snow*, 272 F.Supp.2d 21, 29 (D.D.C. 2003)(discussing *Weinberger v. Salfi*, 422 U.S. 749, 771-83 (1975)).

[81] *Weinberger v. Salfi*, 422 U.S. 749, 777 (1975).

[82] The *Weinberger* analysis is consistent with this Court's analysis in *Markham v. Forgg*, 458 So.2d 1122, (Fla. 1984), where the third part of the test this Court established requires a determination of "whether the expense and other difficulties of individual determinations justify the inherent imprecision of a conclusive presumption.") The third part of this Court's test is not met here either.

rules will be used by out of state lawyers to conduct a general practice in Florida, those limitations are clearly overbroad (*ie*. they exclude out of state lawyers who are engaged in genuinely multijurisdictional practice as well as those improperly engaged in "general practice" in Florida) and there is no acceptable basis for that overbreadth. The only acceptable basis for such overbreadth recognized in *Weinberger* is that "the expense and other difficulties of individual determinations justified the inherent imprecision of a prophylactic rule."[83] There are simply no such concerns here.

In the case of both arbitration and *pro hac vice* admission, the Bar's proposed rules seek not only to impose an irrebuttable presumption, but to also require detailed filings and significant fees from out of state lawyers. These are designed to allow the Bar to monitor what each out of state lawyer who comes to Florida is doing here. Overbroad presumptions about what each lawyer is doing here (general practice on the fourth appearance) are not justifiable in the very same proposals that also seek to closely monitor what each out of state lawyer is actually doing here. Since the Bar's proposals have the out of state lawyers paying hefty fees to the Bar for this monitoring, and since the Bar seems eager to begin its monitoring so it can find out more

[83] *Weinberger,* 422 U.S. at 777. Or in *Markham v. Forgg*, 458 So.2d 1122, (Fla. 1984), that "the expense and other difficulties of individual determinations justify the inherent imprecision of a conclusive presumption."

about the nature of each out of state lawyer's practice in Florida, there is no "expense and other difficulties of individual determinations [to the Bar] justif[ying] the inherent imprecision of a prophylactic rule."

In the case of *pro hac vice* admission, the due process violation is even clearer. *Pro hac vice* admission is typically decided in a routine motion addressed to the court presiding over the case in which admission is sought. That court is in an ideal position to make an individualized determination on the very point addressed by the irrebuttable presumption. This is a cost-free (to the Bar) alternative to the adoption of an overbroad presumption that robs the courts of all discretion and ability to make individualized determinations. It is also the process that has been used for years, all around the country, to make such determinations.

In addition, the Bar proposes that the out of state lawyers pay hefty fees and fill out burdensome, bar application-style motions to facilitate the Bar's monitoring of their every case. The Bar will suffer no "expense and other difficulties of individual determinations justified the inherent imprecision of a prophylactic rule" under its proposed regime sufficient to justify its proposed irrebuttable presumptions under the required Due Process Clause analysis.

The courts of Florida should be allowed to decide, on an individualized basis as they do now, whether an out of state lawyer who is seeking to appear here is engaged in genuinely multijurisdictional practice or is engaged in some furtive attempt at "general practice" in Florida that should be prevented. The courts are particularly well suited to conduct such inquiries, once this Court tells them the standards to use when making such determinations. Florida courts do not need to be hamstrung by the Bar to assure they will do justice. Doing individualized justice is their daily work.

The Bar's proposed rules not only lack respect for the courts' ability to follow the rules established by this Court and administer individualized justice; they are also flawed because they are based on the premise that the current *pro hac vice* rules must be tightened because they could be abused.[84] The Bar Petition repeats vague concerns with the current *pro hac vice* rules.[85] However, this is at best speculation.[86] *The Bar has absolutely no evidence that there is or will be the abuse*. The Bar admits, in its petition, it

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[84] Commission II found that the current pro hac vice rule "could be abused." Commission II Report at 5.

[85] *See, e.g.*, Bar Petition at 17 ("The Florida Bar is concerned that the exception allowing for the exercise of judicial discretion is taking over the rule.") No data supporting this has been advanced.

[86] The Bar's expressed concerns about abuse of the *pro hac vice* rules may or may not be real concerns. They may be no more than a cover for protectionist proposals.

does not even know how many *pro hac vice* petitions are filed in Florida, let alone how many of them are granted.[87]

B. Protectionism Is Illegal

In *Supreme Court of New Hampshire v. Piper*,[88] the United States Supreme Court heard a challenge to New Hampshire's refusal to allow a nonresident to become a member of its bar.[89] The Court found that a State may discriminate against nonresidents only where its reasons are "substantial" and the difference in treatment bears a close or substantial relationship to those reasons. The Court found none of the reasons offered by the Supreme Court of New Hampshire for its refusal to admit nonresidents to the bar -- nonresidents would be less likely to keep abreast of local rules and procedures, to behave ethically, to be available for court proceedings, and to do pro bono and other volunteer work in the State -- met

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[87] Bar Petition at 18 ("Currently, there is no information on how many *pro hac vice* motions are filed in Florida.")

[88] 470 U.S. 274 (1985).

[89] Piper, a resident of Vermont, was allowed to take, and passed, the New Hampshire bar examination. But pursuant to Rule 42 of the New Hampshire Supreme Court, which limited bar admission to state residents, she was not permitted to be sworn in. After the New Hampshire Supreme Court denied appellee's request that an exception to the Rule be made in her case (she lived about 400 yards from the New Hampshire border), she filed an action in Federal District Court, alleging that Rule 42 violated the Privileges and Immunities Clause of Art. IV, § 2, of the United States Constitution. The District Court agreed, and granted appellee's motion for a summary judgment. The Court of Appeals affirmed. The Supreme Court affirmed.

the test of "substantiality," and the means chosen did not bear the necessary relationship to the State's objectives.

This Court should follow *Piper* and not adopt rules that are designed to limit competition from out of state lawyers. What the Court said in *Piper* is also applicable here:

> A former president of the American Bar Association has suggested another possible reason for the rule:
>
> > Many of the states that have erected fences against out-of-state lawyers have done so primarily to protect their own lawyers from professional competition.
>
> [Chesterfield] Smith, Time for a National Practice of Law Act, 64 A.B.A.J. 557 (1978). This reason is not 'substantial.' The Privileges and Immunities Clause was designed primarily to prevent such economic protectionism." [90]

In addition, protectionism is not an appropriate regulatory approach. As the Bar's proposals tacitly recognize, in the present regulatory climate, the Bar must begrudge a few appearances to out of state lawyers here and there to avoid well-founded criticisms of provincialism. However, it is clear that the Bar proposals have rejected the spirit of the ABA MJP Commission reports and recommendations, which are designed to promote the genuinely multijurisdictional practice of law by out of state lawyers.

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[90] *Piper*, 470 U.S. at 285 n. 18.

Clients will bear the inconvenience and expense of a more protectionist approach.[91] The Business Law Section respectfully requests this Court to place the interests of clients above all unfounded fears of multijurisdictional practice. This Court should adopt the ABA proposals on arbitration and *pro hac vice* practice, or at least leave the present *pro hac vice* rules as they are.

[91] "The existing system has costs for clients. For example, out of concern for jurisdicitional restrictions, lawyers may decline to provide services that they are able to render skillfully and ethically. In doing so, they may deprive the client of a preferred lawyer including, at times, a lawyer who can serve the client more efficiently and economically than other available lawyers by drawing on knowledge gained in the course of prior work for the particular client or by drawing on expertise in the particular subject area." ABA MJP Report *supra* note 14 at 12.

3. Proposed Rule 2.061 Should Be Sent Back to Committee

There is no question that the Bar did not follow the rule amendment procedure established in Rule 2.130, Florida Rules of Judicial Administration for amending Rule 2.061, Rules of Judicial Administration. Rule 2.130(b) provides a role, in the amendatory process, for the bar committee (here The Florida Bar Judicial Administration Rules Committee) that has jurisdiction to consider proposed rule amendment. The benefits of this procedure are clear. The committees include "attorneys and judges with extensive experience and training in the area of practice of the committee calling for regular, frequent use of the rules."[92] The Bar argues that it has the authority to recommend amendments to the rule without following this required rule amendment procedure. It relies on Rule 2.130(b)(1) to justify the irregular amendment procedure it has followed here.[93] The Bar has failed to read (b)(1) together with the rest of the rule. Where, as here, a proposed rule amendment is filed that has not been through the committee review process, Rule 2.130(b)(2) provides: "The clerk of the supreme court *shall* refer proposals to the appropriate committee under subdivision (b)(3)" (emphasis added).

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92 Rule 2.130(b)(4).

93 Bar Petition at 14 ("Florida Rule of Judicial Administration 2.130 allows 'any person' to propose amendment to court rules, therefore, these proposals may properly be made by The Florida Bar.")

That rule is mandatory, and was violated by the Bar because no committee review occurred here. This error is serious. When the committee chair asked for an opportunity to conduct such a review he made very negative comments about the proposed amendment.[94] The Bar has failed to adequately address this criticism. [95] This Court should not adopt the proposed changes to Rule 2.061.

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[94] Letter of Sanford Solomon to Lori Holcomb, June 30, 2003, Bar Petition, Appendix D, letter at 1:

> Our concerns include: (a) the manner in which the proposed changes restrict or circumscribe the discretion of the trial judge; (b) the effect and impact of the modified presumption regarding "general practice;" and (c) the use of a Rule of Judicial Administration to impose substantial and non-refundable fee payable to The Florida Bar.

[95] The Bar addresses that letter by characterizing it as "mention[ing] areas of study" and responding that since "[n]o input was given or received, therefore, no response can be given." Bar Petition at 23).

4. Treat All Arbitrations the Same

In response to concerns expressed by the Governor's office, the Business Law Section, the International Law Section and others, the Bar exempted international arbitrations from its proposed restrictive arbitration rules.[96] The Bar accepted criticisms of its initial proposals restricting appearances in international arbitrations. It was correct to do so. The Bar should have also eliminated such restrictions on all arbitrations and proposed rules designed to allow genuinely multijurisdictional practice. The same restrictions that the Bar has acknowledged are bad for international business, are still being proposed for non-international business. People will avoid Florida as an arbitration forum in non-international arbitrations, just as the Bar acknowledged they would in international arbitrations, if the proposed rules are adopted.

The Bar seeks to distinguish international from non-international arbitrations by arguing that: "International arbitrations which are being or

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[96] "[A]rbitration lawyers, business groups, and elected officials, including Gov. Jeb Bush, charged that the Bar's proposed rules governing out-of-state and foreign lawyers – which went well beyond those in any other jurisdiction – would destroy the state's chances of becoming a major international center for arbitration of commercial disputes." Special Report: Arbitration and Mediation, Don't fence us in, Daily Business Review, September 08, 2003, reprint at 1. The Bar explains the real reason for its sudden but limited liberality: "Florida is in the running to become the secretariat for international arbitrations under the Free Trade of the Americas Act (FTAA)," Bar Petition at 27.

will be held in Florida are held here for convenience. The international arbitration proceeding could take place anywhere – it is held in Florida because it is a neutral location with a culturally diverse population."[97] The same is true of some non-international arbitrations. The three appearances per year limit is protectionist, not rational.

V. The History of Florida UPL Enforcement Supports Court Leadership on Multijurisdictional Practice

Even a brief history of UPL enforcement in Florida shows that this Court has done an excellent job leading a reluctant Bar through times of change in the practice. This Court should assume such a leadership role here, and not allow the Bar to repeat mistakes of the past.

UPL enforcement efforts in Florida have gone through many changes and they have, at times, been very controversial. In the 1970s and early 1980's, The Florida Bar took a very hard line on unauthorized practice that was fully supported by this Court.[98] The zenith of this stringent enforcement phase was when this Court found Rosemary Furman in contempt and imposed a sentence of 120 days, with 90 days suspended.[99] These efforts

[97] Bar Petition at 27.

[98] *See, e.g.*, The *Florida Bar v. Brumbaugh*, 355 So.2d at 1186 (Fla. 1978) and The *Florida Bar v. Furman*, 376 So.2d 378 (Fla. 1979)(Furman I) *and* The *Florida Bar v. Furman*, 451 So.2d 808 (Fla. 1984)(Furman II).

[99] The Florida Cabinet awarded Rosemary Furman a pardon. Stephen T. Maher, No Bono: The Efforts of the Supreme Court of Florida to Promote the Full Availability of Legal Services, 41 U. Mia. L. Rev. 973, 981 n. 48 (1987). The entire situation was "a public relations disaster for the state's

reflected a possible low point in this Court's unauthorized practice jurisprudence,[100] but eventually led to some of this Court's best initiatives.[101]

The negative publicity surrounding the *Furman* cases[102] was so bad that it caused the leadership of The Florida Bar to rethink its position on UPL enforcement.[103] In 1986, the UPL rules were changed to provide that

legal establishment." Furman Case Victory is Hollow for State Bar, Ruling Highlights Festering Issue: Legal Aid to Poor" Miami Herald, Feb. 13, 1984, at A1, col 2.

[100] To many, the *Furman* cases showed that people unserved by the legal profession were turning to lay people for help. In the first *Furman* case, this Court ordered a study of the problem of the poor's lack of access to legal counsel. *Furman I*, 376 So.2d at 382. The Furman Study was completed the following year. Center for Governmental Responsibility, Holland Law Center, University of Florida,: The Legal Needs of the Poor and Underrepresented Citizens of Florida: An Overview (J. Mills, ed. 1980).

[101] This Court became a national leader in the delivery of legal services to the poor, leading the nation by example with a Bar-wide voluntary 20 hour per year pro bono program with mandatory reporting, *Amendments to Rules Regulating The Florida Bar- 1-3.1(A) and Rules of Judicial Administration - 2.065 (LEGAL AID)*, 598 So. 2d 41 (Fla. 1992); *Amendments to Rules Regulating The Florida Bar- 1-3.1(A) and Rules of Judicial Administration - 2.065 (LEGAL AID)*, 630 So. 2d 501 (Fla. 1993), and leading all other states and the District of Columbia to develop Interest on Lawyer's Trust Account (IOLTA) Programs. *Matter of Trust Accounts: a Petition by The Florida Bar to Amend the Code of Professional Responsibility and Rules Governing the Practice of Law*, 356 So. 2d 799 (Fla. 1978) (establishing the nation's first IOLTA program); *Matter of Trust Accounts: a Petition by The Florida Bar to Amend the Code of Professional Responsibility and Rules Governing the Practice of Law*, 538 So. 2d 448 (Fla. 1989) (making program mandatory); *Brown v. Legal Foundation of Washington*, 538 U.S. __ (2003) (IOLTA programs are constitutional and are now operational in all states).

[102] Case Challenges the Legal System, N.Y. Times, Aug. 12, 1984 at 17, col 1; Sixty Minutes: People's Court (CBS Television Broadcast Jan. 29, 1984).

[103] "*See*, *e.g.*, the President's Page of the January 1985 Florida Bar Journal, in which Gerald F. Richman suggested that the Bar leave the field

the Florida Bar could only enforce UPL through civil injunction actions, leaving all criminal enforcement of UPL restrictions to the state attorney.[104] "It was hoped that this approach to UPL enforcement would reduce the amount of controversy the Bar's UPL program would generate."[105]

In 1987, this Court adopted an amendment to the definition of the practice of law in Ch. 10 of the Rules Regulating The Florida Bar. "The amendment permitted 'non-lawyers to engage in limited oral communications to assist individuals in the completion of forms approved by the Supreme Court of Florida.' The purpose of this amendment was to address criticism of the rule in The *Florida Bar v. Brumbaugh*, 355 So.2d 1186, 1194 (Fla. 1978), that non-lawyers may sell legal forms and type the forms, copying the information given them by their customers, but may not engage in any oral communication concerning the forms. Consequently, at least insofar as forms which are approved by the Supreme Court, form

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of UPL enforcement to the state attorney." Robert M. Sondak, Access to Courts and the Unauthorized Practice of Law – 10 Years of UPL Advisory Opinions, 73 – FEB Fla. B.J. 14. Robert Sondak chaired The Florida Bar Standing Committee on Unlicensed Practice of Law from 1986-88 and has served on several Bar and Supreme Court committees dealing with access to courts and the unlicensed practice of law.

[104] The *Florida Bar Re: Rules Regulating The Florida Bar*, 494 So.2d 977, 1111 (Fla. 1986).

[105] Sondak *supra* note 103. In 1996, this Court readopted rules authorizing indirect criminal contempt proceedings. *In re: Amendment to Rules Regulating The Florida Bar*, 627, So.2d 272, 296-98 (Fla. 1996).

sellers may now point out errors in the information customers write on the forms, thereby simplifying and streamlining the process."[106] Thus, this Court has moved away from its hard-line positions of the 1970's and early 1980s and has recognized the importance of addressing the real needs of real people in UPL regulation and enforcement, rather than simply paying homage to the rhetoric of consumer protection.

This Court has specifically addressed in-state practice by out-of-state lawyers on a few occasions. In The *Florida Bar v. Savitt*,[107] Strook & Strook & Lavan opened a Miami office, allegedly assigning Savitt, a partner not admitted in Florida, to manage the office. An original proceeding for an injunction was concluded by this Court's adoption of a consent decree forbidding some activities as the unauthorized practice of law and permitting others.[108] This Court became a leader on this issue as well. *Savitt* is the

[106] Sondak *supra* note 103 (*discussing* The *Florida Bar Re: Amendments to Rules Regulating The Florida Bar (Chapter 10)*, 510 So.2d 596, 597 (Fla. 1987).

[107] 363 So.2d 559 (Fla. 1978)

[108] The Florida office was required to be managed by a partner admitted in Florida and non-Florida admitted lawyers could engage in professional activities only as permitted by temporary admissions, transitory professional activities incidental to essentially out-of-state transactions and as coordinating supervisory activities in essentially multi-state transactions in which matters of Florida law are being handled by members of The Florida Bar. In addition, this Court ruled that, provided that clients were advised in writing that the lawyer was not admitted in Florida, and the lawyer was in Florida on a transitory basis, non-Florida admitted lawyers could provide advice on federal law, on non-Florida law and on federal agency practice, so long as matters of Florida law were handled by Florida admitted lawyers.

"only reported case which has ever addressed the operations of an interstate law firm in any detail…."[109]

In *Chandris, S.A. v. Yanakakis*,[110] this Court held that the Massachusetts lawyer had engaged in the unauthorized practice of law.[111] This Court rejected the argument that, because the case had been litigated in federal court, the Massachusetts lawyer had not engaged in UPL, holding that "we find no merit to Yanakakis' argument that there is a general federal law exception to Florida's admission requirement,"[112] This Court reaffirmed its earlier ruling in The *Florida Bar v. Savitt*,[113] that out-of-state lawyers who are members of a multi-state law firm may perform certain functions in Florida, but the activities performed by the Massachusetts lawyer were not among those permitted in *Savitt*. The *Yanakakis* case does not counsel

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Any activities involving the practice of law in Florida are allowed only if such activities merely constitute assistance to Florida lawyers, and if the result of such activities is utilized, it is the product of, or is merged into, the product of a Florida lawyer who takes professional responsibility.

[109] Barker, Extrajurisdictional *supra* note 39 at 1518.

[110] 668 So.2d 180 (Fla. 1995).

[111] An individual licensed to practice to practice in Massachusetts and that state's federal courts signed a contingent fee agreement in Florida with an injured seaman. He was hired to bring a case under the Jones Act, 46 U.S.C. § 668(a). The case was later handled by a Florida lawyer, and a second contingent fee agreement was handled by the client, the Massachusetts lawyer and the Florida lawyer. This Court ruled that both fee agreements were void.

[112] *Yanakakis*, 668 So.2d at 184.

[113] 363 So.2d 559 (Fla. 1978)

against the adoption of the ABA recommendations. *Yanakakis* did not involve genuinely multijurisdictional law practice. The Massachusetts-licensed lawyer in *Yanakakis* lived in Florida.

The most recent UPL case against an out of state licensed lawyer is *The Florida Bar v. Rapoport.*[114] There, this court found that Rapaport, an out of state lawyer, was engaged in the unlicensed practice of law in Florida and enjoined Rapoport from practicing law in Florida without a license. Like *Chandris,* the *Rapoport* case does not counsel against adopting rules that are more accommodating to the multijurisdictional practice of law. *Rapaport* did not involve genuinely multijurisdictional practice.[115]

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[114] 845 So.2d 874 (Fla. 2003). In that case, the Referee found, on summary judgment, that Rapoport was not a licensed Florida lawyer (he was licensed in the District of Columbia) and that he operated a law practice in Florida, he advertised in the *Fort Lauderdale Sun-Sentinel* his availability to represent persons in securities arbitration matters, he offered advice and representation to stockbrokers, he prepared signed and filed securities claims for clients and he represented clients in securities arbitration matters.

[115] The Bar's proposals seem influenced by this case, but how much should they be? Proposed Rule 4-5.5(b)(1) provides that a lawyer who is not admitted to Florida shall not "except as authorized by law establish an office or other regular presence in Florida for the practice of law….". Does this proposal go too far? Can it be read to prohibit out of state law partnerships (whose offices are owned in part by the *out of state lawyer partners* through the partnership) from having offices in Florida? Or in-state partnerships from expanding out of state? This should be clarified.

This Court has established procedures for issuing advisory opinions on the unauthorized practice of law in Florida.[116] "None of the court's advisory opinions directly addresses the actions of out of state or foreign lawyers."[117] In an opinion that was relied on by this Court in deciding *Rapoport*, this Court opined that it was the unlicensed practice of law to give specific legal advice and to perform the traditional tasks of a lawyer in securities arbitrations.[118]

"Chapter 17 of the Rules Regulating The Florida Bar, the "Authorized House Counsel Rule," was initially proposed by The Florida Bar Board of Governors in January 1990, after the Standing Committee on UPL held a public hearing, but declined to issue an advisory opinion on the subject. The Florida Supreme Court rejected the Board of Governor's initial proposed rule, which would have required house counsel to become members of The Florida Bar within a specified period of time. The court decided that this restriction did not 'meet the legitimate needs of business in a modern

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[116] The *Florida Bar Re: Rules Regulating The Florida Bar*, 494 So.2d 977, 115-16 (Fla. 1986).

[117] Sondak *supra* note 46.

[118] The *Florida Bar Re: Advisory Opinion on Nonlawyer Representaiton in Securities Arbitration*, 696 So.2d 1178 (Fla. 1997). "In two other instances in which the issue was presented to the Standing Committee on UPL, the matter was resolved through rules adopted by the Supreme Court governing the conduct, rather than the advisory opinion process." Sondak *supra* note 103.

economy.'"[119] This Court explained that: "We commend The Florida Bar for its efforts to safeguard against the unlicensed practice of law. However, this Court is troubled by the concerns raised by opponents to this proposal. We agree that less burdensome alternatives exist that can provide solutions to this problem.[120]" "A revised Ch. 17 was later adopted in The *Florida Bar RE: Amendments to Rules Regulating The Florida Bar*, 635 So.2d 968, 973-76 (Fla. 1994). The new rule deleted the requirement that in-house counsel become licensed in Florida, and expressly authorized 'an employee of a business organization [to] provide legal services in the state of Florida to the business organization."[121] This Court was a national leader on this issue.[122]

"The 'Foreign Legal Consultancy Rule,' Ch. 16, Rules Regulating The Florida Bar, had a similar origin and history of Bar opposition. [123] This

[119] Sondak *supra* note 103 *quoting In re Amendments to Rules Regulating The Florida Bar(I), 593 So.2d 1035, 1036 (Fla. 1991).*.

[120] *Id.*

[121] Sondak *supra* note 103 *quoting* The *Florida Bar Re: Amendments to Rules Regulating The Florida Bar*, 635 So.2d 968, 973-76 (Fla. 1994).

[122] For a summary of other states that have addressed this question and a description of what they have done, see ABA MJP Report *supra* note 14 at 9 n.21.

[123] Sondak *supra* note 103 *citing* Rule 16-1.3(a)(1). After the Standing Committee on UPL held a public hearing on the issue, it referred the matter to the International Law Section of The Florida Bar. That section then proposed a rule permitting foreign lawyers to act as authorized foreign legal consultants in Florida, to give advice and services "regarding the laws of the foreign country in which such person is admitted to practice as an attorney.'" "Although the rule expressly prohibits a foreign legal consultant from offering legal advice or other services on federal or Florida law, the Florida Board of Bar Examiners objected 'that the chapter does not sufficiently

Court adopted the rule over that opposition and became a national leader on this issue as well.[124]

Conclusion

The Business Law Section respectfully requests that this Court adopt Florida rules based on the ABA's proposed rules on out of state attorney participation in non-international arbitrations and *pro hac vice* admission of out of state attorneys, or alternatively, that this Court not retreat from the *pro hac vice* rules that are currently in place.

CERTIFICATE OF TYPE SIZE AND VIRUS SCAN

I HEREBY CERTIFY that this Comment is typed in 14 point Times New Roman type and that the computer disk that contains this Comment has been scanned by McAfee Anti-Virus Version 4.5.1 and has been found to be free from viruses.

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protect the public.' The court overruled the objection and adopted the rule as providing: 'A means of control and protection for the public that does not now exist and, consequently, we find that it is an adequate beginning for regulation of this kind of activity.'" Sondak *supra* note 103 *quoting* The *Florida Bar Re: Amendment to Rules Regulating The Florida Bar*, 605 So.2d 252, 254 (Fla. 1992). The provisions of Ch. 16 were adopted for a five-year trial period and were made permanent in The *Florida Bar Re: Amendment to Rules Regulating The Florida Bar – Chapters 6 and 16*, 702 So.2d 1261 (Fla. 1997).

[124] About half the states have now adopted foreign legal consultant provisions and the ABA recommends that all states adopt such a provision. ABA MJP Report *supra* note 14 at 10.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing have been sent by United States Mail this __ day of March, 2004 to each of the following at The Florida Bar, 651 East Jefferson Street, Tallahassee, FL 32399-2300: John F. Harkness, Jr., Executive Director, Miles A. McGrane, III, President, Kelly Overstreet Johnson, President-Elect. Alan Bookman, President-Elect Designate, Paul F. Hill, General Counsel, Mary Ellen Bateman, Director, Legal Division. Ethics, UPL, Professionalism, Lori Holcomb, Director, Unlicensed Practice of Law.

Respectfully Submitted,

The Florida Bar Business Law Section

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