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

CORRECTED COMMENTS REGARDING PROPOSED RULES ON THE MULTI-JURISDICTIONAL PRACTICE OF LAW

Undersigned counsel, Stephen Krosschell, hereby files the following comments regarding the Florida Bar Board of Governors' Proposed Rules Relating to the Multi-Jurisdictional Practice of Law.

I. THE BOARD HAS NOT PROVIDED ANY JUSTIFICATION TO CHANGE DECADES OF ESTABLISHED PRACTICE PERMITTING OUT-OF-STATE COUNSEL TO APPEAR IN ARBITRATION.

A. Introduction.

According to Rule Regulating the Florida Bar 1-3.11 which the Florida Bar Board of Governors ("Board") has asked this Court to approve in this proceeding, out-of-state lawyers cannot appear in domestic arbitrations in Florida without requesting leave from the Florida Bar and paying a hefty fee and in any case cannot appear more than three times in Florida arbitrations each year. This rule would be substantially inconsistent with current practice in this country. For decades, if not centuries, out-of-state counsel have routinely represented arbitration litigants, and this

representation has not been deemed the unauthorized practice of law. The Board has provided this Court with no reason to make this substantial change.

B. The Board has not Established that its Proposed Rules are Necessary to Protect the Public.

Several possible rationales exist for imposing restrictions on the authorized practice of law, but these rationales do not support the Board's proposed restrictions on representation in arbitration. In the first place and most importantly, the primary purpose of this Court's unauthorized practice rules "is the protection of the public from incompetent, unethical, or irresponsible representation." Florida Bar v. Moses, 380 So. 2d 412, 417 (Florida 1980). The Board, however, has not established or even stated that any member of the public has complained that they received poor representation because they were represented by a non-Florida counsel in a Florida arbitration. Moreover, undersigned counsel is not aware of any such complaint, published or unpublished, by anyone anywhere in the country. To the extent complaints are made about out-of-state counsel, they are made not because counsel's efforts would have been better if they had been licensed in the state but rather for other, less legitimate reasons, such as a desire by opposing counsel to disqualify their opponents, a desire by opposing parties to avoid paying an arbitration award, a desire by clients to avoid paying their attorneys' fees, or a desire by state bar associations to protect their economic turf.

Indeed, by proposing that out-of-state counsel can appear three times per year, the Board necessarily concedes that the purpose of its proposal is not to protect "the public from incompetent, unethical, or irresponsible representation." Attorneys who are competent to appear three times in Florida arbitrations do not somehow lose their competence when they appear the fourth time. To the contrary, based on the experience and knowledge gained during the prior three appearances, they should generally be more competent during their fourth excursion into Florida.

Furthermore, the Board's proposed restrictions would demonstrably not protect the public but instead harm it. For example, undersigned counsel represents investors in securities arbitrations. The nature of securities fraud is that it impacts numerous persons similarly in a particular jurisdiction. Rogue stockbrokers commonly recommend the same fraudulent investment to numerous clients, and these fraudulent recommendations of the same investment are also made by other stockbrokers in other states. If a state, such as Florida, restricts the ability of attorneys to represent clients from other states, then these clients will be deprived of the expertise and knowledge which these attorneys have developed regarding particular stockbrokers and particular securities. Counsel who have the most expertise regarding a particular investment could only represent three persons per state. This result is inefficient and harms the investing public. When counsel is already representing three other persons who

purchased the same product from the same broker and that counsel has already gained substantial expertise regarding that investment, limiting that counsel's authorized representation to only three persons per year is inconsistent with the primary purpose of the unauthorized practice rules to protect the public.

Of course, the same conclusion holds for the other side of the aisle. For example, the same brokerage firm may be the subject of arbitration suits nationwide regarding the same investment. Generally, the resolution of stock fraud suits does not depend on the intricacies of state law and instead depends on whether the firm's conduct conforms to industry standards that are the same nationwide. In such circumstances, forcing the brokerage firm to hire in-state counsel is senseless, when the firm already has in-house counsel or counsel from outside the state who are handling dozens of arbitrations with the same issues regarding the identical investment or trading practice. The firm is better protected if it can use its own counsel, rather than be forced to hire an in-state counsel with less knowledge about the matter at issue. The Board's proposed restrictions on the appearance of non-Florida counsel are thus inconsistent with the primary purpose of the unauthorized practice rules to protect the public.

C. The Board has not Established that Out-of-State Counsel will be Unregulated.

A second rationale, related to the first, for restrictions on the authorized practice of law, is to ensure that a regulatory body will monitor the conduct of the person providing the representation. Counsel from other states, however, are members of their own states' bars, and these bars are fully capable of regulating the conduct of their lawyers. See Supreme Court of New Hampshire v. Piper, 470 U.S. 274, 286 n.20 (1985) (quoting an Oregon Bar committee) ("[W]hy should it be more difficult for the [Oregon] courts to control an attorney from . . . Washington, than from . . . Oregon, if both attorneys are members of the Oregon Bar . . . ?"). Moreover, to the extent this Court has jurisdiction over out-of-state counsel, it does not lose the ability to supervise their conduct, once they pass the three-appearance threshold. If this Court can regulate three appearances, then it can regulate four of them.

In this respect, this issue is substantially different from the issue before this Court in Florida Bar Re Advisory Opinion on Non-Lawyer Representation in Securities Arbitration, 696 So. 2d 1178 (Fla. 1997). In Advisory Opinion, the Florida Bar Standing Committee on the Unlicensed Practice of Law developed a factual record that persons not licensed in any state were representing Florida residents in securities arbitrations, were harming their clients through ineffective representation and unethical conduct, and were improperly motivated to settle claims because they could not proceed to court to confirm arbitration awards. The Committee emphasized that,

"[m]ost importantly, . . . nonlawyer representatives -- unlike attorneys -- are not supervised or subject to discipline by a state bar or any other regulatory body." Id. at 1181. This Court concluded that "compensated non-lawyer representatives in securities arbitration . . . pose a sufficient threat of harm to the public to justify our protection." Id. By contrast, the Board has presented no threat of harm to the public in this instance to justify its proposed restrictions, and the Board makes no effort to contend that state bars cannot supervise or discipline attorneys who are operating outside their state. Consequently, this second rationale for restrictions on the unauthorized practice of law also does not support the Board's proposals.

D. The Board has not Established that its Proposed Rules are Necessary to Protect the Dignity of Courts.

A third purpose of the unauthorized practice rules is to protect the dignity of Florida courts. While Florida judges might be willing to allow out-of-state counsel to appear on an occasional basis, if these counsel appear too frequently, then Florida has said they should become licensed to practice law in Florida, to provide a greater assurance that they are familiar with Florida court procedures. Arbitrations, however, are not courts, and this justification for unauthorized practice rules is therefore necessarily inapplicable to arbitration. Moreover, even in court, numerical limitations, such as the Board's proposed three-appearance rule, are not appropriate. In a civil rights case, the Fifth Circuit considered a Mississippi rule allowing only one *pro hac*

vice appearance per year and found that the district court erred by denying a *pro hac vice* request. "[T]he assertion of the District Court's regulatory interest cannot justify a rule that limits the number of pro hac vice appearances, whether it be to one case a year or three cases a year. . . . It is difficult to see how the concern of the District Court in decorum, dignity, competency, good character or amenability to service and discipline is served by a numerical limitation." Sanders v. Russell, 401 F.2d 241, 245-46 (5th Cir. 1968).

The First Circuit similarly found that a one-appearance-per-year rule in Puerto Rico was invalid.

> [W]e cannot discern how a simple numerical limitation on the number of *pro hac vice* appearances per year advances the district court's legitimate interest in regulating the conduct of its attorneys. Our skepticism about the propriety of such a rule is heightened by the fact that its application can deprive a criminal defendant of his sixth amendment rights. The right to counsel of choice cannot be denied without a showing that the exercise of that right would interfere with the fair, orderly and expeditious administration of justice. The mere fact that a defendant seeks to retain an out-of-state attorney does not hinder the efficacious administration of justice. . . . Accordingly, we hold that Local Rule 204.2 of the District Court of Puerto Rico is invalid as applied to criminal defendants seeking to retain outside counsel.

United States v. Alvarez, 816 F.2d 813, 817-18 (1st Cir. 1987). See also United States v. Collins, 920 F.2d 619, 626 (10th Cir. 1990) ("[D]istrict courts must articulate reasonable grounds for denying *pro hac vice* admission to defendant's chosen counsel; mechanistic application of rules limiting such appearances is improper.").

Consequently, because arbitrations are not court proceedings, and numerical appearance limitations are in any case inappropriate, the Board's proposed restrictions on appearances in arbitration cannot be justified on the rationale that they are necessary to protect the dignity of courts.

E. Out-of-State Counsel are not Located in Florida.

A fourth rationale for unauthorized practice rules might apply when the attorney is actually located in Florida. In such cases, the lawyer might presumptively be deemed to provide services not only with respect to arbitration but also for other legal issues as well. In such cases, Florida might be said to have a greater interest in regulating the conduct of such lawyers who actually live on Florida soil and in requiring them to become members of the Florida Bar. By contrast, out-of-state lawyers who represent parties in arbitration typically spend almost all of their time in their home state and only come to Florida for the arbitration itself. These attorneys are not presumptively likely to be practicing law on Florida soil outside the arbitration hearing. Indeed, because most arbitrations settle before the hearing, most out-of-state counsel participating in Florida arbitrations do not come to Florida at all in connection with the arbitration.

Consequently, in this respect, the issue now before this Court is substantially different from the issue in Florida Bar v. Rapoport, 845 So. 2d 874 (Fla. 2003). In

Rapoport, the out-of-state counsel was a Florida resident and represented arbitration clients in Florida. Moreover, this Court had previously enjoined him from practicing law in Florida. These facts are necessarily different from those in the typical arbitration involving a non-Florida lawyer, who only flies in for a few days for the arbitration, in the unlikely event the case does not settle or is not otherwise resolved without a hearing. Indeed, the Florida Bar itself has recognized this distinction and presently interprets Rapoport to apply only to attorneys residing in Florida. "[O]fficials at the Florida Bar Association said that while they are still looking at the rules governing what's known as the 'temporary practice of law' in this state, out-of-state lawyers will indeed be allowed to continue doing arbitration work in Florida." David A. Gaffen, "Florida to Out-Of-State Lawyers: Just Kidding," Registered Rep. (Mar. 5, 2003). (See attached Exhibit "A.") Consequently, this fourth rationale for unauthorized practice restrictions also does not support the Board's proposed rule.

F. Out-of-State Counsel Routinely Render Opinions on Florida Law, and Many Arbitrations do not Involve Unique Florida Law.

A fifth argument for unauthorized practice rules is that only Florida lawyers should represent persons who have disputes regarding Florida law. Attorneys, however, commonly render opinions about other states' laws, when they are practicing in their own state. Indeed, Florida judges have themselves repeatedly opined on other

states' laws. See, e.g., Fulton County Administrator v. Sullivan, 753 So. 2d 549 (Fla. 1999) (construing Georgia law); O'Neil v. State, 684 So. 2d 720 (Fla. 1996) (discussing South Carolina law); Lipsig v. Ramlawi, 760 So. 2d 170 (Fla. 3d DCA 2000) (construing Michigan law). Florida judges do not commit the unauthorized practice of law merely by interpreting and applying other states' laws, and a similar conclusion applies to the efforts of non-Florida lawyers regarding Florida law.

Moreover, the Board's proposed restrictions apply regardless of whether the arbitration involves Florida law, and many Florida arbitrations do not have a significant Florida law component. Most importantly, Florida court procedures do not apply in arbitration. Suarez-Valdez v. Shearson Lehman/American Express, 858 F.2d 648, 649 (11th Cir. 1988) ("An agreement to arbitrate is an agreement to proceed under arbitration and not under court rules."). The Code of Arbitration Procedure of the National Association of Securities Dealers, Inc. ("NASD"), for example, has its own procedures for filing and amending claims, selecting arbitrators, serving and responding to discovery requests, and appearing at the arbitration, which are significantly different from those in Florida courts. The NASD even has its own guide, approved by the Securities and Exchange Commission ("SEC"), for discovery procedures. Order Granting Approval to Proposed Rule Change by the NASD Creating a Discovery Guide for Use in NASD Arbitrations, 70 S.E.C. Docket 1139,

1999 WL 688111 (Sept. 2, 1999). At least half of Florida lawyers' particular expertise relates to their knowledge of Florida procedural rules that are inapplicable in arbitration. At least half of the rationale for requiring a Florida-licensed attorney for Florida arbitrations is dissipated on that ground alone.

The substantive law relevant to securities arbitrations is national in scope or nationally uniform and therefore is also not subject to the particular knowledge which a Florida-approved lawyer might provide. Since the Supreme Court in Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987), determined that federal courts will enforce brokerage firm arbitration agreements for federal securities law claims, the vast majority of retail investor disputes are arbitrated. One consequence of this shift into arbitration is that the law in court for these disputes has stagnated, because few of these disputes are litigated. Claimants in arbitration must now look to other sources to determine the standard of care applicable to the brokerage firm's conduct. The NASD and the SEC, through the development of the NASD's rules, the NASD's communications to its members, and the NASD's and the SEC's enforcement actions, have filled the vacuum in the courts' opinions that has resulted from the universal use of the arbitration system by the brokerage industry. NASD arbitrators now generally look to the principles of conduct established by the

NASD and the SEC when determining the propriety of the actions of brokerage firms or their employees, rather than to state law.

Of course, this reliance on national industry standards is appropriate even in courts and certainly is proper in an NASD arbitration.

> New York Stock Exchange Rule 405 requiring that each securities broker "know [his] customer" has been recognized as a standard to which all brokers using the Exchange must be held, the violation of which is tantamount to fraud. . . .
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> Appellants contend that the admission of testimony regarding New York Stock Exchange and NASD rules serve to "dignify those rules and regulations to some sort of standard." The admission of testimony relating to those rules was proper precisely because the rules reflect the standard to which all brokers are held.

Mihara v. Dean Witter & Co., 619 F.2d 814, 825 (9th Cir. 1980). These nationwide standards, rather than idiosyncratic laws applicable only in Florida, now supply most of the law governing securities arbitrations.

In addition, claims for violations of the federal securities laws are the same in every state regardless of where the arbitration hearing takes place. Florida securities laws are based on the Uniform Securities Act, which has been adopted in most of the states. Claims by investors that sales of unregistered securities through misrepresentations and failures to disclose violated state securities laws are the same in every state. Every state has determined that intentional, reckless, or negligent misrepresentations or omissions relating to investments constitute fraud or negligence.

In every state, a broker is an agent and, under the law of agency, has fiduciary duties. The law of contracts, based as it is on black letter principles of offers, acceptances, and consideration, is the same in every state. The vast majority of substantive law applicable in securities arbitrations is the same, regardless of the state in which the arbitration takes place. Consequently, because arbitrators have their own procedures, and the applicable substantive law for many arbitrations is the same nationwide, the Board's proposed rules cannot be justified on the ground that only Florida lawyers should interpret Florida law.

G. The Residency Status of a Party is not by Itself Sufficient to Require that Party to be Represented by Counsel from the Party's State.

A sixth argument for the Board's proposals might be that only Florida lawyers should represent Florida residents. Non-Florida lawyers, however, routinely represent Florida residents, when they litigate in other states. The residency status of lawyers' clients is not by itself sufficient to require lawyers to be licensed in the same states where the clients reside.

Moreover, the Board's proposals apply regardless of whether the represented party is a Florida resident. They require non-Florida residents to be represented by Florida-approved lawyers, and, if adopted nationwide, would preclude Florida lawyers from representing Florida clients. For example, NASD arbitrations are generally held

at the NASD hearing situs closest to the investors' homes. See Arbitrator's Manual at 15 (available on the Internet at www.nasdadr.com/pdf-text/arb_manual.pdf). The NASD holds arbitrations in Florida in Boca Raton, Orlando, and Tampa. Consequently, absent a special request, Pensacola investors must generally arbitrate in New Orleans, because Pensacola is closer to New Orleans than to Tampa. If Louisiana adopted the same rules that the Board has proposed, then a Pensacola attorney could represent only three Pensacola residents per year in NASD arbitrations held in New Orleans, and Pensacola residents could be required to hire Louisiana lawyers.

Moreover, in many states, including Alabama and Iowa, the NASD does not have any hearing situses. Consequently, if the Board's proposals were adopted nationwide, then Alabama lawyers could represent only three Alabama investors in securities arbitration per year. If a stockbroker defrauded four investors in Council Bluffs, Iowa, only three of these investors could hire the same Iowa lawyer to travel a few miles across the Missouri River to arbitrate before the NASD at its hearing situs in Omaha. Even the Board must concede that these results of its own proposal are highly undesirable, and these results establish that the Board's proposal cannot be justified on a rationale that only Florida lawyers should represent Florida residents.

H. That a Florida Proceeding Involves Legal Issues does not Mean that Florida Lawyers must be Involved.

A final argument in support of the Board's proposal might be that only Florida-approved lawyers should be permitted to arbitrate on Florida soil. This argument is a *non sequitur*, however, because it assumes the conclusion, as follows:

1. Only Florida-approved lawyers should be permitted to arbitrate on Florida soil.

2. Therefore, only Florida-approved lawyers should be permitted to arbitrate on Florida soil.

That an event involving the law occurs in Florida does not mean that only lawyers can be involved. For many reasons, this Court allows a variety of persons and entities to practice law in Florida even though they are not lawyers. All legislators, for example, practice law, but not all legislators are lawyers. Similarly, every H&R Block tax preparer practices law, and, contrary to Chicken Little's predictions, the sky has not fallen in. See also Florida Bar v. Moses, 380 So. 2d 412, 417 (Florida 1980) ("[T]he legislature has the constitutional authorization to oust the Court's responsibility to protect the public in administrative proceedings . . . and when it does so any 'practice of law' conduct becomes in effect authorized representation. That we find is the situation here.").

Because many persons practice law on Florida soil without being lawyers, the Board cannot merely assert that only Florida-approved lawyers can appear in arbitrations on Florida soil and then expect this Court automatically to agree. The

Board must identify a reason for its assertion and explain why the rationales underlying the unauthorized practice of law jurisprudence require this Court to overturn decades or centuries of established practice in this country allowing out-of-state lawyers to appear in arbitrations, when the vast majority of their work is done in their home state, most cases settle or otherwise resolved without a hearing, and they appear in the state for only a few days for the arbitration hearing in the few cases that do not settle. The Board has completely failed to satisfy this obligation.

I. The Board's Proposals Appear to have Primarily Economic Motivations.

Because the traditional rationales for unauthorized practice rules do not appear to apply in this instance and because the Board does not generally discuss these rationales as part of its presentation to this Court, the only remaining conclusion is that the Board has other reasons to make its proposals. Here, the Board's primary motivation appears to be not to protect the public but instead to protect the economic interests of the Florida Bar. The United States Supreme Court, however, has squarely rejected this rationale.

> The 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." . . . The Privileges and Immunities Clause was designed primarily to prevent such economic protectionism.

Supreme Court of New Hampshire v. Piper, 470 U.S. 274, 285 n.18 (1985).

The Board admits that it fashioned its proposed rules with economic interests in mind. After the initial version of the proposed rules were publicized, international lawyers complained that these rules would also apply to international arbitrations. Even the Governor of Florida weighed in on this point and said that the proposed rule would harm Florida's economic interests by inducing foreign parties not to arbitrate in Miami. According to the Governor's letter, attached to the Board's Petition as part of Appendix D:

> By placing limits on how many arbitrations non-Florida lawyers can appear in and prohibiting non-U.S. lawyers from appearing in any international arbitrations, Florida will make it more complicated and more expensive for businesses to choose Florida as their arbitral venue. Given this alternative, they will choose New York, London or Paris. It will also make Miami a less attractive candidate for the FTAA Secretariat, giving Atlanta and other cities an unnecessary advantage.

Faced with this threat to Florida's economy, the Board quickly removed international arbitrations from the domain of its proposed multi-jurisdictional practice rules. According to the Board's Petition in this Court at 27 (emphasis added), the Board carved out this international arbitration exception because "Florida is being considered as the location where international arbitrations are being held. Being chosen will be a boost to Florida's economy as well as *a benefit to members of The Florida Bar practicing in the business and international areas*." Thus, the Board

has admitted that its proposed rules have economic motivations, and no other rationales for the rules appear to exist. These facts strongly indicate that, like any other monopoly, the Florida Bar is primarily seeking to protect its economic turf. This Court should not allow this economic protectionism to succeed.

II. THE BOARD'S PROPOSED RULES WILL SUBSTANTIALLY ALTER CURRENT PRACTICE.

The Board asserts in its Petition at 25-26 that its proposals increase the opportunities for non-Florida lawyers to appear in Florida arbitrations because such appearances are currently not allowed. This assertion is incorrect. The Board bases this assertion on Florida Bar v. Rapoport, 845 So. 2d 874 (Fla. 2003), but Rapoport was decided only one year ago. Prior to Rapoport, out-of-state counsel had been appearing in Florida arbitrations for decades without any objection from the Florida Bar. Moreover, Rapoport is substantially distinguishable on its facts, because it involved a Florida resident whom this Court had enjoined from the practice of law. The Florida Bar itself is not enforcing Rapoport against non-Florida residents, and it has told out-of-state counsel that, until this Court approves or disapproves the new rules, they can continue to appear in Florida arbitrations. (See attached Exhibit "A.") Consequently, contrary to the Board's assertions to this Court, the Board's proposals would impose substantial restrictions on arbitration practices in this State that do not currently exist.

In presenting its proposals to this Court, the Board has failed to explain the more than sixty years of nearly unbroken legal authority that authorizes arbitration work by out-of-state counsel. As early as 1940, the court in American Automobile Assn. v. Merrick, 117 F.2d 23, 25 (D.C. Cir. 1940), said that "[w]e are referred to no case, and we have not found one in which it is held that the collection or arbitration of claims alone amounts to the practice of law." Similarly, the court in Williamson v. John D. Quinn Constr., 537 F. Supp. 613, 616 (S.D.N.Y. 1984), decided that a New Jersey lawyer who appeared in a New York arbitration had not engaged in the unauthorized practice of law. Williamson pointed out that arbitrations are significantly different from court proceedings. "An arbitration tribunal is not a court of record; its rules of evidence and procedures differ from those of courts of record; its fact finding process is not equivalent to judicial fact finding; it has no provision for the admission *pro hac vice* for local or out-of-state attorneys." Id. at 616. See also Siegel v. Bridas Sociedad Anonima Petroleia Industrial Y Comercial, 1991 WL 167979 at *5 (S.D.N.Y. Aug. 19, 1991) ("'[R]epresentation of a party in an arbitration proceeding by a non-lawyer or a lawyer from another jurisdiction is not the unauthorized practice of law.").

Parties in labor arbitrations are commonly represented by nonlawyers. "[T]he union need not retain an attorney for the arbitration hearing to meet its duty to represent the employee." Owen Fairweather, Fairweather's Practice and Procedure

in Labor Arbitration, § 7.IV (Ray J. Schoonhoven ed., 4th ed. 1999). "A union ordinarily does not breach its duty of fair representation merely because it uses a union representative rather than an attorney to represent the grievant at the arbitration hearing." Elkouri & Elkouri, How Arbitration Works, ch. 7.3.F (Alan Miles Ruben ed., 6th ed. 2003). "Where a union representative assists an employee at arbitration, the union's failure to provide the employee with an attorney is not a breach of the duty of fair representation." Castelli v. Douglas Aircraft Co., 752 F.2d 1480, 1483 (9th Cir. 1985). "[W]e do not find that the union's decision to have a union representative rather than an attorney represent Plaintiff to have been a breach of its duty." Vance v. Lobdell-Emery Mfg. Co., 932 F. Supp. 1130, 1136 (S.D. Ind. 1996).

Recently, the court in Colmar, Ltd. v. Fremantlemedia N. Am., Inc., 344 Ill. App. 3d 977, 983, 801 N.E.2d 1017, 1023 (2003), was "called upon to determine . . . what effect, if any, an out-of-state attorney's representation of an out-of-state client during arbitration in Illinois has on an arbitration award." The court declined to vacate the award, because it concluded, relying on the new American Bar Association ("ABA") Model Rule 5.5, that representation by out-of-state counsel in an Illinois arbitration was not the unauthorized practice of law.

> [T]he [American Arbitration Association] rules, to which the parties contractually agreed to be bound, do not require that the party's representative be an attorney. . . . [A]rbitration is not a judicial proceeding but, rather, an alternative to such a proceeding, given that

> judicial fact finding, court procedures, evidentiary rules, and other characteristics of the judicial process do not apply in the arbitration context.
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> [W]e find [ABA Model Rule 5.5] persuasive in that it reflects the modern trend in the law of multijurisdictional practice and is also in keeping with well-reasoned decisions from other jurisdictions that have found that an out-of-state attorney's representation of a client during arbitration does not violate the rules prohibiting the unauthorized practice of law.

344 Ill. App. 3d at 984, 988, 801 N.E.2d at 1023, 1026.

Judge Posner also recently reached a similar conclusion.

> Sirotzky's gripe is that at the arbitration hearing Bernstein's New York lawyer was permitted to engage in tactics that an Illinois lawyer would be forbidden by the rules of ethics governing members of the Illinois bar to engage in, and if this is right it does suggest a way in which a litigant can be harmed by the unlicensed status of his opponent's lawyer. However, the procedures and evidentiary rules in arbitration are matters for the arbitrators and the arbitration contract to determine, rather than for a court to impose. The rules of the New York Stock Exchange governing arbitration do not even require parties to be represented by a lawyer, let alone a licensed one, even if they are institutions rather than individuals and hence would not in ordinary litigation be allowed to proceed without a lawyer.
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> . . . .
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> There is nothing outre about this conclusion. Every tribunal determines, subject to due process limitations not remotely transgressed in this case, who is eligible to practice before it. The United States Tax Court, for example, allows nonlawyers who pass an examination and meet other qualifications to represent clients before the court. Likewise

> the New York Stock Exchange determines eligibility for practice before the arbitral forums that it provides, and its rules have not been violated.

Sirotzky v. New York Stock Exchange, 347 F.3d 985, 989-90 (7th Cir. 2003) (citations omitted).

All of the relevant authorities with expertise in arbitration have agreed on this point. According to Robert M. Rodman, Commercial Arbitration, § 19.12 at 383 (1984), for example:

> There does not appear to be any objection to lawyers representing a party in arbitration proceedings which are conducted in a state in which the lawyer is not a member of that bar. Research by the American Arbitration Association disclosed that there was no support in statutes, decisional law or ethical codes for the proposition that representation of a party in arbitration proceedings by out-of-state lawyers or non-lawyers constituted the unauthorized practice of law. The requirement that parties in arbitration be represented by lawyers admitted to practice in the forum state would greatly diminish many of the advantages of the process.

According to Ian R. MacNeil *et al.*, Federal Arbitration Law, § 32.5.3 at 32:48 (1999) (footnotes omitted):

> The imposition of such prohibitions [against non-lawyer representation in arbitration] makes no sense in a contract-based system in which parties are not required to have attorneys and indeed are in some cases contractually forbidden to utilize legal counsel. . . . [S]uch requirements would "greatly diminish" the particular advantages of arbitration.
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> Whenever it arises, the resolution of this question is of great importance to the operations of the [Federal Arbitration Act], as it determines quite fundamentally the nature of arbitration. . . . [T]he resolution should therefore be governed by general federal arbitration law

> and not by state law. Thus, whatever may be the rule respecting representation in arbitrations governed by state arbitration law where the hearing is held, that rule has no pertinence to arbitrations under the FAA.

See also George Goldberg, A Lawyer's Guide to Commercial Arbitration, 47-48 (2d ed. 1983) ("Since a layman is permitted to represent a party in an arbitration, it would seem to follow that representing a party in an arbitration does not constitute the practice of law and that representation by an unadmitted attorney does not constitute the unauthorized practice of law."); Bette J. Roth *et al.*, The Alternative Dispute Resolution Practice Guide, § 7:13 (2003) ("Traditionally, . . . neither advocacy in arbitration . . . [nor] service as arbitrator . . . has been regarded as the practice of law.").

Bar committees have reached the same conclusion. A New York Committee decided unanimously that parties to "interstate arbitration proceedings conducted in New York may be represented in such arbitration proceedings by persons of their own choosing, including lawyers not admitted to practice in New York. . . . The most prominent organizations in the field of arbitration expressly recognize the parties' right to be represented by whomever they choose." Committee on Arbitration and Alternative Dispute Resolution, Recommendation and Report on the Right of Non-New York Lawyers to Represent Parties in International and Interstate Arbitrations

Conducted in New York, 49 The Record of the Association of the Bar of the City of New York, 47, 48 (1994).

In 1994, the New Jersey Committee on the Unauthorized Practice of Law quoted a 1994 law journal article for the proposition that, "[a]s for the question of who may represent a party in arbitration, existing precedent and commentary indicates that arbitration is not considered the unauthorized practice of law." The New Jersey committee agreed that "an out-of-state attorney's representation of a party in an arbitration proceeding . . . in New Jersey does not constitute the unauthorized practice of law." Committee on the Unauthorized Practice of Law, Opinion 28, 3 N.J.L. 2459, 138 N.J.L.J. 1588 (Dec. 1994). The Supreme Court of Nevada Commission on Multi-Jurisdictional Practice concluded in a report dated November 2001 that Nevada's bar admission requirements "should be applied only to court-annexed or statutorily required mediations and arbitrations [and not to private arbitrations], based on a recognition of the contractual nature of private mediations and arbitrations, as well as a balancing of potential harm to a Nevada resident versus the right of that citizen to have an attorney or representative of their choice."

Finally, the American Bar Association has adopted Model Rule 5.5, which the Board declined to follow. Model Rule 5.5 permits out-of-state counsel to appear in arbitrations in other states, if these appearances are reasonably related to counsel's

practice in Florida. Thus, for example, if counsel in one state have developed an expertise in securities arbitrations, they can use that expertise in other states as well. The ABA committee that developed Rule 5.5 explained this point as follows:

> It is generally recognized that, in the ADR [Alternative Dispute Resolution] context, there is often a strong justification for choosing a lawyer who is not admitted to practice law in the jurisdiction in which the proceeding takes place but who has . . . developed a particular knowledge or expertise that would be advantageous in providing the representation. . . . [I]n ADR proceedings, the in-state lawyer is not ordinarily better qualified than other lawyers by virtue of greater familiarity with state law, state legal processes and state institutions. Further, as noted by the ABA Section of Litigation and its comments to the Commission, "Clients have important considerations in ADR, which include confidentiality, consistency, uniformity, costs, and convenience. After all, non-binding ADR procedures usually require client 'buy in' to succeed. Denying a client her preferred counsel could hamper early ADR efforts and impede prompt resolution of disputes."
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> [T]his provision would authorize legal services to be provided on a temporary basis outside the lawyer's home state by a lawyer who, through the course of regular practice in the lawyer's home state, has developed a recognized expertise in a body of law that is applicable to the client's particular matter. This could include expertise regarding nationally applicable bodies of law, such as federal, international or foreign law. A client has an interest in retaining a specialist in federal tax, **securities**, or antitrust law, or the law of a foreign jurisdiction, regardless of where the lawyer has been admitted to practice law. . . . The provision would, thus, bring the law into line with prevalent law practices. For example, many lawyers who specialize in federal law currently practice nationally, without regard to jurisdictional restrictions, which are unenforced. The same is true of lawyers specializing in other law that applies across state lines.

American Bar Association Commission on Multi-Jurisdictional Practice Report 201B to the House of Delegates, 6-8 (August 2002) (emphasis added).

Thus, contrary to the Board's assertions to this Court, appearances by out-of-state attorneys in arbitrations in other states have been authorized for decades or centuries. This Court should require a greater justification from the Board, before this Court decides substantially to alter this long-established practice.

III. THE BOARD'S PROPOSALS ARE IMPROPERLY TIED TO THE FILING OF THE ARBITRATION DEMAND OR RESPONSE AND IMPROPERLY ATTEMPT TO REGULATE THE PRACTICE OF LAW IN OTHER STATES.

Pursuant to proposed Rule 1-3.11(d), the Board has tied the three-appearance rule to the filing of the arbitration demand or response. Under this proposal, out-of-state counsel cannot file more than three arbitration demands or responses in any 365-day period. This provision disregards the practical reality that out-of-state counsel generally do not practice any law in Florida until they fly in to Florida for the actual arbitration. Arbitration demands and responses are prepared in and mailed from counsel's home states. Thereafter, all further filings are also prepared in and mailed from their home states. Because the vast majority of arbitrations settle or are otherwise resolved without an in-person hearing, and only a few cases are actually arbitrated, most out-of-state counsel never come to Florida at all. As a matter of common sense, out-of-state counsel are not practicing law in Florida if they are not in Florida.

Consequently, if this Court chooses to adopt limitations on out-of-state counsel's efforts relating to arbitration, these restrictions should be tied to the actual appearance for the hearing, not the mere filing of the initial demand or response.

If the Board's tying of the three-appearance rule to the initial demand or response were correct, then, if Burger King had an arbitration requirement for its franchisees, the franchisees' local lawyers would be forced to seek permission from and pay a substantial fee to the Florida Bar merely to file their arbitration demands at Burger King's Miami headquarters, even though the arbitrations would themselves ultimately be held outside Florida near the franchise location. Similarly, all NASD arbitration demands are initially filed in New York. The NASD then tentatively determines the arbitration venue and either keeps the case in New York City for administration or ships it to the NASD's four other regional arbitration administrative centers in Boca Raton, Washington D.C., Chicago, or Los Angeles. Consequently, if New York adopted the Board's proposed rule, then Florida lawyers could file only three NASD arbitration demands per year and would have to pay substantial fees to the New York State Bar for that privilege.

The appearance rule also cannot reasonably be tied to the mere filing of documents in an arbitration, after the arbitration venue is tentatively determined. In the first place, the venue might be changed. See Arbitrator's Manual at 12 ("Arbitrators

always have the authority to change the location of the hearing."). Moreover, the preparation of documents related to an arbitration is performed in the lawyers' home states. By attempting to tie the three-appearance rule to the mere placing of a document in the mail, the Board is attempting to regulate the practice of law, not in Florida, but in the states where the documents are prepared and mailed. See Quill Corp. v. North Dakota, 504 U.S. 298, 311 (1992) ("[A] vendor whose only contacts with the taxing State are by mail or common carrier lacks the 'substantial nexus' required by the Commerce Clause" to be taxed by that State.). The Board's proposal interferes with out-of-state lawyers' privilege to practice law in their own states. See Supreme Court of Virginia v. Friedman, 487 U.S. 59, 65 (1988) ("[T]he practice of law . . . is sufficiently basic to the national economy to be deemed a privilege protected by the [Privileges and Immunities] Clause.").

If Louisiana and New York adopted the view that merely placing arbitration-related documents in the mail for mailing to another state constituted the practice of law in that state, then Mississippi lawyers would be hit with a quadruple whammy in securities arbitrations. NASD arbitrations for Mississippi investors are commonly heard in New Orleans and administered from Boca Raton. (See attached Exhibit "B.") If the practice of law in arbitration were tied to the preparation and filing of documents, then Mississippi lawyers would have to pay fees to New York to file the arbitration

demands, fees to Florida to file any later arbitration documents, and fees to Louisiana for the actual hearing, in addition to the fees they already pay to Mississippi for their bar licenses. Moreover, they could do so only three times each year. This result is senseless. The only logical conclusion is that an appearance rule should be tied, if at all, only to counsel's actual appearance at the arbitration in the state, not to the mere placing of documents in the mail.

IV. THE BOARD'S PROPOSALS DISCRIMINATE AGAINST OUT-OF-STATE COUNSEL.

A. The Filing Fee is Excessive.

The Board's rule proposals impose a $250 filing fee for out-of-state counsel seeking *pro hac vice* status and impose unfair disclosure requirements. For three appearances in one year -- which rule 2.061(a) presumes does not constitute a "general practice" – the fee is $750. The fee for an unlimited general practice for Florida lawyers, however, is not more than $265. See R. Regulating Fla. Bar 1-7.3(a). This disparity between $750 for a limited practice by out-of-state counsel and $265 for an unlimited practice by Florida lawyers is contrary to the Commerce Clause and the Privileges and Immunities Clause, because this disparity discriminates against out-of-state lawyers. See Frazier v. Heebe, 482 U.S. 641, 647 n.7 (1987) (Under the Privileges and Immunities Clause, "a State may discriminate against nonresident

attorneys only where its reasons are substantial and the difference in treatment bears a close relationship to those reasons.").

In Department of Revenue v. Kuhnlein, 646 So. 2d 717 (Fla. 1994), this Court found that a $295 impact fee imposed on out-of-state automobile owners who moved to Florida violated the Commerce Clause.

> [T]here can be no question but that a burden is placed on some out-of-state economic interests. Specifically, Florida has erected a financial barrier that gives Florida used-car sellers a substantial advantage over similar out-of-state sellers. . . . A similar impact fee throughout the United States clearly would tend to favor in-state commercial interests over out-of-state concerns, thus directly impinging upon the free-trade zone among the states created by the Commerce Clause.
>
> Accordingly, we conclude that the Florida impact fee does in fact result in discrimination against out-of-state economic interests in contravention of the Commerce Clause. . . . To be constitutionally permissible, the impact fee thus must be capable of surviving the "virtually per se invalid" test.

Id. at 724 -725. The $250 fee imposed by the Board's proposed rules is not materially different from the $295 impact fee found unconstitutional in Kuhnlein.

B. The Disclosure Requirements are Unfair.

The Board's proposed disclosure provisions unfairly also violate the anti-discrimination requirements of the Commerce and Privileges and Immunities Clauses because these disclosure provisions impose significant burdens that Florida counsel need not bear. The Board's proposals require out-of-state counsel to disclose to

opposing counsel their prior arbitration appearances in the state, their disciplinary history, and the dates of representation. See Proposed Rule 1-3.11(e). These disclosures operate to out-of-state counsel's disadvantage and are not generally imposed on Florida counsel. For example, if opposing counsel obtains information about prior arbitration appearances, counsel can contact counsel in the other arbitrations for strategies on how to deal with the out-of-state counsel's tactics. If the arbitrators issued adverse rulings in the other arbitrations, those rulings could be discovered and used against the out-of-state counsel. Similarly, knowledge of the dates of representation, which is ordinarily protected under the attorney-client privilege, can have substantial consequences for such defenses as statutes of limitations or ratification. The potential mischief caused by opposing counsel's knowledge of out-of-state counsel's disciplinary history is particularly obvious. The Board's proposals discriminate against out-of-state counsel in these respects and therefore are impermissible under the Commerce and Privileges and Immunities Clauses.

V. THE BOARD'S PROPOSALS ARE PREEMPTED BY FEDERAL LAW.

A. <u>The Board's Proposals are Preempted by Federal Labor Law.</u>

The Board's proposed rules are also preempted by federal law in several respects. First, the United States Supreme Court has interpreted federal labor law to require unions to satisfy a duty of fair representation. See Bowen v. U.S. Postal Service, 459 U.S. 212, 240 n.9 (1983) ("Although no statute expressly imposes a duty of fair representation on unions, we have held . . . that 'the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct.'" (citation omitted)). In labor arbitrations, federal courts have held that unions can satisfy this duty of fair representation by providing a union representative who is not a lawyer. "Where a union representative assists an employee at arbitration, the union's failure to provide the employee with an attorney is not a breach of the duty of fair representation." Castelli v. Douglas Aircraft Co., 752 F.2d 1480, 1483 (9th Cir. 1985). "[W]e do not find that the union's decision to have a union representative rather than an attorney represent Plaintiff to have been a breach of its duty." Vance v. Lobdell-Emery Mfg. Co., 932 F. Supp. 1130, 1136 (S.D. Ind. 1996); Lettis v. United States Postal Service, 39 F. Supp. 2d 181, 198 (S.D.N.Y. 1998) ("A grievant has no right . . . to require a union to utilize a lawyer, at an arbitration.").

This principle of federal labor law preempts any contrary state requirement, such as the Board's proposed requirement that parties in Florida arbitrations must be represented by Florida-approved attorneys. BIW Deceived v. Local S6, 132 F.3d 824, 830 (1st Cir. 1997) ("State law is preempted whenever a plaintiff's claim invokes rights derived from a union's duty of fair representation."); Richardson v. United Steelworkers of America, 864 F.2d 1162, 1169 (5th Cir. 1989) ("[T]he . . . duty of fair representation . . . completely preempts state law because of the congressional intent that federal law . . . entirely govern the duties which [a] . . . collective bargaining representative owes. . . ."). The Board's proposed rules therefore cannot be applied to labor arbitrations in Florida.

B. The Board's Proposals Are Preempted by the Securities Exchange Act of 1934.

The Board's proposed rules are also preempted for securities arbitrations by the Securities Exchange Act of 1934 ("Exchange Act") and by the SEC's approval of NASD Rule 10316, which provides that "[a]ll parties shall have the right to representation by counsel at any stage of the proceedings." (NASD rules are available on the Internet at cchwallstreet.com/NASD/NASD_Rules.) Although this Court refused to apply Exchange Act preemption in Florida Bar re Advisory Opinion on Nonlawyer Representation in Securities Arbitration, 696 So. 2d 1178, 1184 (Fla. 1997) (acknowledging that the SEC "easily could . . . preempt us" but finding that it had not

done so), this Court in Advisory Opinion only considered whether nonlawyers could be deemed "counsel" for purposes of Rule 10316. Here, by contrast, the significantly different issue is whether lawyers can be deemed "counsel" under Rule 10316. Advisory Opinion does not address this issue.

1. State Courts Have No Jurisdiction Over Exchange Act Claims, Which can be Brought Only in Federal Court or in Arbitration.

Claimants in securities arbitrations commonly bring Exchange Act claims -- claims for which the federal district court has exclusive jurisdiction and which cannot be filed in state court. According to 15 U.S.C. § 78aa, the "district courts of the United States . . . shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter of the rules and regulations thereunder." Pursuant to this provision, "federal courts have been granted exclusive jurisdiction" over claims brought under the Exchange Act. Evans v. Dale, 896 F.2d 975, 978 (5th Cir. 1990).

In 1987, the Supreme Court determined that Exchange Act claims could also be resolved in arbitration under the rules of the self-regulatory organizations ("SROs") such as the stock exchanges and the NASD. The Court reached this conclusion, because a 1975 amendment to the 1934 Act gave the SEC broad powers to ensure the

propriety and adequacy of the SROs' arbitration rules.

> Since the 1975 amendments to § 19 of the Exchange Act, . . . the Commission has had expansive power to ensure the adequacy of the arbitration procedures employed by the SROs. No proposed rule change may take effect unless the SEC finds that the proposed rule is consistent with the requirements of the Exchange Act, and the Commission has the power, on its own initiative, to "abrogate, add to, and delete from" any SRO rule if it finds such changes necessary or appropriate to further the objectives of the Act. In short, the Commission has broad authority to oversee and to regulate the rules adopted by the SROs relating to customer disputes, including the power to mandate the adoption of any rules it deems necessary to ensure that arbitration procedures adequately protect statutory rights.
>
> In the exercise of its regulatory authority, the SEC has specifically approved the arbitration procedures of the New York Stock Exchange, the American Stock Exchange, and the NASD, the organizations mentioned in the arbitration agreement at issue in this case.
>
> . . . .
>
> . . . In this case, where the SEC has sufficient statutory authority to ensure that arbitration is adequate to vindicate key Exchange Acts rights, enforcement does not effect the waiver of "compliance with any provision" of the Exchange Act . . . . Accordingly, we hold the McMahons' agreements to arbitrate Exchange Act claims "enforce[able] . . . in accordance with the explicit provisions of the Arbitration Act."

Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 233-34, 238 (1987) (citations omitted). In view of this SEC control over 1934 Act claims in arbitration, Florida has no jurisdiction to impose its rules on the arbitration of 1934 Act claims which cannot even be brought in state court.

2. The Federal Regulatory Scheme for Securities Transactions and the SEC's Approval of NASD Arbitration Rules Preempt any Attempt by Florida to Control how Securities Arbitrations are Conducted and to Prohibit the NASD's Long-Standing Practice Allowing Counsel from Other Jurisdictions to Appear in NASD Arbitrations.

The system of arbitration promulgated by the SROs under the supervision and approval of the SEC is only a part of federal regulatory oversight over securities transactions in this country.

> The Exchange Act provides a comprehensive system of federal regulation of the securities industry. . . . [T]hat system . . . established extensive guidelines for the formation and oversight of self-regulatory organizations, such as the NASD, and the registered stock exchanges . . . . Congress delegated power to these organizations to enforce, at their own initiative, "compliance by members of the industry with both the legal requirements laid down in the Exchange Act and the ethical standards going beyond those requirements."
>
> To prevent the misuse of this Congressionally-mandated power, Congress granted the SEC broad supervisory responsibilities over these self-regulatory organizations. First, an organization may not become a registered securities association unless its by-laws and rules conform to the Exchange Act . . . .
>
> The registered association is also subject to extensive oversight, supervision, and control by the SEC on an ongoing basis. With limited exceptions not relevant here, the SEC must approve all association rules, policies, practices, and interpretations prior to their implementation. These rules may not impose any burden on competition not necessary or appropriate to further the purposes of the Exchange Act. In addition, the SEC may abrogate or add such rules as it deems necessary, if consistent with the requirements of the Exchange Act.

Austin Municipal Sec., Inc. v. National Ass'n of Sec. Dealers, Inc., 757 F.2d 676, 680 (5th Cir. 1985) (citations omitted).

Pursuant to this Congressional grant of authority, the NASD proposed and the SEC approved NASD Rule 10316, as well as NASD Rule 10324, which provides that the "arbitrators shall be empowered to interpret and determine the applicability of all provisions under this Code and to take appropriate action to obtain compliance with any ruling by the arbitrator(s). Such interpretations and actions to obtain compliance shall be final and binding upon the parties." Although Rule 10316 does not expressly state that counsel from other jurisdictions may appear in an arbitration, the NASD's long-standing practice and interpretation of the Rule is to permit out-of-state counsel to appear in NASD arbitrations. Literally thousands of arbitrations have taken place over the years under the NASD's auspices with out-of-state counsel representing one or more of the parties. This interpretation and long-standing practice is dispositive of the issue, because federal courts defer to interpretations by self-regulatory organizations of their own arbitration rules.

> The [American Stock Exchange ("AMEX")] Constitution is solely the product of AMEX; consequently, AMEX is the best source of information regarding the intended meaning of the disputed provision. See Intercontinental Indus., Inc. v. American Stock Exchange, 452 F.2d 935, 940 (5th Cir. 1971) (stating that AMEX "should be allowed broad discretion in the determination of [the] meaning and application" of its own rules).

McCullagh v. Dean Witter Reynolds, Inc., 177 F.3d 1307, 1309 (11th Cir. 1999) (deferring to stock exchange's interpretation of its arbitration rules).

Furthermore, the Arbitrator's Manual at 10 provides that parties may "be represented by a person who is not an attorney." This provision necessarily means that parties can be represented by out-of-state counsel. The Arbitrator's Manual was published by the Securities Industry Conference on Arbitration, which includes representatives of the NASD and the other SROs. Courts, including the United States Supreme Court, have relied on the Arbitrator's Manual to determine the meaning of the NASD's arbitration rules. See, e.g., Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 61 (1995) (relying on a provision of the Arbitrator's Manual relating to punitive damages); Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 170 F.3d 1, 16 (1st Cir. 1999) (relying on Arbitrator's Manual provision regarding payment of costs); Vestax Sec. Corp. v. Desmond, 919 F. Supp. 1061, 1076 (E.D. Mich. 1995) (relying on Arbitrator's Manual with respect to arbitrators' disclosures of conflicts); Valentino v. Smith, 1992 WL 427881 at *6 (W.D. Okla. Sept. 30, 1992) (relying on Arbitrator's Manual to determine right to depositions).

The Arbitrator's Manual is thus an authoritative source for interpreting the NASD rules. Here, the Arbitrator's Manual clearly provides that representation of

parties in arbitration is not limited to attorneys licensed in the state where the arbitration is taking place.

3. Counsel from Other Jurisdictions are Routinely Permitted to Appear Before the NASD, the SEC, and Other Federal Agencies.

Although NASD and SEC enforcement proceedings occur nationwide, neither the NASD nor the SEC require parties to be represented only by attorneys licensed in the state where the enforcement action occurs. "In any proceeding [before the SEC or a SEC hearing officer], a person may be represented by an attorney at law admitted to practice before the Supreme Court of the United States or the highest court of any State . . . ." 17 C.F.R. § 201.102(b). "[A] person may be represented in any proceeding by an attorney at law admitted to practice before the highest court of any state of the United States, the District of Columbia, or any commonwealth, territory, or possession of the United States." NASD Rule 9141(b). The SEC's and NASD's procedures on this point are consistent with the regulations of numerous other federal agencies, such as the Internal Revenue Service or the Patent Office. The SEC and the NASD could not reasonably have intended to allow miscreant stockbrokers to hire any attorney they want for enforcement proceedings but not to allow defrauded customers the same privilege for arbitrations.

4. Courts Have Repeatedly Determined that State Laws Cannot Interfere With Federally-Approved Rules,

Such as NASD Rule 10316, Which, as Interpreted by the Long-Standing Practice of the NASD, Allows Parties in NASD Arbitrations to be Represented by Counsel from Other Jurisdictions.

To the extent the Board's proposals would preclude out-of-state counsel from representing parties in arbitration, particularly on claims under the federal Exchange Act which cannot even be brought in state court, these proposals are preempted by the Exchange Act's grant of exclusive authority to the SEC to supervise and approve the NASD's rules and arbitration procedures. They would contradict NASD Rule 10316, which, as interpreted under longstanding practice, permits lawyers from other jurisdictions to appear in arbitrations. They would disqualify counsel from appearing who are not disqualified under NASD Rule 10316.

Courts have repeatedly held that federal law can preempt state attorney licensing statutes. In Sperry v. State of Fla. ex rel. the Fla. Bar, 373 U.S. 379 (1963), the Florida Bar attempted to prevent a non-attorney from representing Florida clients before the United States Patent Office. The Court rejected Florida's attempt to prohibit this practice, because the Patent Office allowed non-attorneys to represent parties in proceedings before that Office. "'[T]he law of the State, although enacted in the exercise of powers not controverted, must yield' when incompatible with federal legislation." Id. at 384 (citation omitted).

> [B]y virtue of the Supremacy Clause, Florida may not deny to those failing to meet its own qualifications the right to perform the functions within the scope of the federal authority. A State may not enforce licensing requirements which, though valid in the absence of federal regulation, give 'the state's licensing board a virtual power of review over the federal determination' that a person or agency is qualified and entitled to perform certain functions, or which impose upon the performance of activity sanctioned by federal license additional conditions not contemplated by Congress.

Id. at 385.

The only significant difference between Sperry and the present case is that the Patent Office regulation expressly permitted non-attorneys to represent parties before the Patent Office, while NASD Rule 10316 does not expressly identify the counsel that may appear in NASD arbitrations. In Sperry, however, the Court relied on "the assumptions upon which Congress has acted for over a century" and on "long-established practice" that non-attorneys could appear before the Patent Office. Id. at 388, 390. Here, the NASD's "long-established practice" is that out-of-state attorneys may appear in arbitrations, and courts defer to the NASD's interpretation of its own rules. Thus, pursuant to Sperry, Florida attorney licensing rules are preempted in NASD arbitrations.

The Court in Cohen v. Office Depot, Inc., 184 F.3d 1292 (11th Cir. 1999), vacated in part on other grounds, 204 F.3d 1069 (11th Cir. 2000), considered a similar issue and found that Florida's punitive damage pleading requirements did not apply

in federal court. These requirements were inconsistent with Federal Rule of Civil Procedure 8(a)(3), which only requires federal court complaints to include "a demand for judgment for the relief the pleader seeks."

> Even if Rule 8(a)(3) does not *require* a plaintiff to include in a complaint a request for all the relief sought, there is still a conflict between § 768.72 and Rule 8(a)(3), because the rule clearly *allows* the plaintiff to include a request for punitive damages in her initial complaint, whereas § 768.72 *prevents* her from doing so. A state law may conflict with a Federal Rule even where it violates no affirmative command or requirement of the rule, if the Federal Rule "occupies the statute's field of operation."

Id. at 1298 (citations omitted). Similarly here, NASD Rule 10316 plainly *allows* arbitrators to permit parties to be represented by out-of-state counsel, while the Board's proposed rules would *prevent* them from doing so.

In Mayo v. Dean Witter Reynolds, Inc., 258 F. Supp. 2d 1097 (N.D. Cal. 2003), the court considered a California statute imposing arbitrator disclosure requirements different from those required by the NASD. The court found conflict between the NASD's arbitrator disclosure rules and the California standards, because the California rules would "require disqualification of arbitrators in circumstances where the SRO [self-regulatory organization] rules do not." Id. at 1107. Similarly, in the present case, the Board's rules would "require disqualification of [attorneys] in circumstances where the SRO rules do not."

[T]he California standards . . . conflict with the federal regulatory scheme established pursuant to the Exchange Act and stand as an obstacle to the full accomplishment of the objectives of that scheme. The comprehensive system of federal regulation of the securities industry is designed to provide uniform, national rules for participants in the securities markets. SROs are an integral part of this federal regulatory scheme. An important function of the SROs is to conduct securities arbitrations throughout the United States, and the SEC oversees the SRO arbitration programs. In accordance with the federal regulatory scheme, the SRO arbitration rules apply uniformly across the states. Allowing California and the other states to adopt different requirements as to the manner in which SROs carry out their regulatory functions would conflict with the objectives of the federally regulated scheme of securities arbitration because it would destroy the uniformity of procedural rules applicable to SRO arbitrations.

Further, if the SROs were forced to comply with the California standards in the absence of a nationwide rule change by the SEC, they would be subject to a patchwork of state regulation that would lead to inconsistent . . . disqualifications across the states. Such a result would be at odds with the national function of SROs. . . . Allowing the states to impose procedural rules on the SROs that are not approved by the SEC would override the federal regulatory scheme and result in different treatment of similarly situated investors based solely on their location.

. . . .

The . . . disqualification requirements of the SRO arbitration rules are tailored specifically to the specialized nature of securities arbitration, which often requires the expertise of participants in the securities industry. In approving the SRO arbitration rules, the SEC has exercised its regulatory authority under the Exchange Act to strike a particular balance of statutory objectives. As the SEC notes, it has considered whether additional . . . disqualification requirements will benefit investors and the public interest. That balance will be upset by application of the California standards . . . . The Court agrees with the SEC that any changes to that balance should be made by the SEC, not by the states.

. . . .

> Because it finds that the California standards conflict both with the SEC-approved SRO arbitration rules and with the comprehensive system of federal regulation of the securities industry established pursuant to the Exchange Act, the Court concludes that the Exchange Act and the federal regulatory scheme established pursuant to it preempt application of the California standards to the . . .SROs.

Id. at 1110-12 (citations omitted).

As in Mayo, the Board's proposals conflict with the "SEC-approved" Rule 10316 and "with the comprehensive system of federal regulation of the securities industry." Consequently, any such licensing requirement is preempted.

C. The Federal Arbitration Act Also Preempts the Board's Proposals.

1. The FAA Requires Enforcement of the Parties' Agreements to Arbitrate.

The Board's proposals are also preempted in this instance by the Federal Arbitration Act, 9 U.S.C. §§ 1-16 ("FAA"). "Congress passed the FAA 'to overcome courts' refusals to enforce agreements to arbitrate.'" Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 55 (1995) (citation omitted). The "FAA not only 'declared a national policy favoring arbitration,' but actually 'withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.'" Id. at 56 (citations omitted). "The preeminent concern of Congress in passing the Act was to enforce private

agreement into which parties had entered, and that concern required that we rigorously enforce agreements to arbitrate . . . ." Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 221 (1985).

In NASD arbitrations, the parties agree to comply with NASD arbitration rules, including Rule 10316 regarding representation by counsel and Rule 10324 regarding the arbitrators' power to interpret the other arbitration rules, such as Rule 10316. The parties did not agree to comply with other procedural rules, such as Florida licensing rules. Under the FAA, Florida is precluded from restricting the arbitrators' ability under Rule 10324 to interpret Rule 10316. Parties in NASD arbitrations are entitled to rigorous enforcement of their agreements to arbitrate under NASD rules, which contain no provision requiring representation by a particular state's counsel.

2. The FAA Preempts State Law.

The FAA unambiguously preempts state attempts to interfere with arbitration proceedings and the enforceability of arbitration agreements. "[T]he FAA preempts other state laws that preclude parties from enforcing arbitration agreements." OPE Intern. LP v. Chet Morrison Contractors, Inc., 258 F.3d 443, 447 (5th Cir. 2001). "[T]he Federal Arbitration Act compels enforcement of arbitration agreements . . . [and] preempt[s] . . . state law . . . ." Oppenheimer & Co. v. Young, 475 So. 2d 221, 222 (Fla. 1985).

In Gulf Guaranty Life Ins. Co. v. Connecticut General Life Ins. Co., 304 F.3d 476 (5th Cir. 2002), the court considered a similar issue in which a party attempted to disqualify an arbitrator. The Fifth Circuit rejected this attempt, because, "[u]nder the FAA, jurisdiction by the court to intervene into the arbitral process . . . is very limited." Id. at 486. The FAA does not provide . . . for any court intervention prior to issuance of an arbitral award . . . ." Id. at 487. "'[G]enerally, objections to the nature of arbitral proceedings are for the arbitrator to decide in the first instance,'" and "procedural aspects of arbitration are for the arbitrator to decide." Id. at 487 (citation omitted).

3. The FAA Requires that NASD Arbitrators are Entitled to Interpret their Own Procedural Rules, Including Rules 10316 and 10324.

Under the FAA, NASD arbitrators are entitled to determine the meaning of their own procedural rules, such as Rule 10316. In Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 85 (2002), the Court ruled that the NASD arbitrators, not the courts, should interpret NASD Rule 10304. Similarly, the ability of investors to choose their counsel under NASD Rule 10316 is not subject to interference by the courts. The Howsam Court reasoned that "the NASD arbitrators, comparatively more expert about the meaning of their own rule, are comparatively better able to interpret and to apply it." Id. The Court further observed that, under NASD Rule 10324, "arbitrators shall be empowered to interpret and determine the applicability of all provisions under this

Code." Id. at 86. Procedural matters under arbitration rules are for the arbitrators to decide. Id. at 84. Here, Rule 10316 is a part of the NASD Code of Arbitration Procedure and therefore is inherently a procedural rule. See NASD Rule 10101 ("This Code of Arbitration Procedure is prescribed and adopted . . . .").

In PaineWebber, Inc. v. Bybyk, 81 F.3d 1193 (2d Cir. 1996), the Second Circuit rejected a brokerage firm's contention that courts should interpret NASD arbitration rules. According to the Second Circuit, the parties had agreed through Rule 10324 to arbitrate issues relating to the interpretation of NASD rules.

> [T]he NASD Code itself grants to the arbitrators the power to interpret and apply [NASD Arbitration Rules].
>
> > The arbitrators shall be empowered to interpret and determine the applicability of *all provisions* under this Code and to take appropriate action to obtain compliance with any ruling by the arbitrator(s).
>
> Nothing in the NASD Code removes [a particular NASD rule] from the ambit of [Rule 10324]. As the Eighth Circuit recently held after examining a client agreement that expressly incorporated the NASD Code:
>
> > [T]he parties' adoption of this provision [Rule 10324] is a "clear and unmistakable" expression of their intent to leave the question of arbitrability to the arbitrators. In no uncertain terms, [Rule 10324] commits interpretation of all provisions of the NASD Code to the arbitrators. Reading the NASD Code . . . as a whole, we see no reason not to apply [Rule 10324] to the arbitrators' decision regarding the application of [another NASD Rule].

> FSC Securities Corp. v. Freel, 14 F.3d 1310, 1312-13 (8th Cir. 1994). Thus, the Eighth Circuit concluded that "by adopting the NASD Code of Arbitration Procedure as the rules governing their dispute, appellants agreed to give the arbitrators discretion via [Rule 10324] . . . to interpret [the other NASD rule]." We agree. The language of the Code itself commits all issues . . . to the arbitrators.

Id. at 1202 (citations omitted). Here, by adopting and approving Rule 10324, the SEC and the NASD unambiguously intended that the arbitrators would interpret the NASD's arbitration rules, including Rule 10316.

In Florida Bar v. Rapoport, 845 So. 2d 874, 876-77 (Fla. 2003), this Court declined to adopt an FAA preemption argument. Rapoport, however, did not consider Exchange Act preemption. Moreover, this Court in Rapoport was unaware of NASD Rule 10324 and of Howsam, decided only two months earlier. This Court's reasoning in Rapoport is inconsistent with Rule 10324 and with Howsam and is therefore not valid law.

4. In Accordance with the FAA, Courts Refuse to Disqualify Counsel on the Ground that they Have Not Complied with the Relevant State's Ethical Rules.

In accordance with this principle under the FAA that courts cannot interfere with arbitrations, federal courts routinely reject efforts by parties in arbitration to disqualify counsel for the opposing party. In UBS PaineWebber, Inc. v. Stone, 2002 WL 377664 (E.D. La. Mar. 8, 2002), for example, PaineWebber asked the court to disqualify the investor's counsel in an NASD arbitration, because PaineWebber

claimed that counsel would violate Louisiana rules precluding counsel from acting as an advocate if the lawyer is likely also to be a witness. The court responded by citing Rule 10324 and held that it could not disqualify the investor's counsel.

> PaineWebber's motion asks the district court to inject itself directly into the arbitration proceeding . . . . The issue PaineWebber asks this Court to decide clearly "touches upon" the matter referred to arbitration without implicating the merits of the dispute being arbitrated. Under the rules of the arbitration to which PaineWebber agreed, it is prohibited from bringing this action in federal court.

Id. at *3.

Many other courts have reached the same conclusion. See Freeman v. Complex Computing Co., 931 F. Supp. 1115, 1124 (S.D.N.Y. 1996), reversed in part on other grounds, 119 F.3d 1044 (2d Cir. 1997) (refusing to disqualify counsel in an arbitration, because counsel was a likely witness; "[i]t is unnecessary, however, to rule on the point given the fact that the matter is being sent to arbitration"); Avrick v. Craftmatic Organization, Inc., 1995 WL 723179 at *4 (E.D. Pa. Dec. 4, 1995) (declining to rule on the motion to disqualify counsel, because the court compelled arbitration); Cook Chocolate Co. v. Salomon Inc., 1988 WL 120464 at *1 (S.D.N.Y. Oct. 28, 1988) (declining to review arbitrators' decision not to disqualify counsel); Wurttenbergische Fire Ins. Co. v. Republic Ins. Co., 1986 WL 7773 at *1 (S.D.N.Y. July 9, 1986) (Court refused to disqualify arbitration counsel and to deny the party "counsel of its

choice in that arbitration . . . . I find nothing in the [FAA] sanctioning such judicial interference. . . . It is for the arbitrators to control their internal procedures . . . .").

As Judge Posner stated, arbitrators have the inherent power to determine who may represent the parties before them.

> However, the procedures and evidentiary rules in arbitration are matters for the arbitrators and the arbitration contract to determine, rather than for a court to impose. The rules of the New York Stock Exchange governing arbitration do not even require parties to be represented by a lawyer, let alone a licensed one, . . .
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> . . . .
>
> There is nothing outre about this conclusion. Every tribunal determines, subject to due process limitations not remotely transgressed in this case, who is eligible to practice before it. . . . Likewise the New York Stock Exchange determines eligibility for practice before the arbitral forums that it provides, and its rules have not been violated.

Sirotzky v. New York Stock Exchange, 347 F.3d 985, 990 (7th Cir. 2003).

The court's comments in Mayo v. Dean Witter Reynolds, Inc., 285 F. Supp. 2d 1097, 1113-14 (N.D. Cal. 2003), regarding the FAA's preemptive affect on California's attempt to regulate arbitrator disqualification are also directly applicable to the Board's proposed rules.

> There can be no doubt that Morgan Stanley and Plaintiffs agreed on a specific set of procedural rules to govern arbitration of their dispute: The NYSE arbitration rules. That set of rules neither contemplates nor allows for application of the California standards or any other California arbitration rules.

> Under the FAA, Morgan Stanley has the right to enforce the arbitration agreement according to its terms. Morgan Stanley and Plaintiffs agreed to arbitrate in accordance with the NYSE arbitration rules. Application of the California standards would impose inconsistent and conflicting procedural rules upon those specifically agreed upon by the parties. Because such a result is impermissible under § 2 of the FAA, the California standards, at least as applied here, conflict with the FAA and the federal policy imbedded therein.

For all of these reasons, the Board's proposed rules are preempted by federal labor law, the Exchange Act, and the FAA. This Court should decline to adopt the Board's proposed rules.

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I certify that a copy hereof has been furnished to John F. Harkness, Jr., Executive Director of The Florida Bar, 651 E. Jefferson Street, Tallahassee, FL 32399-2300 via FedEx, on this 22nd day of March, 2004.

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