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
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CASE NO. SC04-135

THE FLORIDA BAR'S REPLY TO COMMENTS

COMES NOW, The Florida Bar, with leave of this Court, and files its reply to the comments filed in response to the petition to amend the rules to allow for the multijurisdictional practice of law.

INTRODUCTION

All of the comments filed with this Court recognize the need for new rules allowing for the multijurisdictional practice of law. Where the comments differ is in how and under what circumstances the multijurisdictional practice of law should be allowed. As with the comments received and debated by the Special Commission on the Multijurisdictional Practice of Law II (hereinafter "Commission II") and the Board of Governors, the majority of the comments filed with this Court take exception with the amendments to rule 2.061 of the Florida Rules of Judicial Administration, rule 1-3.10 (the bar counterpart to rule 2.061) and new rule 1-3.11 regarding arbitration proceedings. Although the comments seem to focus on the

same rules, the basis for objection varies. Therefore, this reply will be by comment, rather than by rule.

REPLY TO COMMENT OF BUSINESS LAW SECTION

The comment filed by the Business Law Section (hereinafter " BLS") uses and defines the phrase "genuinely multijurisdictional practice." The phrase is "used . . 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." The comment then gives an example of what a "genuine multijurisdictional practice of law-jurisdictional practice" would be. [1]

The Florida Bar generally agrees with the BLS statement that a "genuinely multijurisdictional practice" should be allowed so that an out-of-state lawyer could come to Florida "*in some circumstances* . . . without engaging in prohibited practice." (Emphasis supplied.) Where we differ is on how often this practice should take place. While the BLS would allow the practice to take place "regularly," the rules proposed by The Florida Bar allow the out-of-state lawyer to come to Florida on a temporary basis. "Regularly" implies a more permanent presence, a presence that neither the American Bar Association (hereinafter "ABA")

[1] The example involves a New York lawyer coming to Florida for a deposition, presumably in a Florida case. The activities set forth in the example would be allowed under the proposed rules. Rule 4-5.5.(c)(2).

nor The Florida Bar endorses. As found by the ABA, "[w]hen a lawyer seeks to practice law regularly in a state . . . the state has a more substantial interest in regulating the lawyer's law practice by requiring the lawyer to gain admission to the bar." American Bar Association Center for Professional Responsibility, *Client Representation in the 21st Century; Report of the Commission on Multijurisdictional Practice* p. 29 (hereinafter "ABA Report"). The Florida Bar agrees. Therefore, The Florida Bar would define the term "genuinely multijurisdictional practice" to express the concept that it should be proper, in some circumstances, for an out-of-state lawyer to come to Florida on a temporary basis without engaging in prohibited practice. Rather than rejecting the spirit of the ABA recommendations as argued by the BLS, The Florida Bar's recommendations adopt them and adapt them to the circumstances and rules of this state.

Agreeing that it would be proper in some circumstances for an out-of-state lawyer to come to Florida on a temporary basis without engaging in prohibited practice, the converse that it would be *improper* in some circumstances must also be true. The proposed amendments to Rule 2.061 and new rule 1-3.11 set forth these circumstances by establishing a presumption that coming to Florida more than 3 times in a 365-day period to represent an individual in court or in arbitration amounts to a general, or regular, practice.

The BLS argues that the presumption is an unconstitutional irrebuttable presumption. [2] This argument focuses on the number of appearances and is based on the incorrect premise that the amendments limit the number of appearances to 3 a year. The language of the amendment is 3 appearances in a 365-day period, therefore, a new period begins each new day. From a practical standpoint, the number of times an out-of-state attorney could appear is almost unlimited. The only limitation is that the appearances not exceed 3 in a 365-day period.

Focusing on the number chosen ignores the purpose of the amendments. Adding rule 1-3.11 and deleting the language from rule 2.061 as recommended by The Florida Bar preserves this Court's authority over the admission process, a process which this Court recently recognized is necessary to fulfill the "obligation to all citizens of this great state to maintain the highest of reasonable standards for the profession we have been privileged to serve." *In re: Proposed Amendments to the Rules of the Supreme Court Relating to Admissions to the Bar*, No. SC02-2354, 2004 WL 742092 at *3 (Fla. Apr. 8, 2004). Inconsistent application of rule 2.061 erodes this process. What is a related matter and when the additional appearance is not a "general practice" requires an arbitrary determination by each

[2] Neither the report nor the rules state that the presumption is irrebuttable. This is an assumption the Business Law Section is making.

trial court with the possible result of an out-of-state lawyer being allowed to file actions in the Florida courts on a daily basis. [3] Setting forth a specific number sets a bright line which cannot be crossed.

The BLS comment seems to recognize that a bright line is needed. The BLS does not disagree that a general practice should be prohibited. However, the BLS argues that a "genuinely multijurisdictional practice," as defined by the BLS, should be allowed. A "genuinely multijurisdictional practice" as defined by the BLS would allow an out-of-state attorney to come to Florida regularly. Put in the context of appearances before the courts or in an arbitration proceeding, a "genuinely multijurisdictional practice" would be regular appearances before the Florida courts or in arbitration proceedings in Florida. How is this different from a general practice? Clearly, it is not. As the BLS seems to agree that a general practice can be limited and regulated, the same is true for a "genuinely multijurisdictional practice" as that term is defined by the BLS.

The BLS also requests that rule 2.061 be sent back to Commission II for failure to obtain review from the Rules of Judicial Administration Committee

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[3] While not filing actions on a daily basis, an Alabama law firm was denied permission to appear after the trial court learned that the law firm or lawyers from the firm had moved to appear or appeared 25 times in a 3 year period. *Kemp v. Florida East Coast Railway Co.*, 1 Fla. L. Weekly Supp. 385 (Fla. 4th Cir. Ct. May 13, 1993).

(hereinafter "Rules Committee"). The request implies that the Rules Committee did not have an opportunity to review the amendments. This is incorrect. Commission II's report with the rule amendments, including rule 2.061, was first sent to the Rules Committee on March 18, 2003, and comments were specifically requested. This occurred before the report was debated by the Board of Governors. On two occasions, in June and September, 2003, Lori S. Holcomb, Staff Counsel to Commission II, attended meetings of the Rules Committee and discussed the amendments to rule 2.061. Commission II corresponded with the chair of the Rules Committee and encouraged written comment. In other words, rule 2.061 was provided to the Rules Committee for review and comment.

REPLY TO COMMENT OF SECURITY INDUSTRY ASSOCIATION ARBITRATION COMMITTEE

The comment of the Security Industry Association Arbitration Committee (hereinafter "SIA") makes some of the same arguments made by the BLS regarding the irrebuttable presumption. As The Florida Bar addressed those arguments above, they will not be addressed again. Instead, The Florida Bar will focus on new arguments raised by SIA.

SIA begins and ends their comment by asking that the rules proposed by the ABA be adopted verbatim to provide for uniformity among the states. While all of

the states and the District of Columbia have studied or are studying the ABA's recommendations, only 7 states have adopted rules regarding the multijurisdictional practice of law. Of those, only Delaware has adopted the ABA's recommendations verbatim. The bar in Connecticut rejected the recommendation of its task force that multijurisdictional practice of law rules be adopted. Sixteen states, including Florida, have recommendations pending at their courts. The language of those recommendations varies. [4] In other words, at this point, uniformity among the states is not possible. Even if it were, and although the ABA would like to see the rules adopted in a consistent fashion, the ABA recognizes that as with all *model* rules they propose, the states will take the rules and amend them to fit their own circumstances and regulatory scheme. This is what The Florida Bar has done.

The specific language which SIA would like to be included is language regarding in-house counsel proposed by the ABA but not adopted by The Florida Bar. The language would allow for the permanent and temporary presence of in-house counsel in Florida. Both Florida MJP Commissions found that the language was not necessary in light of the this Court's Authorized House Counsel rule, which allows a permanent presence, and the amendments being proposed, which allow for

[4] A chart showing the status of the rules in the various states can be found at http://www.abanet.org/cpr/jclr/jclr_home.html.

a temporary presence. The Board of Governors agreed.

As noted by the ABA, Model Rule 5.5(d)(1) would allow an out-of-state lawyer to work permanently as in-house counsel in the host state. ABA Report, pp. 29- 30. While many states have a rule allowing for such presence, many others do not. Since the other provisions of Model Rule 5.5 allow for a temporary presence, the language of 5.5(d)(1) was necessary to allow the presence to be permanent.

Florida allows for a permanent presence of out-of-state lawyers working as in-house counsel in Florida. R. Regulating Fla. Bar, 17-1.1, et seq. Since a permanent presence is allowed, it is not necessary for Florida to adopt the language of Model Rule 5.5(d)(1) to permit a permanent presence. Nor is it necessary to adopt the language of Model Rule 5.5(d)(1) to allow for a temporary presence. The amendments to 4-5.5 will accomplish this.

SIA argues that by not including this rule clients cannot use in-house lawyers and in-house lawyers who are not certified as Authorized House Counsel are at a disadvantage to in-house counsel who are certified. Both statements are incorrect.

As stated in The Florida Bar's petition, under current rules and law, unless an exception applies, an out-of-state lawyer cannot represent a client in Florida. The amendments change this by allowing out-of-state lawyers to provide legal services in Florida on a temporary basis. The rules apply to all lawyers in good standing

regardless of their type of practice or employment. The Florida Bar fails to see how the amendments deprive clients of their choice of in-house lawyers.

SIA argues that an in-house lawyer who is not certified would not be permitted to provide the same services as a certified lawyer even if the services are provided on a temporary basis. No support is provided for this statement and it is simply not true. The Authorized House Counsel rule allows a certified lawyer to give legal advice to the directors, officers, employees, and agents of the business organization with respect to its business and affairs. The amendments to rule 4-5.5(c)(4) would allow a lawyer who is not certified to provide the same advice and more as the rule does not limit the advice to the corporation's business affairs. A certified lawyer may also negotiate and document all matters for the business organization. The amendments to rule 4-5.5(c)(4) allow this activity as well.

Chapter 17 provides that a certified lawyer may represent the "business organization in its dealings with any administrative agency or commission having jurisdiction; provided however, authorized house counsel shall not be permitted to make appearances as counsel in any court, administrative tribunal, agency, or commission situated in the state of Florida unless the rules governing such court or body shall otherwise authorize, or the attorney is specially admitted by such court or body in a case." R. Regulating Fla. Bar 17-1.3(c). Existing case law and the

amendments to rule 4-5.5 would allow a lawyer who is not certified to do the same. *The Florida Bar v. Moses*, 380 So. 2d 412 (Fla. 1980). However, the *pro hac vice* rules as currently worded and as recommended for amendment would not allow the certified lawyer to appear in court as the rule prohibits a Florida resident from being granted leave to appear. Fla. R. Jud. Admin. 2.061(a). [5] Therefore, to the limited extent certified and non-certified lawyers are treated differently, the difference is to the advantage of the non-certified lawyer.

SIA also argues that new rule 1-3.11 restricts a party's right in securities arbitration proceedings to be represented by counsel of their choice, a right they say is present in the rules governing securities arbitration. The Florida Bar agrees that the rules of the SROs allow a party to be represented by counsel. Counsel, however, is not defined. In Florida, counsel is a member of The Florida Bar and, unless you are a member of The Florida Bar, you may not practice law in Florida. Fla. R. Jud. Admin. 2.060(a) ("Attorneys of other states who are not members of The Florida Bar in good standing shall not engage in the practice of law in Florida. .

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[5] While certified lawyers are somewhat more restricted in the activities they may provide, the Authorized House Counsel rule should not be amended to make it more lenient. The rule is in place to allow lawyers from another state to relocate to Florida and work as a lawyer without having to successfully complete the application process. Since the presence is permanent, the rationale for the rule is different from that for the proposed amendments. The differences are therefore necessary.

.") In fact, a lawyer licensed elsewhere is a nonlawyer. R. Regulating Fla. Bar 10-2.1(c). [6] Therefore, as applied in Florida, the SRO rules allow a party to be represented by a member of The Florida Bar. This reasoning was the basis for this Court's decision in *The Florida Bar v. Rapoport*, 845 So. 2d 874 (Fla. 2003). New rule 1-3.11 increases the choice of counsel by allowing a party to be represented by a lawyer licensed in a state other than Florida. Rather than restricting the right to be represented by counsel of choice as argued by SIA, the rules expand it.

SIA is also incorrect in their argument that rule 1-3.11 would allow a citizen from a foreign county to be represented by anyone in a securities arbitration proceeding while a United States citizen would be deprived of their choice of counsel. SIA's argument is based on the exemption for international arbitrations. The flaw in SIA's argument is that the arbitration in the example given would not be an international arbitration as defined by the rule. [7] If the claim is against a broker-

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[6] This Court has held that the right to counsel does not include the right to be represented by a nonlawyer. *Bauer v. State*, 610 So. 2d 1326 (Fla. 1992).

[7] International arbitration is defined in the comment to rule 1-3.11 as "the arbitration of disputes between: 2 or more persons at least 1 of whom is a nonresident of the United States; or 2 or more persons all of whom are residents of the United States if the dispute (1) involves property located outside the United States, (2) relates to a contract or other agreement which envisages performance or enforcement in whole or in part outside the United States, (3) involves an

dealer in the United States for something that broker-dealer did in the United States, it is not an international arbitration and the exemption does not apply. Moreover, if it is an international arbitration, the United States citizen would be able to use any lawyer, including its in-house lawyer, as the exemption for international arbitrations goes to the type of arbitration, not the jurisdiction of admittance of the lawyer.

SIA asks this Court to adopt an alternative to rule 1-3.11 which would exempt in-house lawyers because they are employed by a sophisticated corporate client. The language SIA proposes goes much further than this. The language would exempt a lawyer who is exclusively employed by the party and affiliated parties the lawyer represents in the arbitration. Therefore, a lawyer in private practice who has one client would fall within this exemption. Consequently, it is conceivable that the exception could overtake the rule.

Not only is the exemption broader than the rationale advanced by SIA, the exemption applies to a class of lawyers solely based on their type of employment.

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investment outside the United States or the ownership, management, or operation of a business entity through which such an investment is effected, or any agreement pertaining to any interest in such an entity, (4) bears some other relation to 1 or more foreign countries, or (5) involves 2 or more persons at least 1 of whom is a foreign state as defined in 28 U.S.C. §1603. International arbitration does not include the arbitration of any dispute pertaining to the ownership, use, development, or possession of, or a lien of record upon, real property located in Florida or any dispute involving domestic relations."

When faced with a request by The Florida Bar to make a distinction in the rules based on whether the lawyer was employed in-house or outside, this Court rejected the rule as establishing a double standard and found that

> The rule, as suggested, seems to emphasize the employer-employee relationship as the element which would distinguish the lawyer's responsibility. . . . It appears to us that the . . . problem might well arise regardless of the nature of the employment relationship between the lay agency and the lawyer. That is to say, . . . it would not be material whether the lawyer is employed as the attorney for the lay agency on a full-time master-servant basis, or merely on an isolated attorney-client basis. The ultimate problem is the same. . . .

In re: Rules Governing the Conduct of Attorneys in Florida, 220 So. 2d 6, 7 (Fla. 1969). The same can be said here. Whether the lawyer is employed in-house or with an outside firm is not material in determining the extent to which the lawyer should be allowed to practice law on a temporary basis in Florida. There is no sound reason to make the distinction advanced by SIA.

REPLY TO CORRECTED COMMENT OF STEPHEN KROSSCHELL

Stephen Krosschell's comment objects also to the amendments regarding arbitration proceedings. All of his arguments are premised on the incorrect statement that the amendments transform existing law by converting a practice that is now allowed to a practice that is the unlicensed practice of law. As noted previously, the general rule is that an individual needs to be a member of The Florida

Bar in order to practice law in Florida or give advice on Florida law unless an exception exists. Fla. R. Jud. Admin. 2.060. Mr. Krosschell argues that appearance in an arbitration proceeding is not the practice of law. Mr. Krosschell cites to a list of cases from other states on this issue but ignores the clear Florida precedent in this area. As held by this Court in *The Fla. Bar re: Advisory Opinion - Nonlawyer Representation in Securities Arbitration*, 696 So. 2d 1178 (Fla. 1997), such representation is the practice of law in Florida. Whether it is the practice of law elsewhere is not relevant as this Court has the authority to control the practice of law within this state. *The Florida Bar v. Sperry*, 140 So. 2d 587 (Fla. 1962), *judg. vacated on other grounds*, 373 U.S. 379 (1963).

Since representation of another in an arbitration proceeding is the practice of law, in order to represent another in an arbitration proceeding in Florida and individual must be a member of The Florida Bar or fall within a recognized exception. Currently, no such exception exists. Mr. Krosschell appears to argue that an exception does exist based on years of out-of-state lawyers coming to Florida to handle arbitration proceedings without objection by The Florida Bar. While he is correct that the out-of-state lawyers have been coming to Florida, they have not done so with The Florida Bar's blessing but have done so at their own risk of having an unlicensed practice of law complaint filed against them. The out-of-

state attorney never knew whether their appearance would result in a complaint to The Florida Bar and sanctions for engaging in the unlicensed practice of law. It was this uncertainty that in part prompted the ABA's study of the multijurisdictional practice of law. Florida's amendments clear up this uncertainty by creating an exception and authorizing an activity that is otherwise not authorized. As the amendments are not declaring an otherwise authorized activity the unlicensed practice of law, it is not necessary to address Mr. Krosschell's points regarding the rationale for prohibiting the unlicensed practice of law.

Seeming to recognize that the practice of law is involved, Mr. Krosschell argues that Florida law is not being applied or that the only nexus to Florida is the residency of a party, and therefore the amendments should not be adopted. As illustration, he provides anecdotes regarding securities arbitration. His arguments fail to recognize that securities matters are not the only matters subject to arbitration in Florida. Many other types of cases involving only Florida law may be arbitrated. For example, a complaint against a contractor may be subject to arbitration. F.S. §§489.129 (11), 558.004(15). Florida "lemon law" claims are subject to arbitration. F.S. §681.109. Workers' compensation claims may be subject to arbitration. F.S. §440.1926. These claims and others are governed by Florida law and Florida law will decide the issues. Representation of individuals in these claims and others

would be governed by the proposed amendments. While Mr. Krosschell's arguments are geared towards securities arbitration only, the amendments are not.

Mr. Krosschell argues also that the amendments attempt to regulate the practice of law in other states. The practice of Florida law is already regulated in other states. Someone not a member of The Florida Bar is considered a nonlawyer and cannot provide legal advice or legal services regarding Florida law. R. Regulating Fla. Bar 10-2.1(c); *The Florida Bar v. Rapoport, supra*. Therefore, a New York lawyer with an office in Manhattan may not draft wills for Florida residents. *The Florida Bar v. Larkin*, 298 So. 2d 391 (Fla. 1974) (out-of-state lawyer engaged in the unlicensed practice of law when he drafted a Florida will). A Georgia lawyer with an office in Thomasville may not negotiate the settlement of an automobile accident which took place in Florida. *The Florida Bar v. Neiman*, 816 So. 2d 587 (Fla. 2002) (nonlawyer engaged in the unlicensed practice of law when he negotiated the settlement of a lawsuit). An Alabama lawyer who has not been admitted *pro hac vice* may not come to Pensacola to take a deposition on a Florida case. *The Florida Bar v. Riccardi*, 304 So. 2d 444 (Fla. 1974) (disbarred lawyer engaged in the practice of law when he took a deposition in Florida). The amendments change this by allowing the New York lawyer to draft the will, the Georgia lawyer to negotiate a settlement, and the Alabama lawyer to take the

deposition. Similarly, the amendments allow the out-of-state lawyer to appear in an arbitration proceeding in Florida, an activity which is currently not allowed.

Although the amendments would allow the appearance, Mr. Krosschell objects to the fee and disclosure requirements of the amendments arguing that they discriminate against out-of-state lawyers. He argues that the fee for 3 appearances, $750.00, is greater than the yearly dues members of The Florida Bar are required to pay. First, this assumes that all out-of-state lawyers will be appearing 3 times. Second, it ignores the fees and costs associated with becoming a member of The Florida Bar. This option is always available to the out-of-state lawyer if they wish to take full advantage of the privilege of being able to practice law in this state. As to the disclosure requirements, information regarding a Florida lawyer's public disciplinary history is easily available by contacting The Florida Bar. If the out-of-state lawyer wishes to obtain this information, the lawyer can easily do so. Information regarding prior cases need not be disclosed if it is otherwise confidential. Assuming it is not confidential and therefore subject to disclosure, the information should be obtainable by the out-of-state lawyer.

Mr. Krosschell also states that the out-of-state lawyers only come to Florida to handle the arbitration proceeding and are subject to discipline from their home state. Mr. Krosschell's statement that the lawyers are not in Florida but only come

to Florida to handle the arbitration is correct. Mr. Krosschell's statement that the lawyer's home bar has disciplinary authority over the lawyer is also correct. However, it is the experience of The Florida Bar that the home bar rarely exercises this disciplinary authority if the unethical conduct takes place outside of its geographical borders. The amendments address this issue by giving this Court jurisdiction to discipline the out-of-state lawyer for unethical conduct in connection with an authorized activity. Therefore, when an out-of-state lawyer is in Florida pursuant to the rules as amended, the out-of-state lawyer can be disciplined in Florida. Without the amendments, such discipline cannot take place as the lawyer would not be here on an authorized basis and would not be subject to the bar's disciplinary rules. Consequently, adoption of the amendments will "protect the public from incompetent, unethical, or irresponsible representation." *The Florida Bar v. Moses*, 380 So. 2d 412, 417 (Fla. 1980). Mr. Krosschell acknowledges the importance of this goal. Corrected Comment of Stephen Krosschell, p. 2.

REPLY TO COMMENT OF ASSOCIATION OF CORPORATE COUNSEL

The Association of Corporate Counsel (hereinafter "ACC") raises 3 objections to the proposed amendments. ACC's first objection is to proposed rule 1-3.11 and commends the comments of SIA. As SIA's comment has been addressed above, The Florida Bar's response will not be reiterated here.

ACC's second objection is to the language of rule 4-5.5. Specifically, ACC requests that "or authorized" be added to 4-5.5(c)(3)(B), (c)(4)(B), (d)(3)(B) and (d)(4)(B). 4-5.5(d)(4)(B) contains "authorized," therefore, there is no reason to add it there again. 4-5.5(c)(4)(A) contains "authorized" when referring to the client thereby allowing the non-Florida lawyer to provide services to their corporate client. The Florida Bar does not see any reason to add "authorized" to (B) if the language is already in (A).

As to subdivisions (c)(3)(B) and (c)(3)(B), while The Florida Bar does not object to including the language, The Florida Bar does not believe that it is necessary. As stated in the petition, other provisions of the rule would allow the practice ACC is concerned about.

The third objection asks this Court to adopt ABA Model Rule 5.5(d)(1). As The Florida Bar addressed this request in response to the comment of SIA, it will not be addressed here. However, ACC's statement that adopting the model rule will more clearly subject the out-of-state lawyer to discipline is incorrect. The Authorized House Counsel rule specifically subjects the certified lawyer to the Rules Regulating The Florida Bar and to discipline by this Court. R. Regulating Fla. Bar 17-1.2 (a)(4) & 17-1.6.

REPLY TO COMMENT OF RULES OF JUDICIAL

ADMINISTRATION COMMITTEE

The main objection of the Rules Committee is to the procedure The Florida Bar used in proposing amendments to Rule 2.061 of the Florida Rules of Judicial Administration. As noted in the response to the BLS, The Florida Bar presented for comment the amendments to the Rules Committee on several occasions and, although informed that comments would be forthcoming, no comments were presented to the Board of Governors. After having the rules, seeing notice in The Florida Bar *News*, and knowing of the comment deadline and asking for and being granted a 6 week extension, the Rules Committee still "has not yet had an opportunity to come to a conclusion about these changes." Comment of Rules of Judicial Administration Committee, p. 6. To now object on procedural grounds basically negates 2 ½ years of work during which time the Rules Committee had ample opportunity to participate.

Although requesting more time to study the issues, the Rules Committee raises concerns with the amendments to Rule 2.061 regarding the judge's exercise of discretion and appearances in related cases. In its comment, the Rules Committee gives an example which they argue shows the inappropriateness of the amendments. The Rules Committee states that if a out-of-state expert on a certain issue appeared in the trial of 2 cases but 1 case was moved directly to this Court, this Court would

not be able to allow the appearance. This is incorrect. Under the rule as currently worded as well as under the proposed amendments, the appearance in this Court would be not be a separate appearance and could be allowed. Moreover, as previously noted in response to the BLS, the language of the amendment is 3 appearances in a 365-day period, therefore, a new period begins each new day. By the time the matter was sent to this Court, a new 365-day period would have begun.

The argument seems to be that a rule cannot have a restriction on the number of appearances. If this were true, there would be no need for a *pro hac vice* rule or for individual state admission requirements as anyone licensed anywhere would be able to appear and represent a party in a Florida court at any time. The ABA's report, this Court's licensing requirements, and the case law does not support this proposition. [8] On the other hand, the amendments proposed by The Florida Bar preserves this Court's authority over the admission process and the trial judge's authority over the courtroom.

REPLY TO COMMENT OF PUBLIC INVESTORS ARBITRATION BAR ASSOCIATION

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[8] *See Leis v. Flynt*, 439 U.S. 417 (1979) (recognizing state's authority of admission and *pro hac vice* appearances): *Kemp v. Fla. East Coast Railway Co.*, *supra* (denying a motion to appear *pro hac vice* because the lawyer was engaging in a general practice of law in Florida); *State Industries, Inc. v. Jernigan*, 751 So. 2d 680 (Fla. 5th DCA 2000) (finding that out-of-state lawyer has no absolute right to appear as counsel in Florida courts).

The Public Investors Arbitration Bar Association (hereinafter "PIABA") raises two basic concerns with proposed rule 1-3.11. The first is a concern that lawyers who are employed as in-house counsel and lawyers from private firms be treated the same. As noted in response to the comment of SIA, The Florida Bar agrees that they should be treated the same. What type of environment one practices in should not determine whether the rules apply.

The second concern is with some of the information which must be provided in the statement filed with The Florida Bar and to whom the statement must be sent. Specifically, PIABA has concerns with the need to identify the number of appearances in the preceding 5 years including the date of commencement and the requirement that the notice be sent to opposing counsel.

The requirement that the out-of-state lawyer provide information regarding the number of appearances in the preceding 5 years, including the date of commencement, is included in the rule to more accurately track the number of appearances in Florida. The rule allows for 3 appearances in a 365-day period. The period therefore begins each day. As the time is fluid, a tracking period larger than 365 days is needed. The 5 year period is the same that is currently used in rule 2.061 for appearances *pro hac vice*. If the information is otherwise confidential, the information regarding the name and case number does not have to be disclosed.

The requirement that a copy of the statement be sent to opposing counsel is done to ensure that the statement is in fact filed and also puts the arbitration rule on the same footing as the *pro hac vice* rule. In order to appear *pro hac vice* under the existing rule and the proposed amendment, the out-of-state lawyer must file a motion with the trial court. As with all motions, opposing counsel is provided a copy. Fla. R. Civ. P. 1.080. Should an out-of-state lawyer attempt to appear without filing a motion, opposing counsel would be alerted and would bring the breach to the attention of the court.

The amendment provides for the same treatment in arbitration proceedings. As The Florida Bar cannot require the filing of a motion with the arbitration panel, the amendment requires the filing of a verified statement with The Florida Bar. Should an out-of-state attorney attempt to appear in an arbitration proceeding without filing the statement, The Florida Bar would hope that opposing counsel would bring the matter to the attention of the panel. However, if the out-of-state attorney is not required to provide a copy of the statement to opposing counsel, opposing counsel would not know whether the statement had been filed. Providing a copy acts as a check to make sure the filing requirement is met.

As to the concern that the statement is providing certain information which the out-of-state attorney may not want to share with opposing counsel, in all likelihood

the statement would be considered a public record and easily obtainable by requesting a copy from The Florida Bar. Again, information that is otherwise confidential does not have to be provided.

REPLY TO COMMENT OF INTERNATIONAL LAW SECTION

As the comments of the International Law Section (hereinafter "ILS") support the amendments as they relate to international arbitrations and stand silent on the others, only a brief response is required. The Florida Bar disagrees with the ILS statement that the amendments place a "limitation" or "3 strikes" provision in the rules. The amendments create a presumption, not a limitation per se. Additionally, The Florida Bar wishes to make clear that the comments of the ILS are those of the ILS and, although considered by The Florida Bar, are not those of The Florida Bar. Nor is The Florida Bar taking a position regarding the Free Trade Area of the Americas agreement or the other treaties or conventions discussed by the ILS.

REPLY TO COMMENT OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF MULTIJURISDICTIONAL PRACTICE

The Florida Bar believes that the issue mentioned by the National Association for the Advancement of Multijurisdictional Practice (hereinafter "NAAMP") regarding federal securities arbitration has been addressed, and therefore, will not be addressed again. As to the First Amendment and other constitutional claims, this Court has consistently held that such constitutional guarantees do not support a right to lay representation or act as a bar to the regulation of the unlicensed practice of law. *The Florida Bar v. Moses*, supra at 416; *The Florida Bar v. Schramek*, 616 So. 2d 979, 983 (Fla. 1993); *The Florida Bar v. Miravalle*, 761 So. 2d 1049, 1052 (Fla. 2000).

CONCLUSION

Like the ABA, The Florida Bar throughly studied the issue of the multijurisdictional practice of law for 2 ½ years. The Florida Bar believes that the amendments pending before this Court strike the proper balance between recognizing the realities of the practice of law today and the protection of the public and the judicial system in Florida. The various comments filed with this Court do not change this conclusion.

WHEREFORE, The Florida Bar respectfully requests that this Court adopt

the amendments Regulating the Florida Bar and The Florida Rules of Judicial Administration filed with this Court on or about February 9, 2004.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent by United States mail to the following individuals this 28th day of April,2004:

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