IN THE SUPREME COURT OF FLORIDA
CASE NUMBER SC04-135

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

SECURITIES INDUSTRY ASSOCIATION ARBITRATION COMMITTEE'S COMMENTS ON THE FLORIDA BAR'S PETITION TO AMEND THE RULES REGULATING THE FLORIDA BAR AND THE FLORIDA RULES OF JUDICIAL ADMINISTRATION

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS (Cont'd)

Page

TABLE OF CITATIONS

Cases

Rules

Page

A.INTRODUCTION AND SUMMARY OF COMMENTS

The Florida Bar seeks approval of amendments to the Rules Regulating The Florida Bar and the Florida Rules of Judicial Administration (the "Proposed Rules") to facilitate the multijurisdictional practice of law ("MJP"). The Securities Industry Association Arbitration Committee commends the Florida Bar for recognizing the multijurisdictional nature of the modern practice of law and the need to facilitate that practice in Florida's regulation of lawyers in a manner that preserves protection of the public. The Committee files these comments to support the sections of the Proposed Rules that accomplish that purpose, and to urge the Court to reject the Proposed Rules that create inappropriate obstacles to multijurisdictional practice and are thus contrary to MJP goals, the Proposed Rules that are legally defective, and those that depart from this Court's directive that Bar Rules be "drafted to meet the legitimate needs of business in a modern economy." *In re Amendments to Rules Regulating The Florida Bar(I)*, 593 So.2d 1035, 1036 (Fla. 1991). Finally, the comments urge the Court to adopt the ABA Model Rules without unnecessarily deviations in order to preserve the uniformity of MJP rules from state to state.

The Proposed Rules are Florida's proposed version of the Model Multijurisdictional Practice of Law Rules adopted by the American Bar Association in August of 2002 (the "ABA Model Rules") following a comprehensive two year study. However, the Proposed Rules deviate from the ABA Model Rules in several material respects. The Florida Bar's alterations to the ABA Model Rules impose unjustified restrictions on multijurisdictional practice, create impermissible presumptions, fail to address the unique circumstances of in-house attorneys, and fail to preserve the careful

balance between the protection of the public and recognition of a client's right to counsel of choice achieved by the ABA Model Rules.

The Proposed Rules substantially limit the practice permissible under the ABA Model Rule 5.5 in an arbitrary and protectionist manner that is not justified by any rationale. In doing so, the Florida Bar has failed to preserve the careful balance between protection of the public and recognition of clients' rights to counsel of choice achieved by the ABA Model Rules.

States have the right, indeed the obligation, to protect their citizens from incompetent legal representation, including refusal to adopt any sections of the ABA Model Rules if they subject citizens to such harm. However, the ABA Model Rules addressed in these Comments do *not* create a risk of harm to the public. They promote the interests of the public, the Florida Bar, and the Judiciary, and conform the regulation of lawyers to the modern practice of law.

Florida should adopt the ABA Model Rules without material modification so that they accomplish their intended purpose of creating uniformity among the states. Uniformity in MJP rules and legislation will enable attorneys to understand their rights and responsibilities from state to state without substantial obstacles created by unreasoned and arbitrary deviations.

This Court should not approve the Proposed Rules for the following additional reasons:

1. The Proposed Rules fail to adopt ABA Model Rule 5.5(d)(1) which would permit a non-Florida in-house lawyer to provide services to the lawyer's employer or organizational affiliates unless the services would require *pro*

hac vice admission by the forum. ABA Model Rule 5.5(d)(1) should be adopted by Florida because it recognizes the multijurisdictional nature of the practice of law unique to in-house lawyers while at the same time protecting the public, the legal profession, and the judiciary in Florida.

2. Proposed Rule 4-5.5(b) ostensibly adopts Model Rule 5.5(b)(3) by permitting a non-Florida lawyer to provide services in Florida on a temporary basis in an arbitration proceeding in Florida if the services reasonably relate to the lawyer's practice in a jurisdiction in which the lawyer is admitted and the forum does not require *pro hac vice* admission. However, Proposed Rule 1-3.11(d) limits non-Florida lawyers to signing three demands for arbitration or responses to arbitrations in separate arbitration proceedings in any 365 day period, and creates a presumption that more than three such "appearances" constitutes the "general practice" of law which is prohibited by Proposed Rule 1-3.11(b)(6). The comment to Proposed Rule 4-5.5(c)(3) and (d)(3) imposes the same presumption. The Bar provides no rationale for imposing the limitation. Moreover, Proposed Rule 1-3.11 creates an impermissible presumption in violation of the Due Process Clause of the United States Constitution.

The SIA's comments on each of these issues follows.

B.STATEMENT OF INTEREST

The Securities Industry Association is the principal national trade association of the North American securities industry. The Association was established in 1972 through the merger of the Association of Stock Exchange Firms and the Investment

Banker's Association, and it brings together the shared interests of nearly 600 securities firms to accomplish common goals. Securities Industry Association member-firms include investment banks, broker-dealers, and mutual fund companies which are active in all U.S. and foreign markets and in all phases of corporate and public finance. According to the Bureau of Labor Statistics, the U.S. securities industry employs 780,000 individuals. Industry personnel manage the accounts of nearly 93-million investors directly and indirectly through corporate, thrift, and pension plans.

The Arbitration Committee of the SIA (the "SIA") is charged with addressing issues relating to litigation and arbitration of securities industry disputes, including rules that impact Securities Industry Association members' choice of counsel to represent their interests in securities industry arbitrations. Association members typically hire in-house lawyers to provide legal services, including the representation of their employers in arbitrations conducted under the rules of securities industry self-regulatory organizations. The in-house lawyers have expertise in securities arbitrations and unique knowledge of their employers' policies, procedures, and products, and are thus in a position to provide valuable legal services in an economic manner. The members of the Securities Industry Association are adversely affected by the Proposed Rules addressed in these Comments because they would prevent members from choosing their own in-house counsel to represent them in arbitrations conducted in Florida.

C.BACKGROUND

The Proposed Rules before the Court are The Florida Bar's proposed MJP Rules that are based on the Model MJP Rules adopted by the Board of Delegates of the American Bar Association ("The ABA Model Rules"). The ABA Model Rules are the

product of a comprehensive study that included the earlier work of the Ethics 2000 Commission, the American Law Institute's Restatement of the Law Governing Lawyers, the ABA Standing Committee on Ethics and Professional Responsibility, the Joint Proposal of the American Corporate Counsel Association (now the Association of Corporate Counsel), the Association of Professional Responsibility Lawyers, and the National Organization of Bar Counsel, and extensive input from state and local bar associations, including The Florida Bar.

[1]

The ABA MJP Commission was assigned the responsibility to:

(1)Research, study, and report on the application of current ethics and bar admission rules to the multijurisdictional practice of law;

(2)Analyze the impact of those rules on the practice of in-house counsel, transactional lawyers, litigators, and arbitrators and on lawyers and law firms, maintaining offices and practicing in multiple state and federal jurisdictions;

(3)Make policy recommendations to govern the multijurisdictional practice of law that serves the public interest and take any other actions as may be necessary to carry out its jurisdictional mandate; and

(4)Review international issues relating to multijurisdictional practice in the United States.

See "Client Representation in the Twenty-First Century; Report of the Commission on Multijurisdictional Practice, American Bar Association Center for Professional Responsibility, Preface, P.1" (hereafter referred to as the "ABA MJP Commission Report"). A copy of the ABA MJP Commission Report is included in the Appendix

[1] The Florida Bar appointed two Special Commissions on the Multijurisdictional Practice of Law to study and make recommendations on the Interim and the Final ABA Model Rules, respectively.

under "A" for the convenience of the Court.

As the ABA MJP Commission explains in the introduction to its report, the predicate for the national study undertaken by the ABA was "[t]he the dynamic change in evolution in nature and scope of legal practice during the past century, facilitated by a transformation in communications, transportation and technology." *Id* at 3. The ABA report further explains that:

> Jurisdictional restrictions on law practice were not historically a matter of concern, because most clients' legal matters were confined to a single state and a lawyer's familiarity with that state's law was a qualification of particular importance. However, the wisdom of the application of UPL laws to license lawyers has been questioned repeatedly since the 1960s in light of the changing nature of clients' legal needs and the changing needs and the changing nature of law practice. *Both the law and the transactions in which the lawyers assist clients have increased in complexity, requiring a growing number of lawyers to concentrate in particular areas of practice rather than being generalists in state law. Often, the most significant qualification to render assistance in a legal matter is not knowledge of any given state's law, but knowledge of federal or international law or familiarity with a particular type of business or personal transaction or legal proceeding.*

Id at 3 (emphasis supplied).

The ABA recognized the need for lawyer regulation to correspond to the evolution in client needs and legal practices in today's modern business economy. The ABA Commission's guiding principal was "[s]earching for the proper balance between the interests of a state in protecting its residents and justice system, on the one hand; and the interests of clients in a national and international economy in the ability to employ or retain counsel of choice efficiently and economically". *Id* at 4. As the ABA Commission emphasized, "[a] key word here is balance". *Id*.

The ABA Commission stressed that MJP rules do not lend themselves to mathematical solutions but rather to informed judgment in order to "[accommodate]

our state-based system of bar admission, which [the Commission fully supported], with the realities of modern life and our tradition of respect for client choice . . .". *Id.* Thus, the Commission judiciously concluded that its recommendations required the exercise of informed judgment "not only by the diverse experience and perspectives of the members of the Commission as liaisons, but also by the wealth of testimony, written and spoken, [which the Commission considered in its extensive study]." *Id.* The ABA Model Rules are the product of that process.

The ABA Commission conducted its study over a period of two and one-half years.[2] The Commission's work included the dissemination of a series of background papers that identified examples of multijurisdictional practice and described relevant regulatory interests and enhancements and reforms that had been proposed by others; by soliciting and considering testimony and written submissions by state and local Bar Associations and other representative organizations of the legal profession and the public, as well as law firms, government and in-house corporate law offices, and individuals. The Commission also conducted public hearings in Atlanta, Chicago, Dallas, Kansas City, Miami, New York, and San Diego and individual Commissioners spoke at Bar Association meetings and other programs throughout the country.

The ABA Commission published an Interim Report in November of 2001 for the purpose of eliciting further feedback from legal and other organizations, including

[2] Alan T. Dimond, Esquire, a past-President of The Florida Bar, was a member of the ABA Commission on Multijurisdictional Practice. *See* ABA MJP Commission Report (Appendix A) at iii.

The Florida Bar, and conducted additional hearings in Philadelphia and New York. The Florida Bar appointed a Special Commission on the Multijurisdictional Practice of Law ("Florida Bar MJP Commission I") to study the ABA Interim Report. Its mission was to analyze the impact of the rules on the practices of in-house counsel, transactional lawyers, litigators, and lawyers and law firms maintaining offices and practicing in multiple jurisdictions, and to provide the Board of Governors "policy recommendations to govern the multijurisdictional practice of law that serves the public interest. . . ." *See* Report of The Special Commission on the Multijurisdictional Practice of Law (February 21, 2002), p. 2. (hereinafter the "Florida MJP Commission I Report").[3] Florida MJP Commission I issued its report to The Florida Bar on February 21, 2002.[4]

The ABA MJP Commission evaluated the voluminous submissions it received (estimated to be in excess of 50), including comments from The Florida Bar (based on the Florida MJP Commission I Report), conducted additional hearings in Philadelphia and New York, and then revised its preliminary recommendations based on all of the input gathered in this extensive process. The ABA Commission filed its final report with the ABA House of Delegates in June 2002, and the ABA House of Delegates ultimately adopted the final report (revised to incorporate additional recommendations the ABA received) of the ABA Commission on August 12, 2002.

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[3] The Florida MJP Commission I Report is included as "Appendix A" to Appendix E to The Florida Bar's Petition.

[4] Significantly, Commission I's position on the ABA Model Rule on temporary practice in arbitrations is *consistent* with ABA Model Rule 5.5(c)(3), and the SIA's position in this rule case.

The ABA MJP Commission's work and the basis for its recommendation of the ABA Model Rules that were ultimately accepted are described in a comprehensive 77 page report.[5]

The ABA's final Model MJP Rules recognize the nature of today's more "borderless" practice of law and contemplate the permissible practice of law by out-of-state attorneys in limited circumstances as long as the practice is "temporary." The ABA Model Rules were carefully fashioned to meet the legitimate needs of our modern economy while maintaining an appropriate level of state regulation and protection of the public interest.

The SIA strongly urges this Court to require the Florida Bar to conform Florida's MJP proposals to the ABA Model Rules to ensure that both Florida lawyers and businesses operating in Florida can enjoy the benefits of a legal system in step with the modern economy.

D.COMMENTS

1. The Florida Bar's MJP Rules Should Include ABA Model Rule 5.5(d)(1)

The Florida Bar should adopt sub-section (d)(1) of ABA Model Rule 5.5 to permit a non-Florida in-house lawyer to provide services to the lawyer's employer or the employer's organizational affiliates unless the services would require *pro hac vice* admission by the forum.

[5] The Proposed Rules in issue in this rules case were recommended by a second Special MJP Commission appointed by the then President of The Florida Bar ("Florida MJP Commission II") to study the final report of the ABA and make recommendations for rule changes. A copy of the Florida MJP Commission II Report to The Florida Bar is included in the appendix to the Florida Bar's Petition as "Appendix E".

ABA Model Rule 5.5(d)(1) provides as follows:

> (d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:
>
> > (1) Are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires *pro hac vice* admission; or . . .

The Model Rule recognizes that in-house lawyers' representation of their employers involves an important choice of counsel by a client and significantly less risk, if any, of harm to the public. As the comment to ABA Rule 5.5(d)(1) explains,

> [An in-house lawyer's] ability to represent the employer outside the jurisdiction in which the lawyer is licensed generally serves the interests of the employer and does not create an unreasonable risk to the client and other because the employer is well situated to assess the lawyer's qualifications and the quality of the lawyer's work.

ABA Model Rule 5.5, Comment 16 (Appendix A at p. 21, ¶ 16).

Although the Florida MJP Commission I mission statement included a directive to analyze the impact of the Interim ABA MJP rules on the practices of in-house counsel, Commission I failed to focus on the unique circumstances of in-house lawyers. The Commission simply concluded that ABA Rule 5.5(d)(1) was "unnecessary" in light of the Florida Bar Authorized House Counsel Rule set forth in Chapter 17 of the Rules Regulating The Florida Bar, and recommended instead that the ABA adopt a model rule similar to the Florida Authorized House Counsel Rule. Florida MJP Commission II followed that recommendation in its report, and The Florida Bar ultimately adopted MJP rules that did not adopt ABA Model Rule 5.5(d)(1). The Florida MJP rules thus deprive clients of their choice of in-house counsel to represent their interests in Florida, including arbitrations in Florida (with the exception of three "appearances" in any 365 day period).

a. The Authorized House Counsel Rule Does Not Facilitate MJP For Non-Florida Lawyers Who Reside Outside of Florida

Commission I recommended the rejection of ABA Model Rule 5.5(d)(1) because the Authorized House Counsel Rule "allows for the *permanent* presence of the out-of-state [in-house] lawyer . . ." *See* Commission I Report at p. 35 (emphasis supplied). The Commission recognized that the Authorized House Counsel Rule does not allow for the "temporary presence" of a non-Florida lawyer, but opined that it "adequately addresses the issues involved in multijurisdictional and corporate practice while at the same time adding a level of protection and regulation not found in proposed [ABA] Model Rule 5.5(d)(1)." *Id* at p. 36. Commission I also stated its belief that "a lawyer wishing to practice as in-house counsel for a corporation on a temporary basis could, in most cases, do so under one of the other 'safe harbors'." *Id*.

This reasoning is flawed for several reasons. First, ABA Model Rule 5.5(d)(1) advances the interests of clients in a national economy by not interfering with their ability to employ the services of their in-house lawyers in Florida. The relationship of in-house lawyers to their employer clients does not implicate concerns about the protection of the public from incompetent, unethical, or irresponsible representation. Corporations are among the most sophisticated consumers of professional legal services, and they are particularly qualified to evaluate the competency of the lawyers they hire as employees.[6]

This Court has held that "[t]he single most important concern in the Court's defining and regulating the practice of law is the protection of the public from

[6] The Florida Bar has not provided any evidence that the Rule would create a risk of harm to the public.

incompetent, unethical, or irresponsible representation". *Florida Bar v. Moses*, 380 So 2d 412, 417 (Fla. 1980). The elimination of ABA Model Rule 5.5(d)(1) does not protect the public from incompetent representation and it disserves the public interest by depriving the client of the lawyer most knowledgeable about the client and most qualified to represent the client efficiently and economically. The "client" in the case of an in-house lawyer is the employer which has presumably screened and hired the in-house lawyer based on the employer's evaluation of the lawyer's knowledge and skills. The "client" in that instance is uniquely capable of evaluating the competency of its lawyer and does not need the protection that might be appropriate for the average citizen. The ABA Model Rules recognize the unique circumstances of in-house lawyers in this respect in the comment to ABA Model Rule 5.5(d)(1):

> [T]he [in-house corporate] lawyer's ability to represent the employer outside the jurisdiction in which the lawyer is licensed generally serves the interest of the employer and does not create an unreasonable risk to the client and others because the employer is well situated to assess the lawyer's qualifications and the quality of the lawyer's work.

ABA MJP Commission Report, p. 21, ¶ 16.[7]

The Florida Bar's rejection of Model Rule 5.5(d)(1) based on the existence of the Florida Authorized House Counsel rule also creates an irreconcilable inconsistency. The Authorized House Counsel Rule does not apply to all in-house lawyers. It applies only to out-of-state in-house lawyers who have a "permanent presence" in Florida. *See* Rules

[7] Moreover, in many instances, the corporate "client" represented by the in-house non-Florida lawyer is not even a citizen of the State of Florida. Indeed, in the case of the SIA, the majority of its members are citizens of states other than Florida.

17-1.2(a)(5) and 17-1.5(4), Rules Regulating the Florida Bar.

Under Chapter 17, a non-Florida in-house lawyer who has a permanent presence in Florida is authorized to represent his or her corporate employer in all matters, except those that require *pro hac vice* admission (in which case, he or she could theoretically obtain *pro hac vice* admission), including administrative hearings. On the other hand, a non-Florida in-house lawyer who does *not* maintain a permanent presence in Florida would not be permitted to represent his employer in "all matters," including administrative proceedings, even if his legal services are only provided on a temporary basis.

In the case of arbitrations, an in-house lawyer whose "permanent presence" is in the state of New York would not be eligible under the Authorized House Counsel Rule to represent his employer in more than three arbitrations in any 365 day period under the Proposed Rules because such practice, however temporary by any reasoned logic, would be deemed to be the "regular practice" of law under Proposed Rule 1-3.11. Even an out-of-state in-house lawyer who has registered under the Authorized House Counsel Rule would be prohibited from representing his corporate employer in an unlimited number of arbitrations in Florida. Authorized House Counsel are subject to the three appearance presumption in Proposed Rule 1-3.11(d), because the representation in arbitrations is not one of the "authorized activities" delineated in Rule 17-1.3(a), Rules Regulating The Florida Bar. [8]

[8] The prefatory language in Rule 17-1.3 makes it clear that the *only* legal services Authorized House Counsel may provide to his employer are those listed in Rule 17-1.3(a). In that regard, Rule 17-1.3(a) provides that "[a]n authorized house counsel, as an employee of a business organization, may provide legal services in the state of

There is no substantive distinction between the protection of the client or public's interest in either circumstance, yet the permitted and prohibited activities are irreconcilably inconsistent. Moreover, the proposed regulation does not provide protection to the public, it is a detriment to the employer client, and it certainly does not facilitate the multijurisdictional practice of law in Florida.

This inconsistency can be cured by the adoption of ABA Model Rule 5.5(d)(1). The Florida Bar would not need to amend the Authorized House Counsel Rule because that rule is limited to out-of-state lawyers who have established a permanent presence in Florida, and thus differ from the Proposed MJP rules, which permit temporary practice only and prohibit a "permanent presence."

2. Rule 4-5.5(c)(3) Should Be Approved, But Proposed Rule 1-3.11 Should Be Rejected Because It Creates an Impermissible Presumption and Arbitrary Limitations on the Temporary Practice Contemplated by Proposed Rule 4-5.5(c)(3)

Proposed Rule 4-5.5(c)(3) would permit a non-Florida lawyer to provide legal services on a temporary basis in arbitrations in Florida as long as the forum does not require *pro hac vice* admission and the lawyer does not have certain disciplinary events. The Proposed Rule provides as follows:

> **(c) Authorized Temporary Practice by Lawyer Admitted in Another United States Jurisdiction.** A lawyer admitted and authorized to practice law in another United States jurisdiction who has been neither disbarred or suspended from practice in any jurisdiction, nor disciplined or held in

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Florida . . . *provided, however, that such activities shall be limited to* [the services described in Subsections 1, 2, and 3]." *Id*. Arbitration is not listed as a permitted activity even though (1) an in-house lawyer's services in an arbitration are similar to services provided in connection with an administrative proceeding; and (2) SRO arbitration rules would permit an out-of-state lawyer to represent a client in an SRO arbitration.

> contempt in Florida by reason of misconduct committed while engaged in the practice of law permitted pursuant to this rule, may provide legal services on a temporary basis in Florida that:
>
> . . .
>
> (3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, and the services are not services for which the forum requires pro hac vice admission:
>
> (A) if the services are performed for a client who resides in or has an office in the lawyer's home state, or
>
> (B) where the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice; and

Proposed Rule 4-5.5(c)(3) facilitates the multijurisdictional practice of law, serves the interests of the client and the public, and does not create an unreasonable regulatory risk. The Rule serves the interests of clients and the public by permitting a client to be represented in arbitrations in Florida by a non-Florida lawyer from the client's home state. It also serves the interests of clients by permitting them to choose to be represented in Florida arbitrations by lawyers with a particular expertise.

[9] In both instances, the client has the benefit of the representation by the client's

[9] Subsection (b) of Proposed Rule 4-5.5 would permit non-Florida lawyers to provide services on a temporary basis in an arbitration in Florida "where the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice. . . . " In the case of SIA members, Proposed Rule 4-5.5(c) would permit members' in-house lawyers to appear from time-to-time in arbitrations conducted in Florida without Florida co-counsel provided that among other things: (1) they do not establish an office in Florida; (2) they do not hold themselves out as admitted to practice law in Florida; (3) their services arise out of or are reasonably related to practice in a jurisdiction in which they are admitted; (4) the services are performed for a client who resides in or has an office in the lawyer's home state; and (5) they are not disbarred or suspended from practice in any jurisdiction or held in contempt in Florida for misconduct while temporarily practicing in Florida. These

existing lawyer who presumably has greater knowledge and experience with the client and the client's business as a result of the existing attorney/client relationship, or expertise in an area of practice, both of which are beneficial to the client.

The Proposed Rule also protects the public and creates no unreasonable regulatory risk because it limits the "authorized temporary practice" to lawyers who are admitted and authorized to practice law in another United States jurisdiction (which means that the lawyer has met the requirements of the practice of law in such jurisdiction(s)), and the lawyer may not have a disciplinary history that would present a regulatory risk or risk of harm to the public. *See* Proposed Rule 4-5.5(c). [10]

Thus, Rule 4-5.5(c)(3) not only achieves the goals of the ABA Model Rules, it also satisfies the conditions The Florida Bar established as a predicate to its approval of ABA Model Rule 5.5(c)(3) through its adoption of the Special MJP Commission I Report. For these reasons, the Court should approve Proposed Rule 4-5.5(c)(3).

However, Proposed Rule 1-3.11(d) and the comment to Proposed Rule 4.5.5(c)(3) should be rejected. Proposed Rule 1-3.11(d) severely limits the temporary practice authorized by Proposed Rule 4-5.5(c)(3) and destroys the balance the rule was intended to create. The Proposed Rule's radical departure from the ABA Model Rules also severely undercuts the comprehensive and reasoned work

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conditions provide adequate protection to clients (who, of course, have hired the in-house lawyers as their employees as well as their lawyers in the first place) and certainly do not present a regulatory risk.

[10] Proposed Rules 4-5.5(d) states similar requirements for non-US lawyers to engage in temporary practice in arbitrations in Florida. Non-US lawyers must be in good standing and subject to effective discipline by a duly constituted professional body or public authority in their home jurisdiction.

of the ABA Commission on Multijurisdictional Practice and the extensive work of state and local bar associations and other organizations that were incorporated in the Model Rules the ABA ultimately adopted.

The Report of the ABA Commission on Multijurisdictional Practice recognizes a strong justification for choosing a lawyer not admitted to the jurisdiction where an arbitration takes place, such as when there is an ongoing relationship or the lawyer has particular knowledge that would be advantageous to the client in the representation. This recognition reflects the ABA's careful deliberations to establish standards to facilitate multijurisdictional practice in identifiable situations that serve the interest of clients and the public and do not create an unreasonable regulatory risk.

Proposed Rule 1-3.11(d) is also inconsistent with the recommendations of Florida Special MJP Commission I. As briefly discussed above, Commission I was appointed to study and make recommendations to The Florida Bar on the ABA MJP Commission's Interim Report in November of 2001. The draft of ABA Model Rule 5.5 that was included in the Interim Report included a list of "safe harbors" that would be permitted under the Model Rule, including rendering legal services on a temporary basis in or ancillary to arbitrations. It did not, however, include any requirement of a nexus between the client or the lawyer and the tribunal.

Commission I *endorsed* adopting the proposed ABA Model Rule permitting ADR representation as a safe harbor if such a nexus was established.

[11] *See* Florida MJP Commission I Report at pp. 31-32. The Commission noted that this "requirement would prevent lawyers from coming into other states for ADR proceedings where there is no connection to the client or the home jurisdiction," and concluded that "[s]uch a nexus will prevent solicitation and add a level of protection which is absent from the ABA proposal." *Id* at 32. Florida Commission I also recommended adding a provision that would prohibit temporary practice under the rule by lawyers disciplined in their home state or for misconduct while engaged in the practice of law under the MJP Rule. *Id* at pp 27-28.

The final version of ABA Model Rule 5.5(c)(3) incorporates *both* of these recommendations of Florida MJP Commission I. Thus, ABA Model Rule 5.5(c)(3) meets the conditions of Commission I's endorsement. Inexplicably, Florida MJP Commission II, which by its own words was "building on Florida MJP I's work," rejected ABA Model Rule 5.5(c)(3), and opted instead to adopt a separate rule for arbitrations which, among other things, imposes a presumption that more than 3 appearances in any 365 day period is the regular, not temporary, practice of law.[12]

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[11] Commission I recommended the ABA adopt the nexus language found in Proposed ABA Rule 5.5(c)(5) that would "require that the client reside or have an office in the jurisdiction where the lawyer is authorized to practice or that the ADR proceeding arise out of or be reasonably related to a matter that has a substantial connection to a jurisdiction in which the lawyer is admitted to practice." Florida MJP Commission I Report, p. 32.

[12] The Florida Bar's departure from the ABA Model Rule in this regard is troublesome not only because it departs from the revised version of the Model Rule which incorporated The Florida Bar's original conditions to its endorsement, but also because it creates an unnecessary departure from uniformity among the states. As Florida MJP Commission I recognized in its report, "[a]ll endorsements and recommendations in this report are made with the understanding that they will be most effective if they are implemented by the various states." *See* Florida MJP Commission I Report at p. 20. Despite this recognition, which was adopted by The Florida Bar through adoption of

Proposed Rule 1-311(d) is even inconsistent with the comment to Proposed Rule 4-5.5(c)(3) adopted by The Florida Bar. The comment reflects the Bar's acknowledgement that out-of-state lawyers may provide legal services on a temporary basis in Florida "under circumstances that do not create an unreasonable risk to the interests of their clients, the public, or the courts." *See* Comment to Proposed Rule 4-5.5, ¶ 4 (unnumbered). The comment explains that subdivisions (c) and (d) of Proposed Rule 4-5.5 identify such circumstances. *Id*. It further acknowledges that "temporary" services may be provided on a recurring basis and that the rule would permit out-of-state counsel to appear in arbitrations conducted in Florida without Florida co-counsel provided that the appearances meet the criteria set forth in the rule. The comment then cautions that "[t]here is no single test to determine whether a lawyer's services are provided on a 'temporary basis' in Florida, and may therefore be permissible under [Proposed Rule 4-4.5(c)]". *Id*. (paragraph 5). However, in Proposed Rule 1-3.11(d), The Florida Bar creates such a "single test."

The Florida Bar's position that Proposed Rule 1-3.11(d) implements rather than negates Proposed Rule 4-5.5(c) is misguided. *See* Petition at pg. 26. To the contrary, by any reading, Rule 1-3.11(d) significantly restricts Rule 4-5.5(c), and thus restricts rather than supports the multijurisdictional practice of law in Florida. For these reasons, this Court should not approve Proposed Rule 1-3.11(d) or the comment to Proposed Rule 4-5.5(c)(3).

3. Proposed Rule 1-3.11 Creates an Unlawful Irrebutable Presumption

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Florida MJP Commission I's report, The Florida Bar is now departing from the very rule it endorsed.

that Non-Florida Lawyers are Engaged in Prohibited General Practice by More than Three Appearances a Year

As briefly discussed in section 2, *infra*, The Florida Bar acknowledges in the comment to Proposed Rule 4-5.5 that the wide universe of circumstances that may exist in a given case make it impossible to fashion a single test to determine whether a lawyer's services are provided on a temporary basis. In that regard, the comment to Proposed Rule 4-5.5 states:

> [t]here is no single test to determine whether a lawyer's services are provided on a "temporary basis" in Florida and may therefore be permissible under paragraph (c). Services may be "temporary" even though the lawyer provides services in Florida on a recurring basis or for an extended period of time as when the lawyer is representing a client in a single lengthy negotiation or contract.

Comment to Proposed Rule 4-5.5, paragraph 5 (unnumbered).

The SIA agrees. In the case of securities industry arbitrations, for example, a non-Florida in-house lawyer who is employed in New York might be assigned to handle four arbitrations ultimately sited in Florida over a twelve month period, but never physically appear in any hearings or engage in any meaningful participation in any of the four arbitrations. Arbitration claims are frequently settled or otherwise resolved prior to hearing. In fact, settlements can and do occur shortly after a lawyer "signs an arbitration demand" or a "signs a response to an arbitration demand." Even though the in-house lawyer's "appearance" in those instances would be deemed to be temporary by any rational standard, the Bar's Proposed Rule 1-3.11(d) creates a *presumption* that it is not. Under Proposed Rule 1-3.11(d), the attorney would be presumptively engaged in a "general practice" and thus presumptively engaged in the unauthorized practice of

law in Florida.[13] Proposed Rule 1-3.11(d) thus imposes a rigid standard that does not advance the public interest and is contrary to the underlying purpose of MJP rules and the very charter of Florida MJP Commissions I and II.

Moreover, the "three appearance presumption" also violates the United States Constitutional prohibition against irrebutable presumptions. Subsection (d) of proposed Rule 1-3.11 creates what essentially amounts to a "conclusive" or "irrebuttable" presumption that an out-of-state attorney who files more than three demands for arbitration or responses to arbitration within any 365 day period is engaging in the "general practice" of law in Florida. Conclusive or irrebuttable presumptions do not afford the opposing party an opportunity to rebut the fact presumed, and thus violate the Due Process Clause of the United States Constitution unless they satisfy all of the following criteria:

> (1) whether the concern of the [presumption-creating-body] was reasonably aroused by the possibility of an abuse which it legitimately desired to avoid;
>
> (2) whether there was a reasonable basis for the conclusion that the presumption would protect against the occurrence of the abuse; *and*
>
> (3) whether the expense and other difficulties of individual determinations justify the inherent imprecision of a conclusive presumption.

Recchi America Inc. v. Hall, 692 So. 2d 153, 154 (Fla. 1997); *Markham v. Fogg*, 458 So. 2d 1122, 1125 (Fla. 1984); *Bass v. General Dev. Corp.*, 374 So. 2d 479, 484 (Fla.

[13] The result is the same even if all four arbitrations involve the same security, related claimants, the same allegations, and the same employer client of the in-house lawyer. The result is also the same even if the "client" of the in-house lawyer is not even a citizen of Florida and Florida law is not the applicable law in the arbitration.

1979).

The United States Supreme Court has held that in order for a presumption to pass Constitutional muster there "shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate." *Usury v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 28 (1976) (quoting *Mobile, J. & K. C. R. Co. v. Turnipseed*, 219 U.S. 35, 43 (1910)).

a. The Florida Bar Has Not Demonstrated Any Evidence of An Abuse The Presumption Is Designed To Avoid

While proposed Rule 1-3.11(d) was purportedly drafted for the purpose of protecting Florida citizens from incompetent legal representation, there is no evidence that such abuses have occurred in the past or will occur in the future, or that the presumption is legitimately justified to avoid the abuses. Therefore, the proposed presumption fails the first test of constitutionality. *Recchi America, Inc.*, *Id*.

b. There Is No Reasonable Basis To Conclude That The Presumption Would Protect Against The Occurrence of Any Perceived Abuse

The Florida Bar does not provide any evidence that the creation of a presumption for *any* number of arbitration appearances will protect the public against any perceived abuses. There is clearly no rationale basis for limiting the appearances to "three" in a 365 day period, or for further limiting the permitted temporary services by defining "appearance" as filing a demand for arbitration or a response to an arbitration demand. *See Bass*, 374 So. 2d at 484.

Neither The Florida Bar's Petition nor the report of Florida Special MJP Commission II cite any rationale for the "three appearance" presumption. They cite no

empirical studies or surveys, and, in fact, make no factual findings whatsoever that might provide a rational basis for the presumption created by the Proposed Rule The Florida Bar asks this Court to adopt.[14] It thus appears that the selection of the number "three" is simply an arbitrary number selected by the Commission and approved by the Board of Governors.

The Report of Florida MJP Commission II reflects that the Commission, on its own initiative, asked the sub-committee assigned to study proposed ABA Model Rule 5.5 whether or not the "three appearance" limitation the Commission proposed for *pro hac vice* admissions should be imposed in arbitrations. *See* Florida MJP Commission II Report, at pp. 25-26. The Report reflects that the sub-committee concluded that it should.[15]

Glaringly absent from The Florida Bar's Petition and Commission II's Report is any rationale for imposing a limitation on the number of appearances by a non-Florida lawyer in arbitrations in Florida. The Commission's report simply states that "the

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[14] The Petition is silent on the existence of any statistics regarding the number of appearances of non-Florida lawyers in arbitrations in Florida. However, in its discussion of the revision to the *pro hac vice* rule, the Florida Bar acknowledges that "[t]here is currently no information on how many *pro hac vice* motions are filed in Florida". *See* Petition at pg. 18. The Bar nonetheless petitioned the Court to amend Rule 2.061 to include a similar "three appearance" limitation for *pro hac vice* admissions.

[15] The subcommittee was also asked to consider whether the limitation should be imposed for transactional work. It concluded that it should not because it is difficult to "determine the defining event which would show the beginning of the transaction," it is difficult to "count transactions," and it would be more difficult to police because there is no court overseeing the process." *Id*. at 26. The subcommittee also believed that the proposed amendments to Rule 4-5.5 and other rules the Commission was recommending contain sufficient safeguards to protect the public. The SIA questions the Commission's rationale on this point, but will not pursue it further here because its primary concern is its member's ability to choose their own in-house lawyers to represent them in arbitrations.

subcommittee felt that a limitation and fee should be imposed in appearances in arbitration proceedings". *Id* at pg. 26. With that, the Commission recommended without further discussion or rationale that the number of appearances in an arbitration proceeding be limited to *three* in any 365 day period. Thus, the Commission recommended adoption of a separate new rule, Proposed Rule 1-3.11(d), which created the flawed presumption. The presumption was also added to the comment to Proposed Rule 4-5.5(c)(3). The presumption appears to be a purely arbitrary mandate. Accordingly, the presumption fails to satisfy the second criteria of this Court's test for Constitutionality.

c. The Inherent Imprecision of Presumptions Is Not Justified By The Logistics of Individual Determinations

The multitude of circumstances that may exist in the modern day practice of law mandates that the determination of whether a non-Florida lawyer is engaged in the temporary or general practice of law be made on a case-by-case basis. The Bar has not made any showing that the proposed presumption is justified by the expense and other difficulties of case-by-case determinations of whether non-Florida lawyers are engaged in the "authorized temporary practice" or the "unauthorized general practice" of law. Indeed, it is doubtful that the Bar could demonstrate that the "expense and other difficulties of individual determinations justify [its] inherent imprecision" because the "Verified Statement" required by the very rule which creates the presumption also creates a simple, efficient, and inexpensive tool to track the number and scope of appearances in Florida arbitrations by non-Florida lawyers. In fact, the Verified

Statement provides a full five year history of all such appearances.[16] Therefore, the proposed presumption also fails the third test of Constitutionality.

d. Proposed Rule 1-3.11 Is Not Supported By The Florida Bar's Rationale

The Florida Bar's response to the opposition to Proposed Rule 1-3.11(d) is circular and unpersuasive. The Bar argues that Rule 1-3.11(d) simply *implements* Rule 4-5.5.[17] However, the language of Rule 4-5.5 that the Bar relies on for this argument is the same presumption language the Bar seeks to add in the comment to Proposed Rule 4-5.5 (c)(3) and (d)(3). Thus, respectfully, the only rationale the Bar offers for the unconstitutional presumption it is attempting to create in Proposed Rule 1-3.11(d) is the very same unconstititutional presumption it is attempting to create in the comment to Proposed Rule 4-5.5(c)(3).

Appendix C to The Florida Bar's Petition, which pairs selected text of the Proposed Rules with the reasons for the changes proposed, is also silent on the Bar's reasons for the presumption in Rule 1-3.11(d). The "reason column" for Proposed Rule 1-3.11(d) simply concludes that the Rule "[p]rohibits general practice of law in Florida by non-Florida lawyers *and sets the criteria*". It does not provide any reason to impose this obstacle to MJP practice. Nor does it provide any evidence that the presumption

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[16] The verified statement requires the non-Florida lawyer to disclose, among other things, the "date, case name, and case number [of] all other arbitration proceedings in which the non-Florida lawyer has appeared in Florida in the preceding 5 years . . .," with an exception that permits the non-disclosure of a case name or number if confidentiality is required by an order, rule, or agreement of the parties. *See* Proposed Rule 1-3.11)(e)(2).

[17] The Petition notes that "the comment to rule 4-5.5[(c)(3)] makes it clear that more than 3 appearances in a 365-day period are presumed to be a regular, not temporary, practice," and then leaps to the conclusion that "[r]ather than negating the intent of 4-5.5, rule 1-3.11 implements it." *See* Petition at page 26.

was created in order to avoid an abuse that the Bar had legitimate reason to believe would otherwise occur, or that the "expense and other difficulties of individual determinations justify the inherent imprecision of a conclusive presumption."[18] *See Recchi America Inc. v. Hall*, 692 So. 2d 153, 154 (Fla. 1997); *Markham v. Fogg*, 458 So. 2d 1122, 1125 (Fla. 1984); *Bass v. General Dev. Corp.*, 374 So. 2d 479, 484 (Fla. 1979).

Proposed Rule 1-3.11(d) should be rejected by this Court for these reasons alone. If, at some time in the future, the Bar determines that there is a need to establish a presumption that a specific number of appearances by a non-Florida lawyer constitutes the "regular practice of law" -- and the Bar can demonstrate a rational basis for the imposition of the presumption and the actual number of appearances that will be *presumed* to be the "regular practice" of law -- the Bar can Petition this Court to amend the Rules to include the presumption.[19]

4. Proposed Rule 1-3.11 Substantially and Unnecessarily Harms Business in Florida

The SIA agrees with The Florida Bar's view that non-Florida lawyers and non-U.S. lawyers should be permitted to provide services to clients in international arbitrations in Florida. However, there is no rational basis for prohibiting non-Florida lawyers from representing clients in domestic arbitrations in Florida as long as the representation is conditioned on the protections recommended by Florida Special MJP

[18] The "reason" column is similarly silent for the comment to Proposed Rule 4-5.5(c)(3) which imposes the same presumption. *See* Petition, App. C.

[19] If the Bar does take such a position in the future, it should also provide a rational basis for its definition of "appearance".

Commission I which were adopted and incorporated in ABA Model Rule 5.5(c)(3). The Florida Bar's response to the SIA's earlier comments regarding this issue only addresses the differences between securities arbitrations and some international arbitration proceedings. This argument, however, evades the issue of whether the ABA Rule 5.5(c)(3) facilitates MJP and is consistent with the client's interests and the protection of the public. It also evades the issue of whether the Proposed Rule relating to non-international arbitration might also harm Florida's economy.

Since the United States Supreme Court's decision in *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987), arbitration has become the dominant means of resolving securities disputes between investors and broker-dealers. In a securities arbitration, including arbitrations conducted in the State of Florida, a Florida lawyer's knowledge of Florida law, legal processes, and institutions is often less important to the representation of the parties, and thus to the client's selection of a lawyer. Florida law may not be the governing law in an arbitration. Moreover, the standards under which the parties' conduct in issue is governed is typically controlled by federally approved rules and regulations adopted by the self-regulatory organizations ("SRO's") of the securities industry, including the NASD, the NYSE, and the American Stock Exchange.

Because of the nature of these proceedings, in-house lawyers employed by broker-dealers are likely to be the lawyers most familiar with the company, including its policies, procedures, operations, business areas, products, and personnel, as well as the securities industry generally, the SRO rules and standards in issue in securities arbitration, the SRO arbitration rules, and the legal and factual issues in dispute. Among

other things, a broker-dealer in-house lawyer's expertise also includes a specialized knowledge of the securities markets as well as the securities and other investment products underlying the claims alleged in securities arbitrations. This knowledge is critical to a lawyer's effective representation of a client in a securities arbitration and uniquely qualifies in-house lawyers of broker-dealers who specialize in securities arbitrations to represent their employers in these proceedings. In-house lawyers are also able to render these specialized services economically because of their unique knowledge of the company and its business, and the economy a company realizes when the in-house lawyer's knowledge and experience can be applied from arbitration to arbitration regardless of the state in which the arbitration is ultimately sited.

Proposed Rule 1-3.11 would make the State of Florida less attractive as a venue for securities arbitration proceedings. Thus, in those instances in which a broker-dealer may have a choice to file an arbitration in Florida or a non-Florida state, or the ability to challenge a Florida arbitration venue in favor of a state which is not as restrictive on non-Florida in-house lawyers, the broker-dealer would be more likely to choose the non-Florida jurisdiction, which would ultimately result in economic harm to Florida's legal community.

The New York State Bar Association has already established its state as a venue *favorable* to arbitration by its approval and endorsement of ABA Model Rule 5.5(c) and Recommendation 9 without suggestions for modification.

[20] Because Proposed Rule 1-3.11 will effectively prevent clients in the securities

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[20] Press Release, New York State Bar Association, NYSBA House of Delegates Urges Amendments to Recommendations of the ABA Commission on Multijurisdictional

industry from being represented by their in-house lawyers in securities arbitration proceedings conducted in Florida, its effect would be to needlessly increase the securities industry's cost to do business in Florida.

5. Proposed Rule 1.3-11 Interferes With Federal Policies Favoring Arbitration and National Oversight of the Securities Industry

The Florida Bar's Petition argues that this Court has already rejected the SIA's comment that federal interests should prevent Florida from engaging in regulation of securities arbitration by virtue of its decisions in *The Florida Bar re: Advisory Opinion - Nonlawyer Representation in Securities Arbitration*, 696 So.2d 1178 (Fla. 1997), and *The Florida Bar v. Rapoport*, 845 So.2d 874 (Fla. 2003). However, the Bar fails to address the dispositive issue.

This Court has not considered whether the prohibition against non-Florida lawyers representing clients in securities arbitrations unnecessarily interferes with the extensive federal regulatory scheme approved and adopted by the Securities and

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Practice; Approves NYSBA Special Committee Report Generally Supporting the ABA Commission's Proposals (www.nysba.org/contentGroups/News1/Reports3/MJP_ABA_comments.pdf). California has also addressed the issue statutorily through an amendment to the California Code of Civil Procedure which permits a lawyer admitted to the bar of any other state to represent the parties to an arbitration proceeding in California, "[n]otwithstanding any other provision of law, *including Section 6125 of the Business and Professions Code [California's UPL statute]. . .*". Cal. Code Civ. Proc. § 1282.4, as amended. The statute includes a certificate procedure that out-of-state lawyers must follow, but it has no presumption that a specific number of appearances violates the permissible practice. *Id.* Instead, it requires the out-of-state lawyer to certify that he or she is not "regularly engaged in substantial business, professional, or other activities in the State of California." Cal. Code Civ. Proc. § 1282.4(c)(7). The certificate procedure enables the governing body to efficiently and economically monitor whether the lawyer is "regularly engaged" in the practice of law in California, and to make that determination on a case-by-case basis.

Exchange Commission ("SEC"), and imposes additional conditions upon lawyers practicing in securities arbitrations that are not found in the SRO arbitration rules. To the extent Proposed Rule 1-3.11(d) forces members of the securities industry to retain a new lawyer in Florida, it could disrupt proceedings conducted under the Federal Arbitration Act and unnecessarily interfere with the long standing self-regulatory scheme created for the securities industry pursuant to federal law.

Pursuant to the Securities Exchange Act of 1934 ("the Exchange Act") and amendments thereto, the SEC has ultimate responsibility for oversight of both self-regulatory organizations and national securities exchanges such as the NASD and NYSE. In *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220 (1987), the United States Supreme Court noted that the SEC's supervisory authority and oversight responsibility extends to ensuring the adequacy of the arbitration procedures employed by the SRO's in the securities arbitrations they administer. Indeed, the SEC is ultimately responsible for approving SRO arbitration rules and ensuring that they are sufficient to protect the public interest:

> No proposed rule change may take effect unless the SEC finds that the proposed rule is consistent with the requirements of the Exchange Act, 15 U.S.C. § 78s(b)(2); 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, 15 U.S.C. § 78s(c). *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.* 482 U.S. at 233-234 (emphasis added).

The SEC has exercised its regulatory authority under the Exchange Act by

approving the arbitration procedures of the NASD and NYSE, which administer the vast majority of securities arbitration proceedings in the United States. *Id.* at 234-235. Specifically, Rule 10316 of the NASD *Code of Arbitration Procedure* ("Representation by Counsel") provides that "[a]ll parties shall have the right to representation by counsel at any stage of the proceedings." Similarly, Rule 614 of the NYSE Arbitration Rules ("Representation by Counsel") states that "[a]ll parties shall have the right to representation by counsel at any stage of the proceeding." Significantly, neither of these SRO rules limit or restrict a party's right to retain a lawyer who is not licensed in the state in which the arbitration hearing is sited. Instead, the SRO rules guarantee parties the right to representation by counsel of their choice. Proposed Rule 1-3.11 imposes additional restrictions that unnecessarily interfere with the SRO rules authorized and adopted by the SEC, and unnecessarily restrict the rights of the parties in SRO arbitrations to be represented by counsel of their choice.

The right of broker-dealers to be represented by a lawyer of their choice in securities arbitration proceedings is a crucial factor in achieving efficiency and economy in those proceedings. This freedom of choice requires that broker-dealers have the ability to be represented by lawyers most familiar with their company, the securities industry, and the applicable arbitration procedures. Because most broker-dealers are not headquartered in Florida, the vast majority of their internal corporate legal staff are located in states other than Florida and are not licensed to practice law in Florida. Nevertheless, the firms' in-house lawyers are often the best qualified to represent their employers (and related parties) in securities arbitration proceedings. Requiring broker-dealers that have already selected their own experienced in-house lawyer for arbitrations

to engage another lawyer (and specifically, a Florida licensed lawyer) simply because the situs of the arbitration is in Florida unduly burdens the broker-dealers' conduct of business in Florida without advancing the policy of protecting Florida residents from unqualified lawyers.

6. Proposed Rule 1-3.11 Will Cause Substantial and Unnecessary Harm to the Important Goals of Alternative Dispute Resolution.

Proposed Rule 1-3.11 also fails to give sufficient weight to the growing importance of Alternative Dispute Resolution ("ADR"). Wholly apart from the unique role arbitration plays in the securities industry, ADR plays an important role in Florida's legal system. It is a method of dispute resolution favored over litigation. By denying broker-dealers their counsel of choice in arbitrations, Proposed Rule 1-3.11 may effectively discourage ADR. The United States Supreme Court has noted that it is the "informality of arbitral procedure that enables it to function as an efficient, inexpensive and expeditious means for dispute resolution." *Alexander v. Gardner-Denver Company*, 415 U.S. 36, 58 (1973). The Commission's recommendation fails to recognize and undercuts this informality, efficiency, and economy, by forcing broker-dealers to obtain representation by Florida lawyers rather than their own in-house lawyers.

Moreover, the exception for international arbitrations contained in proposed Rule 1-3.11 creates an unnecessary anomaly. For example, under the definition of an "international arbitration" in the Committee's comments to proposed Rule 1-3.11, a claimant residing in Mexico, South America, or Europe who files an arbitration demand requesting Florida as the hearing locale would be free to retain a non-Florida licensed

lawyer to represent him in an arbitration against a broker-dealer, and in fact would even be permitted to retain a foreign lawyer not licensed in any United States jurisdiction (who, under the flawed logic of the rule, could be deemed to be more qualified than a New York in-house lawyer who specializes in securities law and, particularly, in the representation of broker-dealers). The broker-dealer respondent in such an "international arbitration" would be permitted to be represented by its in-house lawyer who is not licensed in Florida. Yet, in a separate arbitration involving the same products or issues brought in Florida by a United States resident, the broker-dealer would be denied its right to utilize its uniquely skilled and efficient in-house lawyer if the lawyer had already signed three arbitration demands or responses to arbitration demands in the preceding 365 day period. There is no justification for a rule that deems a broker-dealer's non-Florida licensed in-house lawyer to be "qualified" and a non-threat to the public in one case, but "unqualified" and a threat to the public in a separate but related arbitration based solely upon the happenstance of the claimant's stated residency at the time the arbitration is filed.

The SIA reiterates its support for a rule that facilitates international arbitrations in Florida, and provides this analysis solely to explain yet another deficiency in the Florida Bar's logic in not extending the rule to non-international arbitrations.

7. Proposed Rule 1-3.11 is Improperly Protectionist

Proposed Rule 1-3.11 appears to create an artificial market for the services of Florida lawyers. In the absence of any convincing justification for denying broker-dealers counsel of their choice in arbitration proceedings, the rule appears to be mere protectionism for Florida's legal profession. This unreasonable restriction subjects

Florida to criticism as a "closed shop" state, which is directly contrary to the purpose and goals of multijurisdictional practice. Cautious lawyers will be required to counsel their clients to retain Florida lawyers even when they know this will unnecessarily raise the cost of arbitration and is not required for the client to be competently and ethically represented.

Moreover, a large and growing number of Florida lawyers and law firms are themselves developing national practices, including multijurisdictional practices in the arbitration field. Parochial measures limiting multijurisdictional practice in Florida encourage similar restrictions in other jurisdictions that would adversely impact Florida lawyers. Protectionism always has this effect and this Court should prevent this undesirable result.

8. The Filing Fee In Proposed Rule 1-3.11 Is Excessive

The SIA also urges the Court to reject subsection (e)(6) of proposed Rule 1-3.11 or to reduce the amount of the filing fee that must accompany the Verified Statement filed by non-Florida lawyers who seek to appear in an arbitration in Florida. The proposed fee of $250.00 is excessive, particularly in light of the fact that the annual fee for active members of the Florida Bar is only $265.00. Thus, an out-of-state lawyer who files a demand or a response in two arbitrations will pay substantially more fees than an *active* member of the Bar, who enjoys the full benefits of membership and no restrictions on the lawyer's representation. The proposed amount of $250 per appearance clearly exceeds the administrative costs of regulating non-Florida lawyers

who appear in securities arbitrations in Florida.[21] The appearance fee should be no more than $150 per appearance or a maximum $250 per year, as that amount would adequately cover any administrative expenses associated with the verified statement procedures and regulation.

9. At a Minimum, The Florida Bar Should Modify Proposed Rule 1-3.11 to Address the Unique Circumstances of In-House Lawyers and the Adverse Impact of Proposed Rule 1-3.11 on Their Clients

Proposed Rule 1-3.11 should be rejected as a radical and unjustified departure from the careful balance achieved by ABA Model Rule 5.5(d)(1). In the remote event the Court approves the three appearance presumption in Proposed Rule 1-3.11(d), the Court should, at a minimum, remedy the most egregious flaws relating to its application to in-house lawyers. Thus, the SIA urges the Court -- as a minimal measure -- to require The Florida Bar to address the unique circumstances presented by in-house counsel representation of his or her employer by amending the language of proposed Rule 1-3.11(d) to exclude the temporary services of in-house lawyers from the definition of "General Practice."

Excluding in-house lawyers from the scope of 1-3.11 recognizes the reality that the legal services in-house lawyers provide to their employers does not present a risk of harm to the public because corporations are sophisticated consumers of legal services

[21] Absent the costs associated with the proposed certificate process itself, it is questionable whether The Florida Bar would incur any regulation costs in connection with non-Florida lawyer representation in arbitrations in Florida, particularly in the case of SRO arbitrations in which the arbitrators have -- and who exercise -- the power to address improper conduct by advocates, including the imposition of monetary and other sanctions. The SRO's themselves have broad power to discipline the conduct of broker-dealers for any improper conduct of their employees, including their in-house lawyers.

and well-qualified to select and hire competent lawyers as employees. The Florida Bar employed analogous rationale to support the exemption of international arbitrations from the scope of Proposed Rule 1-3.11. As The Bar notes, "[e]xempting lawyers appearing in international arbitrations from certain requirements of the rule recognizes in part as the reality of this type of practice while at the same time adding a level of protection that is otherwise not present." *See* Petition at p. 27.

The modification recommended by the SIA would make the proposed rule consistent with the exclusion the Commission created for international arbitration. The SIA has attached as "Appendix C" a proposed modified version of proposed Rule 1-3.11(d) for the Court's consideration.

10. Florida's MJP Rules Should Conform To The Model ABA MJP Rules Unless The Protection Of The Public Necessitates Deviation

Absent good reason to depart from the ABA Model Rules, states should adopt them in their "model form" in order to ensure consistency from state to state. Consistency is particularly important in MJP rules since they were created for the purpose of facilitating the practice of law in more than one state.

The SIA has addressed in these Comments how the Proposed Rules' deviations from the ABA Model MJP Rules deprive the public of the benefit of the ABA's extensive deliberations on MJP. The SIA also urges the Court to reject the deviations to the extent they destroy uniformity among the states unless the Bar demonstrates that the deviations advance legitimate state interests.

Reform of outmoded jurisdictional restrictions on national law practice must be undertaken uniformly in order to be practical. Lawyers cannot be expected to navigate

loosened jurisdictional restrictions where each jurisdiction has merely selected parts of a national scheme that is designed to be uniform to facilitate a multijurisdictional practice. This would undermine the whole purpose of reform.

In a recent article in the *ABA Journal*, experts on the multijurisdictional practice of law discussed the impact if states fail to agree on uniform MJP rules. The article expresses concern that the result will be "[a] patchwork of regulations imposing varying requirements on lawyers seeking to practice temporarily in outside jurisdictions." Hansen, "MJP Picks Up Steam", *ABA Journal* (January 2004) at p. 44).[22] The General Counsel of the Association of Corporate Counsel, an organization of in-house attorneys and a proponent of easing jurisdictional restrictions on law practice, crystallized the negative consequences of such a result in the following statement:

> If each state passes reform, but each state's reforms are slightly different from all the others, the end result could be worse than having no reform at all . . . . Lawyers will find it practically impossible to sort out the varying obligations that a matter involving three or 10 or 50 states might involve.

Id.

Uniformity is not an absolute value and unique circumstances in a particular state may need to be addressed in its MJP rules. The Florida Bar provides no such unique circumstances in the case of Proposed ABA Model Rule 4-5.5(c)(3) and Florida Bar Proposed Rule 1-3.11(d). In the absence of true necessity to protect the public, the Proposed Rules' arbitrary and unreasoned deviations from the ABA Model MJP Rules should be rejected by this Court.

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[22] A copy of the *ABA Journal* article is provided in the Appendix under tab "B".

CONCLUSION

The SIA commends The Florida Bar for its consideration of the important multijurisdictional practice of law issues raised by modern law practice. The SIA, however, urges this Court to reject the Proposed Rules in their current form and to adopt Florida MJP Rules consistent with these Comments, including the adoption of ABA Model Rule 5.5(d)(1), and the elimination of Proposed Rule 1-3.11(b)(6) and 1-3.11(d), and the related comment to Proposed Rule 4-5.5(c)(3). In the alternative, the Committee requests that the Court remand this rules case to The Florida Bar to address the issues raised in these Comments in its proposed amendments to the Rules Regulating The Florida Bar.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a correct copy of the Comments of the Securities Industry Association Arbitration Committee was served by mail to John F. Harkness, Jr., Executive Director, Miles A. McGrane, III, Esquire, President, Kelly Overstreet Johnson, Esquire, President-Elect, Alan Bookman, Esquire, President-Elect Designate, Paul F. Hill, General Counsel, Mary Ellen Bateman, Esquire, Director, Legal Division, Ethics, UPL, Professionalism, Lori Holcomb, Esquire, Director, Unlicensed Practice of Law, The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399-2300; and a copy was served by mail to Stephen T. Maher, Esquire, Shutts & Bowen LLP, Attorneys for The Florida Bar Business Law Section, 1500 Miami Center, 201 South Biscayne Boulevard, Miami, Florida 33131, this ___ day of March 2004.

_____

Kathy M. Klock

CERTIFICATE OF TYPE SIZE AND STYLE AND ANTI-VIRUS SCAN

I hereby certify that the foregoing Comments of the Securities Industry Association is typed in 14 point Times New Roman Regular type and that the computer disk filed with these Comments has been scanned by Norton Anti-Virus Corporate Edition for Windows and has been found to be free of viruses.

_____
Kathy M. Klock

IN THE SUPREME COURT OF FLORIDA
CASE NUMBER SC04-135

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

APPENDIX TO SECURITIES INDUSTRY ASSOCIATION ARBITRATION COMMITTEE'S COMMENTS ON THE FLORIDA BAR'S PETITION TO AMEND THE RULES REGULATING THE FLORIDA BAR AND THE FLORIDA RULES OF JUDICIAL ADMINISTRATION

INDEX TO APPENDIX