Report of the Special Commission on the Multijurisdictional Practice of Law 2002

To:
Miles A. McGrane, III
President
The Florida Bar

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I. HISTORY, COMPOSITION AND WORK OF FLORIDA MJP COMMISSION II

In July 2000, Martha Barnett, then president of the ABA, appointed a commission to study the multijurisdictional practice of law and sought input from state bars and interested parties. The multijurisdictional practice of law (MJP) can best be defined as a lawyer providing legal services in a jurisdiction where that lawyer is not licensed to practice law. The legal services can be in any area of the law and may take place at any stage of the representation. The client can either be from the state where the lawyer is licensed (the home state) or where the lawyer wishes to practice or provide the services (the host state). The activity usually takes place on a temporary or occasional basis but at times may be regular and permanent.

In response to the ABA's request for input, Terrence Russell established The Florida Bar Special Commission on the Multijurisdictional Practice of Law ("Commission I"). The ABA issued an interim report in November, 2001. Commission I studied the report and, in March, 2002, made several recommendations to the Board of Governors all of which were adopted by the Board. The recommendations made by Commission I and approved by the Board can be found in Appendix "A." Thereafter, in August, 2002, the ABA adopted a final MJP report and recommendations which varied in some respects from the interim report. The ABA's final recommendations can be found in Appendix "B."

In order to study the final report and make recommendations for rule changes, President Tod Aronovitz appointed a second MJP Commission ("Commission II). Commission II's mission was to study the report and make recommendations for rule changes in light of the policies adopted by the Board in March, 2002. Commission II is comprised of the following members:

John A. Yanchunis, Chair
Tampa, Florida

Anthony Abate
Sarasota, Florida

Edward Robert Blumberg
Miami, Florida

Mr. Alan C. Brandt, Jr.
Fort Lauderdale, Florida

Michele Kane Cummings
Fort Lauderdale, Florida

Thomas M. Ervin, Jr.
Tallahassee, Florida

Linnes Finney, Jr.
Fort Pierce, Florida

Marvin C. Gutter
Boca Raton, Florida

William Kalish
Tampa, Florida

Ruth Barnes Kinsolving
Tampa, Florida

Albert J. Krieger
Miami, Florida

Bruce Douglas Lamb
Tampa, Florida

David Milian
Miami, Florida

Tom Pobjecky,
Florida Board of Bar Examiners
Tallahassee, Florida

Arthur Halsey Rice
Miami, Florida

Herman Russomanno
Miami, Florida

Victoria Wu
Silver Springs, Maryland

The Commission's first meeting was in September, 2002 and was an organizational meeting to discuss the issues and to set future meetings. The Commission next met in October, 2002. At that time, Chair Yanchunis divided the Commission into three subcommittees. The first subcommittee was assigned the task of looking at the recommended amendments to Model Rule 5.5, Florida Bar rule 4-5.5. Subcommittee two was assigned the disciplinary aspects of the recommendations. Subcommittee three was asked to review the *pro hac vice* rules, the recommended rule on admission on motion and the issue of foreign lawyers.

All three subcommittees met by conference call. In January, 2003, the entire Commission met and reviewed the recommendations of the various subcommittees. All were approved in

concept with subcommittee one being asked to consider additional changes in light of what the other subcommittees had recommended. The Commission next met on February 21, 2003. On March 17, 2003 a report was issued. [1] The report and proposed amendments were presented to the Board of Governors in concept only on April 4, 2003. The report was again presented on May 30, 2003, at which time the rules were approved on first reading.

The proposed amendments were scheduled to go back before the Board in August, 2003, however, during the Annual Meeting of The Florida Bar, June 25 - 28, 2003, an issue regarding lawyers admitted in a non-United States jurisdiction was brought to the attention of Miles McGrane, President of The Florida Bar. The issue involved the Commission's recommendation in the March 17, 2003 report that the rules not be amended to allow limited and temporary practice by lawyers admitted in a non-United States jurisdiction. The International Law and Business Law sections of The Florida Bar informed Mr. McGrane that Florida was in the running to become the secretariat for international arbitrations under the Free Trade of the Americas Act (FTAA). Basically, Florida is being considered as the location where international arbitrations would be held. Being chosen will be a boost to Florida's economy as well as a benefit to members of The Florida Bar practicing in the business and international areas. The sections were concerned that approving a recommendation against adopting a rule allowing for non-United States lawyers to come to Florida on a limited and temporary basis would harm Florida's chances of being chosen.

As of a result of the concerns brought to his attention, Mr. McGrane reconvened Commission

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[1] The report was circulated to the Florida Board of Bar Examiners, the Young Lawyer's Division, the Special Committee to Review the ABA Model Rules 2002, the Professional Ethics Committee and the chair and vice-chairs of the Rules of Judicial Administration Committee in March, 2003, prior to any consideration by the Board of Governors.

II. The issue was assigned to subcommittee one who made several recommendations for amendments which are more fully discussed below. The full Commission considered the recommendations on September 4, 2003, and unanimously approved the recommendations.

II. EXECUTIVE SUMMARY

The Special Commission on the Multijurisdictional Practice of Law 2002 (Commission II) was established by President Tod Aronovitz after the American Bar Association adopted several recommendations regarding the multijurisdictional practice of law in August, 2002. The multijurisdictional practice of law can best be defined as a lawyer providing legal services in a jurisdiction where that lawyer is not licensed to practice law. Commission II built on the work of the first Special Commission on the Multijurisdictional Practice of Law whose recommendations were approved by the Board of Governors in March, 2002.

As Commission II had several rules and recommendations to review, Chair Yanchunis divided the Commission into three subcommittees. The first subcommittee was assigned the task of looking at the recommended amendments to Model Rule 5.5 (Florida Bar rule 4-5.5) which would allow limited multijurisdictional practice in certain situations. Subcommittee two was assigned the disciplinary aspects of the recommendations. Subcommittee three was asked to review the *pro hac vice* rules, the recommended rule on admission on motion and the issue of foreign lawyers. The subcommittees and full Commission met several times before approving the recommendations made in this report.

The recommendations from the first subcommittee amend rule 4-5.5 to allow an out-of-state lawyer or lawyer admitted in a non-United States jurisdiction to come to Florida to provide legal services on a temporary basis. The lawyer must not be disbarred or suspended from the practice of

law in any jurisdiction and may not have been held in contempt in Florida due to misconduct when engaging in conduct permitted by the rule. The services may be conducted if local counsel is associated, if the services occur in matters prior to *pro hac vice* admission if such admission is reasonably expected to be granted, if the services occur in alternative dispute resolution proceedings if certain conditions are met and if the services occur in transactional work if certain conditions are met. In all of the situations, the services may only be provided on a temporary basis.

Recognizing that if rules are going to allow out-of-state and non-United States lawyers to come to Florida on a temporary basis, there must be a mechanism to bind the lawyer to Florida's Code of Professional Responsibility and to discipline the for ethical breaches. The recommendations of Commission II amend the disciplinary rules to allow for jurisdiction and discipline.

The final area Commission II considered involves admission before the courts *pro hac vice*, admission to The Florida Bar on motion and Florida's Foreign Legal Consultancy rule. Finding that the *pro hac vice* rule could be abused, Commission II is recommending amendments to the rule regarding the presumption on the number of times the out-of-state lawyer may move to appear in Florida in a 365-day period. As the out-of-state lawyer is subject to discipline for any ethical violations, Commission II is recommending the imposition of a filing fee for *pro hac vice* requests in part to fund the disciplinary system and Clients' Security Fund. Because of the importance of state regulation over the admission of lawyers, Commission II is recommending against the adoption of an admission on motion rule. The Commission is also recommending that no changes be made to The Florida Bar's Foreign Legal Consultancy rule.

Taken as a whole, the recommendations open the door to a limited, temporary practice that

is now closed. The recommendations continue support of state judicial licensing and regulation of lawyers. At the same time, the recommendations recognize the multijurisdictional nature of the practice of law today. The recommendations balance both of these interests while at the same time protecting the public, the legal profession and the judiciary in Florida.

III. DISCUSSION OF RECOMMENDATIONS

Under current rules and case law, a lawyer licensed to practice law in another state or country but not in Florida may not, except in very limited circumstances, provide legal advice or services in Florida or involving Florida law. Recognizing that existing law has not kept up with the reality of modern practices, The Florida Bar, following the lead of the American Bar Association, began studying the issue of the multijurisdictional practice of law in 2001. The recommendations that follow relax many of the existing restrictions and allow temporary practice by non-Florida lawyers.

The ABA report and recommendations are based on the premise of continued support of state judicial licensing and regulation of lawyers. The Florida Bar endorsed this recommendation and continues to do so. The recommendations made by Commission II follow this premise while at the same time recognizing the reality of the multijurisdictional nature of the practice of law today.

The recommendations fall within four categories: the multijurisdictional practice of law, reciprocal discipline, *pro hac vice* admission, and rules recommended by the ABA but not adopted by either Commission I or Commission II. All of the recommendations are discussed below.

MULTIJURISDICTIONAL PRACTICE
Proposed Amendments to Rule of Professional Conduct 4-5.5; Unlicensed Practice of Law

In order to allow for the multijurisdictional nature of the practice of law, the ABA

recommends several changes to Model Rule 5.5, the counterpart to Florida Bar rule 4-5.5. The interim report of the ABA referred to many of the recommended changes to Model Rule 5.5 as "safe harbors." The "safe harbors" established limited areas where lawyers from other states could come in to the host state on a temporary basis to practice law. While the final report does not use the "safe harbor" terminology, the principles remain the same – allowing the limited practice of law in the host state on a temporary basis.

Subcommittee one studied the ABA recommendations and proposed several amendments to rule 4-5.5, including the addition of comment language. After much debate and discussion, the amendments were approved by the full Commission. For the most part, Commission II followed the recommendations of Commission I. Differences are discussed. The rule with amendments follows: (The full text of the amendment with the comment language can be found in Appendix "C.")

RULE 4-5.5 UNLICENSED PRACTICE OF LAW, MULTIJURISDICTIONAL PRACTICE OF LAW

(a) Practice of Law. A lawyer shall not ~~**(a)**~~ practice law in a jurisdiction, other than the lawyer's home state, ~~where doing so violates~~ in violation of the regulation of the legal profession in that jurisdiction or in violation of the regulation of the legal profession in the lawyer's home state; ~~or~~ or assist another in doing so.

(b) Establishing an office and holding out as lawyer prohibited. ~~assist a person who is not a member of the bar in the performance of activity that constitutes the unlicensed practice of law.~~ A lawyer who is not admitted to practice in Florida shall not:

(1) except as authorized by other law, establish an office or other regular presence in Florida for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in Florida.

(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 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:

(1) are undertaken in association with a lawyer who is admitted to practice in Florida and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(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, or

(4) are not within subdivisions (c)(2) or (c)(3) and

(A) are performed for a client who resides in or has an office in the jurisdiction in which the lawyer is authorized to practice or

(B) arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) Authorized Temporary Practice by Lawyer Admitted in a Non-United States Jurisdiction. A lawyer who is admitted only in a non-United States jurisdiction who is a member in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent and subject to effective regulation and discipline by a duly constituted professional body or a public authority, and who has been neither disbarred or suspended from practice in any jurisdiction nor disciplined or held in contempt in Florida by reason of misconduct committed while engaged in the practice of law permitted pursuant to this rule, does not engage in the unlicensed practice of law in Florida when on a temporary basis the lawyer performs services in Florida that:

(1) are undertaken in association with a lawyer who is admitted to practice in Florida and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal held or to be held in a jurisdiction outside the United States if the lawyer, or a person the lawyer is assisting, is authorized by law or by order of the tribunal to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation or other alternative dispute resolution proceeding held or to be held in Florida 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 jurisdiction in which the lawyer is admitted to practice, 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;

(4) are not within subdivisions (2) or (3) and

(A) are performed for a client who resides or has an office in a jurisdiction in which the lawyer is authorized to practice to the extent of that authorization; or

(B) arise out of or are reasonably related to a matter that has a substantial connection to a jurisdiction in which the lawyer is authorized to practice to the extent of that authorization; or

(5) are governed primarily by international law or the law of a non-United States jurisdiction in which the lawyer is a member.

Discussion of Amendments to Title and Subdivisions A and B

The amendment to the title of the rule alerts the reader that the rule also applies to the multijurisdictional practice of law. However, subdivision (a) keeps intact the general principle that a lawyer cannot practice law in a jurisdiction in which the lawyer is not licensed or otherwise authorized or assist another in doing so.

Subdivision (b) keeps intact the general principle that a lawyer admitted in a state other than Florida or in a non-United States jurisdiction cannot establish an office or other regular presence in Florida or hold out to the public that the lawyer is admitted to practice law in Florida. However, the subdivision also recognizes that there may be times when other law, such as Federal rule or regulation, allows a lawyer to have a regular presence in Florida. For example, Federal regulations allow a lawyer admitted in any state or territory to practice Federal patent law before the office of Patent and Trademark. As this activity is specifically allowed, Florida cannot enjoin the activity as the unlicensed practice of law. [2] As Florida cannot enjoin the practice as the unlicensed practice of law, the rule does not prohibit the activity.

Discussion of Amendments to Subdivision C

Subdivision (c) sets forth what the interim ABA report called "safe harbors" and applies to the activities of lawyers admitted in another United States jurisdiction. The first section allows a lawyer who has not been disbarred or suspended from the practice of law in any jurisdiction or who has not been held in contempt in Florida due to misconduct when engaging in conduct permitted by

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[2] *The Florida Bar v. Sperry*, 373 U.S. 379 (1963).

the rule to come to Florida to provide legal services on a temporary basis. The rule therefore requires that several conditions be met in order for the lawyer to come to Florida. If these conditions are met, the lawyer can come to Florida on a temporary basis to engage in the practice of law if the activity falls within one of the enumerated categories. [3]

The first category allows the out-of-state lawyer to come to Florida on a temporary basis if the out-of-state lawyer associates a member of The Florida Bar who actively participates in the matter. The comment makes it clear that the Florida lawyer could not act merely as a conduit but must share actual responsibility for the representation and actively participate. This comment language is from the Commission I report. [4]

The second category is pre-*pro hac vice* admission activity where the lawyer is authorized by law to appear or reasonably expects to be authorized. Examples of allowable conduct given in the comment include meetings with the client, interviews of potential witnesses and taking depositions. Although the language is the same as the language proposed by the ABA, Commission II declined to adopt a paragraph of the ABA's comment which would have extended the authorization to an associated lawyer who does not expect to appear *pro hac vice* or to subordinate lawyers. Commission II felt that this language was too broad.

The third category allows an out-of-state lawyer to render legal services in a pending or potential arbitration, mediation or other alternative dispute resolution if one of two conditions are

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[3] The categories of practice allowed by the Commission's recommendations differ from the categories allowed by the ABA's recommendations. The comment to the ABA's rule provides that the list is an *illustrative* list and other activities may be allowed. The Commission deleted this language from the comment thereby making the list an *exclusive* list.

[4] Two members of the Commission voted against the inclusion of the word "active" in the rule. However, a majority of the Commission participating was in favor of including the word in the rule.

met: 1) the services have to be preformed for a client who resides in or has an office in the lawyer's home state, or 2) the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted. The first condition was included in the ABA's interim report but, although included in the comment, deleted from the rule language of the final report. Commission I endorsed the first nexus, therefore, it was added to the rule. The second condition was made by the ABA in the final report but differs from the nexus requirement made by the ABA in the interim report and approved by Commission I. In both of those reports, the second nexus required that the services be related to a matter in the lawyer's home state. As currently worded, the services have to be related to the lawyer's practice, thereby broadening the scope of the services. While giving deference to Commission I, Commission II agreed with the ABA's language and recommends adoption of the broader authorization as more realistically reflecting multijurisdictional practice. [5]

The fourth and final category allows an out-of-state lawyer to provide transactional work in Florida if the same nexus requirements as discussed above are met. This recommendation deviates from the ABA's recommendation and the Commission I recommendation in the same respects as discussed above. Once again, Commission II agrees with the new language and recommends its adoption.

There are two matters relating to practice by lawyers admitted in another United States jurisdiction which were included in the ABA report which are not included in the proposed

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[5] The Commission's recommendations also vary from the ABA's recommendations by establishing a presumption regarding the number of times an out-of-state lawyer would be allowed to come to Florida to represent an individual in an arbitration proceeding in all matters except those involving international arbitrations. This recommendation is discussed more fully in the section of the report discussing the changes to Florida Rule of Judicial Administration 2.061.

amendments to rule 4-5.5(c). The ABA's rule would allow an out-of-state lawyer to come to Florida on a regular or permanent basis to provide legal services to the lawyer's employer or corporate affiliates. In keeping with the recommendation of Commission I, Commission II felt that this rule was not necessary in light of The Florida Bar's Authorized House Counsel Rule. The ABA's rule also contains language that would allow the out-of-state lawyer to come to Florida on a regular or permanent basis to provide services the lawyer is authorized to provide by federal law or the law of Florida. Commission I found this language redundant and not necessary. Commission II agrees and is not recommending that it be included. [6]

Discussion of Amendments to Subdivision D

Subdivision (d) is very similar to subdivision (c) with the major difference being that the subdivision deals with lawyers admitted in a non-United States jurisdiction. The amendments use much of the language of the ABA's Model Rule on Temporary Practice by Foreign Lawyers. However, instead of proposing the language as a stand alone rule as done by the ABA, Commission II recommends that the language be included in rule 4-5.5. Comment language has also been added.

The first section allows a lawyer who has not been disbarred or suspended from the practice of law in any jurisdiction or who has not been held in contempt in Florida due to misconduct when engaging in conduct permitted by the rule to come to Florida to provide legal services on a temporary basis. The lawyer must be admitted and a member in good standing of a recognized legal profession and subject to effective regulation and discipline by a professional body or public authority. The rule therefore requires that several conditions be met in order for the lawyer to come

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[6] Whether this language should be included was an area of much debate and was studied in depth by the subcommittee assigned to this rule and by the full Commission.

to Florida. If these conditions are met, the lawyer can come to Florida on a temporary basis to engage in the practice of law if the activity falls within one of the enumerated categories. [7]

As with subdivision (c), the first category allows the non-United States lawyer to come to Florida on a temporary basis if the lawyer associates a member of The Florida Bar who actively participates in the matter. The second category is pre-*pro hac vice* admission activity in a matter before a tribunal held or to be held in a jurisdiction outside of the United States where the lawyer is authorized by law to appear or reasonably expects to be authorized. Therefore, a lawyer admitted in a non-United States jurisdiction would not be able to use the rule to provide services relating to a matter pending before a United States court.

The third category allows a lawyer admitted in a non-United States jurisdiction to render legal services in a pending or potential arbitration, mediation or other alternative dispute resolution if one of two conditions are met: 1) the services have to be preformed for a client who resides in or has an office in the jurisdiction where the lawyer is admitted to practice, or 2) the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted. The fourth category allows a lawyer admitted in a non-United States jurisdiction to provide transactional work in Florida if the same nexus requirements as discussed above are met.

Subdivision (d) contains a fifth category which is not contained in subdivision (c). This category allows a lawyer admitted in a non-United States jurisdiction to provide services which are governed primarily by international law or the law of a non-United States jurisdiction in which the lawyer is a member. The Commission felt that due to the unique nature of international practice, this language was necessary.

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[7] As with subdivision (c), the list is exclusive, not illustrative.

The amendments to rule 4-5.5 and the comment incorporate the principles set forth in the report of Commission I with the addition of rules regarding non-United States lawyers. Commission II believes that the amendments serve the public while at the same time protecting the public and the integrity of Florida's judicial system. For the reasons discussed above, Commission II recommends approval of the amendments to rule 4-5.5 and to the comment as set forth in Appendix "C".

RECIPROCAL DISCIPLINE
Proposed Amendments to Rule 3-4.6; Disciplinary Authority, Rule 3-4.1; Notice And Knowledge of Rules And Rule 3-7.2 Procedures Upon Criminal or Professional Misconduct; Discipline Upon Determination or Judgment of Guilt of Criminal Misconduct and Rule 3-2.1 Definitions

As found by Commission I and the Board, without a scheme for meaningful discipline of a lawyer both in the host state and, more importantly, in the home state, the amendments recommended for adoption above do not afford any protection for the courts, lawyers and people of the host state. A lawyer must know that any breach of professional responsibility in the host state will also lead to discipline in the home state. To reach this goal, Commission II is proposing amendments to rules 3-4.1, 3-4.6, 3-7.2 and 3-2.1. As these rules are interrelated, they are all included in Appendix "D."

Discussion of Proposed Amendments to 3-4.1; Notice and Knowledge of Rules

Rule 3-4.1 as currently written, provides for jurisdiction over members of other state bars who are in Florida on a *pro hac vice* basis. As the amendments to rule 4-5.5 being recommended by Commission II allow a greater range of practice and also allow non-United States lawyers to provide certain services, rule 3-4.1 needs to be amended to cover the broader range. Therefore, Commission II is recommending the following amendments to rule 3-4.1:

Rule 3-4.1 Notice And Knowledge of Rules; Jurisdiction Over Attorneys of Other States

Every member of The Florida Bar and every attorney of another state or foreign country who ~~is admitted to practice for the purpose of a specific case before a court of record of this state~~ provides or offers to provide any legal services in this state is within the jurisdiction and subject to the disciplinary authority of this court and its agencies under this rule and is charged with notice and held to know the provisions of this rule and the standards of ethical and professional conduct prescribed by this court. Jurisdiction over an attorney of another state who is not a member of The Florida Bar shall be limited to conduct as an attorney in relation to the business for which the attorney was permitted to practice in this state and the privilege in the future to practice law in the state of Florida.

Discussion of Proposed Amendments to Rule 3-4.6; Disciplinary Authority

The ABA proposes an amendment to subsection (a) of Model Rule 8.5 making it clear that a lawyer is subject to discipline no matter where the conduct which is the subject of discipline occurred. In other words, a member of The Florida Bar who engages in unethical conduct in another state is subject to discipline in Florida. The amendment also makes it clear that a lawyer licensed in another jurisdiction is subject to discipline in the host state for any ethical violations.

Florida Bar rules 3-4.6 and 3-7.2 already subject a Florida lawyer to discipline for activities that took place outside of Florida. Therefore, the substance of the proposed amendments to subsection (a) already exists in Florida. However, Commission II is recommending the following language be added to subsection (a) of rule 3-4.6 to make this clearer: An attorney admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the attorney's conduct occurs. An attorney may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.

The ABA also proposed an amendment to subsection (b) to set forth choice of law provisions. The Florida Bar does not have a counterpart to subsection (b). The amendments to rule 3-4.6 being proposed by Commission II add a choice of law provision similar to that proposed by

the ABA while at the same time incorporating the recommendations of Commission I. The major change from the ABA proposal is the deletion of language which would have based the choice of law on the attorney's reasonable belief regarding where the predominant effect of the attorney's conduct would occur. Commission II did not belief that this language belonged in the rule. As a whole, the amended rule reads:

Rule 3-4.6 Discipline by Foreign or Federal Jurisdiction; Choice of Law

(a) Disciplinary Authority. An attorney admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the attorney's conduct occurs. An attorney may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct. A final adjudication in a disciplinary proceeding by a court or other authorized disciplinary agency of another jurisdiction, state or federal, that an attorney licensed to practice in that jurisdiction is guilty of misconduct justifying disciplinary action shall be considered as conclusive proof of such misconduct in a disciplinary proceeding under this rule.

(b) Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:

(1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and

(2) for any other conduct, the rules of the jurisdiction in which the attorney's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct.

Discussion of Proposed Amendments to Rule 3-7.2 Procedures Upon Criminal or Professional Misconduct; Discipline Upon Determination or Judgment of Guilt of Criminal Misconduct and Rule 3-2.1, Definitions

The ABA proposed several amendments to rules 6 and 22 of the Model Rules of Disciplinary Enforcement. The Florida Bar has not adopted the ABA Model Rules of Lawyer Disciplinary Enforcement although many of the concepts are incorporated into the Rules Regulating The Florida Bar.

Model Rule 6 basically provides for jurisdiction over admitted members and members licensed in other states. The crux of the rule is included in rules 3-4.6 and 3-4.1 as recommended for amendment. Therefore, Commission II is not recommending additional changes.

Rule 22 sets forth the mechanics for imposing reciprocal discipline. It sets forth the procedures the home state must follow in imposing discipline on a member who was disciplined in a host state. Florida already allows for reciprocal discipline and already has procedures in place. What follows is a discussion of the subparts of Rule 22, a comparison to Florida's rules and the amendment being proposed by Commission II.

Subsection A of the ABA rule requires the member lawyer to inform disciplinary counsel of the discipline imposed in the host state. Disciplinary counsel then contacts the host state for the order and files it with the Court. Rule 3-7.2(j) of the Rules Regulating The Florida Bar requires the disciplined member to provide a copy of the order directly to the Supreme Court of Florida. A proposed amendment is being suggested that would also require the member to provide notice to The Florida Bar. No other changes are being proposed as Commission II felt that the burden of providing a copy should remain on the member rather than being placed on bar counsel. The subsection as amended would read:

Misconduct; Discipline Upon Determination or Judgment of Guilt of Criminal Misconduct

(j) Professional Misconduct in Foreign Jurisdiction.

(1) *Notice of Discipline by a Foreign Jurisdiction*. A member of The Florida Bar who has submitted a disciplinary resignation or otherwise surrendered a license to practice law in lieu of disciplinary sanction, or has been disbarred or suspended from the practice of law by a court or other authorized disciplinary agency of another state or by a federal court shall within 30 days after the effective date of disbarment or suspension file with the Supreme Court of Florida <u>and the executive director of The Florida Bar</u> a copy of the order or judgment effecting such disbarment or suspension.

ABA subsection B requires the court of the home state to issue an order asking for a response. Rule 3-7.2(j) states that if a member is disciplined in another state, The Florida Bar can proceed to referee level without a finding of probable cause. This allows all of The Florida Bar's

disciplinary rules and procedures to be utilized. Moreover, as the lawyer is a member of The Florida Bar, the rules apply regardless of what the host state has done. Commission II felt that no amendment to rule 3-7.2 was necessary as all of the Florida rules apply, including the rules requiring a response. However, Commission II believes a definition of "final adjudication" as used in 3-7.2 would be helpful to lawyers and disciplinary counsel. Therefore, Commission II proposed that the following language be added to the definition section of rule 3-2.1: (q) Final Adjudication. A decision by the authorized disciplinary authority or court issuing a sanction for professional misconduct that is not subject to judicial review except on direct appeal to the Supreme Court of the United States.

ABA subsection C requires a stay of the home state discipline if a stay is imposed by the host state. Florida's rules require the disciplined lawyer to notify the Court (and Bar if amended) within 30 days of the effective date of the discipline. Therefore, if the discipline is stayed in the host state, there would be no requirement to notify The Florida Bar. Commission II felt that no amendment was necessary.

ABA subsection D requires that the same discipline be imposed in the home state as imposed in the host state unless disciplinary counsel or the disciplined lawyer can show it should not be based on one of the reasons stated in (1) - (4). Commission I disagreed with this language as it required *identical* discipline to be imposed. Commission I felt that discipline should be imposed in accordance with the public policy of the home state. The Florida Bar's rules already allow for this. As stated above, once the bar member falls within the disciplinary system, all of the Florida rules of procedure come into play. This includes leeway to impose, or recommend, the appropriate discipline. In keeping with the recommendations of Commission I, no amendment is being

proposed.

ABA subsection E provides that the misconduct is conclusively established for purposes of the home state disciplinary process. The Florida Bar rules already provide for this in 3-7.2(j) wherein it states that a finding of probable cause is not necessary. Consequently, no amendment is being proposed.

Commission II is not recommending a great deal of changes to the disciplinary rules because the gist and intent of the ABA recommendations are already part of Florida's rules. Florida's rules currently put members of The Florida Bar on notice as to discipline and allow for discipline for conduct taking place outside of Florida. The amendments put out-of-state lawyers who are in Florida on a temporary basis on the same notice and subject to the same discipline. At the same time, The Florida Bar is given discretion as to the type of discipline to impose on its members. As the amendments continue and strengthen The Florida Bar's ability to impose discipline, Commission II recommends approval of the amendments to rules 3-4.6, 3-4.1, 3-7.2 and 3-2.1 as set forth in Appendix "D."

PRO HAC VICE **ADMISSION**
Discussion of Proposed Amendments to Rule 2.061, Foreign Attorneys Rule 1-3.10 Appearance by Non-Florida Lawyer in a Florida Court and Proposed New Rule 1-3.11 Appearance by Non-Florida Lawyers in an Arbitration Proceeding in Florida

In studying the multijurisdictional practice of law, the ABA felt that it would be helpful if the states approached *pro hac vice* admission on a uniform basis. For this reason, the ABA proposed the adoption of a model rule on *pro hac vice* admission. Commission I reviewed the model rule and declined to recommend its adoption. Commission I felt that the existing Florida rule offered more protection.

Following the direction of Commission I, Commission II declines to recommend adoption of the ABA's model rule. However, in order to afford better protection to the public, the bar and the judicial system, Commission II is recommending several amendments to rule 2.061 of the Florida Rules of Judicial Administration, rule 1-3.10 of the Rules Regulating The Florida Bar and the addition of a new rule, rule 1-3.11 regarding appearance in arbitration proceedings.

Discussion of Proposed Amendments to Rule 2.061 Foreign Attorneys and Rule 1-3.10 Appearance by Non-Florida Lawyers

Rule 2.061 of the Florida Rules of Judicial Administration governs *pro hac vice* appearances in Florida courts. Rule 1-3.10 of the Rules Regulating The Florida Bar is the Bar's counterpart to rule 2.061. Amendments to one necessitate amendments to the other. The rules with amendments can be found in Appendices "E" (2.061) and "F" (1-3.10).

Rule 2.061 allows a lawyer admitted and in good standing in another state to appear on behalf of a client in a Florida court. The rule sets forth certain restrictions including a prohibition against establishing a "general practice" before the Florida courts. As currently worded, a lawyer is presumed to be engaged in a "general practice" if the lawyer makes more than 3 appearances within a 365-day period in separate and unrelated representations. However, the rule gives the court discretion to allow more than 3 appearances upon a showing that the appearances are not a "general practice," or that denial will work a substantial hardship on the client. Commission II was concerned that the exception allowing for the exercise of discretion was taking over the rule. In other words, out-of-state lawyers were being allowed to appear more than 3 times in a 365-day period. Therefore, Commission II is recommending that the language allowing the judge to exercise discretion be deleted. The Commission is also recommending that the language "and unrelated" be deleted as the term is too difficult to define and open to abuse. The same changes are made in rule

1-3.10.

A second amendment being proposed by the Commission would require the movant to file a copy of the motion that was filed with the trial court with The Florida Bar and to pay on a per case basis a nonrefundable $250.00 fee to The Florida Bar. Although not specified in the rule, $25.00 of the fee would be earmarked for the Clients' Security Fund. The court may waive the fee in cases involving indigent clients.

The reason for the imposition of the fee is simple – an out-of-state lawyer admitted to appear *pro hac vice* in a Florida court effectively becomes a member of The Florida Bar for the purposes of that case and is subject to discipline if the lawyer engages in unethical conduct. The cost of that discipline, however, is born by members of The Florida Bar and not by the out-of-state lawyer. The fee is an effort to defray these costs as well as to make a contribution to the Clients' Security Fund should a claim be made based on the lawyer's behavior. Again, the same changes are reflected in rule 1-3.10.

The imposition of a fee in *pro hac vice* admissions and the amount recommended is not without precedent. Twenty-three states currently charge a fee. The amount charged ranges from $70.00 (Indiana) to $350.00 (Nevada). A chart showing the states that charge and the amount charged is included in Appendix "G."

Currently, there is no information on how may *pro hac vice* motions are filed in Florida. Requiring a copy of the motion to be filed with The Florida Bar will enable the Bar to begin collecting data in this regard. Moreover, it will enable the Bar to inform the court if the movant has exceeded the number of appearances allowed by the rule. The Commission anticipates that The Florida Bar will have to hire staff to enter data to accomplish the data entry. The $250.00 fee will

go in part to pay for this program and personnel.

In order to make data entry more uniform, the Commission is proposing a form Verified Motion for Admission to Appear *Pro Hac Vice* Pursuant to Florida Rule of Judicial Administration 2.061, a copy of which is attached in Appendix "H." The form tracks the rule and contains blanks for all of the information required by the rule. It will aid the practitioner in complying with the rule and aid the Bar in entering the necessary data. [8]

The other changes to rule 2.061 and 1-3.10 are technical in nature and conform the rules to terminology used by the Bar. Rule 1-3.10 is further amended to track rule 2.061. Although the language has not substantially changed, the order and numbering has been changed to that of the Judicial Administration rule.

Discussion of Proposed New Rule 1-3.11

In light of the amendments being proposed to rule 2.061, the Commission asked subcommittee one to consider whether similar language regarding the number of appearances and/or the imposition of a fee should be imposed in arbitration proceedings or transactional work. As discussed above, the amendments to rule 4-5.5 would allow an out-of-state lawyer or a lawyer admitted in a non-United States jurisdiction to come to Florida on a temporary basis to represent an individual in an arbitration proceeding or in transactional work if certain requirements are met. Subcommittee one discussed the issue at great length and came to the conclusion that a presumption on the number of appearances or a fee should not be imposed in transactional work. Reasons for the

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[8] The form motion requires the individual to list their social security number. The social security number is needed for data entry purposes. Use of the number will allow the program to determine whether other motions have been filed by the lawyer. The social security number will not be made public by The Florida Bar.

subcommittee's actions are that unlike appearances in court, it is difficult to determine the defining event which would show the beginning of the transaction. It is also difficult to count transactions. Moreover, as there is no court overseeing the process, it would be more difficult to police. The subcommittee was of the opinion that the recommended amendments to rule 4-5.5 and the other rules being proposed by the Commission contain sufficient safeguards to protect the public. Adding a presumption and fee does not add greater protection and could potentially cause more problems than it might solve. The full Commission agreed with the subcommittee's recommendation.

Unlike transactional work, the subcommittee felt that a presumption regarding the number of appearances and a fee should be imposed in appearances in arbitration proceedings. [12] Accordingly, the Commission is recommending that a presumption be imposed on the number of appearances in an arbitration proceeding except those involving international arbitrations. The presumption is contained in the comment to rule 4-5.5. The specific language reads "For the purposes of this rule, a lawyer who is not admitted to practice law in Florida who files more than 3 demands for arbitration or responses to arbitration in separate arbitration proceedings in a 365-day period shall be presumed to be providing legal services on a regular, not temporary, basis, however, this presumption shall not apply to a lawyer appearing in international arbitrations as defined in the comment to rule 1-3.11."

A new rule was necessary in order to impose a fee on the appearance. The new rule is 1-3.11

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[12] Although the amendment to rule 4-5.5 allows appearance in arbitration, mediation and other alternative dispute resolution matters, the subcommittee and Commission believe that the presumption and fee should only be imposed in arbitration proceedings. This is due in part to the fact that unlike mediation and other forms of alternative dispute resolution proceedings, an arbitration has a more definite beginning and end making it easier to impose the presumption and fee.

and applies to appearances in arbitration proceedings only. [13] The rule requires the filing of a statement [14] with The Florida Bar and the payment of a nonrefundable $250.00 fee which may be waived for indigent clients. [15] The fee is payable on a per arbitration (appearance) basis. The statement and the fee is not required in matters involving international arbitrations. Additionally, certain information regarding the lawyer's client is not required if the information is otherwise confidential. The text of the new rule can be found in Appendix "I." [16]

Exempting lawyers appearing in international arbitrations from certain requirements of the rule recognizes the reality of this type of practice while at the same time adding a level of public protection that is otherwise not present. International arbitrations which are being or will be held in Florida are held here for convenience. There is no Florida law being applied. The Florida courts are not involved. The parties or the controversy have no relationship with Florida. [17] The

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[13] The addition of 1-3.11 required that rule 1-3.10 be limited to appearances in court. The language of the rule is being amended to reflect this change.

[14] Again, the lawyer is being asked to supply their social security number for data entry purposes only.

[15] Just as with charging a fee for *pro hac vice* admission, there is precedent for charging a fee for appearances in arbitration proceedings. California Rule of Court 983.4 requires an out-of-state lawyer to pay a $50.00 fee to the Bar in order to appear in an arbitration proceeding in California.

[16] One member of the Commission voted against the amendments to rules 2.061, 1-3.10 and 1-3.11 only as to the imposition of a fee.

[17] The comment to rule 1-3.11 defines international arbitration 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 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

international arbitration proceeding could take place anywhere – it is held in Florida because it is a neutral location with a culturally diverse population.

Although there is an absence of the need to protect the public because there is no connection to Florida other than the location of the proceeding, rule 1-3.11 adds protection not currently in place. The rule requires a nexus between the lawyer and the client or the practice, prevents disciplined lawyers from appearing and prohibits a general practice in Florida.

Commission II recognizes that some of the amendments being proposed to the *pro hac vice* rules could be somewhat controversial. However, the Commission believes the amendments not only protect the public from unlimited representation by lawyers who are not members of The Florida Bar, but also protect the disciplinary system of The Florida Bar. Accordingly, Commission II recommends approval of the amendments to rule 2.061 of the Florida Rules of Judicial Administration with the form motion and rule 1-3.10 of the Rules Regulating The Florida Bar as set forth in Appendices "E," "F" and "H." [18] The Commission also recommends approval of rule 1-3.11 to be included in the Rules Regulating The Florida Bar as set forth in Appendix "I."

ABA RECOMMENDATIONS NOT ADOPTED BY COMMISSION II

There are three recommendations made by the ABA which both Commissions I and II

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some other relation to 1 or more foreign countries; (5) or 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 or of a political nature between 2 or more governments.

[18] Rule 2.130 of the Florida Rules of Judicial Administration sets forth the procedure for amending those rules. Although the rule establishes a committee to review proposed rules and amendments, the rule also allows "any person" to propose amendments. Therefore, the Board of Governors has the authority to propose amendments to the Rules of Judicial Administration.

recommend not be adopted in Florida. The first encourages jurisdictions to use the National Regulatory Data Bank, urges jurisdictions to adopt the International Standard Lawyer Numbering System® and urges jurisdictions to require the lawyers admitted in their jurisdiction to report any change of status. The first and third aspects of this recommendation do not require action on the part of the Bar and, for the most part, are being implemented. Commission II studied the second aspect involving the use of the standard numbering system as it could have a fiscal impact on The Florida Bar. The Commission felt that no change in the numbering system was necessary at this time. Should most of the other states adopt this system, the issue can be revisited.

The second recommendation encourages the states to adopt the ABA's Model Rule on Admission on Motion. Commission I studied this issue and came to the conclusion that Florida should not adopt the admission on motion rule. Commission I endorsed the principle that jurisdictions should continue to exercise their licensing authority on an individual basis in determining the competency of their lawyers and agreed with the Supreme Court of Florida where it held that,

> [w]e see it clearly as our duty to admit to this special position of obligation and trust only those applicants, whether from Florida schools or elsewhere, who can satisfactorily demonstrate their credentials through a test of competence given under our supervision and control. [19]

The Board agreed with the recommendation and reasoning of Commission I. Commission II sees no reason to change this.

The third recommendation encourages the states to adopt the ABA's Model Rule for the Licensing of Legal Consultants. Commission I also studied this recommendation and compared the

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[19] *In re: Russell*, 236 So. 2d 767 (Fla. 1970).

ABA's rule with The Florida Bar's Foreign Legal Consultancy Rule. Commission I found that Florida's rule, found in Chapter 16 of the Rules Regulating The Florida Bar, has more stringent certification requirements and is more limiting than the ABA Model Rule for the Licensing of Legal Consultants. For these reasons, Commission I recommended against the adoption of the ABA model rule. Commission II agrees.

CONCLUSION

As recognized by Commission I and the Board, long ago the Supreme Court of Florida acknowledged the need to adapt the regulations regarding the unlicensed practice of law in response to "the everchanging business and social order." [20] The current rules regarding lawyers practicing law in other states and foreign countries have not kept up with the practice of law as it exists today. Commission II believes that the recommendations for rule amendments made in this report strike the balance between protecting the public and recognizing the realities of the multijurisdictional nature of the modern practice of law. Wherefore, the Special Commission on the Multijurisdictional Practice of Law 2002 respectfully requests approval of the amendments as recommended above and attached hereto.

Respectfully submitted,

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John A. Yanchunis, Chair
Special Commission on the
Multijurisdictional Practice of Law 2002

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[20] *The Florida Bar v. Brumbaugh*, 355 So. 2d 1186 (Fla. 1980).