



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

To:  
Tod A. Aronovitz  
President  
The Florida Bar

March 17, 2003

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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

William Kalish  
Tampa, Florida

Anthony Abate  
Sarasota, Florida

Ruth Barnes Kinsolving  
Tampa, Florida

Edward Robert Blumberg  
Miami, Florida

Albert J. Krieger  
Miami, Florida

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

Bruce Douglas Lamb  
Tampa, Florida

Michele Kane Cummings  
Fort Lauderdale, Florida

David Milian  
Miami, Florida

Thomas M. Ervin, Jr.  
Tallahassee, Florida

Tom Pobjecky,  
Florida Board of Bar Examiners  
Tallahassee, Florida

Linnes Finney, Jr.  
Fort Pierce, Florida

Arthur Halsey Rice  
Miami, Florida

Marvin C. Gutter  
Boca Raton, Florida

Herman J. Russomanno  
Miami, Florida

Victoria Wu  
Silver Spring, 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. At that time, the rules and amendments which are attached to this report and discussed below were

approved and are now being recommended for adoption. <sup>1</sup>

## **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 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

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<sup>1</sup> Due to the deadline for distribution of materials to the Board, the Commission was not able to seek comments or input from interested committees at the time of the writing of the report. However, the report is being 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-chair of the Rules of Judicial Administration Committee. The Commission hopes to have any comments of interested committees prior to the first official reading of the rules.

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 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 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 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 out-of-state

lawyer 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 activities of attorneys licensed in foreign countries. Finding that the *pro hac vice* rule could be abused, Commission II is recommending a limitation 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.

All of the recommendations being made by Commission II 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**

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: 1) the multijurisdictional practice of law; 2) reciprocal discipline; 3) *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) 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) assist a person who is not a member of the bar in the performance of activity that constitutes the unlicensed practice of law.~~

(b) 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) A lawyer admitted and authorized to practice law in another United States jurisdiction, and (i) not disbarred or suspended from practice in any jurisdiction or (ii) 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, if the services are:

(i) performed for a client who resides in or has an office in the lawyer's home state, or

(ii) 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

(iii) the services are not services for which the forum requires *pro hac vice* admission; or

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

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

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

## **Discussion of Amendments to Title and Subparagraph 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, subparagraph (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.

Subparagraph (b) keeps intact the general principle that a lawyer admitted in a state other than Florida 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 subparagraph 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.<sup>2</sup> As Florida cannot enjoin the practice as the unlicensed practice of law, the rule does not prohibit the activity.

### **Discussion of Amendments to Subparagraph C**

Subparagraph (c) sets forth what the interim ABA report called “safe harbors” while incorporating the recommendations of Commission I. 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 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.<sup>3</sup>

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<sup>2</sup> *The Florida Bar v. Sperry*, 373 U.S. 379 (1963).

<sup>3</sup> 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.

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.<sup>4</sup>

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 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 met: 1) the services have to be preformed for a client

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<sup>4</sup> 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.

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.<sup>5</sup>

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

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<sup>5</sup> The Commission's recommendations also vary from the ABA's recommendations in the number of times an out-of-state lawyer would be allowed to come to Florida to represent an individual in an arbitration proceeding. This recommendation is discussed more fully in the section of the report discussing the changes to Florida Rule of Judicial Administration 2.061.

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 which were included in the ABA report which are not included in the proposed amendments to rule 4-5.5. 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. <sup>6</sup>

The amendments to rule 4-5.5 and the comment incorporate the principles set forth in the report of Commission I. These principles were approved by the Board of Governors in March, 2002. Although some changes have been made, Commission II believes that the amendments serve the public while at the same

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<sup>6</sup> 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.

time protecting the public and the integrity of the 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.

#### **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 allows a greater range of practice, rule 3-4.1 needs to be amended to cover the broader range of activities to allow for jurisdiction and discipline. Therefore, Commission II is recommending

the following amendments to rule 3-4.1, a copy of which is in Appendix “D”:

**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 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:

***Rule 3-4.6 Discipline by Foreign or Federal Jurisdiction***

(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.

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 the following language which Commission II felt did not belong in the rule: "An attorney shall not be subject to discipline if the attorney's conduct conforms to the rules of a jurisdiction where the attorney's conduct will occur." The language being proposed by Commission II is:

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

(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.

As a whole, the amended rule reads (the full text of all of the amendments relating to reciprocal discipline can be found in Appendix “E”):

***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 Amendment 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 with the Supreme Court of Florida. A proposed amendment is being suggested that would also require the member to provide notice to The Florida Bar. A copy of the rule with amendments can be found in Appendix "F". 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 and the executive director of The Florida Bar 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 (the full text of rule 3-2.1

appears in Appendix “G”): (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 Appendices "D" through "G."

### ***PRO HAC VICE ADMISSION***

**Discussion of Proposed Amendments to Rule 2.061 Foreign Attorneys, Rule 1-3.10 Appearance by Non-Florida Lawyers and Proposed New Rule 1-3.11**

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

“H” (2.061) and “I” (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 rule would therefore limit the number of appearance to 3 appearances within a 365-day period in separate and unrelated representations. The same change is 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. Nineteen states currently charge a fee. The amount charged ranges from \$90.00 (Indiana) to \$348.50 (Arizona). A chart showing the states that charge and the amount charges is included in Appendix "J."

Currently, there is no information on how many *pro hac vice* motions are filed or granted 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 “K.” 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.

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 arbitrations or transactional work. As discussed above, the amendments to rule

4-5.5 would allow an out-of-state lawyer 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 limitation, in addition to the limitation that the activity be performed on a temporary basis, or fee should not be imposed in transactional work. Reasons for the 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 also 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 limitation 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 limitation and fee should be imposed in appearances in arbitration proceedings.<sup>7</sup> Accordingly, the

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<sup>7</sup> 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 limitation and fee should only be imposed in arbitration proceedings. This is due in part to the

Commission is recommending that the number of appearances in an arbitration proceeding be limited to 3 in a 365-day period. The limitation is imposed 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 and unrelated arbitration proceedings in a 365-day period shall be presumed to be providing legal services on a regular, not temporary, basis.” As rule 4-5.5 only allows for a temporary appearance, more than 3 appearances in a 365-day period would not be allowed. Any complaints received regarding an out-of-state lawyer appearing more than the number of times allowed by the rule would be processed by The Florida Bar in the same fashion as other complaints received by the Bar.

A new rule was necessary in order to impose a fee on the appearance. The new rule is 1-3.11 and applies to appearances in arbitration proceedings only.<sup>8</sup> The rule requires the filing of a statement with The Florida Bar and the payment of a nonrefundable \$250.00 fee which may be waived for indigent clients. The fee is payable on a per arbitration (appearance) basis. The text of the new rule can be

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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 limitation and fee.

<sup>8</sup> 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.

found in Appendix “L.”<sup>9</sup>

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.

The timeliness of the discussion regarding an out-of-state lawyer appearing in an arbitration in Florida came to light at the Commission’s last meeting. The day before the meeting, the Supreme Court of Florida issued an order in *The Florida Bar v. Rapoport*, No. SC01-73, 2003 WL 359303 (Fla. Feb. 20, 2003). The case involved an out-of-state lawyer who resides in Florida and was in the business of representing individuals in security arbitration proceedings in Florida. The Florida Bar sought an injunction to prevent the lawyer from engaging in the unlicensed practice of law. The Bar argued that the Court’s 1997 opinion preventing nonlawyers from representing individuals in securities arbitration matters applied to out-of-state lawyers.<sup>10</sup> The Court agreed and issued an injunction preventing Rapoport from engaging in the unlicensed practice of law.

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<sup>9</sup> 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.

<sup>10</sup> *The Florida Bar re: Advisory Opinion on Nonlawyer Representation in Securities Arbitration*, 696 So. 2d 1178 (Fla. 1997); Rule 10-2.1(c), Rules Regulating The Florida Bar.

It should be noted that if the Board approves and the Court adopts the recommendations of Commission II, Rapoport would not be allowed to resume his practice as he was doing it on a regular rather than temporary basis and he was advertising his services in Florida.<sup>11</sup>

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. Lawyers allowed the privilege to practice before the Florida courts and in arbitration proceedings in Florida should be required to contribute to the Bar's disciplinary system and Clients' Security Fund. 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 "H," "I" and "K."<sup>12</sup> The Commission also recommends approval

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<sup>11</sup> The issue of the out-of-state lawyer advertising services in Florida is addressed in the comment to rule 4-5.5.

<sup>12</sup> 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.

of rule 1-3.11 to be included in the Rules Regulating The Florida Bar as set forth in Appendix “L.”

### **ABA RECOMMENDATIONS NOT ADOPTED BY COMMISSION II**

There are four recommendations made by the ABA which both Commissions I and II 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.<sup>13</sup>

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 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.

The final recommendation encourages the states to adopt the ABA's Model Rule for Temporary Practice by Foreign Lawyers. Commission I also studied this issue. Commission I recommended against adopting a rule which would allow the temporary presence of a foreign lawyer. Florida's rule allows a permanent

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<sup>13</sup> *In re: Russell*, 236 So. 2d 767 (Fla. 1970).

presence only. Allowing a permanent presence leads to a level of protection that is not present when the lawyer is here on a temporary basis. Eliminating this level of protection by allowing a temporary presence when a permanent presence may be obtained does not serve the public interest. Commission II agrees with the recommendation of Commission I and does not recommend that a rule allowing for temporary presence of a foreign lawyer be adopted.

### **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.”<sup>14</sup> The current rules regarding lawyers practicing law in other states 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.

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<sup>14</sup> *The Florida Bar v. Brumbaugh*, 355 So. 2d 1186 (Fla. 1980).

Respectfully submitted,

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