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I. INTRODUCTION

It is well established that in order to practice law in Florida, you must be a member of The Florida Bar unless a specific exception applies.¹ For the most part, licensure in a state other than Florida does not entitle that individual to practice law in Florida. Similarly, licensure in Florida may not entitle that lawyer to practice elsewhere. If a member of The Florida Bar does provide legal services in a state where the individual is not licensed, the member could be found to have engaged in the unlicensed practice of law in that state and be subject to discipline in Florida.²

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 July 2000, Martha Barnett, then president of the ABA, appointed a commission to study the multijurisdictional practice of law. The ABA Commission invited and received testimony and written submissions from other ABA entities, representative organizations of the legal profession, the public and individual lawyers.

Lawyers and legal organizations from other countries also participated. Public hearings and roundtable discussions were held around the country. In studying the issues involving MJP, the ABA Commission sought input from the various state bars.

Several state bars formed Commissions to provide input.

II. HISTORY, COMPOSITION AND WORK OF FLORIDA MJP COMMISSION

In response to the ABA's request for input, Terrence Russell established The Florida Bar Special Commission on the Multijurisdictional Practice of Law (the "Commission"). The mission statement of the Commission is as follows:

The Florida Bar Multijurisdictional Practice Commission is to research, study and report on the application of current ethics and bar admission rules to the multijurisdictional practice of law. The Commission shall analyze the impact of those rules on the practices of in-house counsel, transactional lawyers, and litigators, and on lawyers and law firms maintaining offices and practicing in multiple jurisdictions. The Commission shall make policy recommendations to govern the multijurisdictional practice of law that serves the public interest and give input to the Board of Governors of The Florida Bar on such issues.

The members of the Commission are:

Richard Allen Gilbert, Chair
Tampa, Florida

Michele Kane Cummings
Ft. Lauderdale, Florida

Gregory William Coleman
North Palm Beach, Florida

Thomas M. Ervin, Jr.
Tallahassee, Florida

David Samuel Felman
Tampa, Florida

Linnes Finney, Jr.
Fort Pierce, Florida

Marvin C. Gutter
Ft. Lauderdale, Florida

Thomas Pobjecky,
Tallahassee, Florida

Don L. Horn
Miami, Florida

Arthur Halsey Rice
Miami, Florida

Ruth Barnes Kinsolving
Tampa, Florida

William Kalish
Tampa, Florida

Evet Louise Simmons,
Port St. Lucie, Florida

John Marshall Kest
Orlando, Florida

Bruce Douglas Lamb
Tampa, Florida

The members of the Commission come from a diverse background and a variety of practice areas including real property, tax, litigation and transactional work. One member of the Commission is a staff attorney for the Florida Board of Bar Examiners.

The Commission held several meetings. The first meeting on June 21, 2001 was organizational in nature. Subcommittees were established in the transactional and litigation areas. The subcommittees were assigned the following issues: 1) how to discipline the out-of-state lawyer and provide for regulation; 2) advertising issues; 3) issues unique to the multistate law firm; 4) what elements are encompassed in “association of local counsel;” 4) issues unique to federal law (transactional subcommittee only); 5) appearances in alternative dispute resolution (litigation

subcommittee only); and 6) issues surrounding work performed prior to *pro hac vice* admission being granted (litigation subcommittee only). All members of the Commission were asked to study the following issues: 1) should a law firm involved in a class action suit be allowed to advertise in a national publication for clients in Florida regardless of where the lawsuit is filed; 2) can a lawyer from a multistate firm travel to the Florida office to advise clients on Florida law, federal law or the law of the home state; 3) if 1 or 2 are answered in the affirmative, what bar rules govern and to what extent, who would impose discipline and what would that discipline be; 4) should attorney training and admission requirements be standardized throughout the nation; 5) how do the advances in technology impact upon the ability of state supreme courts or other regulatory agencies to regulate the admission and discipline of lawyers; 6) should we have uniform laws on the unlicensed practice of law and *pro hac vice*; and 7) does globalization of the market place and/or client demands create a need for new rules? A meeting was held via conference call on August 30, 2001 to discuss the work of the subcommittees.

The Commission next met on September 7, 2001 at which time the various positions presented to the ABA were discussed. On December 14, 2001 the Commission met by conference call to discuss the interim report of the ABA Commission. A public hearing was held on January 10, 2002. Many stated that they

would have liked more time to study the issues. Written comments were also received and reviewed. Thereafter, on January 30, 2002 the Commission discussed the issues and voted on how to respond to the ABA Interim Report. A report was prepared and mailed to the Commission on February 13, 2002. On February 19, 2002 the Commission met by conference call to address the issues and approved this report.

This report will begin with a summary of the ABA recommendations. The Commission's reactions and recommendations follow.

III. ABA RECOMMENDATIONS (INTERIM REPORT)

After almost two years of study and receiving testimony from individuals and groups from around the United States and several foreign countries, the ABA MJP Commission issued its interim report in November, 2001. The report makes the following recommendations: ³

List of ABA Recommendations

- Recommendation 1: The ABA should affirm its support for the principle of state judicial licensing and regulation of lawyers.
- Recommendation 2: The ABA should amend Rule 5.5(b) of the Model Rules of Professional Conduct (Unauthorized Practice of Law) to provide that, as a general rule, it is not the unauthorized practice of law for a lawyer admitted in another United States jurisdiction to render legal services on a temporary basis in a jurisdiction in which the lawyer is not admitted if the lawyer's services do not create an unreasonable risk to the interests of a lawyer's client, the public or the courts.
- Recommendation 3: The ABA should adopt proposed Model Rule 5.5(c) - (e) to identify "safe harbors" that embody specific applications of the general principle stated in Recommendation 2. These would include "safe harbors" relating to the following practice areas: (The list is a summary only, the "safe harbors" are discussed in more detail in the report.)

1. Work as co-counsel with a lawyer admitted to practice law in the host state.
2. Professional services that a non-lawyer is legally permitted to render.
3. Work ancillary to pending or prospective litigation.
4. Representation of clients in, or ancillary to, an alternative dispute resolution setting.
5. Non-litigation work ancillary to the lawyer's representation of a client in the lawyer's home state or ancillary to the lawyer's work on a matter that is in the

lawyer's home state as long as there are appropriate nexus requirements.

6. Services involving primarily federal law, international law, the law of a foreign jurisdiction or the law of the lawyer's home state.

7. Work by a lawyer who is an employee of a client or its commonly owned organizational affiliates.

8. Services in a jurisdiction in which the lawyer is not licensed when authorized to do so by Federal Law or by the law or a court rule.

Recommendation 3 also states that the ABA should adopt proposed Model Rule 5.5(e) to prohibit a lawyer from establishing an office, maintaining a continuous presence, or holding out as authorized to practice law in a jurisdiction in which the lawyer is not admitted, unless permitted to do so by law or this rule.

Recommendation 4: The ABA should endorse a model "admission on motion" rule consistent with the one proposed by the ABA Section of Legal Education and Admissions to the Bar to facilitate the licensing of a lawyer by a host state if the lawyer has been engaged in active law practice in other United States jurisdictions for a significant period of time.

Recommendation 5: The ABA should encourage jurisdictions that have not adopted a foreign legal consultant rule to do so consistent with ABA policy.

Recommendation 6: The ABA should endorse a model *pro hac vice* rule consistent with the one under development by the ABA Section of Litigation, the ABA Section of Torts and Insurance Practice and the International Association of Defense Counsel, to govern the admission of lawyers to practice before state courts and government agencies *pro hac vice* in jurisdictions in which the lawyers are not licensed.

Recommendation 7: The ABA should amend Rule 8.5 of the Model Rules of Professional Conduct (Disciplinary Authority; Choice of Law), and adopt and promote other measures to enhance professional regulation and disciplinary enforcement with respect to lawyers who, pursuant to the above

recommendations, practice law in jurisdictions other than those in which they are licensed. Those measures are found in Rules 6 and 22 of the Model Rules of Disciplinary Enforcement.

Recommendation 8: The ABA should establish a Coordinating Committee on Multijurisdictional Practice to monitor changes in law practice and the impact of regulatory reform, and to identify additional reform that may be needed.

The recommendations are more fully discussed below.

Discussion of ABA Recommendations

Recommendation 1: The ABA should affirm its support for the principle of state judicial licensing and regulation of lawyers.

Several of the proposals presented to the ABA in the study of this issue recommended a “driver’s license” or “green card” approach to the problem. These approaches would allow a lawyer admitted in the United States to practice nationally without restrictions and regardless of the host state’s licensing requirements. Recommendation 1 rejects these approaches and instead recognizes the importance of individual state licensing and regulation. In so doing, the ABA does not dispute that the multijurisdictional practice of law is taking place on a regular basis. However, the ABA recommends that “safe harbors,” rather than a national license to practice law, is in the best interests of the public and the judiciary. While recognizing the multijurisdictional nature of today’s practice of law, the ABA Commission felt that a stronger case for national licensing rather than a more measured approach would need

to be made before such a drastic step is taken. As that case had not been made yet, the ABA Commission felt that “for the present, an effort should be made to identify those particular interstate practices . . . that should explicitly be permitted, because client choice and other interests in favor of multijurisdictional law practice outweigh the countervailing regulatory interests” that exist today. ⁴

Recommendation 2: The ABA should amend Rule 5.5(B) of the Model Rules of Professional Conduct (Unauthorized Practice of Law) to provide that, as a general rule, it is not the unauthorized practice of law for a lawyer admitted in another United States jurisdiction to render legal services on a temporary basis in a jurisdiction in which the lawyer is not admitted if the lawyer’s services do not create an unreasonable risk to the interests of a lawyer’s client, the public or the courts.

Rule 5.5 of the model rules currently provides that a lawyer may not practice law in a jurisdiction where doing so violates the regulations of that jurisdiction. Recommendation 2 would keep this general rule intact while at the same time establishing an exception to the general rule. The exception would allow a lawyer to practice law on a temporary basis in a jurisdiction where the lawyer is not admitted if it does not create an unreasonable risk to the client, the public or the courts by stating that such activity is not the unlicensed practice of law. The exception recognizes that “under certain circumstances, it is in the public interest for a lawyer admitted in one United States jurisdiction to be allowed to render legal services in another United States jurisdiction . . . and [if] doing so does not create an unreasonable risk to the

interests of the lawyer's client, the public or the courts.”⁵ Recommendation 3 sets forth an illustrative, non-exclusive list of “safe harbors” in which the exception would apply.

Recommendation 3: The ABA should adopt proposed Model Rule 5.5(c) - (e) to identify “safe harbors” that embody specific applications of the general principle stated in recommendation 2; to identify other appropriate “safe harbors;” and to make clear that, except where authorized by law or rule, a lawyer may not establish an office, maintain a continuous presence, or hold himself or herself out as authorized to practice law in a jurisdiction where the lawyer is not licensed to practice law.

Recommendation 3 has several subparts, all of which establish “safe harbors” which would allow an lawyer to practice law in the host state without engaging in the unlicensed practice of law. The recommendations are as follows:

1. The ABA should adopt proposed Model Rule 5.5(c)(1) to allow work as co-counsel with a lawyer admitted to practice in the jurisdiction.

The first “safe harbor” would allow a lawyer to practice law in the host jurisdiction on a temporary basis where the lawyer associates local counsel who actively participates in the representation and shares responsibility for the representation. It would also allow a lawyer in a multistate firm to render services on a temporary basis in the firm's office in the host state as long as the lawyer is in a true co-counsel relationship with admitted members of the firm. The “safe harbor” would

not, however, allow the lawyer's presence on a permanent basis.

2. The ABA should adopt proposed Model Rule 5.5(c)(2) to allow lawyers to perform professional services that any non-lawyer is legally permitted to render.

This "safe harbor" recognizes that there are certain activities which are generally considered the practice of law but which nonlawyers are authorized to perform. The "safe harbor" would allow lawyers to engage in the activities as well. In providing the services, the out-of-state lawyer would remain subject to the rules of professional conduct of the host state.

3. The ABA should adopt proposed Model Rule 5.5(c)(3) to allow lawyers to perform work ancillary to pending or prospective litigation.

This "safe harbor" would allow a lawyer to practice law on a temporary basis in the host state if the work is in anticipation of litigation reasonably expected to be filed in the lawyer's home state or litigation reasonably expected to be filed in the host state if *pro hac vice* admission is also anticipated. The "safe harbor" would also allow the lawyer to provide legal services if the work is ancillary to pending litigation in which the lawyer is appearing either because of licensure or *pro hac vice* admission. For actual appearance before a tribunal, *pro hac vice* admission is still required – the "safe harbor" would, however, allow work to be done before the litigation is filed or in a state other than where the litigation is filed. This recommendation also includes

amending the comment to the rule to make it clear that lawyers not admitted *pro hac vice* or licensed in the state could provide supporting services to the lawyers so admitted.

4. The ABA should adopt Proposed Model Rule 5.5(c)(4) to allow representation of a client in an arbitration, mediation or other ADR setting.

This “safe harbor” would allow the lawyer to appear in the host state on a temporary basis in connection with the representation of clients in pending or anticipated arbitration, mediation or other alternative dispute resolution proceedings were there is no *pro hac vice* admission rule. The “safe harbor” does not address the work of arbitrators, mediators and other neutrals serving in non-representative roles.

5. The ABA should adopt Proposed Model Rule 5.5(c)(5) to allow transactional representation, counseling and other non-litigation work as long as the work in the host state is on behalf of a client in the home state in connection with a matter in the lawyer’s home state.

As stated in the report, the ABA Commission “recommends that, on a temporary basis, a lawyer be permitted to render non-litigation services outside the lawyer’s home state when the lawyer’s work is reasonably related to legal work that is performed in and has a close connection to the lawyer’s home state.”⁶ The work in the host state would have to be on behalf of a client in the home state or be in connection with a matter in the lawyer’s home state. This “safe harbor” would cover work that is

ancillary to work in the home state and would allow the lawyer to work on related matters for a client. The presence in the host state must be temporary and there must be a reasonable relationship between the lawyer's activities in the host state and the lawyer's activities in the home state. One example given is a lawyer assisting a corporate client in opening stores in several different states.

6. The ABA should adopt Proposed Model Rule 5.5(c)(6) to allow lawyers to provide temporary services involving primarily federal law, international law, the law of a foreign nation or the law of the lawyer's home state.

This "safe harbor" would allow a lawyer to render non-litigation services involving federal, international, foreign law or the law of the lawyer's home state in the host state on a temporary basis.

7. The ABA should adopt Proposed Model Rule 5.5(d)(1) to provide that it is not unauthorized practice of law for a lawyer admitted in another United States jurisdiction to render legal services in a jurisdiction in which the lawyer is not admitted, other than work for which *pro hac vice* admission is required, if the lawyer is an employee of a client or its commonly owned organizational affiliates.

This "safe harbor" would allow an in-house corporate lawyer or government lawyer to render legal services to their employer or affiliated entity on a temporary or permanent basis. The "safe harbor" would not allow representation before a tribunal that requires *pro hac vice* admission without first being so admitted.

8. The ABA should adopt Proposed Model Rule 5.5(d)(2) to provide

that a lawyer may perform legal services in a jurisdiction in which the lawyer is not licensed when authorized to do so by federal law or by the law or a court rule.

This “safe harbor” is self explanatory and was added to the rule to codify established practice and procedure. It allows a lawyer to continue to do that which the lawyer is already allowed to do.

9. The ABA should adopt Proposed Model Rule 5.5(e) to prohibit a lawyer from establishing an office, maintaining a continuous presence, or holding out as authorized to practice law in a jurisdiction in which the lawyer is not admitted, unless permitted to do so by law or this rule.

As all of the “safe harbors,” with the exception of number 7 above relating to corporate and government lawyers, contemplate a temporary practice, the ABA Commission recommends this provision to make the limitations clear. Under no circumstances may a lawyer hold out as being licensed to practice in the host state.

Recommendation 4: The ABA should endorse a model “admission on motion” rule consistent with the one proposed by the ABA Section of Legal Education and Admission to the Bar to facilitate the licensing of a lawyer by a host state if the lawyer has been engaged in active law practice in other United States jurisdictions for a significant period of time.

Unlike the “safe harbors,” this recommendation encourages the states to adopt a rule which would allow a lawyer from another state to become admitted to the practice of law on motion only. The recommendation is not an alternative to the “safe harbors” as it would only be used by lawyers who want to establish a permanent,

regular practice in another jurisdiction. The model rule referred to in the recommendation would allow a lawyer to become licensed to practice law in the new state if 1) the lawyer is licensed and in good standing in any state, territory or the District of Columbia; 2) has graduated from an ABA accredited school; 3) has been in the active practice of law for five of the past seven years; 4) has obtained a passing score (as set by the state in which the lawyer wishes to become admitted) on the Multistate Professional Responsibility Examination and 5) the lawyer possess the character and fitness to practice law in the new jurisdiction. The lawyer would not have to meet the other normal bar admission requirements. Once admitted on motion under the proposed rule, all of the bar rules and requirements of the new state would apply to that lawyer. For this reason, the ABA Commission was of the opinion that lawyers wishing to practice on a temporary basis would not take advantage of admission on motion.

Recommendation 5: The ABA should encourage jurisdictions that have not adopted a foreign legal consultant rule to do so consistent with ABA policy.

This recommendation has two parts. The first part recommends that the ABA encourage states to adopt a foreign legal consultancy rule. Generally speaking, this rule would allow a lawyer admitted in another country to establish an office in the United States to provide legal advice and services on the law of the country where the

lawyer is admitted. The second part of the recommendation is to amend the ABA Model Rule for the Licensing of Legal Consultants to allow such practice on a temporary basis or to clarify the circumstance under which a temporary practice may occur.

Recommendation 6: The ABA should endorse a model *pro hac vice* rule consistent with the one under development by the ABA Section of Litigation, the ABA Section of Torts and Insurance Practice and the International Association of Defense Counsel, to govern the admission of lawyers to practice before state courts and government agencies *pro hac vice* in jurisdictions in which the lawyers are not licensed.

This recommendation endorses standardization of a *pro hac vice* rule to govern the admission of lawyers to practice before state courts and government agencies *pro hac vice* in jurisdictions in which the lawyers are not licensed. It also recommends that the United States District Courts eliminate the requirement of state bar membership for membership in the District Courts. This latter recommendation would have to be implemented through amendment of the Federal Rules of Civil and Criminal Procedure.

Recommendation 7: The ABA should amend rule 8.5 of the Model Rules of Professional Conduct (Disciplinary Authority; Choice of Law), and adopt and promote other measures to enhance professional regulation and disciplinary enforcement with respect to lawyers who, pursuant to the above recommendations, practice law in jurisdictions other than those in which they are licensed.

This recommendation recognizes that in order for the public and profession to

be protected in a multijurisdictional practice climate, lawyers who practice across state lines must be subject to meaningful disciplinary sanctions. This recommendation contains three parts.

1. The ABA should amend Rule 8.5 (Disciplinary Authority, Choice of Law) of the Model Rules Of Professional Conduct in order to better address multijurisdictional law practice.

Rule 8.5 of the Model Rules of Professional Conduct is entitled Disciplinary Authority, Choice of Law. The amendment, proposed by the Ethics 2000 Commission, would clarify that a lawyer not admitted in the host jurisdiction is subject to the disciplinary authority of the host jurisdiction when rendering legal services in that jurisdiction. The rules to be applied (choice of law) would be that of the jurisdiction in which the lawyer's conduct occurred or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction would be applied. The proposal is consistent with current ABA policy.

2. The ABA should amend Rules 6 and 22 of the Model Rules Of Disciplinary Enforcement to promote effective disciplinary enforcement when lawyers engage in multijurisdictional practice of law and should renew efforts to encourage states to adopt Rule 22, which provides for reciprocal discipline.

This recommendation acknowledges that in order for any discipline to be effective, the home state must impose discipline for activities occurring in the host state. As stated in the report, "the host jurisdiction may suspend or disbar the lawyer

from practicing in that particular jurisdiction, but doing so would not in itself deprive the lawyer of the right to practice law in the lawyer's home jurisdiction or in other jurisdictions." ⁷ To accomplish this, the recommended amendments to rule 6 provide that a lawyer who renders legal services in a jurisdiction is subject to the disciplinary authority of that jurisdiction. Rule 22 would require the home jurisdiction to accept and reciprocally enforce another jurisdiction's disciplinary decisions. The discipline imposed in the home state would be based on the record created in the host state. The discipline imposed by the home state would have to be identical to that imposed by the host state unless the procedure used in the host state was so lacking in notice and opportunity to be heard that it constitutes a deprivation of due process, there is a clear conviction on the part of the court of the home state that the record is lacking in proof of the misconduct, the discipline imposed is against public policy or would result in a grave injustice or the reason for the original transfer to disability inactive status no longer exists.

3. The ABA should take steps to promote interstate disciplinary enforcement mechanisms.

This recommendation encourages the ABA to enhance its National Lawyer Regulatory Data Bank, a national clearinghouse for information about lawyers who have been publicly disciplined. The recommendation also asks the ABA to encourage the states to adopt the International Standard Lawyer Numbers system, to require

lawyers to list all states in which they are admitted to practice in their annual registration and to report any changes in the lawyer's ability to practice law to the other states.

Recommendation 8: The ABA should establish a coordinating committee on multijurisdictional practice to monitor changes in law practice and the impact of regulatory reform, and to identify additional reform that may be needed.

The coordinating committee which this recommendation contemplates would be located within the ABA Center for Professional Responsibility and would coordinate the continued study of the multijurisdictional practice of law and make recommendations when needed. No recommendation as to the composition of the coordinating committee is made.

IV. FLORIDA MJP COMMISSION RECOMMENDATIONS

After much study and debate, the Commission makes the following recommendations to the Board of Governors of The Florida Bar. All of the endorsements and recommendations discussed in this report are made with the understanding that they will be most effective if they are implemented by the various states. It may be possible to have some variation in what is actually adopted, but the central principles must be the same.

List of Commission Recommendations

- Recommendation 1: The Commission endorses the ABA recommendation to continue to affirm its support for the principle of state judicial licensing and regulation of lawyers.
- Recommendation 2: The Commission does not endorse the amendment of Rule 5.5(b) of the Model Rules of Professional Conduct (Unauthorized Practice of Law) proposed by the ABA.
- Recommendation 3: The Commission modifies the ABA recommendation to adopt proposed Model Rule 5.5(c) - (e) to identify “safe harbors” allowing a lawyer to practice in another state. The Commission would make the list of “safe harbors” exclusive and would add a provision preventing lawyers who are no longer eligible to practice in the host state from practicing under a “safe harbor.”
1. The Commission endorses the ABA recommendation to adopt proposed Model Rule 5.5(c)(1) to allow work as co-counsel with a lawyer admitted to practice in the jurisdiction if it is made clear that the local lawyer share actual responsibility for the representation.

2. The Commission endorses the ABA recommendation to adopt proposed Model Rule 5.5(c)(2) to allow lawyers to perform professional services that any non-lawyer is legally permitted to render as long as it is made clear that the lawyer is performing the services as a lawyer and remains subject to the Rules of Professional Conduct.
3. The Commission endorses the ABA recommendation to adopt proposed Model Rule 5.5(c)(3) to allow lawyers to perform work ancillary to pending or prospective litigation if the lawyer is authorized by law to appear in the proceeding or reasonably expects to be so authorized.
4. The Commission does not endorse the recommendation of the ABA to adopt proposed Model Rule 5.5(c)(4) to allow representation of a client in any arbitration, mediation or other ADR setting. The Commission endorses adopting a “safe harbor” which would allow representation in ADR matters if a nexus is established.
5. The Commission endorses the ABA recommendation to adopt proposed Model Rule 5.5(c)(5) to allow transactional representation, counseling and other non-litigation work where the work is performed for a client who resides in or has an office in the lawyer’s home state or where the work arises out of or is reasonably related to a matter that has a substantial connection to the lawyer’s home state.
6. The Commission does not endorse the ABA recommendation to adopt proposed Model Rule 5.5(c)(6) to allow lawyers to provide temporary services involving primarily federal law, international law, the law of a foreign nation or the law of the lawyer’s home state.
7. The Commission does not endorse the ABA recommendation regarding corporate counsel and instead recommends that a rule similar to The Florida Bar’s Authorized House Counsel rule be adopted as providing more protection to the public.
8. The Commission does not endorse the ABA recommendation to adopt proposed Model Rule 5.5(d)(2) to provide that a lawyer may perform legal services in a jurisdiction in which the lawyer is not licensed when authorized to do so by federal law or by the law or a court rule as the rule

is not needed.

9. The Commission endorses the ABA recommendation, to adopt proposed Model Rule 5.5(e) to prohibit a lawyer from establishing an office, maintaining a continuous presence, or holding out as authorized to practice law in a jurisdiction in which the lawyer is not admitted, unless permitted to do so by law or this rule, with some changes to further strengthen the rule.

Recommendation 4: The Commission does not endorse the ABA recommendation to adopt a model “admission on motion” rule.

Recommendation 5: The Commission supports the concept of a foreign legal consultant rule but does not endorse the rule proposed by the ABA and does not endorse amending the rules to allow for a temporary presence.

Recommendation 6: The Commission supports the concept of a model *pro hac vice* rule but does not endorse the adoption of the rule proposed by the ABA.

Recommendation 7: The Commission endorses the ABA recommendation to adopt and promote measures to enhance professional regulation and disciplinary enforcement with respect to lawyers who, pursuant to the above recommendations, practice law in jurisdictions other than those in which they are licensed.

1. The Commission agrees with the ABA recommendation to amend Rule 8.5 of The Model Rules of Professional Conduct in order to better address multijurisdictional law practice with some modification of the proposal.
2. The Commission considers the ABA recommendation to amend Rules 6 and 22 of the Model Rules of Disciplinary Enforcement a good first step in promulgating rules to promote effective disciplinary enforcement when lawyers engage in multijurisdictional practice of law. The Commission recommends a modification of the proposal.

3. The Commission endorses the recommendation that the ABA take steps to promote interstate disciplinary enforcement mechanisms.

Recommendation 8: The Commission endorses the ABA recommendation to establish a Coordinating Committee on Multijurisdictional Practice to monitor changes in law practice and the impact of regulatory reform, and to identify additional reform that may be needed.

Unless noted otherwise, all actions were by unanimous vote of the members attending.

The recommendations are discussed in more detail below.

Discussion of Commission Recommendations

Recommendation 1: The Commission endorses the ABA recommendation to continue to affirm its support for the principle of state judicial licensing and regulation of lawyers.

The Commission agrees with the ABA recommendation and endorses it. While the other approaches presented to the ABA (green card, driver's license and common sense) were discussed, the Commission agrees that it is in the best interest of the public and the judicial system as a whole to keep the principle of state judicial licensing and regulation of lawyers intact. This system has a proven history of success and is in place to protect the public and the judicial system by ensuring that those who are licensed to practice law have the requisite knowledge of the state's law and the necessary character and fitness to practice. As stated in the ABA Interim Report, "by limiting law practice in the state to those whom the state judiciary, through its

admission process, has deemed to be qualified to practice law in the state, they promote the state interest in ensuring that those who represent clients in the state are competent to do so.”⁸ The other approaches fail to ensure this competence and, in the opinion of the Commission, fail to protect the public. Therefore, the Commission agrees with the ABA that state regulation should continue.

Recommendation 2: The Commission does not endorse the amendment of Rule 5.5(b) of the Model Rules of Professional Conduct (Unauthorized Practice of Law) proposed by the ABA.

As discussed above, the Commission endorses the recommendation that states continue the licensing and regulation of the practice of law. Recommendation 2 seems contrary to this continued regulation. It is broad, generic and unnecessary. Rather than supporting state regulation, recommendation 2 is a major liberalization of the current rules and would basically allow the practice of law in any state as long as it is on a temporary basis. What is considered an “unreasonable risk” is vague, unenforceable and essentially meaningless. The Commission therefore does not endorse this recommendation.

The ABA Interim Report seems to suggest that proposed Model Rule 5.5(b) is necessary in order for the “safe harbors” in proposed Model Rule 5.5(c) to work. (A copy of proposed Model Rule 5.5 is attached in Appendix “A.”) The Commission disagrees and believes you can have meaningful “safe harbors” without

recommendation 2. Where recommendation 2 would allow a broad, general practice, the “safe harbors” reflect the needs of modern practice and at the same time limit the opportunities to engage in the multijurisdictional practice of law. Although the ABA Interim Report states that the list of “safe harbors” in proposed Model Rule 5.5(c) - (e) are illustrative and not exclusive, the Commission believes they cover most areas of current practice and that the language of proposed Model Rule 5.5(b) is not necessary. If further study or changes in the practice of law show that other “safe harbors” are needed, they can be added.

Moreover, it is the Commission’s opinion that proposed Model Rule 5.5(b) creates a struggle between the first recommendation and the “safe harbor” recommendations that follow. One such struggle takes place in devising a rule which would require the lawyer coming into the host state to support the regulatory system of the host state. For example, how would the out-of-state lawyer contribute to the disciplinary system? Florida lawyers contribute each year when they pay their fees. Would the out-of-state lawyer have to comply with the host state’s continuing legal education and pro bono requirements? If so, how would the host state keep track and know that the requirements are being met? The Commission, as well as the ABA Commission, discussed these issues and could not arrive at a conclusion. They are difficult issues which are made more difficult by the differences in state licensing,

regulation and other bar requirements. Recommendation 2 only enhances the difficulties by erasing jurisdictional boundaries for anyone practicing law on a temporary basis.

On the other hand, the “safe harbors” “identify circumstances in which jurisdictional restrictions do not serve the public interest because they impose an unnecessary obstacle to clients’ ability to hire counsel of their choice, make the provision of legal services, particularly with respect to interstate matters, unnecessarily expensive or inefficient, or otherwise thwart the public interest in enabling clients to meet their legal needs.”⁹ The Commission believes that adopting “safe harbors” which identify these circumstances better serves and protects the public and the judicial system than the broad authority of recommendation 2.

Recommendation 3: The Commission modifies the ABA recommendation to adopt proposed Model Rule 5.5(c) - (e) to identify “safe harbors” allowing a lawyer to practice in another state. The Commission would make the list of “safe harbors” exclusive and would add a provision preventing lawyers who are no longer eligible to practice in the host state from practicing under a “safe harbor.”

Although the Commission does not endorse ABA recommendation 2 discussed above, the Commission agrees that specific “safe harbors” should be established which would allow an out-of-state lawyer to practice in the host state on a temporary basis and under certain circumstances. The Commission recognizes that lawyers practice in other states on a regular basis. Lawyers can and do cross state lines without leaving

their desks. Unfortunately, the current rules in this regard have not kept up with the advances in technology and the changing face of the practice of law. The rules as currently written are archaic and not reflective of the modern practice of law. There needs to be more flexibility. While the current rules need to be modernized, the Commission believes the rules should only be changed to the extent necessary while at the same time preserving as much of the existing system of regulation and state admission as possible. Therefore, the Commission agrees with the ABA that some guidance is necessary. However, the Commission is of the opinion that the ABA proposals need refinement for clarity and greater protection of the public in certain areas. In some places they go too far or have the possibility of effecting the core values of state regulation discussed above. Where such deficiencies are noted, suggested changes are proposed.

One area in which the Commission finds that the core values of state regulation are not addressed is in the area of disciplined lawyers. The Commission strongly believes that lawyers disciplined in the home state should not be able to use licensure in another state to continue to practice law in the home state. For example, a lawyer licensed in Florida and Georgia but subsequently disbarred in Florida, should not be able to use the Georgia license to practice law in Florida on a temporary basis. The ABA proposals are silent on this issue. Therefore, the Commission recommends that

the following language adapted from Florida Rule of Judicial Administration 2.061 be added to the proposed Model Rule 5.5(e):¹⁰

Furthermore, no lawyer is authorized to provide legal services pursuant to this rule if the lawyer (1) is an inactive or suspended member of this jurisdiction, or has been disbarred or has received a disciplinary resignation from this jurisdiction; or (2) has previously been disciplined or held in contempt by reason of misconduct committed while engaged in the practice of law permitted pursuant to this rule.

The specific “safe harbors” are discussed below.

1. The Commission endorses the ABA recommendation to adopt proposed Model Rule 5.5(c)(1) to allow work as co-counsel with a lawyer admitted to practice in the jurisdiction if it is made clear that the local lawyer share actual responsibility for the representation.

The Commission endorses the co-counsel “safe harbor” if certain language is added to the official comment. First, it should be made clear that this “safe harbor” applies to litigation services, transactional services and other legal services. Although this is implied, the Commission believes it needs to be specifically stated. It also needs to be made clear that the relationship between the local lawyer and the out-of-state lawyer is more akin to a co-counsel relationship rather than an association in name only. In this regard, the Commission recommends that the following language adapted from the ABA Interim Report be added to the official comment:

For this exception to apply, the lawyer admitted to practice in the [host] jurisdiction could not serve merely as a conduit for the out-of-state lawyer, but

would have to share actual responsibility for the representation and actively participate in the representation.¹¹

The proposed language acts more as a clarification than an addition. While the report makes it clear that the relationship is closer to a co-counsel relationship, the language of the proposed Model Rule and official comment is not as strong. Mere association in name only does little to protect the public and will allow a multijurisdictional practice to take place relatively unchecked.

2. The Commission endorses the ABA recommendation to adopt proposed Model Rule 5.5(c)(2) to allow lawyers to perform professional services that any non-lawyer is legally permitted to render as long as it is made clear that the lawyer is performing the services as a lawyer and remains subject to the Rules of Professional Conduct.

The Commission agrees with the ABA that it would be anomalous to allow non-lawyers to perform a service while prohibiting a duly licensed lawyer to do the same. Hiring a lawyer who is acting as a lawyer to perform the service can only benefit the client by adding a level of competency and professional responsibility which is not available when hiring a non-lawyer to perform the same service.

The Commission endorses this “safe harbor” if the following language is added to the official comment:

When performing services under this paragraph, the lawyer does so as a lawyer and remains subject to the Rules of Professional Conduct of the host state.

Again, the report makes it clear that such restrictions would apply but the comment is

not as strong. The Commission endorses this “safe harbor” with the change as providing better protection to the public.

Adoption of this “safe harbor” underscores the importance of adopting the Commission’s language proposed in recommendation 3 prohibiting disbarred and resigned lawyers from practicing under any of the “safe harbors.” A disbarred or resigned lawyer is considered a non-lawyer.¹² Without the limiting language, the disbarred lawyer would be able to provide legal services any other non-lawyer would be able to provide thereby reducing the effectiveness of the disbarment.

3. The Commission endorses the ABA recommendation to adopt proposed Model Rule 5.5(c)(3) to allow lawyers to perform work ancillary to pending or prospective litigation if the lawyer is authorized by law to appear in the proceeding or reasonably expects to be so authorized.

The Commission endorses the ABA’s recommendation. The Commission believes that allowing pre-litigation activities and activities ancillary to pending litigation under the restrictions set forth in the proposed Model Rule – that there is a reasonable expectation that *pro hac vice* admission will be granted – adequately protects the public. The protection comes from the nexus established between the services and the anticipated court approval. Where the lawyer has appeared *pro hac vice* too many times or is subject to a disciplinary restriction, there can be no reasonable expectation, and therefore, no “safe harbor” offered by this rule.

Additionally, the Commission believes that prohibiting such activity is not in the public interest as the client is not able to have the lawyer of their choice perform the services. It is incongruous to allow the client to choose a lawyer to actually appear in court while at the same time preventing the client from having the same lawyer perform services before the litigation is actually filed. The proposed Model Rule will correct this.

4. The Commission does not endorse the recommendation of the ABA to adopt proposed Model Rule 5.5(c)(4) to allow representation of a client in any arbitration, mediation or other ADR setting. The Commission endorses adopting a “safe harbor” which would allow representation in ADR matters if a nexus is established.

The ABA recommendation appears to allow unlimited representation in the alternative dispute resolution (ADR) setting as there is no nexus requirement between the client and the lawyer or the lawyer and the tribunal. As worded, the proposed Model Rule would allow representation without restriction. For this reason, the Commission does not endorse this recommendation unless a nexus requirement is established.

The nexus requirement which the Commission recommends is that found in proposed Model Rule 5.5(c)(5) and would require that the client reside or have an office in the jurisdiction where the lawyer is authorized to practice or that the ADR proceeding arise out of or be reasonably related to a matter that has a substantial

connection to a jurisdiction in which the lawyer is admitted to practice. Adopting such a requirement would prevent lawyers from coming into other states for ADR proceedings where there is no connection to the client or the home jurisdiction. Such a nexus will prevent solicitation and add a level of protection which is absent from the ABA proposal.

5. The Commission endorses the ABA recommendation to adopt proposed Model Rule 5.5(c)(5) to allow transactional representation, counseling and other non-litigation work where the work is performed for a client who resides in or has an office in the lawyer's home state or where the work arises out of or is reasonably related to a matter that has a substantial connection to the lawyer's home state.

The Commission, with one dissent, endorses the recommendation of the ABA to allow a "safe harbor" in transactional practice if certain nexus requirements are met. The Commission, with one dissent, also endorses paragraph 10 of the official comments as they relate to this proposed Model Rule.

It is the opinion of a majority of the Commission members that the proposed language of Model Rule 5.5(c)(5) puts litigation and non-litigation (transactional) lawyers on the same footing. Lawyers wishing to represent someone in litigation matters are operating under the supervision of the court. If the lawyer engages in unethical conduct, the court, or the bar, may impose discipline. The supervision of the court serves to protect the public.

Proposed Model Rule 5.5(c)(5) allows a lawyer to provide transactional services

in the host state if the services are performed for a client who resides in or has an office in the home state or where the services arise out of or are reasonably related to a matter that has a substantial connection to the home state. The nexus requirement of this recommendation establishes protection similar to that provided by court supervision by requiring a connection between the client or services and the home state. If the lawyer engages in unethical conduct, the connection with the home state will allow the home state to impose discipline. Without the nexus requirement, the only limitation on the lawyer's ability to practice in other states is that the practice must be temporary.

The recommendation also allows the lawyer to more fully, competently and adequately represent the client if the representation requires that services be performed in another state. By the same token, it allows the client a reasonable opportunity to hire a lawyer of their choosing to represent them in the transaction. The nexus requirement adds a level of protection that would otherwise be unavailable.

The dissenting member of the Commission believes that the recommendation actually puts transactional lawyers on a different footing from litigation lawyers and recommends that the nexus be "with respect to a counseling or transactional matter that arises out of or is reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is authorized to practice." The member also believes that the recommendation actually restricts the client's choice of lawyer as there has to be a

nexus with the home state. The majority of the Commission disagrees with these concerns. A client is free to choose a lawyer who does not meet the “safe harbor” requirements of this recommendation if the lawyer meets another “safe harbor” requirement. For example, the client may hire a lawyer in the host state if the lawyer then associates local counsel as provided for in the “safe harbor” established by proposed Model Rule 5.5(c)(1). The client is thereby protected by the active involvement of a lawyer admitted in the host state. For all of these reasons, a majority of the Commission endorses this recommendation.

6. The Commission does not endorse the ABA recommendation to adopt proposed Model Rule 5.5(c)(6) to allow lawyers to provide temporary services involving primarily federal law, international law, the law of a foreign nation or the law of the lawyer’s home state.

The Commission does not endorse this recommendation for several reasons. First, there is no nexus requirement thereby eliminating a level of public protection.

More importantly, the activity should be covered by the other “safe harbors” or it is too broad. Adoption of this “safe harbor” renders the other “safe harbors” meaningless.

As the Commission finds this recommendation unnecessary and lacking in public protection, the Commission recommends against adoption of proposed Model Rule 5.5(c)(6).

7. The Commission does not endorse the ABA recommendation regarding corporate counsel and instead recommends that a rule similar to The Florida Bar’s Authorized House Counsel rule be adopted as providing

more protection to the public.

Unlike the other “safe harbors,” this recommendation would allow a lawyer to work in the host state on a temporary or permanent basis if the lawyer is an employee of the client or its commonly owned affiliates. Like many other jurisdictions, Florida has a rule which allows a lawyer admitted in another state to establish a permanent presence in Florida to act as in-house counsel for the lawyer’s corporate employer. The rule, Chapter 17 of the Rules Regulating The Florida Bar, has several safeguards which are not in the proposed Model Rule. (A copy of Chapter 17 is attached in Appendix “B.”) For example, the lawyer must register with The Florida Bar and provide evidence of good standing and lack of disciplinary history. The services which the lawyer may perform are limited to those which aid the corporate employer and do not include appearance in court. The lawyer must pay yearly fees and abide by the Rules of Professional Responsibility. The lawyer must also comply with The Florida Bar’s continuing legal education requirements.

As Florida has a rule in place which allows for the permanent presence of the out-of-state lawyer, the Commission rejects the ABA’s recommendation. Instead, the Commission would encourage the adoption of a rule similar to that found in Chapter 17. Although Florida’s rule does not allow for temporary presence, the Commission believes that Chapter 17 adequately addresses the issues involved in multijurisdictional

and corporate practice while at the same time adding a level of protection and regulation not found in proposed Model Rule 5.5(d)(1). Moreover, the lawyer wishing to practice as in-house counsel for a corporation on a temporary basis could, in most cases, do so under one of the other “safe harbors”. For example, as the work is transactional in nature (the Florida rules and the ABA’s proposal prohibit appearance in litigation) and the client either resides in or has an office in the lawyer’s home state, the nexus requirements of proposed Model Rule 5.5(c)(5) are met and this “safe harbor” would allow the temporary presence.

8. The Commission does not endorse the ABA recommendation to adopt proposed Model Rule 5.5(d)(2) to provide that a lawyer may perform legal services in a jurisdiction in which the lawyer is not licensed when authorized to do so by federal law or by the law or a court rule as the rule is not needed.

The Commission finds this recommendation redundant and does not endorse its adoption. Basically, the proposed Model Rule says that if the law or a court rule allows a lawyer to engage in a certain activity, the lawyer can engage in the activity. If a law or rule already allows the lawyer to engage in the activity, a rule stating such is not necessary. As the proposed Model Rule does not add anything to the existing rules and law, the Commission finds that its adoption is not needed.

9. The Commission endorses the ABA recommendation, to adopt proposed Model Rule 5.5(e) to prohibit a lawyer from establishing an office, maintaining a continuous presence, or holding out as authorized to practice law in a jurisdiction in which the lawyer is not admitted, unless

permitted to do so by law or this rule, with some changes to further strengthen the rule.

The Model Rule proposed by the ABA reads as follows:

Except as authorized by these rules or other law, a lawyer who is not admitted to practice in this jurisdiction shall not (i) establish an office or *other permanent* presence in this jurisdiction for the practice of law; or (ii) represent or hold out to the public that the lawyer is admitted to practice law in this jurisdiction. (Emphasis supplied.)

The Commission endorses this recommendation if “other permanent” is changed to “regular.” The section would therefore read “establish an office or regular presence in this jurisdiction.” The Commission feels that making this change makes the rule stronger as it would prevent the out-of-state lawyer from coming to the host jurisdiction on anything other than a temporary basis. It therefore compliments the first recommendation which recognizes the importance of state judicial licensing and regulation of lawyers.

This is also the section where the Commission recommends adding the following language:

Furthermore, no lawyer is authorized to provide legal services pursuant to this rule if the lawyer (1) is an inactive or suspended member of this jurisdiction, or has been disbarred or has received a disciplinary resignation from this jurisdiction; or (2) has previously been disciplined or held in contempt by reason of misconduct committed while engaged in the practice of law permitted pursuant to this rule.

Therefore, the rule as proposed by the Commission would read:

5.5(e) – Except as authorized by these rules or other law, a lawyer who is not admitted to practice in this jurisdiction shall not (i) establish an office or regular presence in this jurisdiction for the practice of law; or (ii) represent or hold out to the public that the lawyer is admitted to practice law in this jurisdiction. Furthermore, no lawyer is authorized to provide legal services pursuant to this rule if the lawyer (1) is an inactive or suspended member of this jurisdiction, or has been disbarred or has received a disciplinary resignation from this jurisdiction; or (2) has previously been disciplined or held in contempt by reason of misconduct committed while engaged in the practice of law permitted pursuant to this rule.

Recommendation 4: The Commission does not endorse the ABA recommendation to adopt a model “admission on motion” rule.

The Commission opposes the adoption of a national or model “admission on motion” rule. (A copy of the proposed Model Rule regarding admission on motion is attached in Appendix “C.”) The Commission endorses the principle that jurisdictions should continue to exercise their licensing authority on an individual basis in determining the competency of their lawyers and agrees 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. ¹³

Recommendation 4 substantially eliminates the opportunity to fulfill this duty.

Moreover, recommendation 4 seems contrary to recommendation 1 regarding state licensing and contrary to the goal of protecting the public. The proposed rule is

unclear on whether the lawyer must meet the character and fitness requirements of the state in which the lawyer wishes to become licensed on motion. Although the proposed rule requires successful completion of the Multistate Professional Responsibility Examination, the lawyer is not required to be tested on the law of the state thereby limiting a level of protection now afforded by state licensing requirements. Admission on motion also puts at a disadvantage those states with high admission requirements. Why would someone sit for The Florida Bar examination when they could take the examination in another state and become licensed here after practicing for a set number of years? For all of these reasons, the Commission does not endorse recommendation 4.

Recommendation 5: The Commission supports the concept of a foreign legal consultant rule but does not endorse the rule proposed by the ABA and does not endorse amending the rules to allow for a temporary presence.

This recommendation has two parts. The first recommends the adoption of the ABA's Model Rule for the Licensing of Legal Consultants. (A copy of the Model Rule is attached in Appendix "D.") The second part recommends that the Model Rule be amended to allow a foreign lawyer to practice in a host state in the United States on a temporary basis. The Commission does not endorse either recommendation.

The Commission is not opposed to the adoption of a rule regarding the

certification of foreign attorneys. Florida, like several other states, has a Foreign Legal Consultancy rule. However, 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. (A copy of Chapter 16 is also attached in Appendix "D.") For example, Florida prevents an applicant who has been denied admission to practice based on character and fitness to practice law in the 15 years preceding application from being certified. The ABA Model Rule merely requires that the applicant be a member in good standing and practicing 5 of the 7 years preceding application. Florida's rule prohibits the Foreign Legal Consultant from preparing documents affecting title to real and personal property. The ABA Model Rule is limited to real property. The ABA Model Rule also appears to allow the Foreign Legal Consultant to give advice on the laws of the United States in certain circumstances. Florida's rule prohibits this. Finally, Florida's rule requires written disclosures and specific language in the retainer agreement, the ABA Model Rule is not as stringent.

The Commission believes that Florida's Foreign Legal Consultant rule better protects the public than the ABA Model Rule. Therefore, the Commission endorses a recommendation to adopt a rule more consistent with Florida's rule. By so doing, the Commission is rejecting the second part of the ABA recommendation allowing a

temporary presence. Florida's rule allows a permanent 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. This is due in part to the differences in licensing and regulation and the potential difficulty in locating a lawyer in another country should disciplinary action need to be brought in Florida. Eliminating this level of protection by allowing a temporary presence when a permanent presence may be obtained does not serve the public interest.

Recommendation 6: The Commission supports the concept of a model *pro hac vice* rule but does not endorse the adoption of the rule proposed by the ABA.

The Commission endorses the concept of a model *pro hac vice* rule but does not endorse the model rule being recommended by the ABA Commission, a copy of which is in Appendix "E." Instead, the Commission endorses the adoption of a rule similar to Florida's *pro hac vice* rule as Florida's rule does more to protect the public.

The Commission's first concern with the model rule is that it covers more areas than appearance in court and would result in the adoption of "safe harbors" which may vary from those of proposed Model Rule 5.5. For example, the model rule addresses ADR proceedings, in-house counsel, activities prior to admission *pro hac vice* and a general statement regarding the unlicensed practice of law. This goes way beyond admission before a court. As it does not appear that these components of the model rule have been debated and discussed in as much detail as proposed Model Rule 5.5,

the Commission cannot endorse its adoption.

On the other hand, the Florida rule regarding *pro hac vice* admission, Rule 2.061 of the Florida Rules of Judicial Administration, is limited in its scope to appearances in state court. (A copy of Rule 2.061 is also attached in Appendix "E.") Some significant differences between the model rule and Florida's *pro hac vice* rule are discussed below.

In addition to the limited scope, an area in which the Florida rule differs from the model rule is the number of times the out-of-state lawyer may appear in Florida.

The Florida rule limits the lawyer to 3 appearances in a 365 day period in separate and unrelated representations although the court has discretion to go beyond that number.

The model rule contains no such limitation. The Commission believes that the language of the Florida rule better protects the public by preventing the out-of-state lawyer from establishing a regular presence here.

Another area in which the model rule varies from Florida's rule is the level of involvement of the bar. The model rule requires the bar to review all applications/motions to appear and file objections. It also requires a fee be paid. Imposing a review and response scheme on the bar appears to be inefficient and imposes a burden, both financial and regulatory, where one does not need to exist. Under Florida's rule, the court where the lawyer wishes to appear administers the rule.

As with other matters in litigation, any objections are filed by the opposing party. This system works and the Commission does not see a reason to change it.

Perhaps most importantly, the Florida rule does not allow an inactive, suspended or disbarred member of The Florida Bar from appearing *pro hac vice* and also prohibits a lawyer who has been disciplined or held in contempt in relation to an earlier *pro hac vice* appearance from appearing. The rationale behind this limitation is obvious -- it is to protect the public and the judicial system. A lawyer who is under a prohibition imposed by the bar should not be able to bypass that prohibition and represent a client in court. The model rule does not contain this safeguard. Consequently, while the Commission endorses the concept of a model *pro hac vice* rule which would be adopted by all of the states, the Commission cannot endorse the model rule being recommended by the ABA Commission without adequate safeguards to better protect the public similar to those found in Florida's rule.¹⁴

Recommendation 7: The Commission endorses the ABA recommendation to adopt and promote measures to enhance professional regulation and disciplinary enforcement with respect to lawyers who, pursuant to the above recommendations, practice law in jurisdictions other than those in which they are licensed.

As with many of the other recommendations, this recommendation has several subparts. The Commission believes that this recommendation is one of the most important being made and serves as the cog which turns the wheel of the other

recommendations.

The three parts of this recommendation deal with reciprocal discipline. Quoting from the ABA Interim Report best sums up the importance of the recommendations:

It is important that state regulatory authorities acknowledge the increasing prevalence of cross-border law practice and respond appropriately. Allowances must be made for effectively regulating lawyers who practice law outside the states in which they are licensed. Sanctions must be available both against lawyers who do unauthorized work outside their home states and against those who violate rules of professional conduct when they engage in otherwise permissible interstate law practice.¹⁵

Without a scheme for meaningful discipline of a lawyer both in the host state and, more importantly, in the home state, the “safe harbors” become unsafe 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. If the home state which has control over the license does not take appropriate action against that license, there may be little motivation for the lawyer to follow the rules of the host state. For these reasons, this recommendation can only work if it is uniformly adopted and implemented by most of the states. The public and judicial system of Florida will not be protected if the out-of-state lawyer will not be disciplined by the home state for activities occurring here. Any discipline imposed by Florida as the host state would be virtually meaningless and an undue drain on our disciplinary

system. Why should The Florida Bar spend the time and money necessary to discipline the out-of-state lawyer if the home bar is not going to take similar action?

1. The Commission agrees with the ABA recommendation to amend Rule 8.5 of The Model Rules of Professional Conduct in order to better address multijurisdictional law practice with some modification of the proposal.

Model Rule 8.5 deals with disciplinary authority, choice of law.¹⁶ The first proposed amendment is to Model Rule 8.5(a) and would provide that “a lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer renders or offers to render any legal services in this jurisdiction.” (A copy of Model Rule 8.5 is attached in Appendix “F.”) The Commission endorses this language. Not only does it make it clear that the out-of-state lawyer may be disciplined in the host state, it also forms the basis for the jurisdiction of the court and the bar to take action.

The second substantive amendment would provide that “[t]he rules of the jurisdiction in which the lawyer’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. A lawyer is not subject to discipline if the lawyer’s conduct conforms to the rules of a jurisdiction *in which the lawyer reasonably believes* the predominant effect of the lawyer’s conduct will occur.” (Emphasis supplied.) The Commission does not

endorse this rule as written due to a concern with the limitations of the last sentence.

As written, the last sentence states that the reasonable belief of the lawyer controls. The Commission believes this language is too general (what is a reasonable belief to one may not be to another) and leaves too much to the discretion of the individual lawyer.

Instead, the Commission endorses a rule in which the last sentence would read “a lawyer is not subject to discipline if the lawyer’s conduct conforms to the rules of a jurisdiction *where* the predominant effect of the lawyer’s conduct will occur.” This change puts the emphasis on the jurisdiction where the services actually occurred. It is more specific and leaves less to the discretion of the lawyer. If this change is made, the Commission can endorse the proposed amendment to Model Rule 8.5(b).

2. The Commission considers the ABA recommendation to amend Rules 6 and 22 of the Model Rules of Disciplinary Enforcement a good first step in promulgating rules to promote effective disciplinary enforcement when lawyers engage in multijurisdictional practice of law. The Commission recommends a modification of the proposal.

Rule 6 of the Model Rules of Disciplinary Enforcement¹⁷ recognizes that “[e]ffective discipline therefore requires that, when a lawyer engages in misconduct outside the jurisdiction in which the lawyer is licensed, the lawyer be sanctioned appropriately in the jurisdiction in which the lawyer is licensed to practice law.”¹⁸ (A copy of Rules 6 and 22 are attached in Appendix “G.”) Rule 6 recognizes this principle

and is very similar to Model Rule 8.5(a). Therefore, the Commission endorses the recommendation as to Rule 6.

Rule 22 of the Model Rules of Disciplinary Enforcement sets forth the mechanics for the reciprocal discipline. It requires that the home state accept and enforce the disciplinary decision of the host state. The discipline would be based on the record established in the host state and, unless one of the very limited exceptions applies, the discipline imposed would be that imposed by the host state.

The Commission supports the concept of Rule 22 as a good first step. However, the Commission believes that a reciprocity rule which allows more flexibility in the discipline the home state may impose is more appropriate. The Commission recommends deleting the words “the identical” when describing the discipline which the home state should impose and allowing the home state to “impose discipline or disability inactive status” in accordance with the public policy of the home state jurisdiction. Again, the Commission endorses the concept of Rule 22 as a good first step in need of further refinement.

The Commission stresses that in order for the rule to be effective, the states must uniformly adopt the concept. There is a concern on the part of the Commission that some lawyers will be affected more if the rule is not uniformly adopted as lawyers in some states will be punished where lawyers in other states will not. Without

uniformity, the reciprocity fails.

3. The Commission endorses the recommendation that the ABA take steps to promote interstate disciplinary enforcement mechanisms.

The Commission endorses this recommendation to the extent it encourages the ABA to enhance its National Lawyer Regulatory Data Bank. The remaining recommendations regarding the adoption of a standard lawyer numbering system and reporting requirements need further study in light of the possible fiscal impact.

Recommendation 8: The Commission endorses the ABA recommendation to establish a Coordinating Committee on Multijurisdictional Practice to monitor changes in law practice and the impact of regulatory reform, and to identify additional reform that may be needed.

The Commission endorses this recommendation and appreciates the opportunity for further input. The Commission recognizes that as the practice of law changes, the rules regarding multijurisdictional practice may have to change. A central monitoring committee will aid in this process.

V. CONCLUSION

Many years ago, the Supreme Court of Florida held that

The reason for prohibiting the practice of law by those who have not been examined and found qualified to practice is frequently misunderstood. It is not done to aid or protect the members of the legal profession either in creating or maintaining a monopoly or closed shop. It is done to protect the public from being advised and represented in legal matters by unqualified persons over whom the judicial department can exercise little, if any control in the matter of infractions of the code of conduct which, in the public interest, lawyers are bound to observe. ¹⁹

Although the case involved an individual who was not licensed to practice law in any state, the holding can be applied to lawyers licensed in a state other than Florida.

The Court has a responsibility to protect the public from being represented in legal matters by individuals who have not been examined and found competent to do so and over whom the Court can exercise little control. The Court has delegated to the Florida Board of Bar Examiners and The Florida Bar some of the responsibility regarding admission and discipline. The work of the Commission has been undertaken pursuant to that delegation.

The Supreme Court of Florida has also 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 have not kept up with the practice of law as it exists today. The

Commission believes that the recommendations 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. The Board is reminded, as noted in the introduction, that the endorsements and recommendations made in this report will be most effective if they are implemented by the various states. While some variation in what is actually adopted may be possible, the central principles must be the same.

A black rectangular box containing a white handwritten signature in cursive script, which reads "Richard A. Gilbert".

Richard A. Gilbert, Chair
Special Commission on the
Multijurisdictional Practice of Law

ENDNOTES

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1. *Chandris v. Yanakakis*, 668 So. 2d 180 (Fla. 1995), Florida Rule of Judicial Administration 2.060(a).
 2. Rule 4-8.5, Rules Regulating The Florida Bar.
 3. A full text of the report can be found on the ABA's website at www.abanet.org/cpr/mjp-home.html.
 4. ABA Interim Report, p. 20.
 5. ABA Interim Report, p. 21.
 6. ABA Interim Report, p. 26
 7. ABA Interim Report, p. 35
 8. ABA Interim Report, p. 14.
 9. ABA Interim Report, p. 21.
 10. As the Commission has declined to endorse ABA recommendation number 2, the remaining rules will have to be renumbered. Although this Commission was not charged with proposing rule language, the following language is suggested:
 - 5.5(b) – A lawyer admitted in another United States jurisdiction but not in this jurisdiction may provide legal services in this jurisdiction if the services are performed on a temporary basis, the lawyer is admitted and in good standing in another United States jurisdiction, and the services fall within one of the following safe harbors: (the language from proposed Model Rule 5.5(c)(1) - (6) would be inserted here).
 - 5.5(e) – Except as authorized by these rules or other law, a lawyer who is not admitted to practice in this jurisdiction shall not (i) establish an office or regular presence in this jurisdiction for the practice of law; or (ii) represent or hold out to the public that the lawyer is admitted to practice law in this jurisdiction. Furthermore, no lawyer is authorized to provide legal services pursuant to this rule if the lawyer (1) is an inactive or suspended member of this jurisdiction, or has been disbarred or has received a disciplinary resignation from this jurisdiction; or (2) has previously been disciplined or held in contempt by reason of misconduct committed while engaged in the practice of law permitted pursuant to this rule.
 11. ABA Interim Report, p. 23.

12. Rule 10-2.1(b), Rules Regulating The Florida Bar.

13. In re: Russell, 236 So. 2d 767 (Fla. 1970). *Accord* Giannini v. Real, et al., 911 F.2d 354, 358 (9th Cir. 1990) (“California has the right to make its examination more comprehensive and difficult than other states . . . [A]llowing California to set its own bar examination standards is rationally related to the legitimate government need to ensure the quality of attorneys within the state.”)

14. ABA recommendation 6 also renews the ABA’s support for the policy adopted in 1995 regarding lowering barriers to practice before the United States District Courts by eliminating the state bar membership requirement for admission through amendment of the Federal Rules of Civil and Criminal Procedure. The Commission did not address this recommendation as it involves a matter for the Federal bar rather than the state bar.

15. ABA Interim Report, p. 34.

16. Rule 4-8.5 of the Rules Regulating The Florida Bar contains language similar to that of the first sentence of Model Rule 8.5. The Florida rule provides that “[a] lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction although engaged in practice elsewhere.”

17. The Florida Bar has not adopted the Model Rules for Lawyer Disciplinary Enforcement, however, many of the concepts of the Model Rules are incorporated into the Rules Regulating The Florida Bar.

18. ABA Interim Report, p. 35.

19. Florida Bar v. Sperry, 140 So. 2d 587, 595 (Fla. 1962), judg. vacated on other grounds, 373 U.S. 379 (1963).

20. Florida Bar v. Brumbaugh, 355 So. 2d 1186, 1192 (Fla. 1980).