March 9, 2004

Justices of the Florida Supreme Court
c/o Clerk's Office
Florida Supreme Court
500 South Duval Street
Tallahassee, Florida 32399-1927

Re: Amendments To The Rules Regulating The Florida Bar And The Florida Rules Of Judicial Administration

Dear Justices of the Supreme Court of Florida:

Please accept this comment letter filed on behalf of the Association of Corporate Counsel, and its Florida Chapters. ACC and these chapters represent the interests of hundreds of in-house counsel working in Florida, as well thousands of in-house counsel who work in other jurisdictions, but whose practices or client needs may on occasion take them to Florida. It is our belief that multijurisdictional practice (MJP) reform is crucial to every lawyer's ability to properly serve clients in today's regional, national and international marketplace.

While we support the majority of the Florida State Bar's recommendations contained in their "Petition to Amend the Rules Regulating The Florida Bar and the Florida Rules of Judicial Administration" ("Petition"), we continue to object to three of their proposals:

(1) Proposed Rule 1-3.11 unnecessarily and unreasonably limits the authorizations provided for in Proposed Rule 4-5.5(b) and should therefore be rejected;

(2) The language in 4-5.5 should be amended to clarify that in-house counsel are authorized to practice in matters where their services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is licensed or authorized; and

(3) Proposed Rule 4-5.5 should include an explicit practice authorization for in-house counsel.

ACC's initial comments concerning Florida's proposed MJP reforms are attached within "Appendix D" of the bar's Petition. We attached a duplicate copy of our comments for your convenience. We have reviewed the Bar's Petition and specifically their response to the issues we raised in our previous comment letter; we believe that our concerns were not meaningfully or seriously addressed. We respectfully request that the Court consider our concerns on their merits and we petition the Court to amend the language in proposed Rule 4-5.5, reject Proposed Rule 1-3.11, and re-insert language into 4-5.5 (as codified in ABA Model Rule 5.5(d)(1), which includes direct practice authorizations for in-house counsel.

1. **The Court should reject Proposed Rule 1-3.11**

We request the Court to reject proposed Rule 1-3.11 because it unreasonably negates the temporary arbitration practice authorizations offered by the Petition in Proposed Rule 4-5.5(c)(3). The Bar's proposal states that more than three arbitration incursions under rule 1-3.11 in a 365 day period constitutes the regular practice of law and is thus not "temporary." The Bar's application of a three-incursion limitation is without rationality or explanation.

Rather than repeat arguments that have already been made to you in great detail, we commend the comments of the Arbitration Committee of the Securities Industry Association, as submitted by the firm of Steel Hector & Davis, on March 9, 2004. In short, it is our belief that limitations on temporary incursions such as those proposed are without any empirical basis, arising out of the concerns of the local arbitration bar that their local practices should be protected and the practices of arbitration lawyers in other states whose clients have matters in Florida should be deterred. The rules of professional conduct are intended to protect the public and clients, not the business interests of specific segments of the local bar. The "public" in the context of securities arbitrations are sophisticated corporate clients who are more than capable of selecting competent counsel and will not view the bar's limitations of their ability to retain the arbitration counsel of their choice as grounded in a need for their "protection." The fact that the Petition proposes to set up a fee structure for lawyers who wish to make more than three incursions per year suggests that public protection is not a problem, but financial and economic concerns are. This is inappropriate to the spirit and purpose of MJP reforms and the integrity of the mission of the rules of professional conduct in your state.

2. **The language in Proposed Rule 4-5.5 should be amended to clarify the authorized practice of in-house counsel.**

Proposed Rule 4-5.5(c)(3)(B), (c)(4)(B), (d)(3)(B), and (d)(4)(B) use the following identical language to authorize practice exceptions:

> ... arise[s] out of or [is] reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice …

ACC is concerned that this practice authorization as written unintentionally denies thousands of otherwise qualified in-house counsel the ability to make use of this rule, which is obviously written in order to facilitate trans-border practices. Many in-house counsel practice in a state in which they are not admitted, but they are excepted from the state's UPL rules or otherwise authorized by registration systems. These counsel are not always, however, considered to be *licensed* in the state from which their client's primary business needs arise. Florida's own Chapter 17 of the Rules Regulating the Florida Bar ("RRTFB Ch. 17" re Authorized House Counsel) authorizes a similar class of practitioners even though Florida may not recognize them as *licensed* in the state.

Please consider a simple amendment to proposed rule 4-5.5 to correct what we believe is the unintentional exclusion of otherwise qualified in-house counsel. ACC recommends the following language for Rule 4-5.5, paragraphs (c)(3)(B), (c)(4)(B), (d)(3)(B), and (d)(4)(B).

> … Where the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted *or authorized* to practice; or …

We note that proposed Rule 3-4.1 grants Florida the authority to discipline lawyers who provide legal services in the state (regardless of whether specifically "admitted" or simply "authorized" to practice in another jurisdiction); thus, this change has no negative impact on Florida's ability to regulate practice of such lawyers who are representing clients within its borders.

3. The Court should include an in-house counsel authorization similar to the ABA's Model Rule 5.5(d)(1)

Florida has a longstanding tradition of offering safe harbor to those in-house counsel who are admitted in another jurisdiction but offering their services to a corporate client on a exclusive basis, as an employed in-house counsel, in Florida. This provision of the bar, codified in RRTFB Ch. 17, has facilitated the practice of in-house lawyers and the legal needs of corporate clients in the state for some time and without any negative repercussions. Indeed, many of the lawyers operating under the limited provisions of practice offered by Chapter 17 have become valued and active members of the local legal community.

But while this provision as an exception to the state's UPL rules was necessary in an era when no other authority was available to allow in-house lawyers to move to Florida, the Court has before it (as do the courts of every other state in the country) the opportunity to codify important multijurisdictional practice reforms, including an in-house counsel practice authorization. Now that these sweeping reforms are under your consideration, we request that this Court place the authorization for non-Florida-admitted in-house counsel to engage in limited practice for their employer-clients within the Florida Rules of Professional Conduct along with all of the other MJP authorizations under the consideration of the Court today. Since we now recognize that MJP deserves the status and force of recognition in the professional rules of conduct, please do not leave in-house lawyers behind as an administrative ruling afterthought.

This group of lawyers – in whom you have already placed your trust and who have proven that they deserved it – should not be treated as a special exception to the state's UPL regulations when all other MJP practices will be authorized under the rules. We encourage you to insert the provisions of the ABA's Model Rule 5.5 (d)(1), generally authorizing in-house counsel practices as a part of the new Rule 4-5.5 that the Petition puts forward. The language of ABA Model Rule 5.5(d)(1), which we request the court insert, authorizes the establishment of a permanent practice authority for legal services" provided to the lawyer's employer or its organizational affiliates" which "are not services for which the forum requires pro hac vice admission."

The Bar's petition argues that Ch. 17 provides "a level of protection and tracking" not available in the ABA's Model Rule 5.5. It is true that the ABA Model does not create a tracking system for lawyers engaged in authorized MJP practices under its provisions. The most significant reason why such tracking is not

included is that there is no need for it nor is there any need for protections for clients or the public from MJP counsel. Indeed, no empirical evidence exists which would suggest that these practitioners are any threat at all to the bar or the public; the lack of such evidence, in the face of so many complaints lodged against all kinds of other lawyers operating with license in the state, infers that these in-house counsel are the least of the bar's disciplinary risks.

While we understand the concerns that "unregulated" MJP practices theoretically pose to those who are accustomed to presuming that all professionals operating in the state should somehow be on the books in order to ensure their regulation, we are looking here to codify existing practices which are already shown to pose no threats. In-house practitioners are one of the most professionally responsible segments of the bar as a group if you look at the records.

According to the leadership of the National Organization for Bar Counsel, such registration systems are generally more costly to administer than can be collected in the form of fees or dues from such members. And if their practices are not a threat to the public or a cost to the bar, it is not appropriate to consider levying exorbitant rates against such lawyers and their clients for the privilege of affording these lawyers with a limited license to practice in the state. With limited resources at the bar, why choose to invest so much in tracking in-house counsel operating in the state under these rules, especially when the bar has the comfort of knowing that another US jurisdiction has already gone through the process of certifying and maintaining the ongoing regulation of these lawyers' eligibility and fitness to practice law?

A simple authorization of in-house counsel under proposed rule 4-5.5 without the accompanying registration systems does not in any way inhibit or discourage the active and desirable participation of corporate counsel in the life of the local bar; indeed, our experience in states that have adopted authorizations for non-locally admitted in-house counsel to practice (such as New Jersey and Virginia) is that even without registration systems, these members are active participants in local bars, local pro bono and public service programs, and other activities that we expect local lawyers to support (e.g., volunteering for leadership positions in the community, supporting the legal system, and so on).

If the Court is concerned that in-house counsel operating under the authority of Rule 4-5.5 must be counted for some reason in spite of the expense and lack of need to further regulate their practices, then the Court may wish to complement the adoption of the ABA Model's 5.5(d)(1) language with the adoption of a simple

self-registration system through some minimal modification of RRTFB Ch. 17. This does not mean, however, that a registration system or even a rule such as RRTFB Ch. 17 is a suitable alternative to the passage of the practice authorizations in Rule 4-5.5.

"Back door" entry to authorized practice in the state for in-house counsel from other jurisdictions now that the bar is ready to authorize MJP practice for other lawyers is not appropriate. The Court and the bar already except these lawyers from UPL because they pose no threat to the public and serve important client interests. There is no benefit to the bar, the public, or the client community in diminishing the status of these practitioners through exclusion of their authorization to practice from the rules that will now otherwise authorize other lawyers' MJP practices. But there are a number of potential harms. Making non-Florida licensed in-house counsel practice under an administrative exception (RRTFB Ch.17) rather than authorizing their practice under the MJP provisions which will become part of your professional rules of conduct may engender a perception that such lawyers are not fully subject to the rules of conduct or the disciplinary and regulatory mechanisms by which the state would seek to control the practices of other MJP lawyers whose practices are so regulated. Likewise, providing non-Florida in-house counsel with a formal authorization provision in the rules of professional conduct ensures that everyone recognizes that such non-Florida admitted counsel are directly subject to the authority of the Florida bar.

And finally, non-Florida admitted in-house lawyers who are considering moving to Florida to take an in-house position will be able to better locate and understand their ability to practice in the state (and any limitations on their services) if the rule is found in the same subsection that authorizes other kinds of multijurisdictional practices, especially since so many other jurisdictions are considering or adopting the ABA Model Rule which contains an in-house authorization. If not offered in the provision to which lawyers in other states have been schooled to look, the immediate presumption may be that in-house counsel are not accorded an authorization to move to client offices to practice in Florida. It is hard enough for layman lawyers to navigate MJP issues generally, and a lot of ethics specialists are confused by these issues, too. Hiding the rules regulating in-house practice by non-locally-admitted counsel in a separate administrative ruling is a disservice to everyone who wants to be properly apprised of and in compliance with the rules of the state.

If we can provide further comments or be of assistance to you, please feel free to call on us. The work you are doing is very important to the bar, the clients in your

state, and lawyers from across the country who represent their interests. We commend you for your vision, and very much appreciate your time and consideration of our perspectives as you implement these necessary changes to the regulation of lawyers in your state.

On behalf of ACC, its members, and its chapters in Florida:

Frederick J. Krebs
President

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