

# Florida's New Rules on Multijurisdictional Practice: A Mixed Bag for Arbitration Attorneys

**The Florida Supreme Court just approved major amendments to the Florida rules that address the issue of multijurisdictional practice. The new rules, which take effect next year, allow unlimited practice of international arbitration in Florida by non-Florida attorneys, but limit practitioners of domestic arbitration to three appearances within a 365-day period.**

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For years, attorneys from states other than Florida who have an opportunity to engage in Sunshine State-based legal practice have bemoaned the fact that they would have to take the bar exam to practice law in Florida.<sup>1</sup> This restriction on law practice puts Florida in the minority of jurisdictions that do not admit out-of-state attorneys to practice based on reciprocity (i.e. being licensed to practice law and in good standing in another state).<sup>2</sup> The bar exam requirement ostensibly protects the citizens of Florida from unqualified practitioners, although some commentators have argued that the true purpose of this requirement is to protect the economic self-interest of the attorneys already practicing there.<sup>3</sup>

The tension between public protection and professional protectionism has heightened as lawyers around the country have broadened their practices to other jurisdictions to service clients who do business in multiple states and even internationally. Florida rules governing law practice define "multijurisdictional" law practice as a lawyer providing legal services in a jurisdiction where the lawyer is not licensed to practice law.<sup>4</sup>

The Florida Bar rules have always prohibited out-of-state attorneys from rendering legal services in Florida, except in the following limited circumstances.<sup>5</sup> Essentially, an out-of-state attorney could only make three appearances in Florida without being admitted by passing the bar exam. This restriction addressed the concern that attorneys from other states might pack up and move to the Sunshine State. It was not intended to address the phenomenon of multijurisdictional practice. Because the

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current rule does not provide a basis for disciplining non-Florida attorneys for violation of the Code of Conduct Governing Florida Attorneys<sup>6</sup> the Florida Bar determined that a rule governing multijurisdictional practice had to be adopted.

**Rule 1.3.11 Appearance by a Non-Florida Lawyer in an Arbitration Proceeding in Florida**

(a) A Non-Florida Lawyer Appearance in an Arbitration Proceeding in Florida. A lawyer currently eligible to practice law in another United States jurisdiction or a non-United States jurisdiction may appear in an arbitration proceeding in this jurisdiction if the appearance is:

- (i) for a client who resides in or has an office in a jurisdiction in the lawyer's home state;
- (ii) where the appearance arises out of or is reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice; and
- (iii) the appearance is not one that requires *pro hoc vice* admission.

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(c) Application of Rules Regulating the Florida Bar. Lawyers permitted to appear by this rule shall be subject to these Rules Regulating the Florida Bar while engaged in the permitted representation, including, without limitation, rule 4-5.5.

(d) General Practice Prohibited. Non-Florida lawyers shall not be permitted to engage in general practice pursuant to this rule... In all arbitration matters, except international arbitration, a lawyer who is not admitted to practice in this jurisdiction who files more than three demands for arbitration or responses to arbitration in separate arbitration proceedings in a 365-day period shall be presumed to be engaged in a "general practice."

Multijurisdictional practice is an outgrowth of tremendous changes in the business world over the past three decades. Businesses have expanded their operations into other states without having offices in those states. Accordingly, they have need of legal advice in states where their regular attorneys are not admitted. This change has affected the practice of law because attorneys need to service clients who do business in multiple jurisdictions where the attorneys are not admitted to practice law. Clients expect these legal services from their regular counsel to avoid the need to have a lawyer in every state. The proliferation of new computer technology and the Internet have made it relatively easy for out-of-state lawyers to research the statutes and case law from states in which they are not admitted to practice law. Thus, the time is long overdue for states like Florida to address multijurisdictional law practice and develop rules that are consistent with modern business practices.

In July 2000, the American Bar Association (ABA) appointed a commission to study the multijurisdictional practice of law, and in August 2002, the ABA adopted the commission's final report and recommendations.<sup>7</sup> When the ABA asked for input from the states, the Florida Bar appointed a commission to study the ABA report. In March 2002, the commission made several recommendations to the Florida Bar Board of Governors, which were adopted. Five months later, the Florida Bar formed a second commission charged with making recommendations to change Florida's rules. After obtaining input from many interested parties, the second commission was reconvened to study the multijurisdictional practice issue. In April 2003, the commission produced its final report, which the Florida Bar Board of Governors adopted in December 2003.

On Feb. 9, 2004, the Florida Bar filed a petition with the Florida Supreme Court asking for an order adopting proposed amendments to the Florida Bar Rules and the Florida Rules of Judicial Administration addressing the multijurisdictional practice of law. On May 12, 2005, the Florida Supreme Court adopted the proposed amendments. The amended rules, which will take effect on Jan. 1, 2006, are expected to profoundly affect the practice of arbitration, among other areas of ADR practices.<sup>8</sup> This article only discusses the impact on arbitration.

### Non-Florida Lawyers in Florida Courts

The current rule allows out-of-state attorneys who are licensed and in good standing in another state<sup>9</sup> (an Admitted Jurisdiction) to obtain three *pro hac vice* admissions in Florida in “separate and unrelated representations” if the attorney associates with a member of the Florida Bar.<sup>10</sup> The reason is that out-of-state lawyers are not allowed to engage in a “general practice” in Florida, which means “more than three appearances, within a 365-day period in separate and unrelated representations.”<sup>11</sup> However, Florida trial courts have discretion to allow more appearances upon a showing that such appearances do not constitute a “general practice.” Additional appearances may also be allowed if the moving party can show that denial of the attorney’s representation would result in substantial hardship.<sup>12</sup> Non-Florida lawyers who are admitted *pro hac vice* are not required to pay a fee to the Florida Bar or submit to the Florida Bar’s disciplinary authority.

The new rules, which take effect next year, continue to limit non-Florida lawyers to three *pro hac vice* appearances before the Florida courts within a 365-day period. However, the trial court’s discretion to increase the number of allowed appearances is eliminated. According to the Florida Supreme Court’s *per curiam* ruling approving the amendments, this is necessary because out-of-state attorneys were abusing the rule.<sup>13</sup>

The new rules also eliminate the “unrelated” prong of the “general practice” definition. This has led some practitioners to question whether interlocutory appeals or certiorari petitions count as separate matters for the purpose of determining whether an attorney is engaged in a general practice in Florida.<sup>14</sup>

To become eligible to appear for one of the three *pro hac vice* appearances, a non-Florida lawyer must file a verified motion, accompanied by a \$250 filing fee made payable to the Florida Bar.<sup>15</sup> All non-Florida lawyers permitted to practice law in Florida courts are subject to the discipline of the Florida Supreme Court if they violate the Florida Bar rules.<sup>16</sup>

### Out-of-State Lawyers in Florida Arbitrations

Arbitration plays a significant role in resolving disputes. In recognition of this fact, the Florida Supreme Court approved a new rule specifically addressing appearances by non-Florida lawyers in arbitrations in Florida.

The rule provides that a lawyer who is eligible to practice law in an Admitted Jurisdiction may appear in an arbitration proceeding in Florida in the following circumstances: (1) (a) the appearance is for a client who resides in the lawyer’s home state, or (b) the appearance arises out of or is reasonably related to the lawyer’s practice in an Admitted jurisdiction, and (2) the appearance does not require *pro hac vice* admission.<sup>17</sup> In this respect the rule mirrors the ABA Model Rules of Professional Conduct (ABA Model Rules) on the subject, which provides that a lawyer may provide services in a jurisdiction in which the lawyer is not admitted if the services “are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires *pro hac vice* admission...”<sup>18</sup>

The comment to the Florida Rule says it applies to arbitration proceedings held in Florida where one or both parties are being represented by a lawyer admitted in another jurisdiction, regardless of the location of that jurisdiction.<sup>19</sup>

The ABA Model Rule governing the temporary practice of law in a jurisdiction in which an attorney is not admitted does not place a numerical limit on the number of arbitration appearances the attorney can make in an arbitration conducted in that jurisdiction. Florida’s new rules on the temporary practice of law, however, like the rules governing court appearances by non-Florida attorneys, do not permit out-of-state attorneys to engage in a “general practice” of arbitration in Florida.<sup>20</sup> The term “general practice” is defined for this purpose as “fil[ing] more than three demands for arbitration or responses to arbitration in

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separate arbitration proceedings in a 365-day period.”<sup>21</sup> Arbitrators have no discretion to allow additional appearances in cases of hardship or for good cause. This rule will curb the ability of out-of-state lawyers to engage in a significant amount of multijurisdictional practice of arbitration in Florida.

Similar to the rules for out-of-state attorneys who seek *pro hac vice* admission to appear in Florida courts, non-Florida lawyers who seek to represent clients in arbitration in Florida must first file a verified statement in the arbitration, accompanied by a \$250 filing fee made payable to the Florida Bar.<sup>22</sup> All non-Florida lawyers permitted to practice arbitration in Florida are subject to the discipline of the Florida Supreme Court.<sup>23</sup>

**Non-Florida Lawyers and International Arbitration**

Florida is an important situs for international arbitrations, particularly those involving Latin and South American countries. No doubt the state desires to maintain this business. To facilitate, and perhaps increase, the use of Florida as a place to hold international arbitrations, the Florida Supreme Court has approved a rule that allows an unlimited number of appearances in international arbitrations in Florida. This is because international arbitrations are not counted for purposes of determining whether a non-Florida attorney is engaged in a “general practice” of law in Florida (i.e., by filing more than three pleadings in separate arbitration proceedings in Florida).<sup>24</sup> “International arbitration” is not defined in the rule proper. Rather, the definition appears in the comment following the rule. International arbitration is

the arbitration of disputes between two or more persons at least one of whom is a nonresident of the United States or between two or more persons all of whom are residents of the United States if the dispute (1) involves property located outside the United States; (2) relates to a contract or other agreement which envisages performance or enforcement in whole or in part outside the United States; (3) involves an investment outside the United States or the ownership, management, or operation of a business entity through which such an investment is effected or any agreement pertaining to any interest in such an entity; (4) bears some relation to one or more foreign countries; or (5) involves two or more persons at least one of whom is a foreign state as defined in 28 U.S.C. § 1603.<sup>25</sup>

The new rules grant out-of-state attorneys who participate in international arbitrations in Florida an exemption from the statutorily required verified statement and the filing fee.<sup>26</sup> These exemptions end when an award is rendered in an international arbitration. According to the comment, this means that out-of-state lawyers may not appear in state court in Florida to confirm or vacate awards in international arbitrations without following the procedures for appearing in the Florida courts.<sup>27</sup> This provision resembles the ABA Model Rule, which provides that a lawyer must obtain admission *pro hac vice* even to appear in a court-annexed arbitration or mediation.<sup>28</sup>

Thus, practitioners of international arbitration seem to benefit the most from the amendments approved by the Florida Supreme Court since they can make any number of appearances in international arbitrations in Florida. This should encourage the use of Florida as a venue for international arbitrations. It may be problematic, however, that the rules limit the number of award challenges and enforcement actions that out-of-state lawyers can bring in Florida. Given the rarity with which such awards are successfully challenged, non-Florida attorneys may feel comfortable hiring Florida counsel to handle this stage of the proceedings.

**Temporary Legal Services in Florida**

Florida has never had a rule allowing out-of-state attorneys to provide legal advice in Florida (as opposed to making an appearance in court).<sup>29</sup> The new rules change this. Now, out-of-state lawyers may advise a Florida client, negotiate a contract for a Florida client, provide legal assistance with Florida real estate, or otherwise participate in a client’s legal matters in Florida, if they comply with the new rule on temporary law practice in Florida. Under the new rules, an out-of-state attorney is allowed to provide legal services on a temporary basis in Florida if two conditions are met. One condition is that the legal

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services are undertaken in association with a lawyer who is admitted to practice in Florida and actively participates in the matter. The second condition is that the client either resides in or has an office in an Admitted Jurisdiction, or the legal services arise out of or are reasonably related to the lawyer's practice in an Admitted jurisdiction.<sup>30</sup>

Not surprisingly, the new rules provide that non-Florida lawyers who provide temporary legal representation in Florida are subject to the disciplinary authority of the Florida Supreme Court.<sup>31</sup>

### Conclusions

In its decision adopting the amendments to the Florida Bar rules, the Florida Supreme Court said its goal is to implement changes that improve legal services for the public by permitting the limited, temporary multijurisdictional practice of law, but at the same time protecting the public, the legal profession and the judiciary.

Unfortunately, we believe that the new multijurisdictional rules may raise more questions than they answer. For example, how will the courts interpret the term "separate" representations? Will appeals be considered to be "separate" from trial proceedings? What if other states impose stricter limits on the practice of law by out-of-state (i.e., Florida) attorneys? Why should domestic arbitration be treated differently from international arbitration? Will the new rules cause more international arbitrations to be held in Florida?

These are some of the questions that are on the minds of practitioners in the wake of these new rules.

### Endnotes

- 1 "All individuals who seek the privilege of practicing law in the State of Florida [must] submit to the Florida Bar Examination." Fla. Stat. Ann. Admission to Bar, Rule 4 (West 2000).
- 2 Christine R. Davis, "Approaching Reform: The Future of Multijurisdictional Practice in Today's Legal Profession," 29 *Fla. St. U. L. Rev.* 1339, 1362 (2002). Twenty-eight jurisdictions currently allow lawyers admitted in another state to practice in the courts of their state. Of these, 15 require the state from which the attorney is licensed to allow similar reciprocity to attorneys from their state. *Id.*
- 3 Andrew M. Perlman, "A Bar Against Competition: The Unconstitutionality of Admission Rules for Out-of-State Lawyers," 18 *Geo. J. Legal Ethics* 135, 137-38 (2004). Similar examples exist throughout history. The first child labor laws were enacted as much to protect the jobs of adults jeopardized by the availability of cheaper child labor as they were to protect children from exploitation. See Marvin J. Levine, *Children for Hire: The Perils of Child Labor in the United States* 22-23 (2003).
- 4 *In re Amendments to the Rules Regulating the Florida Bar and the Florida Rules of Judicial Administration*, 2005 WL 1118034, at \*1 (Fla. May 12, 2005).
- 5 *Fla. Bar. v. Rapoport*, 845 So. 2d 874 (Fla. 2003).
- 6 *Chandri, S.A. v. Yanakakis*, 668 So. 2d 180, 181 (1995) (citing *State ex rel. Florida Bar v. Sperry*, 140 So. 2d 587, 595 (Fla. 1962), rev'd on other grounds, 373 U.S. 379 (1963)).
- 7 The stated principle that influenced the Commission's report was "search[ing] for the proper balance between the interests of a state in protecting its residents and justice system, on the one hand; and the interests of clients in a national and international economy in the ability to employ or retain counsel of choice efficiently and economically." American Bar Association, *Report of the Commission on Multijurisdictional Practice* 5 (Aug. 2002).
- 8 For ease of reference, citations to the old rules will be denoted as R. Reg. Fla. Bar. (current) or Fla. R. Jud. Admin. (current). Citations to the new rules will be denoted as R Reg. Fla. Bar. (2006) or Fla. R. Jud. Admin. (2006).
- 9 Many provisions of the new rules deal with attorneys who have previously been subject to discipline in their home state. This article assumes that the out-of-state lawyer is in good standing in any state where he or she is admitted. An in-depth analysis concerning previously-disciplined attorneys is beyond the scope of this article.
- 10 Fla. R. Jud. Admin. (current) 2.061(a).
- 11 *Id.*
- 12 *Id.*
- 13 *In re Amendments*, *supra* n. 4, 2005 WL 1118034, at \*9.
- 14 See Dan Cordtz, "More Limited Welcome," *Miami Daily Bus. Rev.*, May 20, 2005, at 1.
- 15 Fla. R. Jud. Admin. (2006) 2.061(b); (b)(7).

- 16 R Reg. Fla. Bar (2006) 3-4.1.
- 17 R. Reg. Fla. Bar (current) 1-3.11.
- 18 ABA Model Rule of Professional Conduct S.5(c)(3).
- 19 R. Reg. Fla. Bar. (2006) 1-3.11 comment.
- 20 *Id.* at 1-3.11(b)(6); (d).
- 21 *Id.* at 1-3.11(d).
- 22 *Id.* at 1-3.11(e); (e)(6).
- 23 *Id.* at 3-4.1
- 24 *Id.* at 1-3.11(d).
- 25 *Id.* at 1-3.11 comment.
- 26 *Id.* at 1-3.11 comment.
- 27 *Id.* at 1-3.11(3).
- 28 *Davis, supra* note 2, at 1353.
- 29 ABA Model Rule of Professional Conduct 5.5, comment ¶12.
- 30 *Davis, supra* note 2, at 1353.
- 31 R. Reg. Fla. Bar. (2006) 4-5.5(c)(4).