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February 24, 2004

Hon. Harry Lee Anstead, Chief Justice
FLORIDA SUPREME COURT
500 South Duval Street
Tallahassee, FL 32399

RE: Comments of the Public Investors Arbitration Bar Association to the Petition to Amend The Rules Governing the Multijurisdictional Practice of Law in Florida

Dear Justice Anstead:

I write on behalf of the Public Investors Arbitration Bar Association (PIABA) in response to the Court's invitation to submit comments regarding the proposed changes to the Rules Regulating The Florida Bar and the Florida Rules of Judicial Administration, specifically as those rules affect multijurisdictional practice and SRO sponsored securities arbitrations involving Florida residents or conducted in a Florida venue. PIABA is a national, non-profit bar association of over 700 members dedicated to the representation of investors in disputes with the securities industry. PIABA's express mission since its founding 13 years ago has been to ensure that SRO arbitration is conducted on a level playing field. At present, over 130 PIABA members are licensed to practice law in the state of Florida.

THE COURT MUST ENSURE THAT ANY VERSION OF THE PROPOSED RULES ULTIMATELY ADOPTED TREAT INVESTORS AND SECURITIES INDUSTRY PARTICIPANTS IN SRO ARBITRATIONS EQUALLY

It is PIABA's understanding of the proposed rules that the "3 appearance" provision of Rule 1-3.11 applies to counsel for both plaintiffs and defendants; to outside counsel as well as "in-house" counsel.

Because of PIABA's focus on SRO arbitration, it has thoroughly reviewed the comment letter submitted by the Securities Industry Association (SIA). Among the SIA's expressed concerns is the effect the proposed rules will have on the ability of broker-dealers to utilize in-house counsel to participate in SRO arbitrations in Florida. Without commenting expressly on the merits of the SIA's comments in this regard, PIABA notes that the SIA's argument supporting its

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members' use of in-house counsel is equally applicable to the corresponding deprivation of the rights of defrauded Florida investors to retain the counsel of their choice. For this reason, it is PIABA's hope that - should the Court be swayed by the SIA's argument in favor of expanding the number of appearances allowed to in-house counsel in SRO arbitrations in Florida - the Court will likewise expand the number of appearances afforded to non-Florida counsel appearing in SRO arbitrations on behalf of investors.

PROPOSED RULE 1-3.11(e) SHOULD BE REWRITTEN IN ORDER TO ACCOMPLISH ITS PURPOSE WITHOUT UNDUE INTRUSION UPON THE ATTORNEY-CLIENT RELATIONSHIP OR PREJUDICE TO INVESTOR-PLAINTIFFS IN SRO ARBITRATIONS

Proposed Rule 1-3.11(e) requires that a non-Florida lawyer appearing in arbitrations in Florida file a verified statement with the Florida Bar setting forth certain information, including the identity of all other arbitrations in which the non-Florida lawyer has appeared in the preceding 5 years and the date on which "the legal representation at issue commenced."

PIABA understands the purpose of 1-3.11(e) insofar as it is intended to provide a mechanism by which the Florida Bar can ensure that non-Florida lawyers are in compliance with the "3 appearance" restrictions. However, PIABA can discern no legitimate reason for requiring the disclosure of certain information which has no relationship to the ability of the Florida Bar to monitor compliance with the proposed rules or the requirement that non-Florida attorneys serve a copy of the verified statement on opposing counsel.

The Requirement That Non-Florida Lawyers Disclose Appearances in Florida Arbitrations For the Preceding 5 Years Bears No Rational Relation to the Implementation or Enforcement of the Proposed Rules

Unless the Court intends the limitations imposed under the proposed rule to be applied retroactively, nothing about a non-Florida lawyer's appearances in Florida arbitrations "in the preceding 5 years" bears any relationship to the Bar's ability to monitor and enforce the "3 appearance" limitation. None of those prior appearances have any effect on the rights of non-Florida lawyers to make an appearance in Florida arbitrations as of the effective date of the rule. Nor does such a provision add to the ability of the Bar to monitor the non-Florida lawyer's prior disciplinary history which the Bar doesn't already have available to it or which isn't already provided for in other subsections of the proposed rule [*i.e.,* 1-

3.11(e)(1) and (3)].

Moreover, even after the proposed rules have been in effect for 5 years, the requirement of disclosure of a non-Florida lawyer's appearance in Florida for the preceding 5 years adds nothing to the implementation or enforcement of the proposed rule, for the simple reason that the "3 appearance" limitation is measured by the preceding 365 days. There is nothing in the proposed rule as currently written that either penalizes or rewards a non-Florida attorney for any appearances in Florida arbitrations at any time prior to the current 365 day period. As such, PIABA can not understand what possible purpose the 5 year disclosure requirement would serve that would justify the additional burdens placed upon the non-Florida attorney or the additional irrelevant and immaterial intrusions into the attorney's affairs.

The "Commencement of Representation" Requirement of Proposed Rule 1-3.11(e)(4) is Vague and Bears No Rational Relation to the Implementation or Enforcement of the Proposed Rules

Another troubling aspect of this proposed rule is the requirement of 1-3.11(e)(4) that the verified statement "[identify] the date on which the legal representation at issue commenced."

First, there is no definition of what constitutes the "commencement" of representation. As the Court is undoubtedly aware, the question of when a lawyer's representation of a client "commences" may have absolutely no relationship to when a retainer agreement is signed by the client (if ever) or when an arbitration claim (or response) is filed.

Any information required to be filed by non-Florida lawyers should be narrowly tailored to enable the Bar to monitor compliance with the limitations on appearances by non-Florida lawyers. The "commencement of representation" requirement simply serves no purpose in this regard.

By operation of proposed rule 1-3.11(d), the "3 appearance" limitation is measured by the **filing** of **demands** for arbitration or **responses** to arbitration. As a matter of practical reality, representation by the non-Florida lawyer will typically "commence" at one of two times: (a) prior to the filing of the claim - sometimes even in a preceding 365 day period; or, (b) subsequent to the filing of the claim or response. Conversely, the "commencement of representation" will almost never coincide with the actual date of filing a claim or response. Thus, the question of "commencement of representation" will in most instances bear no relationship to

the events which trigger the obligations under the rule.

The Proposed Rule's Requirement That a Copy of the "Verified Statement" Be Filed With Opposing Counsel Serves No Legitimate Purpose and May Serve to Prejudice Investor Plaintiffs

This may be the most troubling aspect of the proposed rules, as it serves no legitimate purpose and may operate to prejudice investor-plaintiffs.

Opposing counsel has no regulatory authority over the propriety of the appearance of non-Florida lawyers and plays no legitimate role in monitoring prior appearances except under the most general obligation to report all known violations of Florida Bar rules. In the scenario created by the proposed rules, the Florida Bar will already be apprised of any violations of the "3 appearance" limitations, thus obviating the need to "deputize" opposing counsel admitted in Florida in order to bring the violations to the Bar's attention.

In the case of investor-plaintiffs, disclosure of the "commencement of representation" information to opposing counsel (assuming *arguendo* that the date of "commencement" could be precisely and uniformly determined) may serve as the basis upon which broker-dealer defendants would attempt to assert or buttress a defense based on the statute of limitations. It is not difficult to imagine a scenario in which the "commencement" date becomes the centerpiece of statutes of limitations arguments involving inquiry notice. Going the next step, it is not unimaginable that counsel for a party faced with such a defense based upon the "commencement" date would find himself/herself in the position of having to act as a fact witness in the arbitration to explain why the "commencement" date should not act to trigger the limitations period. It is patently unfair to impose a rule which has the effect of providing defense counsel with information which it could use to create and/or supplement an affirmative defense and drive a conflict of interest wedge between plaintiff's counsel and his/her client, particularly when the subject rule lends no efficacy or utility to the Bar's desire to protect the judiciary and the consumers of legal services in Florida.

PIABA thanks the Court for its attention to these concerns. PIABA recognizes the Court's right and interest in regulating the practice of law in Florida. However, in the wake of continuing revelations of systemic fraud and malfeasance by the securities industry - much of which has been visited upon the very residents of Florida the Court and Florida Bar seek to protect - it is imperative that any rules approved by the Court realistically take into account the interests of Florida investors who are compelled by contract to resolve their disputes through arbitration. It is out of PIABA's concern for investor protection that these comments are submitted and the vein in which PIABA hopes they will be considered by the Court.

Respectfully,

Original Signed

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CWAjr:mmi

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