EXHIBIT A-1

STATE BAR of ARIZONA

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PRESIDENT

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March 14, 2002

Mr. Wayne J. Positan
Chair
American Bar Association Commission
on Multijurisdictional Practice
Lum, Danzis, Drasco, Positan & Kleinberg
103 Eisenhower Parkway
Roseland, New Jersey 07068-1049

Re: Comments of the Board of Governors of the State Bar of Arizona to the Interim Report of the ABA Commission on Multijurisdictional Practice

Dear Mr. Positan:

The American Bar Association's Commission on Multijurisdictional Practice requested comments from state bar associations and other entities to its Interim Report on Multijurisdictional Practice. In response to this request, I referred the Commission's Interim Report to a newly formed State Bar of Arizona Task Force on Multijurisdictional Practice for its evaluation and recommendations. The Task Force's Report and Recommendations were presented to the Board of Governors at a special meeting on March 12. After considering the Task Force's recommendations, the Board adopted the enclosed preliminary report and recommendations, with appendices, which I now forward to the ABA Commission for its consideration.

In brief, please be advised that the State Bar of Arizona supports the Commission's recommendation one (state regulation of the profession, with a revision); recommendation two (general support for MJP); recommendation five (foreign legal consultants, with revisions); recommendation 6.1 (*pro hac vice* in United States district courts); recommendation seven

(reciprocal discipline); and recommendation eight (establishing an ABA coordinating committee on MJP).

The State Bar of Arizona expresses no view at this time with respect to the Commission's recommendation four (admission on motion). Arizona does not permit admission on motion.

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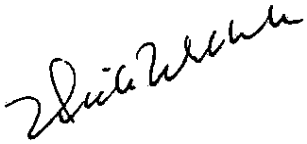
With respect to recommendation three (safe harbors for certain practices by lawyers in states in which they are not admitted to practice), the State Bar of Arizona disagrees with the concept of safe harbors. Instead, the State Bar recommends to the Commission the adoption of a modified version of the so-called "common sense" approach to address these issues. Attached at Appendix B of the Report is a proposed revision to Rule 5.5 of the Model Rules of Professional Conduct to implement this approach.

With respect to recommendation six (adoption of a uniform *pro hac vice* rule for practice before state courts and agencies) the State Bar of Arizona is of the view that the Commission's proposal and commentary is too general and non-specific to be useful. Therefore, we recommend that the Commission clarify its recommendation by, for example, identifying those state rules which the Commission believes unduly burden *pro hac vice* practice.

We hope our comments in the enclosed report are helpful. We look forward to the Commission's final report and recommendations. Our Task Force also will be continuing its work.

With best wishes,

Sincerely,



Nicholas J. Wallwork
President

NJW:cls

Enclosure

cc: Members of the State Bar of Arizona Board of Governors
Members of the State Bar of Arizona Multijurisdictional Practice Task Force
John A. Holtaway, Counsel to the American Bar Association Commission on Multijurisdictional Practice

REPORT AND RECOMMENDATIONS OF THE STATE BAR OF ARIZONA TO THE AMERICAN BAR ASSOCIATION'S COMMISSION ON MULTIJURISDICTIONAL PRACTICE IN RESPONSE TO THE COMMISSION'S INTERIM REPORT

March 12, 2002

I. INTRODUCTION

The ABA's Commission on Multijurisdictional Practice has requested comments from state bar associations and other entities to its November 30, 2001 Interim Report on Multijurisdictional Practice. In response to this request, State Bar of Arizona President Nicholas J. Wallwork referred the Commission's Interim Report to an Arizona Task Force on Multijurisdictional Practice formed in November, 2001, for that Task Force's evaluation and presentation of recommendations to the State Bar Board of Governors. The Task Force's Report and Recommendations were presented to the Board at a special Board meeting on March 12, 2002. After consideration of the Task Force's recommendations, the Board of Governors has adopted the following report and recommendations for transmittal to the ABA Commission for its consideration and action.

The issue of whether and under what circumstances attorneys already licensed to practice law in jurisdictions in the United States other than Arizona (as well as foreign jurisdictions) should be permitted to practice law in Arizona is a subject of great interest to our membership. This issue, often called "multijurisdictional practice" or "MJP," is of special and timely interest in Arizona because of the burgeoning growth of our state and its attractiveness to lawyers across all experience levels and areas of practice. It is also an important issue given the rising level of complex, multi-state litigation and transactional practice demanded by a growing base of sophisticated clients doing business or headquartered in our state. We must balance the paramount importance of the integrity of the legal system and the efficient and just resolution of legal disputes with the fact that the needs of many clients do not stop at state lines, that geographic boundaries do not have the same significance as they did when individual states were first charged with regulating lawyers' conduct, and that the nature of communications, dispute resolution and delivery of legal services are changing rapidly.

II. TASK FORCE MAKEUP AND METHODOLOGY

The initial charge of the Arizona Task Force on MJP was to study the ABA Interim Report and suggest responses to each of the eight MJP recommendations set forth there. The Task Force is comprised of a wide variety of Arizona attorneys, emphasizing geographic and practice diversity. The Co-Chairs are Steven A. Hirsch, a litigation partner in the international law firm of Bryan Cave LLP, and Professor Myles V. Lynk, the Kiewit Professor of Law and the Legal Profession at Arizona State University College of Law. Mr. Hirsch has served as President of the Arizona Bar Foundation, the Morris Institute For Justice, a legal services non-profit corporation, and the University of Arizona Law College Association, as well as serving as Litigation Coordinator for his Firm's Phoenix office. He is involved in many MJP issues in

private practice. Professor Lynk, besides studying the issue as part of his academic duties, is an active participant in the MJP debate at different levels within the ABA, and is a former President of the District of Columbia Bar.

The Task Force assigned the eight ABA recommendations to subcommittees for intensive study and preparation of draft reports. The co-chairs addressed recommendations one and eight, related to maintaining state regulation of the profession and establishing an ABA coordinating committee on MJP. Recommendations two and three, related to multijurisdictional practice and the adoption of "safe harbors" defining acceptable MJP practice, were studied by a subcommittee headed by Leo M. Pruett, Assistant General Counsel for Phelps Dodge Corporation, a multi-national mining and manufacturing company headquartered in Phoenix. Other members of this subcommittee included Lynda C. Shely, Director of Lawyer Ethics of the State Bar of Arizona, Chair of the ABA Standing Committee on Client Protection and a noted national speaker on ethics and practice issues including MJP; David G. Campbell, a commercial litigator with the Phoenix firm of Osborn Maledon with substantial experience in multi-state complex litigation and representing corporate clients with needs across state lines; Diane Drain, an accomplished solo practitioner in bankruptcy law in Phoenix with broad experience in a number of state and county bar committees and programs; and Waldo W. Israel, a former member of the State Bar Board of Governors with a border practice in Yuma.

Recommendation number four, related to admission by motion, was assigned to a subcommittee chaired by David B. Rosenbaum, Immediate Past President of the Federal Bar Association's Phoenix Chapter and a commercial litigator with substantial service to the profession and bar also practicing with the Osborn Maledon firm; Frances L. Johansen, the Unauthorized Practice of Law attorney for the State Bar of Arizona with expertise on UPL issues; and Juan Perez-Medrano, a solo civil litigator in Tucson who serves on the State Bar Committee on Character and Fitness and has experience as a Discipline Hearing Officer. Recommendations five and six, related to foreign legal consultants and *pro hac vice* admission, were studied by a subcommittee chaired by Burgess J. W. Raby, a Tempe transactional lawyer with substantial international law experience and practice, and subcommittee members including the Honorable Roslyn O. Silver, United States District Court Judge for the District of Arizona; Christopher D. Thomas of the national law firm Squire Sanders & Dempsey LLP; Matthew J. Yingling, a Phoenix transactional and litigation lawyer with experience in several states and as in-house counsel; and State Bar Member Services Committee Chair and Member Pamela Treadwell-Rubin of Tucson and Helen Perry Grimwood of Phoenix. As will be detailed in the *pro hac vice* report below, Pam and Helen were involved in the Task Force's work because the *pro hac vice* issue has already been intensively studied by the Member Services committee.

Finally, recommendation number seven, related to reciprocal discipline, was assigned to a subcommittee chaired by Therese L. Martin of the Arizona Attorney General's office. Terri is a public lawyer with experience in civil and administrative law litigation who maintains a multi-state practice including reciprocal enforcement of child support and related matters. Other members of her subcommittee included Elizabeth Feldman, a Phoenix solo practitioner; Professor Theodore J. Schneyer of the University of Arizona James E. Rogers College of Law with expertise on MJP issues; and Allen B. Shayo, General Counsel of the State Bar, with a long-time discipline role at the bar and the state and national levels.

The Task Force and its subcommittees were aided by the results of a membership survey that was distributed via e-mail in January on general MJP issues. A summary of the results of that survey are attached as Appendix A. The Task Force appreciates that its time track was short, and that further study and comment by the bar membership of these recommendations, including the final recommendations adopted by the ABA in August of this year, will be necessary and beneficial.

In light of the above, the Board of Governors considered the report and recommendations of the Task Force in formulating its own recommendations and comments, which follow below. Please be advised that these comments and recommendations are preliminary only, and that the State Bar of Arizona, through its Board of Governors, its MJP Task Force and other Bar committees and sections, as well as the bar membership generally, will continue to study these issues in the coming months. As such, the State Bar of Arizona retains the right to reconsider these issues and recommendations and does not wish for them to be characterized as final and binding on the State Bar of Arizona at this time.

III. EXECUTIVE SUMMARY

The State Bar of Arizona endorses recommendations one (state regulation of the profession, with a revision), two (MJP), five (foreign legal consultants, with revisions), 6.1 (*pro hac vice* practice in U.S. District Courts), seven (reciprocal discipline) and eight (establishing an ABA coordinating committee on MJP). The State Bar of Arizona expresses no view at this time with respect to recommendation four (admission on motion). With respect to recommendation three (safe harbors), the State Bar of Arizona disagrees with the concept of safe harbors, and instead advocates the adoption of a modified version of the "common sense" approach to addressing the issue. With respect to recommendation six (*pro hac vice* practice before state courts and agencies), the State Bar of Arizona is of the view that the Commission's proposal and commentary are too general and non-specific to be useful, and asks the ABA Commission to clarify its recommendation and commentary so that it can be studied further.

IV. STATE BAR OF ARIZONA'S PROPOSED RESPONSES TO ABA RECOMMENDATIONS

A. Recommendation One: State Regulation of Lawyers

The ABA Commission's recommendation one provides as follows:

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

State Bar of Arizona's Response:

The State Bar of Arizona endorses the ABA Commission's recommendation one, subject to the following amendment: the recommendation should read "regulation of the practice of law" rather than "regulation of lawyers."

Commentary:

This recommendation reaffirms the long history of state licensing and regulation of lawyers in the United States. The issue, of course, is whether such state-by-state licensing and regulation of lawyers, with the concomitant differences in state licensing requirements and standards of professional conduct, is inimical to promoting the ability of lawyers to practice in multiple jurisdictions. The ABA Commission notes in its report accompanying this recommendation that it has heard from many organizations and individuals advocating the elimination of geographical restrictions on a lawyer's ability to practice anywhere in the United States. These advocates support a system such as exists in the European Union, where lawyers admitted to practice in one member state may establish a practice in another member state with relative ease.

Yet, as the Commission also notes, there is no empirical evidence about how the elimination of jurisdictional restrictions would affect law practice in the United States. There also is no evidence to support the proposition that clients would be better served by permitting national law practice than by authorizing multijurisdictional practice on a more limited basis. In addition, the Supreme Court of Arizona has long regulated the profession of law within the State of Arizona. The State Bar of Arizona is aware of no sentiment to relinquish this authority, particularly in the absence of any evidence that an alternative form of lawyer licensure and regulation would benefit the public. Consequently, the State Bar of Arizona endorses the recommendation, with the slight change mentioned above.[1] The State Bar supports the principle of state judicial licensing of lawyers and regulation of the practice of law, and will further explore within this regulatory context how and under what conditions state licensing authorities should authorize the practice within their jurisdiction of lawyers admitted in another jurisdiction.

B. Recommendations Two and Three: Multijurisdictional Practice and Safe Harbors

The ABA Commission's recommendation two and recommendation three (with subparts) provide as follows:

(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 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."

(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

[1] Arizona's Supreme Court regulates the practice of law, not just lawyers. Ariz. S. Ct. Rule 31(a)(3).

herself out as authorized to practice law in a jurisdiction where the lawyer is not licensed to practice law."

(3.1) "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."

(3.2) "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."

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

(3.4) "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."

(3.5) "The ABA should adopt proposed Model Rule 5.5(c)(5) to allow transactional representation, counseling and other non-litigation work."

(3.6) "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."

(3.7) "The ABA should adopt proposed Model Rule 5.5(d)(1) to provide that it is not unauthorized practice of law for a lawyer 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."

(3.8) "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."

(3.9) "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."

State Bar of Arizona's Response: The State Bar of Arizona endorses the ABA Commission's recommendation two. With respect to the Commission's recommendation three, the State Bar of Arizona is opposed to the "safe harbor" approach set forth in that recommendation as a means of defining what constitutes acceptable multijurisdictional practice. Instead, the State Bar of Arizona recommends that the Commission adopts the revisions to Model Rule 5.5 set forth in Appendix B to this report as a better way to achieve these goals.

Commentary:

The ABA Commission recommendations and proposed rule revisions serve as a good starting point for the debate over multijurisdictional practice. The State Bar of Arizona reviewed other models as well, including the "Common Sense Approach" (prepared jointly by the American Corporate Counsel Association, National Organization of Bar Counsel, and Association of Professional Responsibility Lawyers), and a proposal adopted by the Colorado Supreme Court Rules Committee. For the reasons described below, the State Bar of Arizona concludes that a modified version of the Common Sense Approach is preferable to the ABA Commission's proposal because it provides a more flexible framework for regulating multijurisdictional practice.

Concerns With the ABA Commission's Proposal

The ABA proposal would amend Rule 5.5 of the Model Rules of Professional Responsibility. The proposed amendments begin with a general rule (Proposed Rule 5.5(b)). As applied in Arizona, the general rule would state that a lawyer does not engage in the unauthorized practice of law if (1) the lawyer is admitted to practice in another state, (2) represents a client in Arizona only on a "temporary" basis, and (3) the lawyer's services in Arizona "do not create an unreasonable risk to the interests of the lawyer's client, the public, or the courts."

The first two criteria of this general rule – being admitted in another state and practicing in Arizona only temporarily – are not controversial. They have been accepted by virtually everyone who has commented recently on multijurisdictional practice, including the drafters of the Common Sense Approach. See, e.g., MJP Reports and Recommendations of the Missouri, Colorado and other Bars. It is the third component of the ABA's general rule – an attempt to control "unreasonable risk" – that complicates matters.

The State Bar of Arizona believes that everyone would agree that lawyers should not create unreasonable risk for their clients, the public, or the courts. Everyone would also agree that reducing such risk is a laudable goal. As the ABA proposal demonstrates, however, it is very difficult to address such risk in a rule regulating the unauthorized practice of law.

The ABA's general rule does not define the kind of risk contemplated, and provides no guidance on what is or is not "unreasonable risk." Without clear definition, applying the general rule would be difficult for the bar, the courts, and out-of-state lawyers who must determine whether their work in Arizona is unauthorized. For example, does a Kansas lawyer create unreasonable risk when she drafts documents for an Arizona real estate transaction? What if she is an expert in real estate law generally? What if she has handled only a few real estate transactions? Does her work become sufficiently risk-free if she follows Arizona forms? Can an Oregon lawyer take a deposition in Arizona? What if the deposition concerns an obscure aspect of Arizona water law? What if the lawyer is very competent but inexperienced in depositions? Finding the point at which risk becomes unreasonable, or at which a bar association or court may later conclude that it was unreasonable, can be very difficult.

Apparently recognizing the ambiguity of its general rule, the ABA proposal attempts to provide clarity by identifying several safe harbors that fall within the general rule. Subpart (c) of

the ABA proposal identifies six safe harbors that, according to the rule, "are within paragraph (b)" – that is, within the general rule. Because subpart (c) expressly incorporates the first two criteria of the general rule by stating that the safe harbors apply only if the work is "performed on a temporary basis by a lawyer admitted and in good standing in another United States jurisdiction," it makes clear that the safe harbors really address the third component of the general rule – risk to clients, the public, and the courts. By identifying situations that will always fall within the general rule, the safe harbors presume to identify situations where the visiting lawyer's work will never create an unreasonable level of risk. Unfortunately, most of the specified circumstances provide no such assurance, and at least one of them is plainly unnecessary.

The first safe harbor (Proposed Rule 5.5(c)(1)) applies when a non-Arizona lawyer associates with an Arizona-licensed attorney and the Arizona lawyer "actively participates in the representation." This safe harbor makes sense if the goal is to reduce the risk that might be created by a lack of familiarity with Arizona laws and procedures. This is the least problematic of the safe harbors.

The second safe harbor (Proposed Rule 5.5(c)(2)) states that a non-Arizona lawyer can perform work in Arizona "that may be performed by a person who is not a lawyer." This safe harbor seems entirely unnecessary. If the work in question can be performed by non-lawyers, then it is not the practice of law and could not constitute the unauthorized practice of law.

The third safe harbor (Proposed Rule 5.5(c)(3)) includes work related to a pending or potential proceeding before a tribunal or administrative agency, provided the lawyer is or will be authorized to engage in the work by the court or agency. This safe harbor makes sense to the extent it requires non-Arizona lawyers to be authorized to practice in this state by an Arizona court or agency, thereby assuring that the lawyer's work will be supervised to some extent by the court or agency. But the rule also permits the non-Arizona lawyer to perform work, potentially extensive work, before being authorized by an Arizona court or agency, and includes no requirement that the non-Arizona lawyer be associated with an Arizona attorney in performing this work. Such pre-litigation work would seem to create as much risk as any other unsupervised work by an out-of-state lawyer. If the ABA's safe harbors are intended to identify categories of work that will never present a risk that is "unreasonable," then the third safe harbor does not achieve its intended objective.

The same is true of the fourth safe harbor (Proposed Rule 5.5(c)(4)), which permits the handling of matters in arbitration, mediation, or other methods of alternative dispute resolution ("ADR"). Because the vast majority of ADR procedures are private undertakings that involve no court or agency supervision, and because it cannot be said that ADR proceedings somehow involve less risk than others kinds of law practice, there is nothing in the safe harbor to suggest that it will never present unreasonable risk.

The fifth safe harbor (Proposed Rule 5.5(c)(5)) permits a lawyer to handle matters for a client from his or her home state, or to handle matters that have a "substantial connection" to his or her home state. Here again, however, there is no assurance of less risk to clients, the public, or the courts. The fact that the client is from the lawyer's home state certainly does not mean that

the lawyer is any more competent to handle the matter in Arizona. Nor does a substantial connection to the lawyer's home state necessarily make the Arizona work less risky.

The sixth safe harbor (Proposed Rule 5.5(c)(6)) applies to matters of federal law, international law, laws of foreign nations, or laws of the lawyer's home state. While matters arising under the laws of the visiting lawyer's home state may present less risk because of the lawyer's presumed familiarity with that law, the fact that a matter is governed by federal law, international law, or the law of another country does not mean that it will present less risk when handled in this state by a non-Arizona lawyer.

In short, the ABA's proposed safe harbors do not accomplish their objective. They do not identify areas of practice that necessarily present less risk to clients, the public, or the courts. As such, they should not be identified as permanent safe harbors where the risk addressed in the general rule will never be present. Moreover, in the process of trying to provide clarity for the ambiguous general rule, the safe harbors set forth a complicated series of circumstances that can be confusing and difficult to apply.

The State Bar of Arizona concludes that risk reduction should not be the goal of a rule on multijurisdictional practice. While it is true that Arizona and other states have legitimate reason to be concerned about the competency and qualifications of lawyers who have not passed their bar examinations or their inquiry into character and fitness, attempting to control that risk through a rule on multijurisdictional practice creates the kind of problems seen in the ABA proposal. The State Bar of Arizona believes that such risk concerns are better addressed through the disciplinary rules and procedures already in existence, and through assuring that non-Arizona lawyers who practice in this state will be subject to reciprocal discipline in their home states for problems they create here. Through such procedures and rules Arizona can protect clients, the public, and the courts as it already does for Arizona lawyers.

Once risk reduction is abandoned as a goal of multijurisdictional practice rules, the ABA's ambiguous general rule is not necessary, nor are the multiple safe harbors designed to bring greater certainty to the general rule. A far simpler approach can be adopted, one that is easier for bar associations, courts, and lawyers to apply. The Common Sense Approach allows lawyers admitted and in good standing elsewhere to practice in Arizona on a temporary basis, and provides the desired simplicity and clarity.

Modified Common Sense Proposal

Rather than rely on the ABA-drafted language to define the circumstances in which the multijurisdictional practice is permitted, the State Bar of Arizona suggests borrowing the tighter language from a model the Colorado Bar developed to prohibit an attorney domiciled in Arizona or having an office in Arizona from practicing law unless licensed by the State of Arizona. A similar prohibition is placed on one who holds himself or herself out in Arizona as available to represent clients in Arizona, or solicits or accepts clients in Arizona.

Arizona would follow the Common Sense and ABA Commission's proposals to permit in-house counsel licensed in another jurisdiction to practice permanently in Arizona.

The State Bar of Arizona understands that the Supremacy Clause of the United States Constitution may require Arizona to permit lawyers to practice before federal courts and federal agencies in this State, even when not admitted to the Arizona bar. Because some lawyers practicing solely before such courts or agencies may be domiciled in Arizona or may open offices in Arizona, and thereby create the appearance of being Arizona attorneys, the State Bar of Arizona believes that if such a lawyer is not admitted to practice in Arizona, this fact should be disclosed on all communications so that neither clients nor opposing counsel are misled.

The State Bar of Arizona recommends adding a requirement that lawyers engaged in *any* of the foregoing authorized forms of MJP disclose to the client that the lawyer is not licensed in the state of Arizona and that such disclosure result in the client's informed consent to that representation. By that disclosure, the client's attention will be drawn to the lawyer's lack of Arizona licensure.

In paragraph (e) of the proposed changes to Model Rule 5.5 (See Appendix B), the State Bar of Arizona has deleted the language "or counselors at law" from the Common Sense Approach, as unnecessary and possibly confusing. The remainder of the Common Sense Approach's language regarding *pro hac vice* admission should be retained, as well as the provisions recognizing that MJP lawyers must follow the Arizona Rules of Professional Conduct and Rules of the Supreme Court when practicing in Arizona.

The State Bar of Arizona recommends adding paragraph (g) to Model Rule 5.5 to explain that a lawyer may engage in the multijurisdictional practice of law in Arizona, pursuant to the requirements of Rule 5.5, *only if* the lawyer is admitted to practice law in a jurisdiction that has adopted a rule or statute providing for reciprocal discipline. It is recognized that this requirement may result in some debate, but is intended to encourage uniform rules among the various states to assure that lawyers practicing in one state will be accountable in their licensing jurisdiction. It also addresses the "risk" concerns identified in the ABA proposal.

Finally, the rule should include a Comment explaining the intent of the domicile and office components of the proposed rule -- that authorized MJP practice in this State, other than practice by in-house lawyers or before federal courts or agencies, should be only temporary.

C. Recommendation Four: Admission on Motion

The ABA Commission's recommendation four provides as follows:

"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."

State Bar of Arizona's Response:

Arizona does not permit admission on motion at this time. The State Bar of Arizona continues to study this issue, and therefore offers no recommendation to the Commission with respect to this recommendation at this time.

D. Recommendation Five: Foreign Legal Consultants

The ABA Commission's recommendation five (with subpart) provides as follows:

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

(5.1) "The ABA should amend either its *Model Rule for the Licensing of Legal Consultants* or Rule 5.5 of the *Model Rules of Professional Conduct* to identify circumstances where it is not unauthorized practice of law for a lawyer admitted in a non-United States jurisdiction to perform services for a client in a United States jurisdiction."

State Bar of Arizona's Response:

The State Bar of Arizona endorses the ABA Commission's recommendation five related to foreign legal consultants, with the revisions discussed below.

Commentary:

The ABA Commission encourages jurisdictions that have not adopted a foreign legal consultant rule to do so. The Commission further recommends that circumstances should be identified when it is not the unauthorized practice of law for a lawyer admitted in a non-United States jurisdiction to perform services for a client in a United States jurisdiction. Finally, the Commission requests guidance as to whether these circumstances should be identified through either an amendment to the ABA's current version of the Model Rule for the Licensing of Foreign Legal Consultants (the "Model FLC Rule") or an amendment to Rule 5.5 of the Model Rules of Professional Conduct, and attaches a proposed amendment to the Model Rule to its Interim Report.

The State Bar of Arizona recommends support for recommendation five, but recommends that the safe harbors proposed by the ABA Commission in the form attached as Appendix L to the Commission's Interim Report be rejected. The State Bar of Arizona further recommends that Rule 5.5 of the Model Rules of Professional Conduct be amended to provide that an attorney admitted in a non-United States jurisdiction may engage in the practice of law in a United States jurisdiction on a temporary basis only when legal services are rendered with respect to the laws of that attorney's home jurisdiction and subject to the additional restrictions as are imposed on out-of-state attorneys from the United States, provided that those restrictions do not violate the United States' foreign trade obligations. If, however, it is determined that those restrictions do violate the United States foreign trade obligations, then the State Bar of Arizona recommends the adoption of a narrowed version of the safe harbors proposed by the ABA Commission.

Status of the Model FLC Rule in Arizona

Effective from December 1, 1994, Arizona adopted a modified version of the Model FLC Rule as Supreme Court Rule 33(f) (the "Arizona FLC Rule"). To date, the State Bar of Arizona is advised by State Bar staff that there have been only two practicing attorneys who have availed

themselves of the Arizona FLC Rule, and there currently is only one practicing attorney registered under the Arizona FLC Rule. The other practicing attorney registered under the Arizona FLC Rule currently is suspended for nonpayment of dues. The State Bar of Arizona is advised that neither of the foreign legal consultants have had any disciplinary complaints made against them.

Approximately 24 other jurisdictions have adopted the Model FLC Rule or a rule similar to the Model FLC Rule. The Arizona FLC Rule differs from the Model FLC Rule in a number of substantive ways, some of which make the Arizona FLC Rule easier to comply with than the Model FLC Rule, and some of which have the opposite effect.

Identification of Circumstances When Foreign Lawyer Is Permitted To Perform Service for a Client in a United States Jurisdiction

The ABA Commission's proposed amendment addressing foreign lawyers, attached to the Interim Report as Appendix L (the "Appendix L Amendment"), proposes six limited situations in which a lawyer admitted only in a non-United States jurisdiction may temporarily perform services within a United States jurisdiction without engaging in the unauthorized practice of law. These amendments substantially mirror the "safe harbor" provisions discussed in recommendation three, above. In evaluating them, the principal concern of the State Bar of Arizona was that non-United States lawyers not be permitted to engage in activities in Arizona on a broader basis than lawyers admitted in other United States jurisdictions would be. A further concern of the State Bar of Arizona was with the difficulties of ensuring effective discipline of non-United States lawyers. Consequently, the State Bar of Arizona recommends that the proposed changes to Rule of Professional Conduct 5.5 be expanded to be applicable to lawyers from non-United States jurisdictions only to permit such lawyers to engage in the practice of law in Arizona on a temporary basis in those situations when the principal substantive issue involved is governed by the laws of a jurisdiction in which the non-United States lawyer is admitted. Specifically, the State Bar of Arizona recommends that:

(1) a modified and abbreviated form of the safe harbors included in the Appendix L Amendment, in the form attached as Appendix E, be adopted as a new sub-paragraph (3) in paragraph (b) of the proposed changes to Model Rule 5.5 (as set forth in Appendix B);

(2) paragraph (e) of that changed Rule be modified to clarify that attorneys must be licensed in a United States jurisdiction to be admitted *pro hac vice*; and

(3) paragraph (g) of that changed Rule be amended by adding the phrase, "Except as permitted by paragraph (b)(3) of this Rule," at the beginning of that paragraph.

E. Recommendation Six: Pro Hac Vice Admission

The ABA Commission's recommendation 6 (with subpart) provides as follows:

(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."

(6.1) "With respect to *pro hac vice* admission in federal district court, the ABA should renew its support, in accordance with ABA policy adopted in 1995, for "efforts to lower barriers to practice before U.S. District Courts on state bar membership by eliminating state bar membership requirements in cases in U.S. District Courts, through amendment of the Federal Rules of Civil and Criminal Procedure to prohibit such local rules."

State Bar of Arizona's Responses: The ABA's recommendation six and its commentary are very general and non-specific. Therefore, the State Bar of Arizona asks the Commission to provide additional conceptual guidance regarding the elements that should be included in a proposed *pro hac vice* rule. To the extent that "a handful of states" are believed to be too restrictive in their *pro hac vice* rules, the Commission should identify the types of restrictions that it believes are overly restrictive and explain how such restrictions could be eliminated or otherwise addressed under a proposed *pro hac vice* rule, or so that individual states could consider them in light of their rules. Further, the State Bar of Arizona endorses the Commission's recommendation 6.1, so long as it is rewritten to confirm a requirement of admission to at least one state bar, though not necessarily that of the state in which the District is located, as a condition of admission to practice before that District Court.

Commentary:

In recommendation six, the ABA Commission recommends that the ABA endorse a model *pro hac vice* rule consistent with rules under development by several ABA Sections. A draft of a rule apparently drafted by the International Association of Defense Counsel is attached to the ABA Commission report as Appendix M. The Commission states that several of its sections, including the Section of Litigation and the Torts and Insurance Practice, are collaborating with the IADC to refine the initial proposal.

The Commission reports that every jurisdiction allows out-of-state lawyers to seek authorization to appear *pro hac vice*, and that many administrative agencies do. Most do not allow out-of state lawyers to practice regularly in the jurisdiction, require applicants to show knowledge of and compliance with local rules of conduct and practice, and require participation of a sponsoring or local counsel.

The Litigation Section of the ABA reports that *pro hac vice* procedure is generally adequate, but that "more uniform pro hac vice procedure" would be preferable. The Commission suggests that "unduly restrictive provisions that exist in a handful of states" should be eliminated and that there should be increased consistency of practice from state to state. Unfortunately, the report does not identify the types of restrictions that it has identified as unduly restrictive in the handful of states.

In recommendation 6.1, the ABA Commission recommends that the ABA "eliminat[e] state bar membership requirements in cases in U.S. District Courts, through amendment of the Federal Rules of Civil and Criminal Procedure to prohibit such local rules." The

recommendation is poorly written and contains an apparent inadvertent flaw. Taken literally, this recommendation would prohibit U.S. District Courts from requiring admission to *any* state bar. In other words, the recommendation, as presently worded, would allow lawyers to practice in federal court without being a member of any state bar. The federal court system relies on the basic examination and character and fitness requirements imposed by the various state bars. The recommendation should be rewritten to confirm that it contains a requirement of admission to practice law in at least one state, though not necessarily that of the state in which the district court is located, as a condition of admission to practice before that district court; with this suggestion, the State Bar of Arizona endorses recommendation 6.1.

F. Recommendation Seven: Reciprocal Discipline

The ABA Commission's recommendation seven (with subparts) provides as follows:

(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."

(7.1) "The ABA should amend Rule 8.5 of the *Model Rules of Professional Conduct* in order to better address multijurisdictional law practice."

(7.2) "The ABA should amend the 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."

(7.3) "The ABA should take steps to promote interstate disciplinary enforcement mechanisms."

State Bar of Arizona's Response:

The State Bar of Arizona endorses the ABA Commission's recommendation seven related to reciprocal discipline. The State Bar of Arizona also recommends that the ABA Commission address certain other issues noted below before it makes a final recommendation to the ABA's House of Delegates later this year. Proposed revisions to Model Rule 8.5 to accomplish these objectives are set forth in Appendix F.

Commentary:

Overview

The Commission recommends that Rule 8.5 of the Model Rules of Professional Conduct (Disciplinary Authority; Choice of Law) be amended to address discipline authority over the practice of law by attorneys not licensed in the jurisdiction in which they are practicing. The Commission seeks to effectively regulate lawyers who practice outside their "home states" (where licensed), and to have sanctions 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."

The specific recommendations include: (1) lawyers being subject to a sanction in a jurisdiction where they commit the misconduct even if they are not licensed there; (2) the home state jurisdiction respecting the disciplinary decisions of other U. S. jurisdictions; and (3) the ABA promoting national registration of attorneys and the use of its National Lawyer Regulatory Data Bank as a repository for disciplinary information.

Specific Recommendations in 7.1

The Commission seeks to amend Model Rule 8.5(a) (as proposed by the Ethics 2000 Commission of the ABA) as follows: "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." Thus, an attorney's misconduct could be punishable in the "host state" (where he/she engages in the practice of law but is not licensed).

A comment to Model Rule 8.5 would also be added to read: "Extension of the disciplinary authority of this jurisdiction to other lawyers who render or offer to render legal services in this jurisdiction is for the protection of the citizens of this jurisdiction."

7.1 also would provide, as to choice of law, that: (1) the law of the jurisdiction where a tribunal hears a matter applies (for court or administrative law proceedings); and (2) as to other activities, "the 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." The "predominant effect" language is meant to provide "a safe harbor for lawyers who act reasonably in the face of uncertainty." The predominant effect of pre-litigation conduct, for example, could be where the conduct occurred, where the tribunal ultimately sits, or even in another jurisdiction entirely. Although not entirely clear, this does afford some flexibility as to choice of law.

This choice of law provision would also apply to "lawyers engaged in transnational practice, unless international law, treaties or other agreements between competent regulatory authorities in the affected jurisdictions provide otherwise."

Specific Recommendations in 7.2

Recommendation 7.2 states that lawyers engaged in law practice in multiple jurisdictions would be subject to "meaningful sanctions for misconduct committed outside the jurisdictions in which they are licensed." Since the host jurisdiction would have a limited array of sanctions at its disposal for an attorney who is not licensed in its jurisdiction, a home jurisdiction should be able to enter meaningful sanctions even though the conduct occurred outside of its boundaries. The State Bar of Arizona notes that 7.2 *does not recommend identical discipline* (although Arizona's Supreme Court Rule 58(c) currently calls for that if an attorney is disciplined in another jurisdiction and the matter is referred to the State Bar for action). There are many

problems that arise with language requiring "identical discipline," as the sanctions imposed in the host state may not even exist in the home state, such as private censure or fines.

Accordingly, the State Bar of Arizona recommends that the Commission define or elaborate upon the types of "sanctions" available to be imposed and provide more specific recommendations as to when the imposition of fines may be appropriate.

The word "jurisdiction" replaces the word "state" in proposed changes to Model Rules 6 and 22. It may be worth clarifying whether territories or tribes are included in that definition.

The State Bar of Arizona notes that the bases upon which a respondent may object to comparable or meaningful discipline being imposed in the home state include the following:

(1) The procedure was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or

(2) Based on the record created by the jurisdiction which imposed the discipline, there was such infirmity of proof establishing the misconduct as to give rise to the clear conviction that the court could not, consistent with its duty, accept as final the conclusion on that subject; or

(3) The discipline imposed would result in grave injustice or is offensive to the public policy of the jurisdiction; or

(4) The reason for the original transfer to disability inactive status no longer exists. [This reference to disability status is important in that Arizona's current Supreme Court Rule 58 does not touch upon disability issues at all and probably should.]

The State Bar of Arizona highlights that the existing ABA Rule 6 "defense" against reciprocal discipline, that "the misconduct established warrants substantially different discipline in this state," is arguably replaced by "[t]he discipline imposed would result in grave injustice or is offensive to the public policy of the jurisdiction." The State Bar of Arizona believes that the new language provides more guidance and is a better reasoned basis for not imposing "meaningful" discipline.

The bottom line of the 7.2 recommendations is that home states reciprocally enforce another jurisdiction's disciplinary decision. Specifically, Rule 6 of the Model Rules for Lawyers Disciplinary Enforcement would add language which makes attorneys not licensed in a jurisdiction but who practice law, render, or offer to render any legal services subject to the jurisdiction of that state court for disciplinary purposes.

The changes to Rule 22 would specifically state that reciprocal discipline is imposed based upon the record created in the other jurisdiction that imposed the discipline. A significant public policy reason for imposing reciprocal discipline in a home state without a full de novo proceeding is to protect the public. Any unnecessary delays that expose innocent clients to harm are not justifiable. [The State Bar of Arizona notes that it would be the burden of a respondent to obtain any actual testimony/transcript and exhibits as the record imparted to other jurisdictions is generally in the nature of the pleadings relating to the disciplinary proceeding.] The State Bar of

Arizona also recommends that the ABA provide that the standard of proof in all jurisdictions be one of clear and convincing evidence in attorney disciplinary proceedings.

A key recommendation in 7.2 is that "the home jurisdiction may impose a different disciplinary sanction from that imposed by the host jurisdiction". This is based upon possible conflicts in public policy between jurisdictions.

Specific Recommendations in 7.3

The ABA currently has a National Lawyer Regulatory Data Bank (Data Bank) which serves as "a national clearinghouse for information about lawyers publicly disciplined for misconduct." The Data Bank's purpose is to facilitate the imposition of reciprocal discipline and to deter lawyers who are suspended or disbarred in one state from coming into or continuing to practice in others. If lawyers choose not to become licensed in one jurisdiction, even though they have been suspended or disbarred in another, in states without an authorized practice of law statute or rule, there is little that can be done to deal with these individuals. Additionally, there are some states that do not report information to the Data Bank. A further problem is posed by the fact that all states may not have similar types of discipline or common terminology for the same discipline. These issues should be addressed so that terms and sanctions are defined and clear. All jurisdictions should be encouraged to report to the Data Bank. The specific recommendations are: (1) that the Data Bank "be funded adequately" to permit automation and dissemination of reciprocal discipline/disability information, and (2) that "the ABA and regulatory officials in each jurisdiction establish a system of assigning a universal identification number to each lawyer licensed to practice." The State Bar of Arizona recommends that if other funding cannot be obtained, it be a cost to the profession of setting up such a system that allows for rapid dissemination of disciplinary information to other jurisdictions.

A further recommendation of the Commission is that the highest court in each jurisdiction require lawyers licensed in that jurisdiction to "register annually with the agency designated by the Court stating all of the jurisdictions in which they are licensed to practice law, and . . . immediately report to the agency designated by the Court changes of law license status in other jurisdictions such as admission to practice, discipline imposed, or resignation." Although Arizona does ask lawyers to provide this information on their annual dues' renewal forms, there is no requirement to do so and no penalty for failing to do so.

The Commission further recommends that the "ABA . . . provide adequate technological support to permit direct on-line reporting to the ABA National Lawyer Regulatory Data Bank of public regulatory actions involving lawyer's licenses by reporting agents designated by each jurisdiction's highest court." The ABA would also provide the technological support on any website dealing with the Data Bank. Data input on the website could include the lawyer's name, date of birth, registration/identification number, regulatory actions involving the lawyer's license and links to state websites containing lawyer regulatory data.

The State Bar of Arizona recommends that the ABA consider making malpractice judgment information available in the Data Bank (perhaps noting that the matter is on appeal, if applicable). Plaintiff's counsel could be the responsible reporting person to the state bar/Supreme Court in which the judgment is entered. If this were done, an individual

considering retaining an attorney would have a much better picture of possible issues involving the attorney.

G. Recommendation Eight: Coordinating Committee on MJP

The ABA Commission's recommendation eight provides as follows:

"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."

State Bar of Arizona's Response:

The State Bar of Arizona endorses the ABA Commission's recommendation eight.

Commentary:

Under this recommendation, after the ABA acts on the Commission's final recommendations, the follow-up work required to implement those recommendations, monitor their effect and identify any further steps that might be required to implement whatever decisions are made by the ABA will be undertaken by a new Coordinating Committee on Multijurisdictional Practice. The Commission recommends that this Coordinating Committee be established within the ABA's Center for Professional Responsibility. The Commission views this committee as being a continuing, institutional advocate for multijurisdictional practice within the ABA after the Commission completes its work. The State Bar of Arizona thinks that the establishment of such an institutional advocate for MJP has merit.

There is a continuing need for a committee on multijurisdictional practice within the ABA, and it should properly be located within the Center for Professional Responsibility. Such a committee will help the ABA develop and maintain its expertise and experience on multijurisdictional practice, and will oversee the implementation of the ABA's policy on this subject. Perhaps most importantly, however, this new committee will serve as a resource for state licensing and regulatory authorities that must continue to address this issue for the foreseeable future. When the Commission completes its work, there will be no other existing entity within the ABA that is charged with this responsibility.

V. CONCLUSION

The State Bar of Arizona Board of Governors is pleased to submit to the ABA this report and responses to the recommendations made in the November 30, 2001 Interim Report of the ABA Commission on Multijurisdictional Practice.

APPENDIX A

SUMMARY OF JANUARY MJP SURVEY RESULTS
(as of 2/9/02)

Total Responses Received		66
Support		34
Admission on Motion (specifically)	5	
Safe Harbors (specifically)	6	
Oppose		14
No Stated Support or Opposition But Suggestions Offered re Rules/Regs/Exam/etc.		7
Interested in Learning More (general)		1
Request to Be Removed From Listserv or Notification of New Email Address (no other comment provided)		7
Could Not Access ABA Link (Report) (either mailed hard copy or put member in contact with List Administrator)		2
ABA Delegate Declined to Comment at This Time Due to Scheduled Upcoming Vote By House		1

APPENDIX B

STATE BAR OF ARIZONA
PROPOSED CHANGES TO MODEL RULE OF PROFESSIONAL CONDUCT 5.5

5.5 Unauthorized practice of law

(a) A lawyer shall not:

(1)~~(a)~~ practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or

(2)~~(b)~~ assist a person ~~who is not a member of the bar~~ in the performance of activity that constitutes the unauthorized practice of law.

(b)The authorized multijurisdictional practice of law in the State of Arizona is defined as set forth in sub-paragraphs (1) and (2) below:

(1)The practice of law by an attorney who is not admitted to practice in the State of Arizona, but who practices law in the State of Arizona, and who is admitted to practice law in any other jurisdiction in the United States, and who is a member of the bar and in good standing in all courts and jurisdictions where he or she has been admitted, unless such person:

(A) establishes domicile in the State of Arizona; or

(B) establishes a place for the regular practice of law in the State of Arizona from which such person holds him or herself out for engagement by the public; or

(C) solicits and accepts clients in Arizona.

(2) The practice of law by an attorney who is not admitted to practice in the State of Arizona, but who practices law in the State of Arizona and who is admitted to practice law in any other jurisdiction in the United States, and who is a member of the bar and in good standing in all courts and jurisdictions where he or she has been admitted, if such attorney's practice of law is:

(A) limited to acting as in-house counsel for a single client, and the attorney has advised such client of the status of his or her license, or

(B) limited to the practice of federal law before federal agencies or courts, as authorized by law or court rule, and discloses on all communications the federal law limitations on his or her practice in this jurisdiction.

(c) Any attorney who engages in the authorized multijurisdictional practice of law in the State of Arizona under this rule must advise the lawyer's client that the lawyer is not

admitted to practice in Arizona, and must obtain the client's informed consent to such representation.

(d) Authorized multijurisdictional practice does not constitute the unauthorized practice of law as otherwise defined in the State of Arizona.

(e) Attorneys not admitted to practice in the State of Arizona, who are admitted to practice law in any other jurisdiction in the United States and who appear in any court of record or before any administrative hearing officer in the State of Arizona, must also comply with Rules of the Supreme Court of Arizona governing *pro hac vice* admission.

(f) Any attorney who engages in the multijurisdictional practice of law in the State of Arizona, whether authorized in accordance with these Rules or not, shall be subject to the Rules of Professional Conduct and the Rules of the Supreme Court regarding attorney discipline in the State of Arizona.

(g) An attorney may engage in the multijurisdictional practice of law in the State of Arizona pursuant to this rule only if the lawyer is admitted to practice law in a United States jurisdiction that has adopted a rule or statute or otherwise maintains procedures that provide for reciprocal enforcement of disciplinary findings and sanctions issued in the State of Arizona as defined in ER 8.5.

Comment

[1] The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. Paragraph ~~(b)~~(a)(2) does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. See ER 5.3. Likewise, it does not prohibit lawyers from providing professional advice and instruction to nonlawyers whose employment requires knowledge of law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants and persons employed in government agencies. In addition, a lawyer may counsel nonlawyers who wish to proceed pro se.

[2] The provisions of subparagraph (b)(1) are intended to communicate that the authorized multijurisdictional practice of law in Arizona by lawyers licensed to practice in other jurisdictions pursuant to paragraph (b)(1) should be on a temporary basis and not a regular course of practice. Lawyers wishing to practice in Arizona on a regular basis should seek admission to the Arizona bar.