

## **Testing federal Indian jurisdiction and tribal governmental immunity**

### ***Relevant Factual Information:***

- Arizona Indian tribes are an important, and vital, part of the Arizona economy.
  - ❖ Tribes employ thousands of Arizonans, both Indian and non-Indian, in their governments, utility authorities, casinos and entertainment venues, tourist attractions, as well as on construction projects, and in agriculture, mining, and industrial enterprises.
  - ❖ Consider the following: a 2001 study estimated nearly 15,000 in-state jobs with private employers are directly attributable to Indian gaming<sup>1</sup>. In addition, according to the most recent Arizona Indian Gaming Association Annual Report (FY2007), Indian gaming enterprises alone directly employed over 12,000 Arizona citizens – 60% of whom are non-Indian<sup>2</sup>. By comparison, Arizona's largest employers (e.g., Wal-Mart and Banner Health), employ 31,000 and 22,000 persons, respectively<sup>3</sup>.
  - ❖ Consider the host of labor and employment issues arising from Arizona Indian tribes' employment of nearly 30,000 Arizona citizens, which intersect federal Indian jurisdiction and law by virtue of that employment.
  - ❖ ***As such, federal Indian jurisdiction and law implicates a wide variety of business transactions, employment law issues, and related regulatory and litigation matters.***
- Arizona Indian tribes are a significant part of the Arizona jurisdictional mix.
  - ❖ Approximately 28% of the State's total land base is comprised of Indian reservations which are subject to the jurisdiction of one of the 22 Indian tribes within the State.
  - ❖ Many of these tribes have significant water rights and have entered into agreements with major municipalities to fill the critical water needs of those municipalities.
  - ❖ In addition, many of Arizona's Indian tribes share geographical boundaries with major cities and towns such as: Phoenix, Scottsdale, Tempe, Mesa, Chandler, Prescott, Casa Grande, Florence, Tucson, and Yuma.
  - ❖ Consider the variety of land use and jurisdictional issues that arise from the geographical proximity of Arizona Indian tribes and Arizona municipalities, which intersect federal Indian jurisdiction and law as a result of that proximity.
  - ❖ ***As such, federal Indian jurisdiction and law issues often impact the rights and authorities of private businesses or governmental entities with respect to land use and development rights, rights of way and easements, water law, and even criminal jurisdiction.***
- Arizona Indian tribes and tribal members are an integral part of the social fabric of Arizona.
  - ❖ An estimated 250,000 Arizona citizens are enrolled members of a federally recognized Indian tribe. Many tribal members live off-reservation and many are married to non-Indians and have children who are enrolled members as well as citizens of Arizona.
  - ❖ ***As such, many people and businesses interacting with tribal members and the rights and remedies available to these persons' and businesses' are often impacted by federal Indian jurisdiction and law issues.***

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<sup>1</sup> Stephen Cornell & Jonathan B. Taylor, AN ANALYSIS OF THE ECONOMIC IMPACTS OF INDIAN GAMING IN THE STATE OF ARIZONA. Udall Center for Studies in Public Policy, The University of Arizona, June 2001.

<sup>2</sup> Arizona Indian Gaming Association Annual Report (FY2007). Available at: [www.azindiangaming.org/pdf/AIGA\\_AR07\\_LR.pdf](http://www.azindiangaming.org/pdf/AIGA_AR07_LR.pdf)

<sup>3</sup> Arizona Republic – The Republic 100 (2008). Available at: [http://www.azcentral.com/business/datacenter/republic100\\_data.html?appSession=471615699571027&RecordID=&PageID=2&PrevPageID=2&cpipage=1&CPIsortType=asc&CPIorderby=Employees\\_2008](http://www.azcentral.com/business/datacenter/republic100_data.html?appSession=471615699571027&RecordID=&PageID=2&PrevPageID=2&cpipage=1&CPIsortType=asc&CPIorderby=Employees_2008)

## **Reasons for testing federal Indian jurisdiction and Tribal governmental immunity on the Arizona Bar Exam:**

### **1. Attorneys in Arizona and Their Clients Will Benefit**

- a. Testing knowledge of Indian Law on the Bar Exam will increase minimum attorney competence.
  - i. Federal Indian jurisdiction and law is implicated in a wide variety of everyday affairs effecting Arizonans. Federal Indian jurisdiction and law has a nexus with family law, domestic relations, community property, contracts, criminal law, etc.
  - ii. Attorneys will be better able to represent their clients, whether those attorneys represent clients in interactions and transactions with tribes or Indian people or their client is involved in a matter that arises from within the boundaries of an Indian reservation in Arizona.
- b. Increasing minimum attorney competence will, in turn, reduce the potential ethical breaches that occur frequently when attorneys who are unknowledgeable in Indian law waive a client's contract rights, or file suit in the wrong forum, resulting in dismissal for want of jurisdiction.

### **2. Arizona Citizens, Especially Those Receiving Legal Services, Will Benefit**

- a. Increased attorney competence will directly result in citizens of Arizona receiving higher quality legal services. b. Knowledge of federal Indian jurisdiction and law directly addresses ER 1.1. Attorneys frequently encounter legal issues that require specialized legal training in order to properly represent clients; however, the ability to properly identify the applicable jurisdiction, analyze precedent, and evaluate evidence is a basic skill possessed by all attorneys. A basic understanding of federal Indian jurisdiction will assist an attorney in obtaining and exercising the requisite competence to analyze precedent and evaluate evidence and in turn correctly apply pertinent law, especially with regard to threshold jurisdictional issues.

### **3. The Arizona State Justice System Will Benefit**

- a. Attorneys need to know how to analyze their cases within the framework of federal/state/tribal jurisdiction –a practical reality of practicing in Arizona.
- b. By resolving jurisdictional questions early on (rather than requiring a Court to re-hear issues already resolved at law), the burden on the Justice System and the Courts is reduced.
- c. Cases that are filed improperly in the wrong jurisdiction waste the Court's time, waste the client's financial resources, and increase the risk of a client being denied their day in court due to running of statutes of limitations.

### **4. All Jurisdictions in Arizona Will Benefit from Increasing Recognition of, Respect for, and an Understanding of Tribal Government Sovereignty**

- a. In recognition of the unique jurisdictional authority of sovereign tribal governments, the State Legislature (at the urging of the Supreme Court) enacted A.R.S. §12-136(A) in 1992 requiring state courts to recognize involuntary commitment orders from tribal courts.
- b. In 1999, the Arizona Supreme Court adopted the Rules of Procedure for Recognition of Tribal Court Judgments.
- c. Increasing Recognition of, Respect for, and an Understanding of Tribal Government Sovereignty will foster better relationships between all jurisdictions through:
  - i. Better understanding of which jurisdiction's law enforcement should respond and when;
  - ii. Better understanding of where suits can be brought and applicable time frames; and
  - iii. Increased likelihood of cooperation among jurisdictions based in mutual respect and understanding.

## How to Submit Online Comments to the Arizona Supreme Court Forum

*You must register with the Supreme Court Rules Forum site before you are permitted to electronically file a Comment or Rule Change petition.*

The website address is:

**<http://azdnn.dnnmax.com/AZSupremeCourtMain/AZCourtRulesMain/CourtRulesForumMain/tabid/89/Default.aspx>**

1. **To register**, click on “Register” in the far upper right hand corner of the webpage. A registration window will open. The first 5 fields are required (marked with an asterisk); the others are optional.

You will be required to choose a User Name and a Password. You will need to remember these in order to log in. You will also be required to enter a valid e-mail address. After submitting your registration request, a Verification Number will be sent to your e-mail address. You will need this Verification Number the first time you log in.

2. Once you have successfully registered and logged in using your User Name, Password and Verification Number, you may file Rule Change Petitions or Comments. [If you do not receive your Verification Number within 24 hours, then contact the Support Center at 602 452-3519. ]
3. Once you are logged in to the Forum using your User Name and Password, filing a Comment is very simple.

Just follow these steps:

1. On the right side of the page, under “**Quick Links**” click on “**Court Rules Forum**”.
2. On the next page, on the left side of the page under “**Rules Links**”, click “**View or File Rule Change Petitions and Comments**”.
3. When the new page opens, under the heading “Rule Change Petitions Under Consideration”, click the link for “**Rules of the Supreme Court**”.
4. On the next page, click the link for “**R-08-0016 Petition to Amend Rule 35(b) Arizona Rules of the Supreme Court**”, and a new page will appear displaying information about the petition;
5. Click the “**Add Reply**” icon (located next to yellow stars) to begin the comment process. In the “Body” field you should list the following information:
  - Commenter’s Name
  - Committee Name, if applicable
  - Mailing Address
  - Phone Number
  - FAX Number
  - E-mail Address
  - If you are an attorney: Bar Number
6. You may choose to leave your complete comment in the “Body” field, or you may submit your comment as a document using “Message Attachments”. If the comment is provided as an attachment, then it must in PDF format, immediately followed by a copy in Microsoft Word format as the second attachment. The PDF version will be considered the official copy if any differences are found between the PDF and Word versions.
7. Any supplemental documents must be included as “Message Attachments”. All “Message Attachments” must be in Adobe PDF, and Microsoft Word format.
8. If you wish to be notified whenever someone submits a comment which addresses your comment, then check the ‘Subscribe’ checkbox before submitting your Comment filing.

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9 **IN THE SUPREME COURT**

10 **STATE OF ARIZONA**

11 PETITION TO AMEND RULE 35(b) ) Supreme Court No. R-\_\_\_\_\_  
12 ARIZONA RULES OF THE SUPREME )  
13 COURT ) PETITION TO AMEND RULE 35(b)  
14 )  
15 \_\_\_\_\_ )

16 Pursuant to Arizona Supreme Court Rule 28, the State Bar of Arizona,  
17 respectfully submits this petition to the Court requesting an amendment to Rule 35(b)  
18 of the Rules of the Supreme Court, as set out in Appendix "A", to include Indian law  
19 as one of the subject areas which may be tested on the Arizona Bar Examination ("bar  
20 examination").

21 **I. Background and Need for the Proposed New Rule**

22 An attorney's understanding of the basic precepts of Indian law, especially  
23 regarding jurisdiction and the limited circumstances under which a tribe is subject to  
24 suit, can have a significant impact on the rights and remedies available to that  
25 attorney's clients. It is, therefore, essential to amend Rule 35(b) to include Indian law  
26 as a potential subject for the bar examination to ensure that exam takers are able to  
recognize the three distinct governments operating within the State of Arizona – state,

1 federal and tribal government. Incorporating Indian Law into the bar examination  
2 will not require applicants to have a comprehensive knowledge of Indian law. In fact,  
3 this amendment simply proposes that applicants be able to spot issues relating to tribal  
4 government jurisdiction and sovereignty which are implicated in otherwise common  
5 situations.

6 Indian tribes and tribal governments in this State have always been influential  
7 players in the economic, political, and legal developments that have shaped Arizona.  
8 More recently, tribal governments engage in real estate development, energy  
9 development, banking and finance, telecommunications, wholesale and retail trade,  
10 and tourism as an exercise in inherent tribal sovereignty and economic self-  
11 determination. These activities occur both on and off-reservation and implicate an  
12 array of legal issues, especially those involving determinations of jurisdiction, which  
13 call for competent legal counsel.

14 There are twenty-two federally recognized tribes exercising jurisdiction over  
15 nearly twenty-two million acres of land located within the State of Arizona –  
16 comprising over one quarter of the land within this State. Arizona has the greatest  
17 percentage of Indian lands of all states in the country. Indian lands have been (and  
18 continue to be) developed by some of *Fortune 500's* most powerful companies,  
19 including Wal-Mart, AT&T, Home Depot, Bank of America, Peabody Energy, El  
20 Paso Gas Corporation, and John Deere. These partnerships between Arizona's tribal  
21 governments and national corporations generate billions of dollars in income and tax  
22 revenue, and create significant employment opportunities for tribal members and non-  
23 Indians alike. These transactions necessarily give rise to questions of jurisdiction  
24 regarding the relationship between tribes and non-tribal businesses, employees, and  
25 customers.

1 Another area in which Indian law issues arise on a consistent basis is during  
2 the development of non-Indian owned land near reservations or waterways –  
3 particularly in the context of negotiations or litigation. As a result of the expansion of  
4 Arizona's cities and towns today, tribal lands are integral components of local,  
5 regional and state planning efforts that include transportation, water rights, right-of-  
6 way development, energy development, and environmental compliance. As such,  
7 more and more municipalities are finding that their ability to properly plan for the  
8 future requires developing a relationship with neighboring Indian tribes. And many  
9 attorneys who represent these local governments are found to lack the basic  
10 understanding of the powers and authorities of Indian tribal governments.

11 Legal issues that require an understanding of Indian law are not confined solely  
12 to transactions that occur solely on our near Indian lands, or to which an Indian tribe  
13 is a party. Indian law is a critical component of a wide array of practice areas which  
14 are implicated in everyday interactions. Much of the general population is not aware  
15 of how greatly Indian Law implications can affect their rights.

16 For example the State of Arizona – Tribal Gaming Compact, authorized by  
17 voter initiative in 2002, requires that each tribal government that is a signatory to the  
18 compact establish procedures for handling tort claims involving patrons at gaming  
19 facilities. The patrons making such claims are typically non-Indian. Further, the  
20 attorneys who represent these clients are usually not regular practitioners of Indian  
21 law. It is not uncommon for these attorneys to mistakenly assume that (1) the State  
22 has jurisdiction over these claims and (2) State tort laws apply. As a result these  
23 attorneys neglect to look for applicable tribal laws and consequently run afoul of such  
24 basic legal requirements as notice rules, statutes of limitation, and general  
25 jurisdictional considerations to the detriment of their clients.

1        Other examples of situations where attorneys regularly fail to adequately  
2 identify the impact that Indian law may have on their client's interests are: litigation  
3 involving the adoption of an Indian child, the probate of real property on tribal lands,  
4 auto accidents which occur on tribal reservations, criminal activity occurring within  
5 the boundaries of Indian reservations, environmental compliance, and energy  
6 development on tribal lands. Each of these examples represents a practice area that an  
7 Arizona attorney should reasonably expect to encounter at some point in his practice,  
8 yet each example also presents a situation where an attorney must be able to spot the  
9 Indian law issue in order to competently represent their client.

10        The odds are that the general practitioner or public lawyer in Arizona, at some  
11 point over the course of his career, will become involved in a case requiring the  
12 ability to identify issues raised by Indian law. This intersection of Indian law  
13 considerations vis-à-vis the general practice of law in this State is the crux of this  
14 petition to include Indian Law as a possible test subject on the bar examination.

15        In the best interest of Arizona citizens, every lawyer licensed by the Arizona  
16 Supreme Court must be able to spot Indian legal issues in the general practice of law  
17 in order to possess basic competency. Each bar applicant must have an understanding  
18 of Indian law implications on basic matters involving jurisdiction as they are already  
19 required to be for federal, and state, government. Further, the potential to harm  
20 clients and the unnecessary burden on State, Tribal and Federal courts attributable to  
21 the inability of practitioners and even judges to recognize Indian law jurisdictional  
22 issues far outweigh the natural disinclination to include an additional subject matter  
23 area into the bar examination.

24        To underscore this point, at least three other states – Washington, New Mexico  
25 and South Dakota – now include aspects of Indian law as potential areas for  
26 examination on their bar exams. These changes came as a direct result of the

1 increased appreciation by those bars that lawyer competence in states with significant  
2 populations of Indian people and Indian tribal governments requires, at a minimum,  
3 that lawyers be able to identify situations where tribal jurisdiction and tribal  
4 governmental sovereignty are implicated.

5 Initiatives similar to the Petition before you are currently under active  
6 consideration in Michigan, Oklahoma, Montana, Wisconsin, Idaho, and Oregon.  
7 Although Arizona has the largest percentage of Indian lands comprising the state, we  
8 are facing the prospect of falling behind the bars of other similarly situated states by  
9 failing to recognize the importance of Indian law as a legal area which must be tested  
10 on the bar examination. The unfortunate result is the potential harm to clients due to  
11 attorneys who cannot adequately identify key issues.

12  
13 **II. Including Tribal Jurisdiction and Tribal Governmental Sovereign**  
14 **Immunity as Examination Subjects Will Not Require Specialized**  
15 **Understanding of a Sophisticated Area of Law**

16 The bar examination is designed to test core competencies and specialty subjects  
17 are not appropriate examination material. And, while it is true that Indian law can  
18 contain many nuances, this Petition proposes to include Indian law as a possible test  
19 subject on the bar examination in a manner that will not require bar applicants to have  
20 specialized knowledge of Indian law in order to be adequately prepared for the exam.  
21 Instead, this Petition seeks to include only those fundamental Indian law issues, tribal  
22 jurisdiction and tribal governmental immunity, that come from an attorney having the  
23 most basic knowledge of Indian law.

24 The ability to identify when tribal jurisdiction might apply is no different than  
25 the existing requirement that applicants be able to discern when state law applies and  
26 when federal law applies. For example, applicants are already tested on the ability to

1 identify when Arizona and federal civil procedure rules apply; it would not be a great  
2 leap to also expect that applicant to be cognizant of the possibility that tribal laws may  
3 apply where the action is in tribal court, which is not subject to either state or federal  
4 rules of civil procedure. The inclusion of Indian law on the bar examination would  
5 not require each applicant to be intimately familiar with the specific laws of a  
6 particular tribe. Instead, this proposal would merely require that the test taker be able  
7 to identify when tribal law may be implicated in a situation that is otherwise  
8 commonplace in the practice of law in Arizona.

9 The following is an example test question taken from facts similar to a recent  
10 criminal case decided by the Supreme Court of Wyoming:

11 A Native American father is charged by the State of Arizona for  
12 felony murder resulting from the death of his daughter by child abuse.  
13 The alleged murder occurred in the family home in the town of Rio  
14 Salado, Arizona, located within the former boundaries of the Rio  
15 Salado Reservation established in 1879 by Executive Order. The  
16 lands upon which the town of Rio Salado is located were ceded by the  
17 Rio Salado Indian Community to the federal government in 1905 by  
18 treaty. The town of Rio Salado is presently unincorporated as a  
19 municipality of the State of Arizona. You have been appointed to  
20 represent the accused in the case filed by the State of Arizona.  
21 Discuss all issues that could be raised on the question of jurisdiction  
22 of the state court over your client and the subject matter. Assume this  
23 offense occurred on Indian lands.

24 A proper legal analysis would include discussing the potential criminal  
25 jurisdiction by the federal government under the Major Crimes Act for acts of a  
26 Native American charged as murder. It may also include a discussion of concurrent  
tribal court jurisdiction if the tribal laws of the Rio Salado Indian Community provide  
for the prosecution of child abuse resulting in death.

Including tribal governmental immunity would simply seek to have the  
applicant recognize that Indian tribes are governments, not businesses or entities

1 subject to Arizona law. As such, tribal governments, like any other government, have  
2 laws governing when and where the tribe may be subject to suit. By adopting the  
3 proposed rule change to include tribal governmental immunity on the bar  
4 examination, applicants will not be required to know the specifics about when and  
5 where a tribe can be sued. The proposed change would require that exam takers be  
6 able to recognize that the answers to questions regarding when and where a tribe can  
7 be sued will not be found in Arizona or federal law and attorneys must look for  
8 answers in laws of the Tribe against which they are seeking to bring a claim. Once  
9 more, this situation is becoming increasingly common for Arizona practitioners, and  
10 bar applicants need to be aware of the potential negative consequences that can result  
11 from their inability to recognize this basic principle of Indian law.

12       The Indian Child Welfare Act is a prime example of a specific law that is  
13 encountered everyday in State Courts throughout Arizona by practitioners who must  
14 be aware of the law and its implications in order to competently represent their  
15 clients; ICWA is an act of Congress which specifically requires that Indian tribes be  
16 provided an opportunity to intervene as a party in any actions in State Court which  
17 impact the parental rights of Indian tribal members, and understand that each Tribe's  
18 laws will impact any potential placement or adoption of an Indian child. Accordingly,  
19 it is important for applicants to know that there are Indian law implications in all  
20 adoption and dependency matters involving Indian children. When the Court  
21 considers that Arizona has a significant Indian population and that Indian children are  
22 disproportionately represented in the juvenile court system, the importance of such  
23 understanding on the part of practitioners is even more compelling. Although this  
24 Petition does not seek to compel applicants to become experts on specific laws, such  
25 as ICWA, including Indian law as a possible subject area on the bar examination  
26

could be as simple as requiring that an applicant be able to spot an Indian law issue in a commonly arising, but otherwise every-day dependency or child welfare matters.

### **III. Proposed Period for Implementation the Amended Rule**

One logical concern about this Petition is that Indian law is not a required course in law school; and, applicants, especially those from out of state, may not have had an opportunity to become familiar with the subject matter. However, the same is true for other “fair game” subject matters such as taxation, evidence, and secured transactions. Like Indian Law, these subjects are not required law school courses; however, these courses are offered as part of the elective law school curriculum. Bar applicants have been regularly tested on these areas for decades and have routinely proven their competency without any extraordinary bar preparation efforts. The same result could reasonably be expected once Arizona requires Indian law on the bar examination.

However, in order to address this concern in a proactive manner, this Petition proposes that the Supreme Court implement the inclusion of Indian law on the bar examination following a reasonable notice period. This notice period will provide the incoming class of first-year students, enrolled at the time of the Supreme Court’s adoption of the Rule, with sufficient notice of the new requirement. Such a notice period is precisely how the State Bar of Washington resolved this concern.


Preparation for this change is facilitated by the fact that BAR/BRI (one of the preeminent bar prep course firms in the nation) already offers Indian law materials as part of its prep course for exam takers in those states which require it on their bar examination. Additionally, the law schools at Arizona State University and the University of Arizona already offer a wide variety of Indian law courses (and have for well over 10 years) which enjoy healthy enrollment by a broad range of law students.

1 A reasonable notice period, coupled with the already ubiquitous law school  
2 Indian law course offerings and prep course materials, will adequately ensure that all  
3 future applicants are well-prepared for the possibility of Indian law as a test subject on  
4 the bar examinations beginning in July of 2011.

5 **IV. CONCLUSION**

6 The State Bar respectfully requests that the Court amend Rule 35(b) as set forth  
7 in Appendix "A".

8  
9 DATED this 6<sup>th</sup> day of May, 2008.

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13   
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20 Clerk of the Supreme Court of Arizona  
21 this 6<sup>th</sup> day of May, 2008.

22 by: Kathleen A. Gunderson  
23  
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25  
26

## **APPENDIX A**

**PROPOSED AMENDMENT TO RULE 35(b)**

*(proposed additional language shown by underscoring and proposed deletions shown by strike-through)*

**Rule 35(b). Examination Subject; Grading**

1. "Essay examination questions at each examination will be upon some, but not necessarily all, of the following subject mater areas: contracts (including the Uniform Commercial Code except Articles 4, 5, 7, and 8); torts; criminal law; constitutional aspects of criminal procedure; corporations, partnerships, and other business organizations; trusts; wills; professional responsibilities; civil procedure; civil procedure (Arizona and federal); constitutional law (Arizona and federal); evidence; real property; ~~and; community property;~~ and jurisdiction (including Arizona, federal, and tribal) and tribal governmental immunity."