

**Indian Law Question
on the
State Bar Exam Rule Petition**

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 gaming¹. 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-Indian². By comparison, Arizona's largest employers (e.g., Wal-Mart and Banner Health), employ 31,000 and 22,000 persons, respectively³.
 - ❖ 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.*

¹ 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.

² Arizona Indian Gaming Association Annual Report (FY2007). Available at: www.azindiangaming.org/pdf/AIGA_AR07_LR.pdf

³ 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

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.

Courtesy: Court Rules Forum FAQ <http://azdnn.dnnmax.com/Default.aspx?tabid=90>

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8
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 Pursuant to Arizona Supreme Court Rule 28, the State Bar of Arizona,
16 respectfully submits this petition to the Court requesting an amendment to Rule 35(b)
17 of the Rules of the Supreme Court, as set out in Appendix "A", to include Indian law
18 as one of the subject areas which may be tested on the Arizona Bar Examination ("bar
19 examination").

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

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

1 could be as simple as requiring that an applicant be able to spot an Indian law issue in
2 a commonly arising, but otherwise every-day dependency or child welfare matters.
3

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

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

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


20 Preparation for this change is facilitated by the fact that BAR/BRI (one of the
21 preeminent bar prep course firms in the nation) already offers Indian law materials as
22 part of its prep course for exam takers in those states which require it on their bar
23 examination. Additionally, the law schools at Arizona State University and the
24 University of Arizona already offer a wide variety of Indian law courses (and have for
25 well over 10 years) which enjoy healthy enrollment by a broad range of law students.
26

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 6th day of May, 2008.

10
11
12
13 
14 Robert B. Van Wyk
15 Chief Bar Counsel
16 STATE BAR OF ARIZONA
17 4201 North 24th Street, Suite 200
18 Phoenix, Arizona 85016-6288

19 Electronic copy filed with the
20 Clerk of the Supreme Court of Arizona
21 this 6th day of May, 2008.

22 by: Kathleen A. Lundgren
23
24
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."



PATRICK IRVINE
JUDGE

Court of Appeals

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STATE OF ARIZONA
DIVISION ONE
STATE COURTS BUILDING
1501 WEST WASHINGTON STREET
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June 19, 2007

Kerry Patterson, President
Indian Law Section
State Bar of Arizona
4201 N. 24th Street, Suite 200
Phoenix, Arizona 85016-6288

Re: Indian Law on the State Bar Examination

Dear Ms. Patterson:

As was decided by vote of the Arizona State, Tribal, and Federal Court Forum at its April 27, 2007 meeting, I am writing to convey the support of the Forum for the efforts of the Indian Law Section to have Indian law added to the topics that may be included in essay examination questions listed in the Rules of the Supreme Court, Rule 35 (b) (1).

The Arizona State, Tribal, and Federal Court Forum was established in 1990 by order of the Chief Justice of the State of Arizona. Today the Forum includes members from state, tribal and federal judiciaries and from the public law offices of these three jurisdictions. One of the stated purposes of the Court Forum is:

To promote improvement in the quality of justice delivered in the context of the overlapping jurisdiction of state, tribal and federal courts through judicial education, professional court administration, education of attorneys and the public about tribal courts,

The support of the Court Forum for the Indian Law Section's efforts, particularly to include civil and criminal jurisdictional issues on the Bar exam, promotes this purpose by prompting Bar examinees to educate themselves on these basic principles before they are licensed to practice in Arizona where these issues are so pervasive.

Thank you for your presentation to the Forum on this matter. Please keep the Forum informed of the progress of this effort and feel free to request further assistance and support from the Forum, as needed, in the future.

Sincerely,

A handwritten signature in black ink, appearing to read "P. Irvine", written over the word "Sincerely,".

Patrick Irvine, Chair
Arizona State, Tribal, and Federal Court Forum

Hon. Ruth V. McGregor
Chief Justice of the Arizona Supreme Court

I am writing in support of the Petition to Amend Rule 35(b) of the Arizona Rules of the Supreme Court, which seeks to include aspects of Indian law on the Arizona State Bar examination.

A large part of my practice has been representing Indian tribes and their business entities, particularly involving personal injury claims and some commercial disputes. It is true that most every lawyer practicing in Arizona will face questions involving tribal law, and with increasing frequency, yet few are equipped to recognize fundamental principles of jurisdiction and sovereignty which go to the heart of every case. All too often new lawyers (as well as seasoned practitioners) simply do not appreciate these issues and pitfalls, which not only is a disservice to the client, it can be legal malpractice.

"Indian law" is complex, and there are far too many issues to cover as a whole on the bar exam, which is all the more reason why lawyers should be able to recognize when an Indian law issue exists and be keenly aware that jurisdiction and sovereignty will be case dispositive. For example, most cases arising on a tribal reservation within the state of Arizona will implicate tribal court jurisdiction, and many commercial and tort remedies involving tribal governments and business enterprises require an understanding tribal law and procedure will likely govern. A lawyer proceeding under the false assumption "Indian law" claims can be litigated in Federal Court will find the case dismissed leaving the client with no remedy, except against the lawyer.

It is not too much to ask that applicants sitting for the Arizona Bar Examination be expected to understand that Indian tribes have a unique status as sovereign nations, and that claims involving tribal governments or occurring on tribal lands will necessarily require careful analysis and faithful adherence to the applicable rules of law and procedure. I strongly urge the Court to Amend Rule 35(b) to include these discrete issues of Indian law on the Arizona Bar Examination.

Theodore A. Julian, Jr.
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702 E. Osborn, Suite 200
Phoenix, AZ 85014



STATE OF ARIZONA

JANET NAPOLITANO
GOVERNOR

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January 8, 2009

James Stipe, President
Indian Law Section
State Bar of Arizona
4201 N. 24th Street, Suite 200
Phoenix, AZ 85016-6288

Dear Mr. Stipe,

I write today in support of the Indian Law Section's efforts to have tribal government jurisdiction and immunity included as a potential test subject for the Arizona State Bar examination. As United States Attorney for the District of Arizona, Attorney General, and Governor, I have worked on legal issues with tribes in a variety of contexts including public safety, growth and development, the environment and contractual matters. These issues can be very complex and lawyers in Arizona should have a foundational awareness of tribal government jurisdiction and immunity in order to be able to advise their clients in a competent and responsible fashion.

Given the important role tribal governments play in Arizona's legal landscape, it is highly likely that a large portion of attorneys practicing in Arizona will at some point in their careers encounter a tribal government jurisdictional or immunity issue. Arizona is home to 22 tribal governments who collectively control roughly 28% of our state land base, meaning almost all roads lead through Indian Country. Because there is more Indian reservation land within Arizona than any other state, there are potentially more jurisdictional issues present here. Moreover, even within Indian Country there are distinctions: Arizona is home to the Navajo Nation with the largest reservation in the country, the San Juan Southern Paiute Tribe with no reservation land, and several tribes whose land is comprised of Indian and non Indian ownership rendering these reservations a checkerboard of state, tribal, and federal jurisdiction.

Tribal leaders frequently tell me of challenges they face from growth and development approaching their boundaries particularly when working with developers and residents who do not understand the unique legal status of tribal governments. Economic growth on Indian lands involving tribal governments, tribal members and non-tribal members and entities has increased and will undoubtedly continue to grow. In

Jim Stipe
December 7, 2008
Page Two

several regions of our state, tribal enterprises are the area's largest employers, offering jobs to tribal members and non-members alike. These dynamics mean that Arizona attorneys are increasingly called upon, more so than probably any other state, to deal with land, contractual, tort, and family matters that implicate Indian law or have Indian law as the foundational backdrop.

Arizona's legal landscape and the significant role tribal governments play renders it essential for the Bar to understand core federal Indian law principles to effectively represent individual, business and government clients. Failing to do so could lead, and in fact does lead, to lawyers filing claims in the wrong court or worse, having claims dismissed entirely for lack of jurisdiction. Certainly, Arizona businesses and citizens are deserving of protection from such disastrous results. In my view, the potential harm to clients and the unnecessary burden on state, tribal and federal courts far outweighs the natural disinclination to include more subject matters on the bar examination.

Several of our sister states including New Mexico, South Dakota, and Washington now include federal Indian law as a potential test subject for their bar examinations. Other states are considering such action. As a result, the major bar preparation courses have materials to help test takers adequately prepare for this potential subject. More importantly, Arizona is home to two of the finest Indian law programs in the country. Our law schools support the effort to include tribal government jurisdiction and immunity as a potential test subject and will ensure that future graduates are prepared for this portion of the exam, should the Supreme Court act favorably upon the Indian Law Section's petition.

Finally, Arizona's tribal leaders acting through the Inter Tribal Council of Arizona also support this effort. Adding tribal government jurisdiction and immunity as a potential test subject for the Arizona Bar examination is a natural step in the development of legal practice in our state and one I am happy to support.

Yours very truly,

A handwritten signature in dark ink, appearing to read "Janet Napolitano", with a long horizontal flourish extending to the right.

Janet Napolitano
Governor



Supreme Court

STATE OF ARIZONA

COMMITTEE ON EXAMINATIONS

1501 W. Washington Street, Suite 104
Phoenix, Arizona 85007-3222
602-452-3971

March 27, 2009

Honorable Ruth V. McGregor
Chief Justice of the Arizona Supreme Court
Room 402, Arizona State Courts Building
1501 West Washington Street
Phoenix, Arizona 85007-3329

Dear Chief Justice McGregor:

This letter is in response to the petition to amend Rule 35(b) of the Arizona Rules of the Supreme Court, which seeks to include Indian Law as one of the subject areas that may be tested on the Arizona Bar Examination. Your Committee on Examinations carefully considered this issue when it was previously raised three years ago, and the Committee voted to not recommend a change to the rule at that time. Our then-Chair Jeanette Boulet provided the Committee's decision and reasoning in a letter to you dated September 22, 2006. Because we have not seen any new evidence or arguments regarding this issue in the interim, the Committee has not altered its recommendation to the Court.

For your information, I have enclosed copies of the September 22, 2006 letter, along with documents and copies of correspondence that provided the basis for our decision not to recommend a change. Please let us know if we can provide you or the other justices with additional information about our review and recommendation.

Sincerely,

A handwritten signature in dark ink, appearing to read "Theodore Campagnolo", is written over a large, faint, circular watermark or seal.

Theodore Campagnolo
Vice-Chair, Committee on Examinations

Anna Maria Chavez, Chair • Theodore Campagnolo, Vice-Chair • Jeffrey B. Messing
Terri L. Clarke • Michael G. Galloway • K. Scott McCoy • David B. Earl • Raymond K. Ramella
Jeff T. Bergin • Jim Drake, Jr. • Jeffrey A. Weinstein • Karen L. Karr



Supreme Court

STATE OF ARIZONA

COMMITTEE ON EXAMINATIONS

1501 W. Washington Street, Suite 104
Phoenix, Arizona 85007-3231
602-364-0371

September 22, 2006

Honorable Ruth V. McGregor
Supreme Court, State of Arizona
Room 402, Arizona State Courts Building
1501 W. Washington
Phoenix, Arizona 850007-3329

Dear Chief Justice McGregor:

As you may or may not be aware, your Committee on Examinations has been considering whether or not to support or recommend an amendment to Rule 35(b), Ariz. R. Sup. Ct., 17A A.R.S., to include federal Indian law as a tested subject on of the Arizona Bar Examination. I am writing to apprise you that the Committee will not be recommending such a change at this time.

We first began our inquiry after we learned that New Mexico had decided to include this subject area, and based on our appreciation of the Indian law issues that frequently arise for Arizona lawyers. After our initial discussions, we were approached by the Indian Law Section of the Arizona State Bar, supported by the State Bar Board of Governors, and asked to "work together with the Indian Law Section to include Indian law jurisdictional subject matter on the Arizona State Bar examination, beginning with the summer 2008 examination and continuing thereafter, such that every bar-licensed attorney will receive knowledge reasonably necessary for the representation and protection of all who are subject Arizona State law." (For your information, I have enclosed the Board of Governors' resolution, along with a cover letter from the Indian Law section, with this correspondence.)

During the course of our review over many months beginning in 2005, we met with members of the Indian Law Section and others in the Arizona legal community who are knowledgeable about either federal Indian law or our bar examination requirements. In addition, the Committee members contacted various of their counterparts in other jurisdictions. And lastly, Carolyn de Looper of your staff has provided invaluable assistance in collecting and reporting to us about similar considerations in other states. (A survey of the thirty-seven states that responded to Carolyn's inquiries is also enclosed.)

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Honorable Ruth V. McGregor
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Ultimately, after much discussion, the committee determined that it would not, at this time, offer its support to the rule amendment proposed by the Indian Law Section. Our reasons for that decision are explained in the enclosed correspondence to Shannon O'Loughlin, our contact with that section's executive council.

Please let us know if we can provide you or the other justices with any further information about our review. Although our decision was one of "no action at this time," we nonetheless wanted you to be aware of our consideration of this subject.

Sincerely,



Jeanette M. Boulet
Chair, Committee on Examinations

jmb
attachments



August 2, 2005

Ms. Carolyn DeLooper
Committee on Examinations, Committee on Character and Fitness
Arizona Supreme Court
Administrative Office of the Courts
1501 W. Washington, Suite 104
Phoenix, AZ 85007-3231

Re: Indian Law Subject Matter on Arizona State Bar Examination

Dear Ms. DeLooper:

On May 20, 2005, the Arizona State Bar Board of Governors adopted and approved the Executive Council of the Arizona State Bar Indian Law Section's Resolution concerning Indian Country Jurisdiction on the Arizona State Bar Examination. Enclosed is a copy of that Resolution.

In addition, our Indian Law Section members have been informing the Indian legal community and Indian tribal communities about the Resolution. The Resolution was a topic of discussion at the Indian Law Section's CLE presentation and annual meeting at the Annual Bar Convention in Tucson, and at the May 2005 meeting of the Inter-Tribal Council of Arizona.

As stated in previous correspondence, the Indian Law Section is happy to assist the Committee on Examination in this matter in any way that it can. We appreciate your time and consideration into this matter. Please feel free to contact Shannon O'Loughlin, Chair Elect of the Indian Law Section, at (602) 528-4030.

Sincerely,

A handwritten signature in black ink, appearing to be "Shannon O'Loughlin", written in a cursive style.

The Indian Law Section of the Arizona State Bar

AUG 03 2005



RESOLUTION

Federal Indian Jurisdiction on the Arizona State Bar Examination

**Adopted and Approved by the Arizona State Bar Board of Governors on May 20, 2005,
and the Executive Council of the Arizona State Bar Indian Law Section on April 18, 2005**

WHEREAS, we, the members of the Indian Law Section of the Arizona State Bar Association, in support of our purpose to advance the understanding, study, adoption, application, interpretation, and improvement of Arizona state and tribal laws, rules, and regulations that pertain to Indians, Indian tribes or Indian Country, and to their administration and enforcement, to understand and improve the relationships of these bodies of law and judicial and administrative systems, and to encourage and support mutual respect for, and understanding of, the cultures, values, customs, and heritages which underlie them, hereby submit this Resolution; and

WHEREAS, the recent growth in tribal economic development and the resulting increase in interaction of Arizona's twenty-two (22) federally recognized Indian tribes with non-Indian entities and individuals, both on and off of the reservation, has given rise to an array of business transactions, regulatory issues and litigation matters between tribal and non-tribal parties in this state; and

WHEREAS, the citizens of Arizona and their attorneys do not generally understand the sovereign legal rights of Arizona Indian tribes; nor do they understand precisely how tribal self-governance and self-determination, and the laws and ways of Arizona Indian tribes, affect and intersect Anglo-American legal and jurisdictional principles; and

WHEREAS, the integrity and competence of the legal profession in this state would be enhanced if attorneys licensed by the Arizona State Bar Association generally understood significant Indian law jurisdictional principles, particularly the common law doctrines of tribal sovereignty, tribal sovereign immunity, tribal subject matter jurisdiction (both criminal and civil), and the Indian Child Welfare Act; and

NOW THEREFORE BE IT RESOLVED, that we do hereby support and urge that the Arizona Supreme Court and its Committee on Bar Examinations work together with the Indian Law Section to include Indian law jurisdictional subject matter on the Arizona State Bar examination, beginning with the Summer 2008 examination and continuing thereafter, such that every bar-licensed attorney will receive knowledge reasonably necessary for the representation and protection of all who are subject to Arizona State law.

Testing on Indian Law
March 2006 Survey

Jurisdiction	Do you currently test on Indian Law?	If yes, when did you begin?	Do you plan to test on Indian Law?	If yes, when?
Arizona	No		Under consideration.	
Colorado	No		No	
Connecticut	No		No	
Delaware	No		No	
Georgia	No		No	
Florida	No		All currently tested subject matters will be reviewed this year; does not imply IL will be added.	
Hawaii	No		No	
Idaho	No		No	
Illinois	No		No	
Indiana	No		No	
Iowa	No		No	
Kansas	No		No	
Louisiana	No		No	
Maryland	No		No	
Massachusetts	No		No	
Michigan	No		No	
Minnesota	No		No	
Mississippi	No		No	
Missouri	No		No	
Montana	No		No	
Nevada	No		No	
New Hampshire	No		No	
New Jersey	No		No	
New Mexico	Yes	Feb. 2003	IL is a "testable" subject matter; not necessarily tested on every exam.	
Ohio	No		No	
Oklahoma	No		No	
Oregon	No		No	
Pennsylvania	No		No	
Rhode Island	No		No	
South Carolina	No		No	
South Dakota	No		The SD Equal Justice Commission has recommended adding an Indian law question. The Board of Bar Examiners is in the process of proposing rule changes to the Supreme Court to allow for this. The Court will hear these sometime in the late summer or early fall of 2006. If approved the earliest would be July 2007.	

Tennessee	No		No	
Texas	No		No	
Utah	No		No	
Vermont	No		No	
Washington	No		IL will be tested, but no sooner than July 2007.	
West Virginia	No		No	
Wyoming	No		No	



Supreme Court
STATE OF ARIZONA
COMMITTEE ON EXAMINATIONS

1501 W. Washington Street, Suite 104
Phoenix, Arizona 85007-3231
602-364-0371

June 15, 2006

Shannon Keller O'Loughlin
Dreyer Boyajian LLP
75 Columbia Street
Albany, New York 12210

By Fax 518-463-4039 (3 pages)

Re: Arizona State Bar Indian Law Section Proposal

Dear Ms. O'Loughlin:

The Supreme Court Committee on Examinations has considered the proposal of the Executive Council of the Indian Law Section to amend Rule 35(b), Ariz. R. Sup. Ct., 17A A.R.S., to include Indian Law as a subject tested in the essay portion of the Arizona State Bar Examination. We are currently conducting a full review of our bar examination, including the areas tested and the format of the questions, and may in the future be submitting proposed rules changes to the supreme court to implement any recommendations we reach through that process. At your request, we have separately considered the change proposed by the Indian Law Section, which would amend the potential areas of testing to include, in addition to the twelve topics currently listed:

Tribal sovereign immunity; and civil and criminal jurisdiction over actions involving Tribes, Tribal members or entities, or arising on Indian lands.

After considerable discussion, the committee has voted to withhold its support for such an amendment to Rule 35 at this time.

As you know from our meeting with members of the Indian Law Section Executive Council last fall, we appreciate the need for Arizona attorneys to recognize and respond

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Shannon Keller O'Loughlin
Dreyer Boyajian LLP
June 15, 2006
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appropriately to Indian Law issues that may be relevant to a case or legal problem. The committee discussed other ways such education might be provided, such as mandatory CLE, or integration of Indian Law issues in mandatory law school core courses.

We are concerned, however, about attempting to improve the knowledge of Arizona attorneys by including this sophisticated and complex field on the bar examination, when the subject matter is not a required course in Arizona's law schools or, to our knowledge, any law school in the country. As you can imagine, there is a tension between competing concerns about the efficacy of our bar examination, with some critics maintaining that the bar exam already tests too many subject areas and judges applicants too harshly, and others questioning whether the existing topics are sufficient to test basic legal knowledge.

We are mindful of our supreme court's admonition that the practice of law "is not a privilege but a right, conditioned solely on the requirement that a person have the necessary mental, physical and moral qualifications." *See, e.g. In re Klahr*, 102 Ariz. 529, 433 P.2d 977 (1967). Accordingly, the bar exam is designed to test the core competencies needed to begin the practice of law, not expertise in any particular area. Other highly specialized fields of legal knowledge that routinely impact practice are not tested. Committee members noted that taxation, administrative law, and bankruptcy are all examples of such omitted subject areas that regularly require attention in an Arizona attorney's practice.

Committee members also addressed whether a proposed change provides fair notice of the specific areas to be tested on the exam, an issue we discussed with you last fall. We appreciate your work in drafting the proposed language, but find it sweeps broadly, touching upon Indian Law aspects of constitutional law, jurisdiction, criminal law, procedure, and possibly conflicts of law. In the context of testing a range of topics to ensure general competency, the committee expressed concern that this change requires too much of applicants, at least in the context of the bar examination as it is currently comprised and formatted.

Shannon Keller O'Loughlin
Dreyer Boyajian LLP
June 15, 2006
Re: Arizona State Bar Indian Law Section Proposal
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We wish you well in your important efforts to improve the education of members of the Arizona Bar about the Indian Law issues that may regularly affect their clients, and have appreciated the opportunity to meet with you about your concerns.

Sincerely,



Jeanette M. Boulet, Chair
Committee on Examinations
Supreme Court of Arizona

JMB/

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