

1 Michael C. Nelson
2 Chairman, Arizona Court Forum
3 Apache County Superior Court
4 Post Office Box 667
5 St. Johns, AZ 85936
6 (520) 337-4364

7 IN THE SUPREME COURT
8 OF THE STATE OF ARIZONA

9 **IN RE: RULES OF
10 PROCEDURE FOR THE
11 RECOGNITION OF TRIBAL
12 COURT JUDGMENTS**

13 **REPLY TO COMMENTS**

14 _____)
15 Michael C. Nelson, Chairman of the Arizona State, Tribal and Federal Court Forum and petitioner in this
16 matter hereby replies pursuant to Rule 28 (D) to comments requested and received by the Court and to
17 issues raised regarding this petition.

18 **Need for Proposed Rules** (Comment by Civil Practice Committee, State Bar of Arizona)

19 The only existing procedures for recognition of tribal court judgments are the Procedures for Enforcement
20 of Tribal Court Involuntary Commitment Orders adopted by this Court in response to a particular need
21 expressed in a petition filed by this petitioner. Federal statutory law cited by one commenter requires that
22 tribal court orders concerning child support, dependency and domestic violence be accorded full faith and
23 credit by state courts but does not provide any procedures for doing so. The existence of these provisions
24 is not evidence that these rules are not needed as suggested by the commenter.

25 These proposed rules improve access to the courts by both Indian and non-Indian litigants who are subject
26 to tribal court jurisdiction. The rules provide a clear procedure for filing and processing tribal court
27 judgments, a procedure that does not currently exist. This procedure assures prompt, fair recognition of
28 these judgments consistent with the Justice 2002 goal to provide access to fair and swift process for
resolving civil disputes through court procedures that promote this goal. Litigants should not
bear the burden and experience the delay of commencing a new lawsuit in state court to enforce
rights already adjudicated in tribal court.

1 These proposed rules would also promote clarity and greater certainty for both Indian and non-Indian tribal
2 court litigants and their attorneys who need their disputes resolved in tribal court because they are subject
3 to tribal jurisdiction and who need the assistance of state courts to enforce judgments obtained in tribal
4 court. The case law that these rules implement is not well known even to attorneys who specialize in Indian
5 law. This problem is compounded by the relative infrequency recognition of tribal court orders is sought.

6
7
8 These proposed rules would allow judges, court staff, attorneys and litigants to efficiently, consistently and
9 fairly enforce tribal court judgements that ought to be enforced pursuant to existing Arizona law. The rules
10 promote the finality of valid judgments by tribal courts of competent jurisdiction thus preventing relitigation
11 of issues or disputes in state court and the consequent waste of time and money by litigants and by the state
12 courts. The rules also promote respect for valid court orders.

13
14 The proposed rules are also needed to promote cooperation and mutual respect by state and tribal courts
15 for each others' orders and cooperation between courts in enforcement of those orders. The Forum agrees
16 with comments that this is especially needed as the interaction between individuals and businesses within
17 and outside tribal jurisdictions increases. These rules increase the ability of state court judges to prevent
18 and resolve jurisdictional disputes that may result in protracted litigation and that ill-serve the litigants and
19 the courts. Such action by state judges will encourage tribal judges to do likewise.

20
21 No state exceeds Arizona in the percentage of land within the state under the jurisdiction of Indian nations
22 and tribes. Yet the states of Washington, Oklahoma, New Mexico, North Dakota, South Dakota and
23 Wisconsin have all seen the need to adopt provisions concerning the recognition and enforcement of tribal
24 court judgments. These rules are proposed to address a clearly recognized and important, though perhaps
25 uncommon, need.

26
27 **Authority to Adopt Proposed Rules** (Comment by Civil Practice Committee, State Bar of Arizona)

28 The proposed rules provide procedures for recognition and enforcement of rights adjudicated in tribal

1 courts. They do not create, define or regulate rights; but rather prescribe the method by which substantive
2 rights are enforced or made effective. In establishing the courts, the constitution gives citizens the right to
3 access the courts to enforce rights including those established by foreign judgments and to redress
4 grievances. Therefore, this court may adopt these rules prescribing a method to enforce these rights
5 pursuant to its Arizona Constitution, Article 6 §5 (5) rule making authority.

6
7 The court in C & J Travel, Inc. V. Shumway, 161 Ariz. 33, 775 P.2d 1097 (Ct. App. 1989)
8 acknowledged the right to enforce a foreign judgment in Arizona courts through means other than the
9 Foreign Judgments Act.

10 Arizona has adopted the Uniform Enforcement of Foreign Judgments Act, and A.R.S. § 12-1706
11 provides: "The right of a judgment creditor to bring an action to enforce his judgment instead of
12 proceeding under this article remains unimpaired." Thus, the procedure created by the statute is not
13 exclusive and does not preclude a creditor's unimpaired right to bring a separate action on the
14 foreign judgment and reduce it to judgment in a sister state. Annot., 72 A.L.R.2d 1257 (1960),
15 citing, Hoffman v. Hart, 309 S.W.2d 709 (Mo.App.1958).

16 The procedures stated in proposed Rules 3 and 4 are derived from the Foreign Judgments Act and the
17 proposed standards stated in the proposed Rule 5 are derived from federal and state common law. As
18 explained below, these rules do not create new or modify existing rights or standards. Since tribal court
19 judgments are recognized and enforced by Arizona courts according to existing court rules and case law
20 it is reasonable to conclude that this court may adopt these rules to provide a clearer and more efficient
21 method for such recognition and enforcement.

22 The Court has adopted rules that provide standards for adjudicating substantive rights in several other
23 contexts. (See A.R.C.P. Rule 60 (b) (grounds for relief from judgment), A.R.C.P., Rule 65 (d) (grounds
24 for issuing a temporary restraining order), A.R.C.P., Rule 32.1 (grounds for granting post-conviction relief),
25 A.R.P.S.A., Rule 3 (grounds for bringing a special action). The grounds contained in these rules restate
26 rather than create or modify case law rights like the grounds for recognizing tribal court judgments
27 contained in Rule 5 of the proposed rules.

28 **Implementation of Current Law** (Comment by Civil Practice Committee, State Bar of Arizona)

1 The proposed rules are consistent with both state and federal law concerning recognition of tribal court
2 judgments. They do not affect the existing jurisdiction of tribal courts. They expressly do not apply where
3 federal law requires full faith and credit such as in dependency, child custody, child support, and domestic
4 violence matters. These rules do not require greater recognition of judgments than that dictated by the
5 Arizona case law. The Forum found that Arizona case law leaves no doubt that the judgments of tribal
6 courts of competent jurisdiction are to be recognized. All appellate cases on this issue have upheld or
7 required recognition of the tribal law or judgment at issue. Tracy v. Superior Court, 168 Ariz. 23, 810
8 P.2d 1030 (1991), Lynch v. Olsen, 92 Ariz. 354, 377 P.2d 199 (1962), Begay v. Miller, 70 Ariz. 380,
9 222 P.2d 624 (1950), Leon v. Numkena, 142 Ariz. 307, 689 P.2d 566 (App. 1984), Brown v. Babbitt
10 Ford, 117 Ariz. 192, 571 P.2d 689 (App. 1977). The proposed rules combine the elements of comity
11 and full faith and credit only in the sense that the proposed Rule 5 mandatory grounds for denying
12 recognition of a judgment are the case law bases for denying recognition of even a judgment entitled to full
13 faith and credit while the proposed Rule 5 discretionary grounds for denying recognition are the case law
14 bases for denying recognition of a judgement under the principle of comity. The proposed Rule 5 is also
15 consistent with the case law for recognition of tribal court judgments by federal courts articulated in Wilson
16 v. Marchington, 127 F.3d 805 (9th Cir. 1997).

17
18 **Validity of Tribal Court Orders** (Comment by Civil Practice Committee, State Bar of Arizona)

19 The commenter criticizes the procedures contained in the proposed rules as unfair to the subjects of tribal
20 court judgments despite the fact that these are the same procedures provided for enforcement of foreign
21 judgments in state statutes. Tribal court orders should not be presumed less deserving of recognition than
22 judgments of the courts of Arizona or other states which may be entered by non-lawyer judges who are
23 subject to political influence due to election or appointment through political processes. The proposed rules
24 presume the validity of tribal judgments. This presumption is rebuttable through a clear, efficient and fair
25 process. However, petitioners have no objection to setting a higher level of procedural fairness in these
26 rules that is more consistent with the Arizona Rules of Civil Procedure.

27
28 **Applicability of Rules of Procedure and Evidence** (Comment by Civil Practice Committee, State Bar

1 of Arizona)

2 The Arizona Rules of Civil Procedure and Rules of Evidence apply to all proceedings in superior court
3 including the proceedings governed by these rules except where they are inconsistent. Tribal judgments
4 recognized under these rules would have the same force and effect as Arizona judgments. Therefore, these
5 judgments would be subject to challenge, as is any Arizona judgment, under Rule 60 of the Arizona Rules
6 of Procedure and the associated case law. (See Miller v. Eloie Farms, Inc., 128 Ariz. 269, 625 P.2d 332
7 (App. 1980).

8 9 **Reciprocity**

10 The Forum discussed at length and rejected a requirement that a tribal court be governed by rules similar
11 to these before the orders of that court will be recognized under these rules. The primary reason for this
12 position is that this requirement is not consistent with current Arizona law. As noted above, Arizona courts
13 have routinely recognized tribal court orders in cases before them without regard to whether tribal courts
14 have a policy or practice of recognizing state court orders. Presumably, a reciprocity requirement is not
15 part of Arizona case law because it is a political rather than a legal requirement that has no relevance to the
16 issue of whether a tribal court order is valid and should be recognized. It is bad public policy because it
17 would have the effect of penalizing citizens who have the misfortune of having a dispute that is subject to
18 the jurisdiction of a tribal court which does not have such a policy in place. Additionally, the difficulties of
19 administering a reciprocity requirement may well remove most of the benefits these rules are designed to
20 provide. As noted in the comment by a tribal official, some tribal governments, such the Navajo Nation
21 and the Colorado River Tribes, have already adopted laws concerning recognition of state court judgments
22 to meet the same needs described above. Such reciprocal action can be effectively encouraged but not
23 coerced by adoption of these rules.

24 25 **Response to Commenters' Recommended Changes in Proposed Rules**

26 **Policy Statement** (Suggested by DNA People's Legal Services)

27 Arizona court rules do not typically include policy statements. If needed such information may be placed
28 in a comment to the rule. The recommended North Dakota policy statement concerning a tribe's

1 equivalency to a foreign nation is not consistent with Arizona case law. Any needed clarifying policy
2 statements would be most effective in comments to particular rules.

3
4 **Inapplicability to Criminal Judgments** (Suggested by Maricopa County Attorney)

5 The Forum agrees that the proposed rules should be clarified to apply exclusively to recognition of tribal
6 court civil judgments. This could be accomplished by adding “civil” before “judgments” in the title and in
7 Rule 1, as follows:

8
9 **RULES OF PROCEDURE FOR RECOGNITION OF TRIBAL COURT CIVIL JUDGMENTS**

10 **Rule 1. Applicability**

11 These rules shall govern the procedures for recognition and enforcement by the superior
12 court of the State of Arizona of tribal court civil judgments of any federally recognized Indian tribe.

13 **Notice of Response Period** (Suggested by Brad Jolly)

14 The Forum agrees that the notice of filing of the tribal court judgment required to be sent to the judgment
15 debtor should include notice of the response period. The Forum recommends that a sentence be added to
16 the end of Rule 3(b) as stated below.

17
18 **Service Concerns** (Raised by the Civil Practice and Procedure Committee, State Bar of Arizona)

19 Proposed Rule 3(b) was modeled after and tracks the procedure in the Uniform Enforcement of Foreign
20 Judgments Act at A.R.S. §12-1703(B). However, the Forum does not oppose a modification of Rule
21 3(b) to require that notice of the filing be mailed to the Responding party by certified mail, return receipt
22 requested, or served through personal service. The Forum also agrees that Rule 3(b) should specify that
23 service of the notice be made on the Attorney General’s Office when the State or any of its officers,
24 employees, etc. are the Responding party. Rule 3(b), as revised would read:

25
26 **(b) Notice of Filing.** Promptly upon the filing of the tribal judgment and the affidavit, the enforcing
27 party shall serve the notice of the filing, pursuant to Rule 4.1(h), Arizona Rules of Civil Procedure
28 or mail by certified mail, return receipt requested, the notice of the filing of the tribal judgment and
a copy of the tribal judgment to the Responding party at the address given and shall file proof of
mailing with the clerk. The notice shall include the name and address of the enforcing party and

1 the enforcing party's attorney, if any, in this state.
2 If the Responding party is the State of Arizona, or any of its officers, employees, departments,
3 agencies, boards or commissions, the notice of the filing shall be mailed to the Attorney General's
4 Office. The notice of filing shall include the text of Rules 4 and 5(a) and (b).

4 **Response Period Concerns** (Raised by the Civil Practice and Procedure Committee, State Bar of
5 Arizona)

6 Again, Proposed Rule 4 was modeled after the procedure in the Uniform Enforcement of Foreign
7 Judgments Act at A.R.S. §12-1703(B) and §12-1704(C). However, the Forum does not oppose a
8 modification of Rule 4 to require a response to be filed within 20 days of receipt of the notice or 25 days
9 of mailing of the notice. Rule 4, as revised, would read:

11 Any objection to the enforcement of a tribal judgment shall be filed within twenty (20) days of
12 service or of receipt of the mailing of the notice of filing the order or within twenty-five (25) days
13 of the mailing, whichever last occurs.

13 **Period for Reply and Hearing** (Suggested by DNA People's Legal Services)

14 Rule 4 provides the judge flexibility to determine the need as well as the timing of replies and hearings
15 considering the merits of the objection. An evidentiary hearing may be unnecessary depending upon the
16 nature of the objection. Express time limits should not be needed.

19 **Res Judicata Effect of Tribal Court Judgment** (Suggested by DNA People's Legal Services)

20 The amendments suggested would clarify that tribal court findings of fact concerning subject matter
21 jurisdiction would have res judicata effect and that the state court could only decline to enforce the
22 judgment if it found, as a matter of law, that the tribal court lacked subject matter jurisdiction. Res judicata
23 limitations on a party who has had a full and fair opportunity to litigate an issue apply to tribal court
24 adjudications under Arizona law without adding language to the rule. This could be clarified by adding the
25 following comment to proposed Rule 5(a):

27 Tribal court findings of fact concerning jurisdiction following a full and fair opportunity to be heard
28 have res judicata effect in state court proceedings. (See Leon v. Numkena, 142 Ariz. 307, 689

1 P.2d 566 (Ct.App. 1984) See also Lofts v. Superior Court, 140 Ariz. 407, 410, 682 P.2d 412,
2 415 (1984) and Firedoor Corp. of America v. Tibshraeny Bros. Construction, Inc., 126 Ariz.
3 392, 616 P.2d 67 (App.1980).

4 **Change Consideration to “Due Process”** (Suggested by Civil Practice and Procedure Committee, State
5 Bar of Arizona)

6 The Forum does not oppose a modification substituting “due process” for “notice or an opportunity to be
7 heard” in Rule 5(c)(2). The intent of this language was to indicate, as specifically as possible, the minimum
8 requirement of fair procedure. However, the term “due process” includes other elements of fundamental
9 fairness that may be raised. That term is flexible enough to allow recognition even if a tribal court judgment
10 is not obtained by the same process as applies in state court. Rule 5(c)(2), as revised, would read:

11 **(c) Mandatory Considerations Following Objection.** A tribal judgment shall not be recognized
12 and enforced if the objecting party demonstrates to the court at least one of the following:

13 2. The defendant was not afforded ^{...} due process of law.

14 The Forum recommends that the following paraphrase of discussion of this issue in Wilson v. Marchington,
15 127 F.3d at 811, be added as a comment to proposed Rule 5(c)(2) to clarify this basis for denying
16 recognition:

17 The due process requirement stated in this rule does not require that a tribe utilize judicial
18 procedures identical to those used in state courts. Tribal law notions are not per se disharmonious
19 with due process by reason of their divergence from the Arizona rules or common-law notions of
20 procedure. State courts must be careful to respect tribal jurisprudence along with the special
21 customs and practical limitations of tribal court systems. Extending recognition to tribal judgments
22 under these rules is not an invitation for state courts to exercise unnecessary judicial paternalism
23 in derogation of tribal self-governance. Instead, tribal court proceedings must afford the parties
24 the basic tenets of due process.

25 **Make Fraud Consideration Mandatory** - The Forum concluded that this consideration should remain
26 discretionary. This is consistent with the Restatement (Third) of Foreign Relations Laws of the United
27 States (1986) cited in Wilson and, consequently, will promote the consistent development of the law by
28 Arizona and federal courts. Fraud can be considered in determining whether the subject of the judgment
was afforded due process.

1 **Make All Discretionary Considerations Mandatory** (Suggested by DNA People’s Legal Services)

2 The considerations as stated in Rule 5 are most consistent with Arizona case law. Rule 5(a) requires that
3 an order not be enforced based upon considerations that would prevent enforcement of even a judgment
4 entitled to full faith and credit. Rule 5(b), on the other hand, contains discretionary considerations which
5 are reasons for rejecting a judgment on the basis of comity. As noted above, this is consistent with the
6 Restatement cited in Wilson and, consequently, will promote the consistent development of the law by
7 Arizona and federal courts.

8
9 **Effect of Public Policy Considerations on Judgments Based upon Tribal Customary Law** (Raised
10 by Fort McDowell Mojave-Apache Indian Community)

11 The Forum agrees that tribal court judgments should not be rejected just because they are based upon tribal
12 customary law. Recognition should be declined only if the application of the customary law violated some
13 important public policy such as conduct that would be illegal under Arizona law or if the application of
14 customary law would shock the conscience. This issue was address by this Court with respect to
15 recognition of a Mexican judgment in Veytia v. Alvarez, 30 Ariz. 316, 247 P. 117 (1926) as follows:

16 It may be that the ties of comity among the states are or ought to be stronger than those between
17 nations (see, however, Buckner v. Finley, supra) but none will argue that we should indulge a spirit
18 of captiousness against our neighboring republic. With it and its people our government and our
19 people are in constant governmental and commercial contact. Citizens of the one country own
20 property and transact business in the other, and the course of trade is growing. It should be
21 encouraged and fostered for our mutual welfare. Of those Mexicans with whom we make valid
22 contracts in this country we expect faithful performance or the right to secure redress through
23 Mexican courts. Adverse decisions on grounds of **policy** will breed suspicion or discrimination
24 against us. We should be careful not to give less than we expect to receive. Elusive notions of
25 public policy, an unruly horse at best (Hogston v. Bell, 185 Ind. 536, 112 N. E. 883), should not
26 be an obstacle to just claims. If we are bound to hear one plead his own wrong as a defense to just
27 claims, let us at least insist that our judicial consciences are really shocked.

23 State courts should have no less regard for the judgments of self-governing Indian Tribes and nations within
24 Arizona whose members and residents are citizens of this state. Accordingly, the Forum recommends the
25 following comment to proposed Rule 5(d)(4):

26 Denial of recognition of a tribal court judgment on the basis of public policy should be disfavored
27 due to its subjective nature and the potential for this exception to completely undermine the
28 principle of comity. Recognition of a tribal judgment should not be held contrary to the public
policy unless recognition of the judgment would shock the conscience.

1 The Forum has made every effort to respond to and address the comments filed in this matter and for the
2 reasons stated seeks adoption of the proposed rules with the recommended changes and comments.

3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Respectfully submitted this 6th day of August, 1999.

Michael C. Nelson
Chairman, Arizona State, Tribal
and Federal Court Forum

Original and 6 copies
hand-delivered this 19th
day of August, 1999 to:

Arizona Supreme Court
Clerk's Office
1501 W. Washington Street, Suite 402
Phoenix, AZ 85007-3327

Rachel McFarland