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May 7, 2009

Chief Justice Ruth V. McGregor
Supreme Court of Arizona
1501 W. Washington
Phoenix, Arizona 85007-3231

Re: *Petition to Amend Supreme Court Rule 35(b)*

Dear Chief Justice McGregor:

As Chair of the Indian Law Section of the State Bar of Arizona (the "Section"), I write in response to the comment submitted by the Vice-Chair of the Committee on Examinations (the "Committee") with regard to Petition R-08-0016, in which the Arizona State Bar requests an amendment to Rule 35(b) of the Arizona Rules of the Supreme Court. The Committee's comment states that it had previously taken this issue under advisement and, in September 2006, voted not to support a change to Rule 35(b). The Committee also states that it has received no new evidence or arguments since it considered the matter nearly three years ago. However, the Section did, in fact, respond to the Committee in June of 2007. *See* attached letter from Kerry Patterson on behalf of the Section. The Committee has yet to respond to the Section's letter.

In its June 15, 2006, letter to the Section, the Committee cited three reasons for its decision to withhold support for the proposal to include Indian law on the bar examination: (1) Indian Law is too complex to test considering that it is not a required law school course; (2) Indian law is highly specialized and requires more in-depth knowledge than the core competencies that the bar exam is designed to test; and, (3) prospective bar takers need fair notice before such a subject is added to the bar examination. Taking the Committee's concerns to heart, the Section set out to address them and find workable solutions where necessary. To bolster this effort, opinions were solicited from practitioners, academics, and other members of the legal community. The outcome of this effort was the June 2007 letter submitted by the Section to the Committee, in which the Section responded to each of the concerns raised by the Committee.

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In response to the Committee's concern that Indian Law is "too sophisticated and complex to test considering it was not a required law school course", the Section offered for the Committee's consideration the fact that Rule 35 (b) presently requires bar examination essay questions to address the subject areas of evidence, wills and trusts, community property, corporations, criminal procedure, and secure transactions. As your honor is aware, none of these subjects are "required law school course[s]" and each can be quite complex, yet every year hundreds of persons sit for, and successfully pass, the Arizona Bar Examination ("Bar Exam"). Moreover, the fact that three states are already testing Indian law and Arizona's law schools have sophisticated Indian law programs means that test-takers will have plenty of available study materials and help in preparing for this topic, even if they did not take an Indian law specific law school course. As such, the Section feels that the Committee's first concern is misplaced.

With respect to the Committee's second concern, that "Indian law is highly specialized and requires more in-depth knowledge than the core competencies that the Bar Exam is designed to test," the Section proposed to limit the Indian law topic to only jurisdiction and sovereign immunity. The State Bar adopted this approach in its petition, which simply seeks to require that exam takers be prepared on two fundamental aspects of Indian Law: (1) that there is a third, distinct jurisdiction within Arizona; and, (2) that Tribal governments have a unique status as sovereigns which must be addressed in disputes involving tribes, tribal businesses, and tribal members. Requiring exam takers to demonstrate a basic awareness of all three jurisdictions present within Arizona does not require specialized knowledge. Further, requiring an exam taker to recognize that any issue involving an Indian tribe might implicate sovereign immunity does not seem to require any more "in-depth knowledge" than does requiring exam takers to recognize community property issues in a divorce matter. We submit that issues of jurisdiction and immunity are "core competencies." Being able to spot Indian law jurisdiction and immunity issues early in proceedings will save time and money, reduce malpractice, allow practitioners to identify when further research into Indian law topics is necessary, and improve judicial efficiency.

In its third concern, the Committee commented that requiring Indian law to be tested presented "fairness" issues for applicants due to the fact that it has not been tested before on the Arizona Bar Exam. The Section addressed this concern by proposing a "grace period." The State Bar's proposal would not make Indian law jurisdiction or immunity fair game topics for the Bar Exam until at least July of 2011. A similar grace period was used in Washington State's implementation of its rule change to include Indian law on that State's bar exam, and this is sufficient time to allow students enrolling in Arizona law schools in August to be aware of the new requirement during their first year so they can plan their curriculum accordingly.


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In reviewing the Committee's concerns for a second time (with the most recent comments submitted to the Supreme Court), the Section has come to suspect that perhaps the Committee has a misconception regarding how to test Indian law on the Bar Exam. In Arizona, the Bar Exam typically tests only one core subject per essay. In other states, a particular topic may be touched on in an essay largely dedicated to other matters. For example, in Texas, oil and gas law is one subject that examinees may encounter on the bar examination; however, that subject may be tested in an essay with a broader focus. If the Committee is concerned about dedicating an entire essay to discussing tribal jurisdiction and tribal sovereign immunity, these topics could be tested within the context of broader issues. For example, it is easy to imagine how an essay on torts could also present issues of Tribal jurisdiction and immunity. As all Arizona attorneys who have encountered Indian law issues know, when a practitioner encounters Indian law in their practice, it will be woven into other issues. That is how we believe it could be tested on the Bar Exam.

Including federal Indian jurisdiction and tribal governmental immunity as a fair game subject for the Bar Exam will improve the legal profession by minimally, but necessarily, expanding the core competencies an attorney must have to practice law in Arizona. Like all subject matters that may be tested, practitioners certainly can develop sophisticated, specialized, and in-depth knowledge of Indian law. However, just as the Bar Exam only requires applicants to demonstrate a basic understanding of the Arizona-specific aspects of real property, evidence, community property, or wills and trusts, the State Bar has proposed a narrowly drafted rule change that merely requires exam takers to have a working understanding of the two areas of Indian law that they are most likely to encounter. By providing a two-year delay, we feel that future applicants will have more than fair notice of what will be expected of them on future bar exams.

In conclusion, the Section has carefully considered the Committee's concerns. The Committee's letter in opposition to the rule change does not address our June 2007 response. We do believe their concerns have been addressed. We support the State Bar's petition to amend Rule 35(b) and ask that it be granted.

Very truly yours,



James M. Stipe
For the Firm

JMS/bb