ACCORD

A Legal Journal for Practitioners

VOLUME 5 | SPRING 2016 | NUMBER 1

Published by
Arizona Summit Law School
Phoenix, Arizona 85004

Published by *Accord, A Legal Journal for Practitioners, Arizona Summit Law Review*, Arizona Summit Law School, 1 North Central Avenue, Phoenix, Arizona 85004.

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Cite as:
5 Accord, Prac. Legal J. ___ (2016).

ACCORD,
A Legal Journal for Practitioners

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Arizona Medicinal Marijuana Cards and DUI Law; A Fragile Balance

Professor Alexander Benikov*

I. Introduction

Driving under the influence ("DUI") laws exist for a simple and logical reason. The American people do not want impaired or drunk drivers on the road. The reason for this is simple; they are a danger to themselves and others. In 2003, 17,013 people were killed in alcohol related vehicular accidents.[1] This number represents forty-one percent of the 43,005 people killed in all traffic accidents.[2] The average American has a thirty percent chance of being killed or injured by an impaired driver during his or her lifetime. The numbers are substantial and should be troubling. Impaired driving continues to be the leading cause of death for people under the age of thirty.[3]

The numbers are equally troubling for Arizona. In 2003, there were 1,120 traffic deaths; 470 were alcohol related. The alcohol related deaths accounted for forty-two percent of the deaths.[4] In Arizona, nineteen percent of people killed in crashes had a blood alcohol concentration ("BAC") over 0.15.[5] Alco-

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1 *Traffic Safety Facts 2003 Data,* National Center for Statics and Analysis, (2003), http://www-nrd.nhtsa.dot.gov/Pubs/809761.pdf (last visited June 17, 2015).

2 *Id.*

3 *Id.*

4 *Id.*

5 *Id.*

hol is a factor in more than twenty-six percent of Arizona's crash costs.[6] In 2001, alcohol-related crashes cost Arizonans more than $2.6 billion, including $1.1 billion in monetary costs and $1.5 billion in quality of life losses.[7] But what about drug DUIs wherein the drug legally possessed and used, and the driver was not impaired by the drug?

What if the State of Arizona made it legal to possess marijuana and a person were to drive with it in his or her central nervous system? Can the person still be prosecuted for a drug DUI? Furthermore, at the time of trial is it fair for the jury know that the alleged offender had a medicinal marijuana card? In other words, does the Arizona Medical Marijuana Act ("AMMA") prohibit the government from prosecuting an authorized marijuana user for driving under the influence? The State's argument is that the person can and should be.

II. Roadmap

This article will first examine the current DUI drugs in Arizona. Second, the article will discuss some of the cases that have analyzed marijuana DUI laws in the past. Lastly, this article will examine a recent Arizona Court of Appeals case dealing with the issue of a marijuana card and a drug DUI.

A. *Current Arizona Drug DUI Laws*

Today, the Arizona Revised Statutes, Title 13, govern Arizona Drug DUI laws.[8] It states, "[i]t is unlawful for a person to drive or be in actual physical control of a vehicle . . . while there is any drug . . . or its metabolite in the person's body."[9] The statutes further define what constitutes a drug; both marijuana and any marijuana metabolite are clearly covered within the statutes.[10] Under these specified statutes, if marijuana or a marijuana metabolite is detected in a driver's system while driving, he or she can be charged with a drug DUI in Arizona.

B. *A Brief History Of Arizona DUI Drug Cases*

In the 1994 case of *State v. Phillips*, the Arizona Court of Appeals first dealt with the issue of a presence of a marijuana metabolite in a DUI case.[11] This case is important from a historical perspective, as it was one of the first

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[6] *Impaired Driving*, Arizona Department of Public Safety, http://www.azdps.gov/Information/Impaired_Driving/ (last visited June 17, 2015).

[7] *Id.*

[8] Ariz. Rev. Stat. Ann. § 28-1381(A)(3).

[9] *Id.*

[10] *Id.*

[11] State v. Phillips, 873 P.2d 706, 706 (Ariz. Ct. App. 1994).

cases to address the issue of drug DUIs. The case arose after an officer responded to a traffic accident.[12] It is unclear as to why the officer was called to the scene.[13] At the scene, the officer observed the defendant, who smelled of alcohol and seemed impaired.[14] Eventually, low levels of alcohol, low levels of methamphetamine, and a marijuana metabolite were found in the defendant's body.[15]

The defendant was found guilty under Arizona's drug DUI statute, A.R.S. 28-692(A)(3).[16] The defendant appealed, but the court upheld the conviction.[17] The defendant further appealed on the grounds that the statute was vague and overbroad.[18] The defendant argued that the statute lacked specific guidelines for its application and therefore permitted arbitrary and unfair enforcement.[19] One of the defendant's arguments was that the statute might punish someone who passively inhaled smoke, or was not impaired by the use of illicit drugs.[20] The defendant argued that since a metabolite does not impair, the statute is too vague in attempting to regulate the presence of metabolites in the system under the DUI statute.[21]

The court did not find the defendant's argument persuasive, and stated in its opinion:

> The legislature was reasonable in determining that there is no level of illicit drug which can be acceptably combined with driving a vehicle, the established potential for lethal consequences is too great. The state has a compelling legitimate interest in protecting the public from drivers whose ability may be impaired by the consumption of controlled substances and the legislature reasonably could have concluded that the per se prohibition in section 28-692(A)(3) provides an effective deterrent to such activity.[22]

State v. Hammond was the next major Arizona decision pertaining to the presence of metabolites on drug DUI cases. The case arose when the police pulled over Mr. Hammond for driving with expired registration tags and a ficti-

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12 *Id.*
13 *Id.*
14 *Id.*
15 *Id.*
16 *See* Phillips, 873 P.2d 706, 706.
17 *Id.*
18 *Id.*
19 *Id.*
20 *Id.*
21 *See* Phillips, 873 P.2d 706, 706.
22 *Id.* at 710.

tious license plate.[23] The responding officer observed open beer cans inside the car and suspected Mr. Hammond was intoxicated.[24] Officers administered field sobriety tests and arrested Mr. Hammond for DUI.[25] At the station, the police requested Mr. Hammond provide a urine sample. The urine sample revealed the presence of carboxy tetrahydrocannabinol ("THC"), a metabolite of marijuana.[26] At trial, expert testimony established:

> Metabolites of a drug are a product of the body's metabolizing, or breaking down, the original drug into discrete components. It is only when the drug is in the bloodstream that it is capable of impairment of driving skills, and this impairment lasts so long as the drug is in the bloodstream. At the metabolite state, the metabolic component detected in the urine is "inactive," in the sense that it is incapable of causing impairment.[27]

At trial, Mr. Hammond was convicted of the metabolite count. Mr. Hammond appealed the conviction on equal protection grounds, arguing that the statute was overbroad because it included drivers that only had a metabolite of a drug in their system.[28] Mr. Hammond claimed that scientific evidence supported a finding that the mere presence of a metabolite in urine does not indicate driver impairment. Additionally, Mr. Hammond claimed that the test could not show when the drug was ingested.[29]

The Arizona Court of Appeals rejected the argument for two main reasons.[30] The first reason was that the law was consistent with the intent of the legislature. The court stated that the legislature wanted metabolites included in the statute and therefore intentionally did not distinguish between active and inactive metabolites.[31] Second, according to the court, "urine testing for metabolites does contribute to detection of impaired drivers because detection of a metabolite indicates that the driver may also have active components present."[32]

The court argued that just because someone does not have an active drug in his or her system at testing does not mean the drug could not have been active

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[23] *Id.* at 530.
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *Id.* at 604.
[29] *Id.*
[30] *Id.* at 606.
[31] *Id.*
[32] *Id.*

at time of driving. Furthermore, the court stated, "[i]f a driver is impaired from recently using a prescription drug, and has also used marijuana at some point in the past, metabolite testing of urine will detect the marijuana metabolite as well as the prescription drug metabolite."[33]

C. *The Darrah Decision*

The narrow question before the Arizona Court of Appeals was "[w]hether the Arizona Medical Marijuana Act [("AMMA")] prohibits the State from prosecuting an authorized marijuana user for driving under the influence pursuant to 28-1381(A)(3)?"[34] The case arose due to a DUI drug charge.

On December 2011, Travis Lance Darrah was charged with two counts of DUI in violation of A.R.S. § 28-1381.[35] One count was based on impairment and the second count was based on the presence of marijuana or its metabolite.[36] Darrah was an authorized medical marijuana user at the time of his arrest, which was uncontested. Furthermore, it was uncontested whether Darrah had the presence of active tetrahydrocannabinol ("THC") in his system.[37]

Prior to trial, Darrah requested dismissal of the (A)(3) charge based on his position that A.R.S. §36-2802(D), a provision of AMMA, only permits prosecution of an authorized marijuana user under the (A)(1) statute.[38] The municipal court denied Darrah's request and granted the State's motion in limine to preclude evidence that Darrah possessed a medicinal marijuana card, finding that such evidence was not relevant to either charge.[39]

The jury acquitted Darrah of the (A)(1) charge, but they found him guilty under the (A)(3) charge. On appeal, the superior court affirmed.[40] Darrah then sought review from the Arizona Court of Appeals, in the form of a special action, as he had no direct right to appeal.[41] Darrah argued that his conviction should be set aside based on A.R.S. 36-2802(D), which states:

> This chapter does not authorize any person to engage in, and does not prevent the imposition of any civil, criminal or other penalties for engaging in, the following conduct. Operating, navigating or being in actual physical control of any motor vehicle, aircraft or motorboat while under the influence of

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33 *Id.*
34 Darrah v. McClennen ex rel. Cnty. of Maricopa, 337 P.3d 550 (Ariz. Ct. App. 2014).
35 *Id.*
36 *Id.*
37 *Id.*
38 *Id.*
39 Darrah, 337 P.3d 550.
40 *Id.*
41 *Id.*

> marijuana, except that a registered qualifying patient shall not be considered under the influence of marijuana solely because of the presence of metabolites or components of marijuana that appear in insufficient concentrations to cause impairment.[42]

The Arizona Court of Appeals concluded that nothing in the plain language of the statute, or anywhere else in the AMMA, supported Darrah's interpretation of the statute.[43] The court went on to state, "[i]f Arizona voters had intended to completely bar the State from prosecuting authorized marijuana users under A.R.S. 28-1381(A)(3) they could have easily done so by using specific language to that effect."[44] The court cited *Harris* in its decision:

> Moreover, accepting Darrah's interpretation would directly contravene *Montgomery v. Harris* where the defendant was prosecuted for DUI and the Arizona Supreme Court held that a 'non-impairing' metabolite of marijuana is not a prescribed drug under Arizona law, and therefore its presence in a person's body cannot support a conviction for DUI. Consistent with *Harris* the AMMA does not operate as a bar to Darrah being prosecuted for DUI.[45]

III. Conclusion

This issue is not currently settled as the Arizona Supreme Court has taken the case under review. It is unclear if the Supreme Court will rule on the entire case or only a part of the case. Only time will tell in regards to what effect having a medicinal marijuana card will have on a (A)(3) charge. While many things are uncertain, one thing is for sure— Marijuana use in the context of DUIs will continue to be an issue for years to come.

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[42] *Id.*
[43] *Id.*
[44] Darrah, 337 P.3d 550.
[45] *Id.*

Dual Agency: Rebutting the Presumption That an Employment Relationship Permits Discovery of Confidential Physician-Patient Communications

Darko Bilic*

I. Introduction

Currently, hospitals employ more physicians than ever before.[1] Physicians are driven from solo practice due to the unsatisfying work-life balance and the exorbitant operating costs.[2] Between 2000 and 2010, analysts noted a thirty-four percent increase in the number of hospital-employed physicians.[3] Likewise, research indicates that hospitals will employ seventy-five percent of newly hired physicians by 2014.[4]

Acknowledging this trend, this Article evaluates how the increase in percentage of hospital-employed physicians affects patients' privacy interests. Specifically addressed are the contradicting legal obligations imposed on physicians by physician-patient relationships and employer-employee relationships. Part II discusses the obligations imposed on physicians by their fiduciary status in a physician-patient relationship. Part III discusses the legal obligations imposed on physicians by their agent status in an employer-employee relationship. Finally, Part IV discusses dual agency and proposes a viable solution to the dilemma currently plaguing hospital-employed physicians.

II. Physician-Patient Relationship: Physician's Fiduciary Duties to the Patient

The physician-patient relationship is a confidential relationship.[5] When a patient seeks treatment from a physician, they enter into a relationship wherein the physician holds all the power—patients need medical treatment, and physi-

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1 Ann S. O'Malley et al., *Rising Hospital Employment of Physicians: Better Quality, Higher Costs*, HEALTH SYS. CHANGE (2011).

2 Erika Mekies, *Hospital Employment of Physicians*, 60-MAY FED. LAW. 40, 40 (2013).

3 Robert Lowes, *Number of Physicians Employed by Hospitals Snowballing*, MEDSCAPE MED. NEWS (Jan. 24, 2012), http://www.medscape.com/viewarticle/757386.

4 Mark Crane, *Hospital Employment of Physicians Continues to Grow*, MEDSCAPE MED. NEWS (July 6, 2012), http://www.medscape/com/viewarticle/766967.

5 *See infra* Part II.A.

cians hold "exclusive" ability to treat.[6] In other words, the physician's medical knowledge is superior to that of the patient.[7] Likewise, the patients' need for medical treatment further diminishes their ability to bargain in physician-patient relationships.[8] As such, physicians are fiduciaries within physician-patient relationships.[9]

A. *Delegation of Powers and Risk of Abuse*

A fiduciary is a party in a status relation who "has a partial or full monopoly over the means for satisfying the needs of the other party."[10] Within medical context, the physician holds all the bargaining power and the patient must trust the physician to provide the appropriate medical treatment.[11] Consequently, patients delegate their power to physicians.[12]

Patients delegate their powers by disclosing confidential information to physicians who use this information to render accurate treatments.[13] In exchange, physicians become obligated to keep this information regarding their patient confidential.[14] This agreement is commonly known as the physician-patient privilege.[15]

The existence of a risk that fiduciaries could abuse their power "to the detriment of the entrustor" justifies these obligations.[16] Patients risk embarrassment by confiding their "most profound secrets" to their physicians.[17] Thus, possession of these profound secrets tremendously empowers physicians and creates a risk that these physicians might "abuse [their] power to the detriment of [their patients]."[18] Accordingly, fiduciary obligations exist to ensure that such abuse does not occur.[19]

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[6] Andrea K. Marsh, *Sacrificing Patients for Profits: Physician Incentives to Limit Care and ERISA Fiduciary Duty*, 77 WASH. U. L. Q. 1323, 1333 (1999).

[7] *Id.* (noting that disparity of knowledge is inherent in the physician-patient relationship).

[8] *Id.* (noting that dependence is inherent in the physician-patient relationship relation).

[9] Tamar Frankel, *Fiduciary Law*, 71 CAL. L. REV. 795, 796 (1983).

[10] *Id.* at 795.

[11] Marsh, *supra* note 6 (warning that "disruption of trust could lead to lower quality care if it dissuades patients from seeking medical attention early or from following the advice of their physicians.").

[12] Frankel, *supra* note 9, at 809.

[13] Bernard Friedland, *Physician-Patient Confidentiality: Time to Re-Examine a Venerable Concept in Light of Contemporary Society and Advances in Medicine*, 15 J. LEGAL MED. 249, 256 (1994).

[14] *Id.* at 253.

[15] *See infra* Part III.B.

[16] Frankel, *supra* note 9, at 810.

[17] Friedland, *supra* note 13.

[18] Frankel, *supra* note 9, at 809.

[19] The policy behind the physician-patient privilege is to "encourage patients to freely and candidly discuss medical concerns with their physicians by ensuring that those concerns will nec-

B. *Fiduciary Duties*

Fiduciary obligations are legal regulations that ensure that a fiduciary does not abuse his or her power.[20] Fiduciaries actively participate in the accomplishment of this task through self-regulations.[21] In the medical field, self-regulations are exemplified in the Hippocratic Oath, the Code of Medical Ethics of the American Medical Association, and other codes of ethical behavior.[22] Self-regulations are ethical obligations that discourage physicians from abusing their power over patients through rewards, imposed control, monitoring, and other nonjudicial regulation.[23] However, ethical obligations are not the only means of ensuring a fiduciary fulfills his or her obligations.[24]

Alternatively, state legislatures have enacted legal obligations that discourage physicians from abusing their fiduciary status.[25] Legal obligations include laws that "impos[e] . . . fiduciary obligations" on a fiduciary.[26] For example, the physician-patient privilege prohibits physicians from disclosing a patient's confidential information without obtaining consent.[27] When a breach occurs, courts permit patients to file civil actions against the breaching physicians.[28] In addition to civil actions, state appellate courts are also generally open to reviewing physician-patient privilege issues to prevent inadvertent disclosures that cause irreparable harm.[29]

Ironically, there are also legal obligations that mandate disclosure of confidential information.[30] Such obligations are imposed on physicians upon entering into an employment relationship.[31]

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essarily be disclosed to a third person." Steinberg v. Jensen, 534 N.W.2d 361, 368 (Wis. 1995), *cited with approval in* Christopher J. Smith, *Recognizing the Split: The Jurisdictional Treatment of Defense Counsel's Ex Parte Contact with Plaintiff's Treating Physician*, 23 J. LEGAL PROF. 247, 249 (1999).

[20] Frankel, *supra* note 9, at 807.

[21] *Id.* at 815.

[22] Friedland, *supra* note 13, at 251.

[23] Frankel, *supra* note 9, at 811.

[24] Smith, *supra* note 19, at 248 (the physician-patient privilege is statutory in most states).

[25] *See id.*

[26] Frankel, *supra* note 9, at 825.

[27] Friedland, *supra* note 13, at 251.

[28] *Id.*

[29] *See, e.g.*, Estate of Stephens v. Galen Health Care, 911 So. 2d 277, 279 (Fla. Dist. Ct. App. 2005) (accepting jurisdiction because disclosure of privileged information cannot be remedied).

[30] *See infra* Part III.

[31] *See infra* Part III.A.

III. Employer-Employee Relationship: Physician's Duties to the Hospital

Eliminating employment obligations ensures that physicians provide quality care to their patients.[32] However, hospitals are liable for the acts of their employees.[33] As such, these hospitals have an important interest in communicating with physicians they employ.[34] Consequently, this important interest justifies obligating physicians to disclose material information to their employers.[35]

Yet, such disclosures jeopardize physicians' relationships with their patients.[36] These disclosures also violate statutory laws enforcing the confidentiality of the physician-patient communication.[37] As a result, disclosure obligations create a catch-22 dilemma for physicians whose duties to an employer are in direct contradiction with their duties to patients.[38]

A. *Physician's Negligence, Hospital's Liability*

Under agency law, an agent is authorized to act on behalf of the principal.[39] An agent is a "party who is hired by a business entity to perform a task connected with the business."[40] A principal "is a party who employs an agent."[41]

Once the employment relationship is established, the principal becomes liable to third parties for acts of the agents.[42] This liability is established under

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32 Marsh, *supra* note 6.

33 *See infra* Part III.A.

34 Marin R. Scordato, *Evidentiary Surrogacy and Risk Allocation: Understanding Imputed Knowledge and Notice in Modern Agency Law*, 10 Fordham J. Corp. & Fin. L. 129, 131 (2004) ("[T]he 'imputed knowledge rule' . . . charges the principal with information obtained by the agent within the scope of the agent's service for the principal.").

35 *Id.*

36 Marsh, *supra* note 6 (disclosure could damage the trust essential to the physician-patient relationship).

37 Scordato, *supra* note 34, at 152 ("Either [physicians] would convey the information to their principal and violate the confidentiality owed to the third party or they would honor the confidentiality and deprive the principal of important knowledge which the principal will nevertheless be legally deemed to possess.").

38 *See infra* Part III.E.

39 Scordato, *supra* note 34, at 129.

40 *An Efficiency Analysis of Vicarious Liability Under the Law of Agency*, 91 Yale L.J. 168, 169 (1981) [hereinafter *Vicarious Liability*].

41 *Id.*

42 Scordato, *supra* note 34, at 129-130.

three theories: (1) vicarious liability; (2) ostensible agency; and (3) corporate negligence.[43]

1. Vicarious Liability

Under vicarious liability, hospitals are liable for acts of physicians under their control.[44] Control exists when an agent's "conduct in the performance of . . . services is controlled or is subject to a right of control by the principal."[45] Existence of control is shown by numerous factors, some of which are:

> (a) [T]he extent of supervision upon which the parties agree,
> (b) [W]hether the agent is engaged in an occupation or business independent or distinct from that of the principal,
> (c) [T]rade practices regarding the degree of supervision that an employer normally exercises,
> (d) [T]he agent's skill level,
> (e) [W]hether the employer supplies tools and the place of work,
> (f) [T]he employer's power to terminate the agency,
> (g) [T]he method of payment,
> (h) [W]hether the agent's work is part of the employer's regular business, and
> (i) [W]hether the parties believe they are creating a master-servant relation.[46]

Direct employment facilitates establishment of a hospital's control.[47] When direct employment cannot be established, "the payment of a salary" can satisfy the vicarious liability requirements instead.[48]

For example, in *Gilstrap v. Osteopathic Sanatorium Co.*,[49] a plaintiff alleged that the defendant hospital, "acting through its agents and servants," caused the death of her husband.[50] In response, the defendant hospital alleged that no evidence could establish the physician, who caused the death of plain-

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43 Cassandra P. Priestley, *Hospital Liability for the Negligence of Independent Contractors: A Summary of Trends*, 50 J. Mo. B. 263, 263 (1994).

44 *Id.* at 264; *see generally* Restatement (Second) of Agency § 220(2) (1958).

45 *Vicarious Liability*, *supra* note 40.

46 *Id.* at 170-71.

47 *See id.* at 168 ("If a tort is committed within the scope of the agent's employment, the existence of control is a sufficient but not a necessary condition for the imposition of vicarious liability.").

48 Arthur F. Southwick, *Vicarious Liability of Hospitals*, 44 Marq. L. Rev. 153, 167 (1960).

49 Gilstrap v. Osteopathic Sanatorium Co., 24 S.W.2d 249 (Mo. Ct. App. 1929).

50 *Id.* at 250.

tiff's husband, as an agent of the defendant.[51] The surgery performed by the negligent physician was outside the general purpose for which the defendant hospital was maintained and conducted.[52]

Nevertheless, the defendants permitted the negligent physician to operate in defendant's hospital.[53] Furthermore, the defendant hospital employed the negligent physician for the same salary, whether he "treated 1 or 150 patients."[54] As such, the court held that the negligent physician was acting "within the apparent scope of his authority as a staff physician."[55]

Likewise, the deceased husband was not aware of limitations on the negligent physician's authority.[56] The court noted:

> There is in general no particular mode in which an agency must be established; and it is immaterial what terms are used by the patients, or by what name the transaction is designated, if the requisite elements of such statutes are otherwise deducible from the facts taken as a whole.[57]

Instead of a particular mode, courts use three rationales to justify imposition of vicarious liability on the principal.[58] First, the principal "reaps the benefits of [agent's] endeavors," and thus the principal "should bear the cost of the agent's endeavors."[59] Second, vicarious liability "spreads the cost of torts to principals" who possess "deeper pockets" than their agents and are able to spread the loss by imposing higher prices for their goods and services onto the society as a whole.[60] Third, vicarious liability "guarantees that no agency activity is undertaken unless the principal and the agent together are willing to bear the tort costs of the activity."[61] These rationales justify holding the principal liable regardless of whether vicarious liability requirements can be satisfied.[62]

2. Ostensible Agency

Regardless of whether vicarious liability requirements can be satisfied, a hospital can be liable under ostensible agency when patients are justified in

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[51] *Id.* at 251.
[52] *Id.*
[53] *Id.* at 252.
[54] *Id.* at 255.
[55] *Id.* at 256.
[56] *Id.*
[57] *Id.*
[58] *Vicarious Liability*, *supra* note 40, at 171.
[59] *Id.* at 171-72.
[60] *Id.* at 172.
[61] *Id.*
[62] *See infra* Part III.A.2.

relying on the hospital for treatment.[63] Under this theory, the hospital does not actually employ the physician; however, the hospital holds out the physician as an employee.[64] Consequently, "the 'holding out' of the physician as [an employee] . . . estops the defendant hospital from asserting the true relationship as a defense to the imposition of vicarious liability."[65]

Courts do not want a "patient in pain" to "inquire whether doctors are employees or independent contractors."[66] Instead, agency is established when the principal "intentionally, or by want of ordinary care causes a third person to believe another to be his agent."[67] As such, the hospital's control of the physician is inferred.[68]

3. Corporate Negligence

Finally, a hospital is liable under corporate negligence for failure to "exercise reasonable care while provid[ing] services to the patient."[69] These services include "(1) performing administrative functions, (2) selecting competent staff, (3) supervising the delivery of health care, and (4) inspecting the facilities and equipment."[70] Duties under the theory of corporate negligence are non-delegable, and hospitals are obligated to "uphold a proper standard of care."[71]

Consequently, these theories create vast potential for hospitals to be liable for the negligence of their employees.[72] Furthermore, situations where defendants employ plaintiff's treating physicians are becoming more common as the percentage of hospital-employed physicians grows.[73] As a result, the confidential nature of the physician-patient relationship frustrates the ability of hospitals to communicate with some of their employees.[74]

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63 Priestley, *supra* note 43, at 265.

64 *Id.*

65 Southwick, *supra* note 48, at 170.

66 *Id.* at 169 (citing Stanhope v. L.A. Coll. of Chiropractic, 128 P.2d 705, 708 (Cal. Ct. App. 1942)).

67 *Id.*

68 Priestley, *supra* note 43, at 265.

69 *Id.* at 266.

70 *Id.*

71 *Id.*

72 Southwick, *supra* note 48, at 169.

73 *See, e.g.*, Lee Mem'l Health Sys. v. Smith, 56 So. 3d 808, 814 (Fla. Dist. Ct. App. 2011) (observing "the recent trend toward the employment of physicians by hospitals" as "driven by economic and financial forces affecting the medical profession and our health care system" and noting that the defendant hospital, Lee Memorial, "happens to employ some or all of the [plaintiff's] treating physicians.").

74 *See supra* Part II.A.

For example, in *Royal v. Harnage*,[75] an employee of the defendant hospital negligently performed a surgery causing the death of a patient.[76] The personal representative of the patient filed a wrongful death action against the negligent physician.[77] Consequently, the plaintiff asserted a claim against the hospital under two theories: vicarious liability for the negligent conduct of the physician and direct liability for the negligent supervision of its employees.[78]

During the suit, the representative alleged that Florida's statutory physician-patient privilege prohibited the defendant hospital from communicating with employees who previously treated the decedent.[79] Disagreeing, the *Royal* court reasoned that the physician-patient privilege did not prohibit the hospital from communicating with its physician-employees regarding the treatment of the decedent.[80] As such, "the filing of the lawsuit does not create a privilege where none existed in the past."[81]

More importantly, the court in *Royal* noted that "restrictions on the lawyer-client relationship and on free communication during pretrial litigation have repeatedly been regarded as causing sufficient irreparable injury."[82] Permitting employers to "discuss a pending lawsuit with its employees" is an existing competing interest.[83] Accordingly, the hospital's "attorneys should . . . be able to speak with the [hospital's] employees and agents as the corporate entities are able to function only through them."[84]

B. *Physician-Hospital Communications*

The physician-patient privilege prohibits physicians from disclosing confidential information obtained through physician-patient communications.[85] Generally, a patient impliedly waives the physician-patient privilege when the patient places the medical treatment at issue in litigation.[86] However, the

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75 Royal v. Harnage, 826 So. 2d 332 (Fla. Dist. Ct. App. 2002).

76 *Id.* at 334.

77 *Id.*

78 *See id.*

79 *Id.*

80 *Id.* at 336.

81 *Id.*

82 *Id.* at 337 (citing Alachua Gen. Hosp., Inc. v. Steward, 649 So. 3d 357 (Fla. Dist. Ct. App. 1995)).

83 Lee Mem'l Health Sys. v. Smith, 40 So. 3d 106, 108 (Fla. Dist. Ct. App. 2010) (citing Estate of Stephens v. Galen Health Care, 911 So. 2d 277, 279 (Fla. Dist. Ct. App. 2005)).

84 *Estate of Stephens*, 911 So. 2d at 282, *cited with approval in Lee Mem'l Health Sys.*, 40 So.3d at 108.

85 Smith, *supra* note 19, at 247.

86 Friedland, *supra* note13, at 258.

patient "is the only person who may waive the privilege"; thus, the physician-patient privilege still applies to physicians whose conduct is not at issue.[87]

When the physician-patient privilege applies, *ex parte* communication is prohibited between defendant-hospitals and certain hospital employees innocent of malpractice.[88] The confidential nature of the physician-patient relationship allows a physician to obtain information from patients that patients would normally not disclose.[89] As such, the physician-patient relationship and the physician's fiduciary status obligate physicians with the responsibility to not abuse their power by disclosing confidential information to the defendant hospital.[90]

Nevertheless, prohibiting hospitals from communicating with their employees can be frustrating.[91] Thus, hospitals are utilizing the employment relationship to bypass restrictions imposed by the physician-patient privilege.[92]

C. *Physician-Patient Privilege Not Applicable*

In order to bypass the physician-patient privilege, hospitals are successfully arguing that *ex parte* communications between hospitals and physicians they employ cannot be restricted by the physician-patient privilege.[93] Specifically, Florida and Arizona courts have found this argument to be persuasive, as noted within three cases: (1) *Estate of Stephens v. Galen Health Care*;[94] (2) *Lee Memorial Health System v. Smith*;[95] and (3) *Phoenix Children's Hospital, Inc. v. Grant*.[96]

1. *Estate of Stephens v. Galen Health Care*

In 2005, a Florida appellate court dealt a blow to patients' privacy rights by holding that the physician-patient privilege does not restrict employer-employee communications, which are not considered "disclosure[s]."[97] In *Estate of Stephens v. Galen Health Care*, a patient died in a hospital operated

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[87] Smith, *supra* note 19.

[88] *See, e.g.*, Duquette v. Superior Court, 778 P.2d 634, 642 (Ariz. Ct. App. 1989) (holding that "defense counsel in a medical malpractice action may not engage in non-consensual ex parte communications with plaintiff's treating physician.").

[89] *See supra* Part II.A.

[90] *See supra* Part II.B.

[91] *See supra* Part III.A.

[92] *See infra* Part III.C-D.

[93] *See infra* Part III.C.1.-III.D.

[94] Estate of Stephens v. Galen Health Care, 911 So. 2d 277 (Fla. Dist. Ct. App. 2005).

[95] Lee Mem'l Health Sys. v. Smith, 40 So. 3d 106 (Fla. Dist. Ct. App. 2010).

[96] Phx. Children's Hosp., Inc. v. Grant, 265 P.3d 417 (Ariz. Ct. App. 2011).

[97] *Estate of Stephens*, 911 So. 2d at 282.

by defendants.[98] Consequently, the estate of the patient filed a medical malpractice action against the hospital.[99] Strategically, the plaintiffs did not assert claims against the physicians that treated the decedent.[100] Without assertion of negligence against these treating physicians, the plaintiffs did not waive the statutory physician-patient privilege.[101]

Florida's legislature enacted the physician-patient privilege to protect "the patient's interest in keeping the details and nature of his medical treatment confidential . . . ."[102] Yet, the trial court permitted defendants to communicate with decedent's former treating physicians.[103] On appeal, a Florida appellate court explained that a hospital, as a corporation, "can function only through its employees and agents, and its 'knowledge' of information . . . depends solely on information acquired and reported by its agents and employees."[104] Thus, the physician-patient privilege should not prohibit a doctor from "discussing the patient information with the hospital's risk manager, for example[,]" because "[the doctor] is *employed by* or is an *agent of* a hospital corporation."[105]

Nonetheless, the appellate court quashed the trial court order permitting *ex parte* communication[106] between defendants and decedent's former treating physicians.[107] The order was too broad and failed to identify whether defendants employed the physicians with whom they sought to communicate.[108] The trial court's order perished, but the notion that employer-employee communications are not "disclosures" remains good law.[109]

2. *Lee Memorial Health System v. Smith*

In deciding *Estate of Stephens*, another Florida appellate court determined whether Florida's statutory physician-patient privilege precluded a defendant hospital from communicating with its employees providing "post-incident treatment" to the plaintiff's daughter.[110] In *Lee Memorial Health System v. Smith,*

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98 *Id.* at 279.
99 *Id.*
100 *Id.* at 278.
101 *Id.* at 279.
102 *Id.* at 280.
103 *Id.* at 279.
104 *Id.* at 281.
105 *Id.* at 282.
106 *Ex parte* communications are defined as "extra-judicial disclosures by a person to an opposing party in a lawsuit." Smith, *supra* note 19, at 247. Such communications arise when "one party meets with the person informally without opposing counsel being present." *Id.*
107 *Estate of Stephens*, 911 So. 2d at 283.
108 *Id.*
109 *See infra* Part III.C.2.
110 Lee Mem'l Health Sys. v. Smith, 40 So. 3d 106, 107 (Fla. Dist. Ct. App. 2010).

plaintiffs alleged that defendants provided negligent care to their daughter.[111] However, the treating physicians at issue only provided "post-incident follow-up treatment."[112] As such, these physicians were not liable for the underlying allegations—the negligent care of plaintiffs' daughter.[113]

The trial court prohibited *ex parte* communication between these treating physicians and the defendant hospital, reasoning that the *Estate of Stephens* decision did not permit *ex parte* communications that do "not concern the events giving rise to the malpractice complaint."[114] The appellate court reversed, explaining that the physician-patient privilege did not apply and that the context of these communications is irrelevant.[115] Instead, the physician-patient privilege did not apply because communications between the employer and its employees are not "disclosures."

3. *Phoenix Children's Hospital, Inc. v. Grant*

Concurring with Florida courts, an Arizona appellate court held, in *Phoenix Children's Hospital, Inc. v. Grant*, that "a hospital's right to discuss a plaintiff/patient with its employees exists because the employment relationship exists."[116] In *Grant*, a defendant's employee "negligently placed a feeding tube into [a child's trachea]."[117] As a result, the child's parent's asserted medical malpractice claims against the hospital and the negligent employee.[118] Simultaneously, physicians, employed by the defendant hospital, continued treating the child.[119] As the litigation progressed, the plaintiffs sought to prohibit *ex parte* communications between defendant hospital and defendant hospital's employees not "affirmatively alleged" in the suit.[120] Like Florida, Arizona's legislature enacted a statutory physician-patient privilege to encourage "full and frank disclosure of medical history and symptoms by a patient to his doctor."[121] Accordingly, the physician-patient privilege prohibited the defendant "in a medical malpractice action [from engaging] in ex parte

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[111] *Id.*

[112] *Id.* at 108.

[113] *Id.* at 107.

[114] *Id.*

[115] *Id.*

[116] Phx. Children's Hosp., Inc. v. Grant, 265 P.3d 417, 421 (Ariz. Ct. App. 2011).

[117] *Id.* at 418.

[118] *Id.*

[119] *Id.*

[120] *Id.*

[121] Lewin v. Jackson, 492 P.2d 406, 410 (Ariz. 1972) (construing ARIZ. REV. STAT. ANN. § 12-2235 (2003)), *cited with approval in Phx. Children's Hosp., Inc.*, 265 P.3d at 419.

communications with a plaintiff's treating physicians without the plaintiff's consent."[122]

Nevertheless, Arizona common law imputes "the knowledge of a corporate agent" onto the corporation "if [the knowledge] is acquired by the agent within the scope of his or her employment and relates to a matter within his or her authority."[123] As such, a "conclusive presumption" exists that agents communicate their knowledge to their employer."[124] Therefore, the court concluded that the physician-patient privilege did not prohibit the defendant hospital from communicating with its employees "who are or were" treating the plaintiff's child.[125]

D. *The Imputed Knowledge Rule*

The *ex parte* communication is justified under the agency law principle of imputed knowledge ("imputed knowledge rule").[126] The imputed knowledge rule assists courts in resolving uncertainty where conflicting reports exist of whether a principal possesses knowledge that the principal is alleged to possess.[127] The imputed knowledge rule obligates agents to disclose their knowledge to their principal.[128] Consequently, such obligation justifies charging a principal with the knowledge of an agent.[129]

Likewise, under the risk allocation rationale, principals supervise agents and, thus, are in the best position to manage the risk of not receiving notice from those agents.[130] As such, the imputed knowledge rule creates a conclusive presumption that an agent disclosed his or her knowledge to the principal.[131]

Yet, a physician's duty to communicate confidential information to his employer causes this physician to breach his duties to his patients.[132] In cases where such breach occurs, a physician subjects himself to the risk of civil liability.[133] Accordingly, one cannot presume that a physician will breach his

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122 *Phx. Children's Hosp., Inc.*, 265 P.3d at 418 (citing Duquette v. Superior Court, 778 P.2d 634 (Ariz. Ct. App. 1989)).

123 Samaritan Found. v. Goodfarb, 862 P.2d 870, 876 (Ariz. 1993), *cited with approval in Phx. Children's Hosp., Inc.*, 265 P.3d at 421.

124 Fridena v. Evans, 622 P.2d 463, 466 (Ariz. 1980), *cited with approval in Phx. Children's Hosp., Inc.*, 265 P.3d at 421.

125 *Phx. Children's Hosp., Inc.*, 265 P.3d at 422.

126 *See supra* Part III.C.

127 Scordato, *supra* note 34, at 145.

128 Restatement (Second) of Agency § 275 (1958).

129 Scordato, *supra* note 34.

130 *See id.* at 149-150.

131 *Id.* at 146.

132 *Id.* at 147.

133 Friedland, *supra* note 13, at 251.

duties to the patient in order to fulfill his duties to the employer.[134] Instead, the imputed knowledge rule creates a "catch-22" dilemma.[135]

E. Contradicting Obligations

A "catch-22" exists because employment status forces physicians to breach either the duty to their patients or the duty to their employer.[136] Yet, the contradiction is dismissed as *de minimis* because situations where a defendant employs the plaintiff's treating physician rarely occur.[137] However, such situations are becoming more common as hospitals employ a growing number of physicians.[138] Hence, this dilemma cannot be dismissed as *de minimis*.[139]

Alternatively, this dilemma is dismissed under the rationale that patients should identify the risks where the imputed knowledge rule compromises their confidentiality and take the proper precautions.[140] In fairness, agents serving two principals are obligated to disclose any information they possess that reasonably might affect either principal in permitting dual agency.[141] However, this rational is illusory in the health care field, where dual agency issues only arise when patients assert medical malpractice claims against a physician's employer.[142]

First, physicians exclusively control access to medical treatments.[143] To avoid imputed knowledge obligations imposed under an employment relationship, a patient needs treatment from a self-employed physician.[144] Yet, self-employed physicians are becoming less attainable as physicians abandon independent practice for employment within hospitals.[145]

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134 Scordato, *supra* note 34, at 129.

135 *See infra* Part III.E.

136 Scordato, *supra* note 34, at 152.

137 *Id.* at 153.

138 Mekies, *supra* note 2 (noting that "[p]hysician employment at hospitals remains on a healthy growth path.").

139 *See, e.g.*, Youngs v. Peacehealth, 316 P.3d 1035, 1043 (Wash. 2014) (arguing that a blanket privilege for corporations to communicate with employees "in the era of rapidly consolidating healthcare systems would all but eviscerate" the physician-patient privilege).

140 Scordato, *supra* note 34, at 153.

141 Restatement (Second) of Agency § 392 (1958).

142 *See* Smith, *supra* note 19, at 256.

143 *See* Marsh, *supra* note 6 ("[P]hysicians act as the exclusive source of expertise and help for sick, vulnerable patients . . . .").

144 Priestley, *supra* note 43, at 265 ("[O]ne who is in an emergency situation may not have the time and [ability] to make a choice among health care facilities.").

145 *See, e.g.*, Lee Mem'l Health Sys. v. Smith, 56 So. 3d 808, 813 (Fla. Dist. Ct. App. 2011) (noting the recent trend where "physicians in a variety of specialties are employed by hospitals instead of in stand-alone, independent medical practices" and "the fact of the hospital's ownership of the medical practice and employment of the physicians and others working there may not be readily apparent to the physicians' patients and the general public.").

Second, determining whether the hospital's interests or the physician's interests are adverse is nearly impossible.[146] The adversity is caused by a medical malpractice litigation, in which the patient asserts a claim against the hospital but not the treating physician.[147] Under such circumstances, the hospital wants to communicate with the treating physicians in order to discover information about the patient which is material to its defense.[148] As such, the imputed knowledge rule obligates the treating physician, employed by the defendant hospital, to disclose confidential information.[149] However, the physician-patient privilege forbids disclosure of this information.[150] Thus, a patient's ability to take proper precautions is contingent on an unworldly ability to predict the occurrence of a medical malpractice incident that triggers the physician's duty to his or her employer.[151]

Ultimately, neglecting the "catch-22" dilemma will result in patients losing trust in their physicians and disregarding their physicians' advice.[152] Such results are certain to cause the quality of care to also decline.[153] Thus, the contradictory obligations of physicians in an employment relationship should be reconciled.[154]

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146 *See* Scordato, *supra* note 34, at 155 (noting that "it is not likely that the third party will known in advance, or at all, that the agent with whom she is dealing possesses interests that are adverse to those of the principal.").

147 *See, e.g.*, Phx. Children's Hosp., Inc. v. Grant, 265 P.3d 417, 418 (Ariz. Ct. App. 2011) (following the incident where a nurse employed by the defendant negligently placed a feeding tube into a minor's trachea, the minor continued to be treated by defendant's "physicians and other personnel.").

148 *See Lee Mem'l Health Sys.*, 56 So. 3d at 813 ("It is extremely important—if not essential—for plaintiff's counsel in a medical malpractice case to interview and consult with his or her client's treating physicians. Such informal contacts enable plaintiff's counsel to discover the facts, formulate legal theories, and develop strategies for the case."); *see also* Estate of Stephens v. Galen Health Care, 911 So. 2d 277, 281 (Fla. Dist. Ct. App. 2005) (underscoring the importance of a corporation being able to speak to its agents and employees by noting that "the hospital, a corporation, can function only through its employees and agents, and its 'knowledge' of information like how its standards for nurse training and patient care are being carried out depends solely on information acquired and reported by its agents and employees.").

149 The imputed knowledge rule "imputes to a principal knowledge or notice received by an agent within the scope of the agent's authority." Scordato, *supra* note 34, at 164.

150 *See supra* Part II.A.

151 *See generally* Mark F. Grady, *Why Are People Negligent? Technology, Nondurable Precautions, and the Medical Malpractice Explosion*, 82 Nw. U. L. Rev. 293 (1988) (discussing the difficulty of predicting the occurrence of a negligent event).

152 Marsh, *supra* note 6.

153 *Id.*

154 *See infra* Part IV.

IV. Dual Agency: Exceptions to the Imputed Knowledge Rule

Exceptions to the imputed knowledge rule offer a solution to the contradictory obligations an employment relationship imposes on physicians.[155] These exceptions rebut the presumption that physicians will disclose confidential knowledge to their employers.[156] As a result, physicians are able to fulfill their obligations under the physician-patient privilege.[157] Likewise, hospitals employing physicians are not charged with presumptions that defy logic.[158]

A. *Imputed Knowledge Rule Within Dual Agency*

Dual agency creates an exception to the imputed knowledge rule—"the confidential agent exception."[159] Under this exception, knowledge that a dual agent receives within a confidential relationship is not imputed onto the principal.[160] Instead, the imputed knowledge presumption is rebutted.[161]

1. General Rule

Generally, the dual agent status does not rebut the presumption that the knowledge of an agent is automatically imputed onto the principal.[162] For example, in *Manley v. Ticor Title Insurance Co. of California*, the Supreme Court of Arizona held that "the knowledge of a dual agent is normally imputed to both principals."[163]

In *Manley*, Henry and Donna Manley ("the Manleys") sold real property through George Stika ("Stika"), a real estate agent.[164] Stika arranged for the property to be sold to a entity known as Pyramid I ("Pyramid)."[165] Pyramid

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155 Scordato, *supra* note 34, at 147.

156 *See infra* Part IV.A.

157 *See infra* Part IV.B.

158 Scordato, *supra* note 34, at 164 (When an exception to the imputed knowledge rule applies, information received by the agent is not "automatically imputed to the principal," but instead it is required for "the third party in such cases to directly establish the principal's receipt of the relevant knowledge or notice.").

159 Scordato, *supra* note 34, at 143; *see also* Restatement (Second) of Agency § 392 cmt. b (1958).

160 Scordato, *supra* note 34, at 133.

161 *See id.* at 147 ("[I]t is not at all clear that most agents will in fact break the confidentiality owed to the third party and transmit the information to the principal, and the appropriate legal response to this altered probability of agent conveyance is the maintenance of a confidential relationship exception to the imputed knowledge rule.").

162 *See* Wolf v. Lovering, 159 F. 91, 93 (2d Cir. 1908) (holding that the agent was acting for both the seller and the buyer and that the agreement was binding on the seller even if the agent failed to notify the seller of the agreement).

163 Manley v. Ticor Title Ins. Co., 816 P.2d 225, 230 (Ariz. 1991).

164 *Id.* at 226.

165 *Id.*

and the Manleys named Ticor Title Insurance Company of California ("Ticor") as their escrow agent.[166] Within this arrangement, Ticor notified the Manleys that Pyramid intended to take out a loan to make construction improvements on the Manleys' property.[167] Because the liens on property exceed the property's value and sales price, these improvements were necessary for the property to not be "overencumbered."[168] Nevertheless, Ticor discovered that Pyramid intended to use the loans as down payment on the property, which implied that the construction improvements were not going to be made and that Manleys' property would become "overencumbered."[169] As such, Ticor's internal policy prohibited handling transactions with overencumbered properties.[170] Yet, Ticor's agent noted that the Manleys were represented by legal counsel and decided to proceed with the arrangement, and disclosed Pyramid's actual intent to Stika.[171] As a result, Pyramid defaulted on its payments, and the Manleys filed legal action against Ticor for failure to disclose Pyramid's breach of promise to make the necessary construction improvements.[172]

As the underlying issue, the Arizona Supreme Court determined whether Ticor's notice to Stika sufficed as notice to the Manleys.[173] As an agent of the Manleys, "Stika had a fiduciary obligation to reveal all material facts about the transaction to his principals."[174] However, the Manleys contended that Stika was also an agent for Pyramid, and as a dual agent, notice to Stika was not imputed to the Manleys;[175] instead, Ticor should have directly notified the Manleys.[176] The court rejected this contention, however, holding that "[t]he knowledge of a dual agent is normally imputed to both principals."[177] Accordingly, the dual agent status does not rebut the imputed knowledge presumption.[178]

More importantly, the Arizona Supreme Court also held that the trier of fact must determine whether Stika's interests were adverse enough to impede Stika from informing the Manleys about Ticor's notice.[179] Thus, while as a

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[166] *Id.*
[167] *Id.* at 227.
[168] *Id.*
[169] *Id.*
[170] *Id.*
[171] *Id.*
[172] *Id.* at 228.
[173] *Id.* at 229.
[174] *Id.* at 226 (citation omitted).
[175] *Id.* at 229-30.
[176] *Id.*
[177] *Id.* at 230 (citation omitted).
[178] *Id.* (Citation omitted).
[179] *Id.*

general rule the knowledge of a dual agent is imputed, the court hinted that exceptions to the imputed knowledge rule do exist.[180]

2. Exceptions

The imputed knowledge rule establishes the presumption that an agent will disclose his or her knowledge to the principal.[181] However, the United States Supreme Court recognizes an exception to this presumption, which was provided by Justice Joseph P. Bradley in *In re Distilled Spirits*[182]:

> When it is not the agent's duty to communicate such knowledge, when it would be unlawful for him to do so, as, for example, when it has been acquired confidentially as attorney for a former client in a prior transaction, the reason of the rule ceases, and in such a case an agent would not be expected to do that which would involve the betrayal of professional confidence, and his principal ought not to be bound by his agent's secret and confidential information.[183]

Applying the imputed knowledge presumption to an agent whose interests are adverse to those of a principal defies logic.[184] Accordingly, the Supreme Court established in *American National Bank v. Miller*[185] that the law does not charge the principal "with notice of facts which the agent not only did not disclose, but which he was interested in concealing."[186]

In *American National Bank*, the President ("the President") of the First National Bank of Macon ("the Macon bank") was insolvent.[187] He kept a deposit account with the American National Bank of Nashville ("American National Bank").[188] Using this deposit account, he presented the Macon bank with a check for $3,000, which the American National Bank credited before learning of the President's bankruptcy.[189] When the Macon bank attempted to recover the $3,000, the American National Bank alleged being able to cancel the credit because the Macon bank, as the principal, was charged with notice of

180 *See infra* Part IV.A.2.
181 *See supra* Part III.B.
182 *In re* Distilled Spirits, 78 U.S. 356 (1870).
183 *Id.* at 367.
184 *See, e.g.*, Melms v. Brewing Co., 66 N.W. 518, 522 (Wis. 1896) ("[W]hen [communication] would be unlawful for [an agent] to do so, as for example, when it has been acquired confidentially as attorney for a former client, the reason of the rule ceases . . . .").
185 Am. Nat. Bank v. Miller, 229 U.S. 517 (1913).
186 *Id.* at 522.
187 *Id.* at 519.
188 *Id.*
189 *Id.* at 519-20.

the president's insolvency.[190] The Supreme Court disagreed.[191] The Court reasoned that concealing the facts of his insolvency and his indebtedness to the American National Bank was in the President's personal interest, and the Court did not charge the Macon bank with notice of these facts.[192]

Likewise, disclosure will not be presumed when: (1) the agent is acting nominally "for another in ministerial matters"; (2) the agent is "in reality acting for himself or for another as principal"; and (3) the agent's interests are "adverse to those of the nominal principal."[193] Instead, the adverse interests exception rebuts the presumption because the agent's interests are "adverse to disclosing [his] knowledge."[194]

The adverse interest exception provides that the knowledge is not imputed to the principal where the agent conspires with a third person to defraud the principal.[195] For example, the knowledge of an agent is not imputed onto an insurance company when the agent participates in perpetuating a fraud with the insured.[196] Instead, the inquiry is made to determine whose interests the agent was aligned with—"the principal he purported to serve" or "someone else."[197] The agent must have "intended to deceive or perpetrate a fraud upon" the principal.[198] In other words, the agent must "act entirely for his own or another's purpose."[199] The mere fact that the agent "has a conflict of interest or . . . is not acting primarily for his principal" is insufficient.[200]

For example, suppose that "an attorney has two clients, and there has been a fraud perpetrated upon one client and the attorney participated in that fraud . . . ."[201] Under such circumstances, "is it to be presumed in law, in the absence of direct knowledge and notice to the other client, that such client has knowledge of the fraudulent transaction?"[202] The circuit court of Ohio answered this question in *Wright v. Snell*[203]:

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[190] *Id.* at 521.

[191] *Id.* at 522.

[192] *Id.*

[193] Aetna Indem. Co. v. Schroeder, 95 N.W. 436, 438 (N.D. 1903).

[194] *Id.*

[195] Schmidt v. Fortis Ins. Co., 349 F. Supp. 2d 1171, 1199 (N.D. Iowa 2005).

[196] *Id.* (citing Smith v. Iowa State Live Stock Ins. Co., 191 N.W. 981, 984 (Iowa 1923)).

[197] *Id.*

[198] *Id.* at 1203.

[199] Restatement (Second) of Agency § 282 (1958), *cited with approval in* Long Island Sav. Bank, FSB v. United States, 503 F.3d 1234, 1249 (Fed. Cir. 2007).

[200] Ctr. v. Hampton Affiliates, Inc., 488 N.E.2d 828, 830 (N.Y. 1985), *cited with approval in Long Island Sav. Bank, FSB*, 403 F.3d at 1249.

[201] Wright v. Snell, 12 Ohio C.D. 308, 314 (Ohio Cir. Ct. 1901).

[202] *Id.*

[203] *Id.*

> If an attorney, while conducting a transaction for his client acquires knowledge, which it would be a breach of professional confidence for him to disclose, and he is subsequently employed by another person, the latter is not chargeable with the knowledge thus acquired and possessed by the attorney.[204]

The circuit court relied on *Melms v. Brewing Co.*[205] where the Supreme Court of Wisconsin held that the attorney or the agent "cannot be expected to communicate what . . . it would be his legal duty to conceal, or information which, from his relation to the subject-matter or his previous conduct, it is certain that he would not disclose."[206]

In *Melms*, the plaintiffs sought to set aside several deeds, which originated from a sale executed in an attempt to defraud creditors of an estate.[207] As such, this sale was fraudulent in law and void.[208] Unfortunately, another party purchased the deed without notice of the initial fraudulent conduct.[209] The latter purchaser was a bona fide purchaser for value without notice of the fraud.[210] However, the attorney who assisted in preparing the original deed and "who was clearly cognizant of the illegality of the same" represented the latter purchaser in obtaining the deed from the fraudulent parties.[211] Accordingly, the plaintiffs argued that the attorney's knowledge of the original fraud must be imputed onto the latter purchaser.[212]

The plaintiffs relied on a general rule: "where a purchaser employs the same attorney as the vendor, he will be affected with notice of whatever such attorney acquired notice, in his capacity of attorney for either vendor or purchaser, in the transaction in which he was employed."[213] The court, however, rejected the argument.[214] Instead, the court reasoned:

> When it is not the agent's duty to communicate such knowledge, when it has been acquired confidentially as attorney for a former client, the reason of the rule ceases, and in such cases an agent would not be expected to do that which would

[204] *Id.* (citing Melms v. Brewing Co., 66 N.W. 518 (Wis. 1896) (holding that the principal is not charged with the agent's knowledge where the agent's disclosure of his knowledge would have been a breach of professional confidence)).
[205] *Melms*, 66 N.W. 518.
[206] *Id.* at 522.
[207] *Id.* at 521.
[208] *Id.*
[209] *Id.*
[210] *Id.* at 522.
[211] *Id.*
[212] *Id.*
[213] *Id.*
[214] *Id.*

> involve the betrayal of professional confidence, and his principal ought not be bound by his agent's secret and confidential information.[215]

Thus, the presumption behind the doctrine of imputed knowledge is rebutted when presumed communication would cause "a breach of professional confidence."[216]

Accordingly, a breach of professional confidence—the confidential agent exception—rebuts the imputed knowledge presumption.[217] The rebuttal, however, is subject to a certain qualification.[218]

3. Qualification

While the law obligates an agent "to communicate to his principal the knowledge he has,"[219] the law presumes that an agent will breach "his duty of communication when his interest is to conceal the facts."[220] The exception is based on the rationale that "where an agent, though ostensibly acting in the business of the princip, is really committing a fraud, for his own benefit, he is acting outside of the scope of his agency, and it would therefore be most unjust to charge the princip with knowledge of it."[221] Nonetheless, this rationale does not apply where "the princip adopts the unauthorized act of his agent in order to retain a benefit for himself."[222]

In *Curtis, Collins & Holbrook Co. v. United States*,[223] the Supreme Court qualified its ruling in *American National Bank v. Miller*, which provided that a principal would not be charged with knowledge of an agent who had a personal interest in concealing his knowledge from the principal.[224] The United States sought to set aside patents for land possessed by the Curtis, Collins & Holbrook

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215 *In re* Distilled Spirits, 78 U.S. 356, 367 (1870), *cited with approval in Melms*, 66 N.W. at 522.

216 *Melms*, 66 N.W. at 523.

217 *See id.* at 522; *see also* Aetna Indem. Co. v. Schroeder, 95 N.W. 436, 438 (N.D. 1903).

218 *See supra* Part IV.A.3.

219 Munroe v. Harriman, 85 F.2d 493, 495 (2d Cir. 1936) (citing *Distilled Spirits*, 78 U.S. at 367).

220 *Id.* (citing Am. Nat. Bank v. Miller, 229 U.S. 517, 522 (1913)).

221 Thomas-Houston Elec. Co. v. Capitol Elec. Co., 65 F. 341, 343 (6th Cir. 1894), *cited with approval in Munroe*, 85 F.2d at 495.

222 *Munroe*, 85 F.2d at 495.

223 Curtis, Collins & Holbrook Co. v. United States, 262 U.S. 215 (1923).

224 Am. Nat. Bank, 229 U.S. at 522, *reviewed by Curtis, Collins & Holbrook Co.*, 262 U.S. 215 ("We held that . . . knowledge [of its President's insolvency] could not be imputed to the Macon bank merely because the President knew it, for the reason it was not to be inferred that he would communicate such knowledge to his own bank.").

Company on the ground that these patents were obtained fraudulently.[225] Under the Timber and Stone Act, the United States sold land, valued chiefly for timber or stone, to the citizens of the United States, so long as each buyer stated, under oath, that he purchased the land "in good faith to appropriate it to his own exclusive use and benefit."[226] Consequently, agents of a man, only known as Tuman, purchased the land under "false oaths in violation of the statute."[227] The agents conveyed the land to another man whom Tuman and C. H. Holbrook ("Holbrook") nominated as their trustee.[228] This trustee conveyed the land to the Curtis, Collins & Holbrook Company.[229]

Unfortunately, Holbrook was aware of the fraudulent purchases and was an incorporator of the Curtis, Collins & Holbrook Company.[230] Nevertheless, the Curtis, Collins & Holbrook Company argued that Holbrook's knowledge could not be imputed onto the company because Holbrook secured the fraudulent titles in violation of the company's instructions for his own profit.[231] The Court, however, did not apply the adverse interest exception.[232] Instead, the Court held that "[t]he interest of Collins, Curtis and Holbrook in the acquisition of the tiles was common" and that "[t]he adverse interests as between them in sharing the fruits of the common business cannot enable the company to retain its share and repudiate the agent with all he knew."[233]

The Court of Appeals for the Second Circuit interpreted the Supreme Court's decision in *Curtis, Collins, & Holbrook Co.* to qualify the exceptions to the imputed knowledge rule: when a principal "retains the property, he adopts the agent's act in procuring it and must in fairness take the accompanying burden of the agent's knowledge."[234] For example, in *Munroe v. Harriman*,[235] Charles A. Munroe ("Munroe") lent shares of stock to Joseph W. Harriman ("Harriman").[236] Harriman then fraudulently "pledged [those shares] as collateral for a loan" from a certain bank.[237] Since Harriman was the president of

[225] *Curtis, Collins & Holbrook Co.*, 262 U.S. at 216.

[226] *Id.* at 218-19.

[227] *Id.* at 219 (Agents of Tuman made entries under "an agreement to convey the lands to any one he might direct, he paying all the expenses and $100 for each entry, and the entrymen making false oaths in violation of the statute.').

[228] *Id.*

[229] *Id.*

[230] *Id.* at 219, 223-24.

[231] *Id.* at 223-24.

[232] *Id.* at 224.

[233] *Id.*

[234] Munroe v. Harriman, 85 F.2d 493, 495 (2d Cir. 1936) (construing *Curtis, Collins & Holbrook Co.*, 262 U.S. at 224).

[235] *Id.* at 493.

[236] *Id.* at 494.

[237] *Id.*

this bank, Munroe attempted to rescind his shares by alleging that Harriman's knowledge of fraud could be imputed onto the bank.[238] In response, the Second Circuit adopted the "sole actor" doctrine to note that Harriman's will "alone caused the making of the loan and the acceptance of the collateral."[239] As such, the court granted recovery of the shares from the bank by arguing that "the corporation can claim title only by virtue of the sole actor's act and must accept it burdened with his knowledge of the defect in title."[240]

Subsequently, the Circuit Court of Appeals for the Tenth Circuit, in *Maryland Casualty Co. of Baltimore v. Queenan*,[241] synthesized the application of the imputed knowledge rule to agents serving two or more principals.[242] As a general rule, the "notice to, or knowledge of, an agent while acting within the scope of his authority and in reference to a matter over which his authority extends, is notice to, or knowledge of, his principal."[243] However, "[a] principal is not charged with or bound by notice to, or knowledge of, an agent as to matters involved in a transaction in which the agent deals with the principal or another agent of the principal as, or on account of, an adverse party."[244] Finally, "a qualification of the exception is recognized where the agent, although engaged in perpetrating an independent fraudulent act on his own account, is the sole representative of the principal and the principal, with knowledge of the facts, retains the fruits of the transaction."[245] As such, dual agency offers a solution to the contradicting obligations that the employment relationship imposes on physicians.[246]

B. *Dual Agency Within Health Care*

Dual agency exceptions to the imputed knowledge rule are directly applicable to health care law.[247] Employed physicians are dual agents who serve two masters: the patient and the employer.[248] As such, dual agency exceptions are

[238] *Id.* at 494-95.

[239] *Id.* at 496.

[240] *Id.*

[241] Maryland Cas. Co. v. Queenan, 89 F.2d 155 (10th Cir. 1937).

[242] *See generally id.*

[243] *Id.* at 156-57.

[244] *Id.* at 157.

[245] *Id.*

[246] *See infra* Part IV.B.

[247] Some legal journalists have hinted at the application of dual agency to health care law. *E.g.*, Scordato, *supra* note 34, at 133 ("While otherwise sound, . . . [when] the physician obtain[s] the information in question within the scope of a legally confidential relationship or transaction with the individual, . . . the usual operation of the imputed knowledge rule is abated.").

[248] *See supra* Part III.

applicable to resolving the pertinent dilemma physicians undertake by entering into an employment relationship.[249]

Specifically, the confidential agent exception, if adopted, can resolve the contradicting obligations expected of employed physicians.[250] The confidential agent exception provides that the imputed knowledge presumption is rebutted when observation of the imputed knowledge rule would result in a breach of professional confidence.[251] The imputed knowledge rule presumes that employed physicians will disclose confidential information, obtained through communications with patients, to their employer.[252] However, the fiduciary status obligates physicians to preserve the confidentiality of their physician-patient relationship.[253] As such, breach of professional confidence will result from observation of the imputed knowledge rule.[254] Thus, the confidential agent exception rebuts the presumption that obligates physicians with the duty to disclose confidential information to their employers.[255]

Moreover, the confidential agent exception allows physicians to provide quality health care to their patients, as the employment status does not burden physicians with additional obligations to their employer.[256] Thus, physicians can pursue employment within hospitals, or other health care facilities, without sacrificing the quality of care their patients receive.[257]

V. Conclusion

Physicians are abandoning independent practice for employment within hospitals. This trend diminishes the quality of health care when courts grant hospitals access to confidential physician-patient communication through the imputed knowledge presumption. This practice weakens physician-patient communications: the patients lose trust in their physicians, and the physicians become entangled in contradictory expectations from their patients and their employer.

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[249] *See supra* Part IV.

[250] *See supra* Part IV.A.

[251] *See supra* Part IV.A.2.

[252] *See supra* Part III.D.

[253] *See supra* Part II.A.

[254] *See supra* Part III.E.

[255] *See supra* Part IV.A.2.

[256] *See* Scordato, *supra* note 34, at 152 (". . . an imputed knowledge rule without a confidential agent exception would work against, and thus to some degree compromise, the social benefits that are sought by the creation and maintenance of legally confidential relationships."); *see also* Marsh, *supra* note *6* ("When a physician bears full responsibility only to patients, the physician remains free to act as a knowledgeable, skilled, and trustworthy advocate in delivering to the patient the best care available.").

[257] *See supra* Part III.E.

Fortunately, this dilemma can be resolved through adaptation of dual agency exceptions to the imputed knowledge rule. Specifically, the confidential agent exception can reconcile the conflicting obligations of physicians who choose to pursue employment within hospitals. This exception allows employed physicians to preserve their patients' trust. In exchange, their employers, the hospitals, are not charged with the unrealistic presumption that physicians would disclose confidential information in violation of their fiduciary obligations.

Police Body Cameras: Transparency in a Sphere of Relentless Scrutiny

Dustin Fahrbach-Staats[1]

I. Introduction

Arizona House Bill 2511 proposes that every peace officer in the state of Arizona shall wear a camera that electronically records both audio and video while the officer is performing official duties likely to result in a criminal investigation or arrest.[2] The bill also dictates that the Attorney General shall establish the guidelines and directives needed to implement and enforce the legislation.[3] Incorporated into Arizona Revised Statutes as § 38-1115, this bill would amend the current law enumerating the rights and requirements of peace officers in Arizona.[4] Without the incorporation of the Attorney General's directives and guidelines,[5] the ultimate intent of the current law and the impact to peace officers' obligations are difficult to determine.[6]

Presumably, the law is intended to mandate transparency, ensure accountability, and enhance the public trust of the actions of Arizona police officer action given the national controversies over police use of force that have cast police officers in a negative light. Recent events like the shooting death of Michael Brown in Ferguson and the chokehold death of Eric Garner in NewYork, have ignited a firestorm of outrage and protests throughout the nation.[7]

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[1] Dustin Fahrbach-Staats is a 2016 Juris Doctorate candidate at Arizona Summit Law School and a Staff Editor on *Arizona Summit Law Review, Volume VIII.* Dustin served in the United States Navy, had a strong passion for the criminal justice system prior to attending law school, and seeks to strike a balance of justice and accountability during a period in our society that is riddled with an enhanced scrutiny of law enforcement activities due to the advent of technologies that can broadcast them nearly instantaneously. The author would like to dedicate this article to his wife, MeLanie, who always believed in him with anything he set his mind to, and his daughter, mother, and father for their love and support.

[2] H.R. 2511, 52nd Leg., 1st Reg. Sess. (Ariz. 2015).

[3] *Id.*

[4] Ariz. Rev. Stat. Ann. §§ 38-1101-1114 (2015).

[5] The author formally requested an interview with Attorney General Mark Brnovich, but was unable to schedule the meeting prior to the due date of this comment.

[6] *See* H.R. 2511, *supra* note 2.

[7] *See* Emily Brown, *Timeline: Michael Brown shooting in Ferguson, Mo.*, USATODAY (Dec. 2, 2014, 7:37 p.m.), http://www.usatoday.com/story/news/nation/2014/08/14/michael-brown-ferguson-missouri-timeline/14051827/ (last visited Jul. 26, 2015); J. David Goodman and Al Baker, *Wave of Protests After Grand Jury Doesn't Indict Officer in Eric Garner Chokehold*

Presumably, the law is also intended to protect officers from false allegations of misconduct or use-of-force complaints during encounters with the public, in lieu of conducting costly trials.

This bill could provide additional legal protection for both criminal defendants and peace officers by striking a balance between justice and accountability. However, if courts interpret the statute and Attorney General directives too strictly, the bill could result in case dismissal for officers failing to fully comply through no fault of their own.

II. Background

Representative Reginald Bolding [D] is the sole sponsor of House Bill 2511, which he proposed to the Arizona House of Representatives ("House") in January 2015.[8] The bill sat awaiting assignment to a committee after first being proposed on January 20, 2015,[9] and it was introduced to the full House and read for the first time on March 31, 2015.[10] Limited sponsorship from within the legislature provokes a disconcerting lack of bipartisan support for the bill, which may affect the bill moving forward out of committee.

III. Proponents

A. *Rep. Reginald Bolding*

As the bill's sponsor, Rep. Bolding stated in an interview with the author on March 4, 2015, that the lack of sponsorship should not be interpreted as a lack of support from other members of the House.[11] Rep. Bolding went on to clarify that the bill has bipartisan support and that an administrative timetable is the principal cause for the lack of formal sponsorship.[12] Rep. Bolding cites the bill's delayed committee assignment as an unfortunate political partisanship obstacle to what he considers critial legistlation.[13] However, a calculated timeline by the House planned the bill to move directly to the Senate later in the

Case, The New York Times (Dec. 3, 2014), http://www.nytimes.com/2014/12/04/nyregion/grand-jury-said-to-bring-no-charges-in-staten-island-chokehold-death-of-eric-garner.html?_r=0 (last visited Jul. 26, 2015).

[8] *See* sources cites *supra* note 2; *Reginald Bolding – As a lawmaker*, FollowTheMoney, http://followthemoney.org/entity-details?eid=12719942 (last visited Jul. 26, 2015).

[9] Interview with Reginald Bolding, State Representative, Ariz. House of Representatives, Phx., Ariz. (Mar. 4, 2015); *Arizona House Bill 2511 - Summary*, Legiscan, https://legiscan.com/AZ/bill/HB2511/2015 (last visited Jul. 26, 2015).

[10] *Id.*

[11] Interview with Reginald Bolding, St. Rep., Ariz. H.R., Phx., Ariz. (Mar. 4, 2015).

[12] *Id.*

[13] *Id.*

session.[14] An ancillary benefit of the bill that Rep. Bolding illustrates is the influence on various law enforcement agencies across the state that have implemented new policies or are undergoing pilot testing of body cameras.[15]

B. *State Law Enforcement Initiatives*

The Chandler Police Department recently proposed purchasing one hundred and eighty Axon body-worn video cameras from Scottsdale-based Taser International ("Taser"), with an expected cost of approximately $1,000,000 for a five-year agreement.[16] Chandler officers became familiar with the Axon cameras during a trial period to assess the benefits of department-wide deployment, and one hundred percent of the officers involved in the testing thought the cameras were of value to the department.[17] After receiving the prestigious Gold Standard of Assesment with Excellence by the Commission on Accredidation for Law Enforcement for seven consecutive years, Chandler Police Chief Sean Duggan noted that the department "has always prided itself on being forward-thinking and civic-minded" so it is no surprise that the department acted preemptively by equiping its officers with body-worn cameras.[18] Chief Duggan asserts that "[t]echnology is changing the nature of police work . . . . [t]his is an opportunity for us to move forward to help ensure accountability and enhance public trust."[19] Taser spokesman Steve Tuttle states that "there really are no downsides to having the best available [video] evidence when law enforcement interacts with the public" and that Taser's research indicates some police departments receive as much as a three hundred percent return in cost savings simply by reducing civilian complaints.[20]

The Phoenix Police Department is conducting pilot-program testing of body-worn cameras in their Maryvale Precinct, where Precinct Commander, Michael Kurtenbach, praised body cameras for increasing productivity and accountability among officers using them.[21] In conjunction with a study (conducted by Arizona State University's Center for Violence Prevention and Community Safety) to evaluate the impact of video cameras on domestic violence cases and officer accountability, research indicated a twenty-three percent

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14 *Id.*

15 *Id.*

16 Curt Blakeney, *Chandler Police Make Plans For More Body-Worn Cameras*, SAN TAN SUN NEWS, February 21, 2015, at 1.

17 *Id.* at 4.

18 *Id.* at 1.

19 *Id.*

20 *Id.*

21 Megan Cassidy, *Phoenix Police: Body Cameras Beneficial But Costly*, AZCENTRAL (January 22, 2015, 6:45 a.m.), http://www.azcentral.com/story/news/local/phoenix/2015/01/21/phoenix-police-body-cameras-beneficial-costly/22142475/ (last visited Jul. 26, 2015).

decrease in complaints against Maryvale officers during the testing period.[22] Other precincts not utilizing the cameras recorded a forty-five percent increase in complaints during the same period.[23]

Law enforcement agencies across the state are implementing or testing the use of body-worn cameras, including the Maricopa County Sheriff's Office with seven hundred cameras, the Mesa Police Department with one hundred and fifty cameras, the Surprise Police Department with seventy-two cameras, the Lake Havasu Police Department with sixty cameras, the Peoria Police Department with fifty-four cameras, the Flagstaff Police Department with fifty cameras, and the Scottsdale Police Department with forty cameras.[24] The Lake Havasu Police Department reported a fifty-eight percent reduction in complaints.[25] The ability to accurately review video evidence provides critical information as proven in the tragic fatal shooting of twenty-four-year-old rookie Flagstaff police officer Tyler Stewart, who recorded his own murder on his body-worn camera as he responsed to a domestic violence complaint.[26]

C. *National Quantitative Research*

The Police Executive Research Forum ("PERF")[27] conducted a survey of five hundred police departments across the country in July 2013 with the objective of assessing the usage and considering the difficulties of body-worn cameras.[28] Two hundred fifty-four departments responded to the survey, and of those, only sixty-three reported using body-worn-cameras.[29] Of the sixty-three departments that use body-worn cameras, one-third did not have any type of written policy governing the usage of the equipment; many police executives stated a lack of guidance on what should be included in the policy as the reason for the reluctance to implement written directives.[30]

Police departments implementing body-worn cameras provides accountability and transparency to the public, which helps resolve issues raised during

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22 *Id.*

23 *Id.*

24 Blankeny, *supra* note 18, at 4.

25 *Id.*

26 Matthew Casey, *Flagstaff Police Officer's Body Camera Captures Fatal Shooting*, AZCENTRAL.COM, (January 15, 2015, 12:02 p.m.), http://www.azcentral.com/story/news/local/arizona/2015/01/13/records-flagstaff-officer-shot-searched-suspect/21526819/ (last visited Jul. 26, 2015).

27 PERF is a nonprofit, police research and policy organization and a provider of management services, technical assistance, and executive-level education to support law enforcement agencies.

28 *Implementing a Body-Worn Camera Program: Reccomendations and Lessons Learned*, COMMUNITY ORIENTED POLICING SERVICES, 2 (Sept. 9, 2014), *available at* http://ric-zai-inc.com/Publications/cops-p296-pub.pdf.

29 *Id.*

30 *Id.*

public interactions. Likewise, the cameras potentially provide a deterrent to the public from escalating confrontational situations by warning the public that the encounter is being recorded by law enforcement. Police department executives from across the country report significant reductions in the complaints against their officers and more easily resolve officer-involved incidents when officers wear body cameras.[31] The Rialto Police Department conducted a one-year study in 2012 over approximately 1000 shifts by randomly assigning body-worn cameras to various officers.[32] The study documented a sixty percent reduction in use-of-force complaints and an eighty-eight percent reduction in the number of overall complaints compared to the prior year.[33] Similarly, the Mesa Police Department conducted a controlled, one-year study in 2012 of fifty officers wearing cameras and fifty officers without cameras.[34] The study noted a forty percent reduction in overall complaints, and a seventy-five percent reduction in use-of-force complaints against the officers wearing cameras.[35] Notably, officers without cameras noted nearly three times more complaints.[36] Officers with police departments in Daytona Beach, Florida and Greenville, North Carolina who have a history of complaints, actively request to wear body-worn cameras to protect themselves in the future.[37] An additional example of accountability is evident in the termination of a Phoenix police officer after his body-worn camera documented repetitive occurrences of unprofessional conduct such as verbal abuse, profanity, and threats against members of the public.[38]

IV. OPPONENTS

A. *Privacy Concerns of Public*

The most common concern from skeptics about the use of body-worn cameras by police officers generally points to privacy concerns.[39] Chandler Police Chief Duggan addressed this concern saying, "[o]ur body-worn camera policy would mirror existing policies regarding privacy issues, such as a citizen request not to be recorded during a consensual encounter in public or in the privacy of their own home."[40] Legislators in at least fifteen states have

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31 *See id.* at 5-7.
32 *Id.* at 5.
33 *See* source cited *supra* note 28.
34 *Id.*
35 *Id.* at 6.
36 *Id.*
37 *Id.* at 7.
38 *Id.* at 7-8.
39 *See supra* note 18 at 4.
40 *Id.*

presented a contravening issue that undermines what many law enforcement executives and state and municipal leaders claim to be the main purpose of utilizing body-worn cameras. These privacy concerns, if implemented, would exempt video recordings of police encounters with citizens from state public records laws, or limit what can be made public.[41] The stated purpose of these bills is to preserve the privacy of videotaped people, and to save considerable time and money spent on public information requests as the technology quickly becomes more widely used.[42]

B. *Financial Impact on Departments/Public*

The cost of implementing mandatory, state-wide use of body-worn cameras could be astronomical. The Phoenix Police Department recently indicated that the cost of equipping all of their first-responding officers with cameras would peak at $3,500,000 (including the cost to procure the equipment and store the data).[43] Maryvale Precinct Commander Michael Kurtenbach stated, "[t]he technology itself is relatively easy to acquire, *assuming that you have the funds to do so* . . . . [t]he challenges come with managing all the data that is created by applying the technology"[44] Chandler Police Department's proposed five-year, $1,000,000 agreement with Taser for 180 Axon Flew cameras would include the cameras, docking stations/chargers, data storage, and monthly service to Taser's secure evidence.com website.[45] After recording an interaction, Chandler officers can stream video via Bluetooth to their smartphone. Then, using the Axon application, they can view the video, and add notes and meta-tags to complete the video as evidence.[46] The most promising benefit of the five-year agreement is the cost, which would be offset by funds accumulated by forfeited assets seized during arrests.[47]

V. CONCLUSION

The implementation of state-wide body-worn cameras by Arizona peace officers encounters the challenge of providing the general public with a means of transparency while ensuring privacy and a tangible benefit for the use of public tax dollars. However, the benefits of body-worn cameras are not only

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41 Ryan J. Foley, *Should Access To Police Body Cameras Be Limited?*, ASSOCIATED PRESS, (Jan. 20, 2015, 5:44 PM),.), http://www.thenewsstar.com/story/news/crime/2015/03/20/state-bills-limit-access-officer-body-camera-videos/25110745/.

42 *Id.*

43 *See supra* note 23.

44 *Id.* (emphasis added).

45 *See supra* note 18 at 1, 4.

46 *Id.* at 4.

47 *Id.* at 1.

for the public citizen—they also provide a means of ensuring compliance from the public and reduce the need for officers to use force. Privacy concerns are important and need to be addressed, so the best solutions should protect both citizens and officers. All concerns considered, I believe the benefits far exceed the detriments, and a law mandating all police officers to wear body cameras in the State of Arizona is on the very near horizon.

Waiving the Rights of the Mentally Ill in Arizona

Jason Kinsman*

I. Introduction

On March 23, 2015, the Arizona Legislature passed a small piece of legislation that the governor duly signed the following day. The bill was first introduced in late January, proceeding through each of the legislative branch committees with very little commentary and no debate. The only comments made were in support of the bill. These comments came from the agency that proposed the bill. Only one senator voted against the bill's passage.[1]

The bill, Arizona House Bill 2307 ("H.B. 2307"), became effective July 3, 2015, and changed the way courts could conduct hearings regarding court-ordered mental health treatment.[2] The summary transmitted to the Governor stated the bill's provisions were intended as conforming changes to Arizona Revised Statute (A.R.S.) § 36-539 by requiring:

> "the [mental health] evaluation agency to disclose to the court all drugs, medication and treatment that an inpatient has received during the 72 hours immediately before a court-ordered mental health hearing, and allows the hearing to proceed if a patient cannot be present for psychiatric reasons *or* is unable to appear by other reasonably feasible means."[3]

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1 Eddie Farnsworth et al., AZ State Legislature, Committee on Judiciary 107-08 (2015); House Judiciary on Court Ordered Treatment, AZ House of Rep., http://azleg.granicus.com/MediaPlayer.php?view_id=13&clip_id=14828 (watch video at 46 min. 10 sec.)(last visited Oct. 08, 2015); Senate Judiciary on Court Ordered Treatment, AZ Senate, http://azleg.granicus.com/MediaPlayer.php?view_id=13&clip_id=15436 (reference at 5 min. 26 sec.) (last visited Oct. 08, 2015).

2 Farnsworth, *supra* note 1.

3 *Id.*

This characterization is, at best, inaccurate, because H.B. 2307 adds the phrase "psychiatric reasons," which allows the absence of a proposed patient to be determined *prior to* commencement of the involuntary commitment hearing based on the opinions of the doctors and staff who are requesting his or her commitment.

H.B. 2307 does *not* merely make a conforming change of A.R.S. § 36-539 by bringing the statute in conjunction with other statutory provisions in the same scheme or case law. H.B. 2307 removes the rights of vulnerable citizens to appear *in person*, bringing the due process protections of Arizona's mental health statutory scheme below the federally mandated minimum. An examination of the changes to the mental health statutory scheme of Arizona, as well as current federal and state case law provides the appropriate context for this conclusion.

II. The History

The Arizona territory provided the insane[4] with due process protections that could be considered liberal in comparison to other states.[5] As early as 1864, the territory of Arizona required the following due process protections in involuntary commitment proceedings:

1) The presence of the accused;[6]
2) The presence of a mental illness;
3) Dangerousness to the accused or others;
4) A petition made under oath for examination of the accused;
5) A hearing before an independent decision maker;
6) Testimony from two or more "acquaintance witnesses;"
7) Personal examinations by one or more doctors;
8) Affidavits by the examining doctors detailing their judgment as to accused's:
    a) Mental illness,
    b) Dangerousness, and

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[4] Ariz. Rev. Stat. Ann. §36-501 (2014) (The term mentally ill was not used in the Arizona statutory scheme until 1955).

[5] *See generally* D.E. Alexander & Isaac Joseph, Probate Law, Practice, and Forms, Under the Laws of CA, OR, AZ, ID, MO, NV, UT, WA, and WY: Embracing the Text of the CA Code of Civ. Pro. Relating to Probate Matters (San Francisco: Bancroft-Whitney Company, 1892).

[6] The Compiled Laws of the Territory of AZ, the Howell Code and the Session Laws from 1864 to 1871, 580 (Coles Bashford Comp., 1871) ("The probate judge of any county in this Territory, upon the application under oath, setting forth that a person by reason of insanity is dangerous, being at large, *shall cause such person to be brought before him for examination.*").

c) Whether the insanity is permanent or temporary;[7]

9) Judicial review of commitment.

The Arizona territory expanded the judicial review protections in 1887 by enumerating the persons who could petition the court for review, which included the person declared insane, the guardian, if any, relatives to the third degree, or any friend.[8] The new provision provided for the right to a jury trial in determining the issue of sanity.[9] The next major expansion occurred sixteen years after statehood, in 1928, when the legislature recognized the need to provide court appointed counsel to indigent patients, a decision made thirty-five years before the Supreme Court of the United States ("SCOTUS") applied the same to criminal defendants.[10]

From 1928 until 1974, the Arizona mental health statutory scheme was a piecemeal affair, which did nothing to expand the due process procedural safeguards of the mentally ill. During this time, however, an Arizona Supreme Court decision did away with the statutorily granted judicial review by jury for the involuntarily committed.[11] In *Cubbison v. Cubbison,* a woman was involuntarily committed after an insanity hearing, but was restored to competency by judicial order.[12] Mrs. Cubbison sought relief from a divorce decree because the proceedings occurred while she: (1) was still presumed insane[13]; (2) was not represented at the proceeding; (3) did not receive personal service of the proceeding; and (4) did not have a guardian to act in her best interest. The court held that the superior court lacked jurisdiction to restore Mrs. Cubbison back to competency or to release her from the state asylum. The Court reasoned that the superior court lacked jurisdiction because the statute proscribing the competency hearings did not apply to persons committed to the state asylum.[14]

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[7] *Id.*

[8] The Revised Code of Arizona, 253 (Prescott Courier Print 1887).

[9] *Id.*

[10] F.C. Stuckmeyer, The Revised Code of Arizona, 418 (1928).

[11] Cubbison v. Cubbision, 40 P.2d 86, pincite (1935).

[12] *See supra* note 10 at 956.

[13] The Arizona Supreme Court seemed to need a way to presume Mrs. Cubbison still insane. Invalidating the judicial review for restoration to competency statute's relation to involuntary commitment proceedings was the lynch pin allowing the court to rule in Mrs. Cubbision's favor. *See supra* note 11. Despite the record which indicated a superior court lawfully found her "restored to capacity" under a valid law, Article 17 of Chapter 88, R. C. A. 1928 (section 4107 et seq.), which had obviously been used this way in the past and was part of the statutory scheme since 1887 (*See* 1 Revised Statutes of Arizona 381 Title XVII Courts Probate Chapter 14 Guardian § 1340 (1887); Revised Code of Arizona Chapter 88 Probate Procedure § 4143 (1928).

[14] Whether the 1935 Arizona Supreme Court had the authority to summarily do away with jury trials in judicial reviews is unclear since the Arizona Constitution preserves the right to a jury trial as it existed at the time the constitution was adopted. *See* Derendal v. Griffith, 104 P.3d 147 (Ariz. 2005).

Even though protects the protections afforded by Arizona statute were considered liberal at the time, many fundamental due process rights were not protected. Thus the lack of these protections would now be considered serious human rights issues.[15] The absent protections are:

1) Right to notice prior to the proceedings;
2) A pre-petition screening by a mental health professional;
3) A speedy trial;
4) A full adversarial hearing;
5) Confinement to treatment facility awaiting the hearing[16];
6) An independent evaluator;
7) A defined time period of commitment;
8) Mandatory institutional or judicial review of ongoing confinement occurring with fixed frequency; and
9) Delineated rights after institutionalization.[17]

During the mid-1970's and through the 1980's, while still in the wake of the deinstitutionalization movement, two events occurred changing the landscape of due process protections in involuntary commitment hearings in Arizona.[18] The first event occurred in 1974 when Arizona passed the Arizona's Mental Health Services Act ("the Act"). The Act completely revised Arizona's statutory law regarding involuntary commitment.[19] The intention of the Act was to cure the missing due process protections listed above.[20] The second event was a series of SCOTUS cases analyzing the protections owed to citizens facing involuntarily commitment under the Due Process Clause of the Fourteenth Amendment.[21]

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[15] *See generally* Daniel W. Shuman, Kenney F. Hegland, & David B. Wexler, *Arizona's Mental Health Services Act: An Overview and an Analysis of Proposed Amendments*, 19 Ariz. L. Rev. 314, 314-45 (1977).

[16] As opposed to a county jail which was the practice of many counties prior to 1974. *Id.* at 317.

[17] *See generally supra* note 15.

[18] Deinstitutionalization movement occurred during the 1960's and 1970's and was, driven by a backlash against psychiatry and an interest in greater individual freedoms for the mentally ill. The movement called for the closing of state-funded psychiatric hospitals. Austin Baumgarten, *Medical Treatment Demands Medical Assessment: Substantive Due Process Rights in Involuntary Commitments*, 45 U.C.D. L. Rev. 597, 600-01 (2011).

[19] *See supra* note 15

[20] *See supra* note 15.

[21] This article reviews four SCOTUS opinions: O'Connor v. Donaldson, 422 U.S. 563 (1975) (requiring mental illness and dangerousness to allow a state to involuntarily commit); Addington v. Texas, 441 U.S. 41 (1979) (establishing intermediate burden of proof, clear and convincing evidence, that the state must establish to overcome the significant liberty interest of the mentally ill patient); Vitek v. Jones, 445 U.S. 480, 492, (1980) (holding the minimum due process protec-

The first case in the series of SCOTUS cases, *O'Connor v. Donaldson* (1975),[22] reviewed the commitment of a Florida man to the state's mental hospital; a man whose repeated requests for release were rejected even though he was not receiving treatment nor was he considered dangerous to himself or others. The case heralded a new era for the involuntarily committed by recognizing the liberty interest protected by the Fourteenth Amendment which, in part, prohibits the custodial confinement of the mentally ill for the sake of giving the person a better standard of living or protecting the sensibilities of society.

Part of the holding in *O'Connor* stated, "a State cannot constitutionally confine without more, a non-dangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends."[23] Prior to this decision, states other than Florida, acted under the color of law to "provide indefinite custodial confinement of the 'sick,' even if they were not treated, and their release would not be harmful."[24] Arizona used the color of law to institute confinements of this nature as evidenced by the case of the "laughing lady."[25]

SCOTUS's next case, *Addington v. Texas* (1979),[26] recognized two important due process concepts in involuntary commitment hearings. SCOTUS recognized the liberty interests involved with involuntary commitment and established a requisite burden of proof to be overcome before dangerous mentally individuals could be committed.

The case of *Addington* involved a Texas man who repeatedly had been through the mental health system on an inpatient basis and refused to participate in outpatient programs. The Texan had threatened his parents and other individuals,, was involved in several assaults while hospitalized, caused substantial property damage to his home and the home of his parents, and had escaped from mental hospitals several times. The legal issue presented to SCOTUS was what standard of proof did a state have to overcome in order to prove the man's dangerousness to a jury. The state trial court used the "une-

tions due in involuntary commitment hearings); Zinermon v. Burch, 494 U.S. 113, (1990) (examining the need to determine consent prior to accepting voluntary mentally ill patients).

22 *O'Connor*, 422 U.S. at 563 (1975).

23 *Id. at* 576.

24 *Id. at* 563.

25 A rural county in Arizona committed a nineteen-year-old woman for suffering from a mental illness, which was evidenced by her "tendency to laugh and cry" and "for her desire to dance." "Bathing in cold water and her menstrual period" brought on the illness. The laughing lady was committed in 1912 and was still committed to the Arizona State Hospital in 1971, at the age of 78. David B. Wexleret al., *The Administration of Psychiatric Justice: Theory and Practice in Arizona*, 13 ARIZ. L. REV. 1, 1-2 (1971).

26 Addington v. Texas, 441 U.S. 41 (1979).

quivocal and convincing standard" or the "clear and convincing standard." This standard of proof is an intermediate level of proof typically used in civil courts when determining issues "involving allegations of fraud or some other quasi-criminal wrongdoing."[27] The Texas appellate court disagreed and ordered that the highest standard of proof, "beyond a reasonable doubt" should be used. The Texas Supreme Court citing its decision in a previous case held that the proper standard was the lower standard of "preponderance of the evidence," which is used in most civil proceedings.[28]

SCOTUS, applying the *Matthews Test*,[29] concluded that a "civil commitment for any purpose constitutes a *significant* deprivation of liberty that requires due process protections" against error (emphasis added).[30] This holding directly contradicted some state supreme courts, which held that "[s]uch loss of liberty is not such liberty as is within the meaning of the constitutional provision that 'no person shall be deprived of life, liberty or property without due process of law.' "[31]

Using "significant deprivation" as the level of liberty interest requiring protection from the risk of error SCOTUS set the intermediate standard of "clear and convincing evidence" as the appropriate standard of proof. The argument was that involuntary commitment proceedings are civil in nature and the risk of erroneous confinement is not as high as it is in criminal due to the "layers of professional review and observation of the patient's condition and the concern of family." In addition, "given the lack of certainty and the fallibility of psychiatric diagnosis, there is a serious question as to whether a state could ever prove beyond a reasonable doubt that an individual is both mentally ill and likely to be dangerous."

Under the *Mathews Test* SCOTUS balanced the patient's interest and his significant desire to be free from indefinite confinement in a mental hospital and from psychiatric medications, against the state's legitimate interest. The

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[27] *Id.* at 424.

[28] *See id.* at 422. (The Texas Supreme court also held the trial court harmlessly erred when instructing the jury to use the "clear and convincing" standard. The error occurred because in Texas juries can only be instructed in either beyond a reasonable doubt or preponderance of the evidence and nothing else).

[29] Mathews v. Elridge, 424 U.S. 319, 321 (1976) (in determining the amount of process due, the court should weigh three factors: 1) The interests of the individual in retaining their property, and the injury threatened by the official action; 2) The risk of error through the procedures used and probable value, if any, of additional or substitute procedural safeguards; 3) The costs and administrative burden of the additional process, and the interests of the government in efficient adjudication).

[30] *Addington*, at 425

[31] Prochaska v. Brinega, 251 Iowa N.W.2d 870, 872 (1960) (the case held that the right of appeal from a finding of the Commissioner that one is insane, where done without notice to him and without his presence, affords him due process of law).

state's lawful and legitimate interest in involuntary civil commitment derives from *parens patriae* and *police* powers. *Parens patriae* is a state's inherent duty as sovereign to protect those unable to care for themselves.[32] The classic example is the state acting "as the general guardian of all infants, idiots, and lunatics."[33]

The concurring opinion in *O'Connor* explained that the *parens patriae* power does not justify a state confining of a mentally ill citizen when the only purpose for the confinement is treatment. This is because many forms of mental illness are still not understood, treatable, or curable and because of the uncertainty of diagnosis and the experimental nature of professional judgment in the field of psychiatry.[34] The police power, on the other hand, allows the state to protect the community from the dangerous tendencies of some who are mentally ill through incarceration. The state, however, uses the police power as punishment while the civil nature of commitment is aimed at treatment.[35] *Addington* maintained this rationale using it as a part of the balancing test to arrive at the "clear and convincing standard."

In the next case of the series, *Vitek v. Jones,*,[36] SCOTUS announced the minimum due process protections owed to a convicted felon facing involuntary commitment as:[37]

> A. Written notice to the prisoner that a transfer to a mental hospital is being considered;
> B. A hearing, sufficiently after the notice to permit the prisoner to prepare, at which disclosure to the prisoner is made of the evidence being relied upon for the transfer and at which an opportunity to be heard *in person* and to present documentary evidence is given;[38]
> C. An opportunity at the hearing to present testimony of witnesses by the defense and to confront and cross-examine witnesses called by the state, except upon a finding, not arbitrarily made, of good cause for not permitting such presentation, confrontation, or cross-examination;

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32 *Parens patriae,* BLACK'S LAW DICTIONARY (10th ed. 2014).

33 *O'Connor,* at 583.

34 *Id.* at 583-84.

35 *Id.* at 585.

36 Vitek v. Jones, 445 U.S. 480, 492 (1980).

37 See *id.* at 492-93. (The rights of a convicted felon are less than those of "an ordinary citizen" in an involuntary commitment proceeding).

38 Miller v. Vitek, 437 F. Supp. 569, 574 (1977) (explaining the District court characterized the requirements of A and B, which include the opportunity to be heard in person "so fundamental that little discussion of them is needed.").

D. An independent decision maker;
E. A written statement by the fact-finder as to the evidence relied on and the reasons for transferring the inmate;
F. Availability of legal counsel, furnished by the state, if the inmate is financially unable to furnish his own; and
G. Effective and timely notice of all the foregoing rights.[39]

The *Vitek* case involved a Nebraska prisoner's transfer to a state mental hospital solely based upon the opinion of the prison physician that he was suffering from a mental condition, which the person could not adequately treat.[40] The Nebraska statute authorizing such transfers did not provide the prisoner with notice or the opportunity to appear and be heard before a neutral decision maker. SCOTUS agreed with the federal three –judge District Court, which stated that transferring Jones without adequate notice or the opportunity for an adequate hearing deprived him of liberty without due process of law contrary to the Fourteenth Amendment.[41] The Court went to some length to explain that the liberty interest involved in involuntary commitment is a separate interest from the liberty interest found in criminal proceedings.

SCOTUS agreed the state's characterization of the prisoner as mentally ill had "some stigmatizing" consequences and, coupled with the "mandatory behavior modification treatment" that the prisoner would be subjected, to amounted to a grievous loss in liberty for which due process protections under the Fourteenth Amendment are required.[42] SCOTUS pointed out that if the state subjected an "ordinary citizen" to an involuntary hospitalization without notice or an adequate hearing it would be undeniably unconstitutional.[43] Per the *Vitek* holding even a convicted felon, whose liberty rights are already constrained but not dissolved, deserves appropriate procedures in place before he is labeled, transferred, and medicated for having a mental disease which makes him dangerous.[44]

Despite the clear minimum due process protections enumerated by the court in *Vitek* and the *Zinermon* court's announcement that it is "foreseeable that a person needing mental health care will be . . . unable 'to make knowing and willful decision[s]' " many states, including Arizona, allow a waiver of

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[39] *Vitek,* at 494. (Original quotes removed; emphasis added; Justice White writing for the majority, with Mr. Justice Brennan, Mr. Justice Marshall, and Mr. Justice Stevens in the majority but not concurring with bullet point "F" reasoning the Court has "not required the automatic appointment of counsel for indigent prisoners facing other deprivations of liberty.").

[40] *Id.* at 489-90.

[41] *Id.* at 494.

[42] *Id.* at 492.

[43] *Id.* at 492.

[44] Vitek v. Jones, 445 U.S. 480, 493-94 (1980).

presence in involuntary commitment hearings by the proposed patient.[45] Under the prior version of § 36-539,[46] Arizona law allowed for the absence of the patient in three circumstances: 1) voluntary waiver that is knowing and intelligent; 2) a medical condition that prevents the proposed patient from attending and; 3) waiver by conduct.

The Arizona Court of Appeals, in *In re MH 2006-000749* (2007), created case law allowing the voluntary waiver of a proposed patient.[47] The court citing reasoning used in cases involving equitable estoppel and probation revocation as well as waiver cases from other jurisdictions, stated that a proposed patient in an involuntary commitment hearing may waive his right to be present since "the intended beneficiary of a statute generally may waive the statute's benefit."[48] It correctly pointed out there is a presumption of competency even in involuntary commitment hearings.[49] The court clarified that it could not accept the waiver of the patient unless the patient gave it voluntarily and intentionally and a court may not presume that a patient knowingly and intelligently waived their right merely from the patient's absence.[50]

To determine whether the waiver of presence was voluntary, the appellate court suggested a two-fold inquiry held on the record.[51] First, the lower court should ascertain the patient's reasons for wishing to abstain from participating in the proceedings. Afterward, the court should discover whether the patient understands the consequences of not participating. In the event the proposed patient is not present for the court to inquire into these matters, the court is instructed to examine third parties about the facts of the patient's decision and understanding. If the court, as the trier of fact, believes it is unclear whether the patient made a knowing, intelligent, voluntary waiver, the court is not to accept the waiver and the presence of the proposed patient is required.[52]

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[45] *See* 53 Am. Jur. *Mentally Impaired Persons* § 33 (2014).

[46] ARIZ. REV. STAT. ANN. § 36-561 (1974) (West), Ch. 185, § 2, eff. Oct. 15, 1974. Renumbered as § 36-539. Amended by Laws 1979, Ch. 64, § 37; Laws 1981, Ch. 66, § 1; Laws 1983, Ch. 253, § 14; Laws 1989, Ch. 284, § 9, eff. July 1, 1990; Laws 2009, Ch. 153, § 7; Laws 2010, Ch. 272, § 5; Laws 2011, Ch. 219, § 3, eff. April 25, 2011; Laws 2014, Ch. 215, § 108; Laws 2015, Ch. 75, § 1.

[47] In re MH 2006-000749, 152 P.3d 1201 (2007); S.B. 1152, 49th Leg., 1st Sess. (Az. 2009), codified voluntary waiver. S.B. 1152 added the phrase "[t]he patient may choose to not attend the hearing or the patient's attorney may waive the patient's presence" after the phrase "[t]he patient and his attorney shall be present at all hearings and the patient's attorney may subpoena and cross-examine witnesses and present evidence" which until that time had been unchanged since the 1974 overhaul of the Services Act.

[48] *In re MH*, at 1205.

[49] *Id.* at 1206.

[50] *Id.*

[51] *Id.* at 1207-08.

[52] *Id.*

A court's use of third parties to determine the voluntariness of waiver by a mental patient is fraught with issues. Chief among these issues are the filings that institute the proceedings.[53] The affidavits of the doctors recommending involuntary commitment and treatment, attached to the petitions requesting a hearing and order from the court, must include opinions as to: 1) the severity of the proposed patient's mental illness; 2) the capacity to reason and recognize reality; and 3) the patient's understanding of the need for treatment.[54] The doctor's opinions as to severity, capacity, and understanding are not favorable because if the opinions were favorable, the basis for requesting involuntary commitment would be absent since, under the Title 36 statutory scheme, a finding of involuntary commitment can only be made if the proposed patient has a severe mental disorder that renders him or her dangerous, and the proposed patient does not understand their need for treatment.[55] Although the appeals court contemplated allowing voluntary waiver of a proposed patient's presence by third party testimony, the reality of such a scheme is impractical. The court would be finding a knowing and intelligent waiver of the proposed patient's legal rights based on the opinions of the individuals alleging that the proposed patient is so mentally ill that they cannot make decisions regarding their medical rights.

The second situation in which a court can proceed *in absentia* is statutorily based. Under the prior version of A.R.S. § 36-539 (C), upon clear and convincing evidence a proposed patient for medical reasons could not physically appear the court could proceed with the hearing. Under this circumstance the court could only proceed after the court inquired into the practicality of conducting the hearing "where the patient is being treated or confined."[56] This provision required the court to leave the confines of the courtroom if doing so were practical. In the event going to the proposed patient was not a practical option, case law required the court to have the patient "appear by other reasonably feasible means."[57] The appeals court, in *In re MH2010-002637,* noted other reasonably feasible means could include appearance by telephone and videoconference with current technology.[58]

Waiver by conduct is also rooted in case law that interpreted the prior language from A.R.S. § 36-539 (C).[59] The appeals court in reviewing *In re MH*

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53 Another issue being that it is the very definition of hearsay an out of court statement, used in court, used to prove the truth of the matter asserted.

54 *See* ARIZ. REV. STAT. ANN. § 36-501 (5),(6),(31) (2016); *See also* ARIZ. REV. STAT. ANN. § 36-533 (2014); Ariz. Admin. Code. § R9-21-504, Exh. E (2014).

55 Need citation

56 H.B. 2307, 52d Leg. 1st Reg. Sess. (Ariz. 2015).

57 In re MH 2010-002637, 263 P.3d 82, 83 (Ariz. Ct. App. 2011).

58 *Id.*

59 In re MH 2007-000629, 197 P.3d 750 (Ariz. Ct. App. 2008).

2007-000629 concluded "medical reasons include a situation where the patient's mental illness may result in behavior so disruptive that the hearing must take place without [them]."[60] The court explained it had arrived at this interpretation because "[o]ther jurisdictions that have addressed whether disruptive patients may be removed have also concluded removal does not violate the patient's right to due process."[61]

SCOTUS has not specifically decided whether a proposed patient's presence is capable of being waived. However, as *In re MH2006-000749* and *In re MH2007-000629* point out, a number of federal district courts and state courts analyzed the issue and found that the presence of the mentally ill defendant is waivable and appropriate when upon clear and convincing evidence, the waiver is given in a knowing and intelligent manner or when the patient's conduct is so disruptive that the proceeding cannot continue in any reasonable manner.[62] All of the intermediate federal decisions from which waiver advocates draw support were either decided prior to the *Vitek* decision or do not address the issue.[63] Therefore, there still is a question as to whether waiver of presence is appropriate in involuntary commitment proceedings.[64]

III. Return to the Present

The new wording of the current version of A.R.S. § 36-539 seems at first blush to make a conforming change to existing law, as proponents of H.B. 2307 have claimed.[65] The appellate court decision in *In re MH2007-000629* found that medical reasons include situations where the patient's mental illness may

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60 *Id.* (Giving a warning is considered best practice, but not required in all circumstances.).

61 *Id.* at 752-53 n.2 (citing relevant federal citations for the position that a patient may be removed for conduct: Tyars v. Finner, 709 F.2d 1274, 1276, 1284 (9th Cir. 1983); Suzuki v. Quisenberry, (Suzuki I), 411 F. Supp. 1113, 1130 (D. Haw. 1976) aff'd in part, rev'd in part, and dismissed in part, 617 F.2d 173 (9th Cir. 1980); Doremus v. Farrell, 407 F. Supp. 509, 515 (D. Neb. 1975); Kendall v. True, 391 F. Supp. 413, 419 (W.D.Ky. 1975); Bell v. Wayne County Gen. Hosp., 384 F. Supp. 1085, 1094 (E.D.Mich. 1974)). Of note, each of these decisions were made prior to *Vitek* except for *Tyars v. Finner* which does not discuss waiver of presence by conduct.

62 *See supra* notes 43 and 56.

63 *See supra* note 43 for the proposition *Vitek* came after intermediate court decisions; Suzuki v. Yuen, 617 F.2d 173 (9th Cir. 1980) (the only case decided after *Vitek* the issue of waiver was not addressed, instead the Ninth Circuit court addresses issues of self-incrimination, danger to property, imminent dangerousness, and using "proof beyond a reasonable doubt" burden).

64 *See* Hargrove v. North Carolina, 528 U.S. 1047 (1999), (certiorari denied) (waiver by counsel in involuntary commitment).

65 *Hearings* on H.B. 2307 Before the H. Comm. on the Judiciary, 52d Leg. 1st Reg. Sess. (Jan. 28, 2015) http://azleg.granicus.com/MediaPlayer.php?view_id=13&clip_id=14828 at 46 min 10 sec (supporting statement for statutory change); Hearing on H.B. 2307 Before the S. Comm. on the Judiciary, 52d Leg., 1st Reg. Sess. (Mar. 5, 2015), http://azleg.granicus.com/MediaPlayer.php?view_id=13&clip_id=15436 at 5 min 26 sec. (supporting statement for statutory change).

result in disruptive behavior and that similar wording appears in the text of A.R.S. § 36-543 (G) (4). This, however, ignores two issues. First, a plain reading of the current version of A.R.S. § 36-539 broadens the scope of the court's ability to proceed *in absentia* and does not limit the court to situations, as in when the proposed patient's conduct disrupts the court proceedings because of his mental illness. Second, the purpose and scope of A.R.S. § 36-539 differ from A.R.S § 36-543.

Regarding the second issue, the current version of A.R.S. § 36-539 now contains text that approximates the text of A.R.S. § 36-543 (G) (4).[66] The difference between the two statutes is A.R.S § 36-539 governs the conduct of a new order for involuntary commitment of proposed patients, while A.R.S § 36-543 (G) (4) governs the renewal of existing orders for patients with "grave disability" or "persistent or acute disability."[67] Hearings under A.R.S § 36-539 involve a *proposed patient*'s liberty interests that are completely intact and the state still has the burden to overcome the presumption of mental stability and non-dangerousness by clear and convincing evidence. In A.R.S § 36-543 renewal hearings, however, the state have already met the burden of showing the patient has a mental illness and requires treatment to prevent dangerousness. The state still carries the burden of proof in A.R.S § 36-543 hearings but the state need only show that the mental illness continues, as does the risk of dangerousness without treatment.

The state also has a lower burden in the substantive due process requirements of A.R.S § 36-543 renewal hearings. While a new court order for treatment under A.R.S § 36-539 requires the examinations and testimony of two psychiatrists and the testimony of two acquaintance witnesses,[68] renewal hearings only require an examination and testimony of one psychiatrist and the testimony of one acquaintance witness.

The provisions of A.R.S. §36-543, in its current state, have not yet undergone constitutional scrutiny. The wording of subsection (G) (4) was added by the legislature in 2012.[69] An appellate court has not yet had to scrutinize the constitutionality of the statute. Given SCOTUS's holding in *Jones v. U.S.*, later

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[66] "If the patient is unable to be present at the hearing for medical or psychiatric reasons and the hearing cannot be conducted where the patient is being treated or confined, or the patient cannot appear by another reasonably feasible means, the court shall require clear and convincing evidence that the patient is unable to be present at the hearing and on such a finding may proceed with the hearing in the patient's absence." ARIZ. REV. STAT. ANN. § 36-543 (G) (4).

[67] *Cf.* ARIZ. REV. STAT. ANN. § 36-543 (titled "Release from treatment of a patient with a grave disability or a patient with a persistent or acute disability; annual review; court order for continued treatment") *and* ARIZ. REV. STAT. ANN. § 36-539 (titled "Conduct of hearing; record; transcript").

[68] *Id.*

[69] H.B. 2532, 50th Leg. 2d Reg. Sess. (Ariz. 2012).

reaffirmed in *Foucha v. Louisiana*, which stated a patient "is entitled to release when he has recovered his sanity or is no longer dangerous" and the minimum procedural safeguards announced in *Vitek v. Jones*, supra, the substantive due process provisions of A.R.S. § 36-543 renewal hearings would be found constitutional, with one exception: the ability to proceed *in absentia* for psychiatric reasons.[70] This is the very language that H.B. 2307 appended to A.R.S. § 36-539.

IV. Conclusion

A constitutional challenge to the current version of A.R.S. § 36-539 would reasonably succeed given that a plain reading of A.R.S. § 36-359 allows the court to proceed *in absentia* in situations where the proposed patient has *never* been present in the court for the particular reasons why the hearing is being conducted: psychiatric reasons. The constitutional challenge would succeed given: 1) the minimum due process procedures required to guard against error announced in *Vitek*; 2) the significant nature of the liberty interest at stake announced in *Addington*; and 3) the relatively low cost of using other procedures that would not invite error.

Allowing an involuntary commitment hearing to proceed *in absentia* contradicts of the clearly mandated minimum due process requirements announced in *Vitek v. Jones,* specifically, the right to appear in person.[71] The proposed patient's interest in the outcome of a court's inquiry into his absence for psychiatric reasons is *no less significant* than his liberty interest in the involuntary commitment hearing itself. The clear and convincing evidence standard required to proceed is indirect evidence of the liberty interest at stake. The fact that the court's inquiry will answer at least one of the ultimate issues of the involuntary commitment hearing, namely the existence a mental illness in the proposed patient and the severity thereof, constitutes additional substantive evidence. The only question left for the court after the inquiry into the proposed patient's absence for psychiatric reasons would be dangerousness—and that assumes the issue of dangerousness was not broached during the inquiry.

A continuance of the matter would preserve the liberty interests of the proposed patient while posing no greater risk of error in the proceedings. With a continuance, time is allotted for the alleged psychiatric issue preventing the person's presence to resolve. This simple solution obliterates the need to proceed *in absentia* for psychiatric purposes.

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[70] Jones v. U.S., 463 U.S. 354, 368, (1983) (relying on the reasoning in O'Connor v. Donaldson, 422 U.S. 563, (1975)); Foucha v. Louisiana, 504 U.S. 71, 77 (1992).

[71] *Id.*

Since Arizona's territorial founding, the state has provided many procedural safeguards for the liberty interests of citizens facing involuntary commitment. The language that H.B. 2307 added to A.R.S. § 36-539 constitutes a new exception to the right to appear *in person* before a neutral decision maker. The exception to proceed *in absentia* for psychiatric reasons is an end-run around the procedural protections provided by the statutory scheme of Title 36 and conflicts with the minimum due process requirements announced by SCOTUS, given the significant liberty interest involved.

age Association, all eleven-member companies of the Beer and Wine Distributors of Arizona, and other organizations.[10] These supporters view the Bill as beneficial because it will preserve jobs (at microbrewer-producer retail sites) and will preserve neighborhood social scenes that revolve around these beer retail sites.[11] The benefit of preserving jobs and preserving neighborhood pub social scenes is appealing to the public, which explains the generally widespread support for the Bill.

The illustrative example involving Four Peaks highlights the primary reasons the Bill enjoys such widespread support from state beer-related associations. Four Peaks has achieved significant recognition at a national level,[12] but without the protection of the Beer Bill, it would be forced to close non-producing locations if it desired to achieve sufficient growth to serve a market commensurate to its fame. Closing locations, cutting jobs, and reducing brand footprint seems like a counterintuitive step for an expanding microbrewery to implement. For this reason, any microbrewery with dreams of expanding in the near future will likely support this Bill.

The near-universal support for the Beer Bill extends beyond beer-related organizations. The Bill passed quickly through both the Arizona State Senate and the Arizona House of Representatives.[13] The Bill's impressive momentum continued when Governor Ducey signed the Bill—at a ceremony held at Four Peaks—on March 31, 2015.[14] As a result, the Beer Bill will soon become the law of Arizona, and Arizona's craft beer industry will have a solid foundation upon which to expand.

IV. The Case Against

The primary opposition to the Beer Bill came from the Arizona Wine and Wholesale Association.[15] The opposition's argument against the Bill was that it would threaten the integrity of the state's existing three-tier system, which

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10 *Id.*

11 *Id.*

12 Kellie Hwang, *Four Peaks Wins Travelchannel.com's Top Brewery Contest*, AZCentral (Oct. 9, 2014, 12:32 PM), http://www.azcentral.com/story/entertainment/dining/2014/10/08/four-peaks-brewery-tempe-travel-channel-microbrewery/16947255/.

13 Jess Harter, *State Legislature Passes Arizona Beer Bill – Here are the Immediate Effects*, Jess Harter's Mouth by Sw. (last updated Mar. 26, 2015), http://mouthbysouthwest.com/2015/03/26/state-legislature-passes-arizona-beer-bill-here-are-the-immediate-effects/.

14 *Ducey Signs Craft Beer Bill at Four Peaks Brewing Co.*, AZCentral (Mar. 31, 2015, 8:45 PM), http://www.azcentral.com/story/money/business/2015/03/31/ducey-signs-craft-beer-bill/70757504.

15 Monique Griego, *AZ Craft Brewers Say Success is Penalized*, AZCentral (Feb. 9, 2015, 11:07 AM), http://www.azcentral.com/story/news/12-news/2015/02/09/12news-craft-beer-boom-distribution-bills/23096023/.

would prove harmful to smaller brewers.[16] The three-tier system is the alcohol distribution system currently in place in Arizona. The three-tier system consists of producers at tier one, wholesalers at tier two, and retailers at tier three.[17] The critical tier is tier two, which ensures product safety, tracking, fair competition, and tax collection.[18]

Opponents of the Bill were concerned that, with breweries effectively acting as both producers and retailers, tier two would be eliminated from the process entirely, and that would lead to a lack of regulation and accountability. Beyond that, Bill opponents were worried that smaller producers would be unable to compete fairly with established breweries like San Tan or Four Peaks. Bill supporters also supported the three-tier system[19], and had no intention of eliminating the second tier through the Bill. Given that there was only one real issue dividing Bill proponents and detractors, a compromise was inevitable.

Initially, the opposition managed to keep the Bill tied up in the Senate, but a compromise on the language of the Bill allowed it to pass the Senate and proceed on to the House.[20] This compromise involved changes to the rules related to the purchase for sale of beer produced or manufactured at other microbreweries, a clarification of the language concerning surrendering microbrewery licenses, and other minor modifications to the language of the Bill.[21] As a result of this give and take, the Beer Bill was no longer meaningfully opposed. The three-tier alcohol distribution system will of course remain intact, and Arizonans will be able to enjoy copious quantities of properly regulated craft beer at retail locations throughout the state.

V. Comparison to Other States

Other nearby states has also expanded their laws to account for the rapid growth of the craft beer industry in recent years. For example, California has enacted a significant amount of very liberal legislation, including a law allowing licensed craft beer manufacturers to obtain sales permits for certified farmers' markets.[22] Colorado, meanwhile, allows for higher yearly production from its brew-pubs[23] (equivalent to Arizona's microbreweries). Washington

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16 *Id.*

17 *Arizona's Three-Tier Distribution System*, Beer and Wine Distributors of Arizona, http://www.bwdaz.com/arizonas-three-tier-distribution-system (last visited Apr. 6, 2015).

18 *Id.*

19 *Id.*

20 Ryan Randazzo, *Bill Amended to Allow Craft Brewers to Increase Beer Production*, AZCentral (Mar. 10, 2015, 12:45 PM), http://www.azcentral.com/story/money/business/2015/03/09/arizona-craft-brewers-amend-bill-increase-beer-production/24674609.

21 *Id.*

22 Cal. Bus. & Prof. Code § 23399.45 (West 2015).

23 Colo. Rev. Stat. Ann. §12-47-103(4) (West 2015).

(and repeals) existing law, which allows a producer to sell beer produced through the producer's own on-sale retail premises if the producer also holds an on-sale retail license.[4] Instead of being forced to sell beer produced on site through an on-sale retail store, a microbrewery that has transitioned into a producer could continue to sell beer at up to seven licensed retail locations, including retail locations that are separate from the production site.[5] The Beer Bill introduces other changes as well, such as a production cap increase and a provision that allows microbreweries to sell beer from other microbreweries provided those sales do not exceed twenty percent of the licensee's annual sales of beer at the premises.[6] Although the ancillary changes are important, the true heart of the bill is the provision that allows microbreweries transitioning into producers to keep their retail licenses.

To illustrate, Four Peaks Brewing Company[7] ("Four Peaks") has a retail location and production site in Tempe, a retail location at Sky Harbor Airport, and a retail location in Scottsdale.[8] There is no production site attached to either the Sky Harbor Airport location or the Scottsdale location. Under existing law, Four Peaks would be required to close both the Scottsdale location and the Sky Harbor Airport location in the event it transitioned from microbrewer to producer status, and would thereafter only be permitted to operate from its Tempe location. The Beer Bill, on the other hand, would allow Four Peaks to continue operating the Scottsdale location and the Sky Harbor Airport location even after transitioning to producer status. Given the size of the Phoenix metropolitan area—to say nothing of the size of the state of Arizona—the benefit of being permitted to operate retail locations separate from production sites is clear.

III. The Case For

The Beer Bill enjoys widespread support from Arizona's craft beer organizations.[9] The Beer Bill is supported by all fifty-seven microbrewers that make up the Arizona Craft Brewers Guild, members of the Arizona Licensed Bever-

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4 Ariz. Rev. Stat. Ann. § 4-243.02 (2015).

5 S.B. 1030, 52nd Leg., 1st Reg. Sess. (Ariz. 2015).

6 *Id.*

7 The author is an admitted fan of Four Peaks (though he prefers their Peach Ale to their flagship Kiltlifter), and chose them to serve as an example largely because the brand seems to have decedent name recognition and definitely has both producing and non-producing locations. Needless to say, readers are welcome to substitute the microbrewery of their choice in the place of Four Peaks should they prefer another brand of beer!

8 Four Peaks Brewing Company Pub Locations, http://www.fourpeaks.com/our-pubs/ (last visited Oct. 8, 2015).

9 *The Arizona Beer Bill, SB 1030*, Beer and Wine Distributors of Arizona, http://www.bwdaz.com/arizona-beer-bill-sb-1030 (last visited Feb. 18, 2015).

I'LL DRINK TO THAT: THE BEER BILL

David R. G. Mercer*

I. BRIEF DESCRIPTION OF THE BILL

The craft brewing industry has grown steadily since 2003 by riding a tide of support for local businesses, sustainability, and the millennial/hipster hype.[1] With growth comes change, and in Arizona that change comes in the form of the Beer Bill.[2] The Beer Bill establishes clear rules for a microbrewery transitioning into a producer. The Beer Bill will facilitate this transition by both amending and repealing existing laws related to microbreweries in an effort to create an intermediate stage between a microbrewery and a producer. The Beer Bill is a positive step forward for Arizona's growing craft beer industry because it will allow local craft brewers to grow their businesses without losing the retail-level locations that built their brands.

This comment will briefly outline the legal effect of the Beer Bill and the differences between the bill and existing Arizona law. Next, this comment will explore both the arguments in favor of the Beer Bill and the counterarguments. Additionally, this comment will place Arizona's Legislation in context by comparing the Beer Bill to the efforts of other nearby states to expand (or regulate) their craft brew industries. That comparison will also explore some of the potential consequences of facilitating the growth of Arizona's craft beer industry by examining emergent situations in other nearby states that have more developed craft beer scenes.

II. LEGAL EFFECT OF THE BILL

The Beer Bill departs from existing Arizona law because it does not require a microbrewery transitioning to producer status to surrender any other microbrewery licenses or retail licenses held by the licensee.[3] This differs from

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[1] Shirley Chen, *Craft Beer Drinkers Reignite the Wine Wars*, 26 LOY. CONSUMER L. REV. 526, 539-40 (2014).

[2] S.B. 1030, 52nd Leg., 1st Reg. Sess. (Ariz. 2015).

[3] *Id.*

State and Oregon are also hotbeds of growth for the craft beer movement, and both are experiencing similar growing pains.

Washington State's growing pains provide a potential glimpse into Arizona's future as the Arizona craft beer scene continues to expand. Washington State has experienced labor shortages relating to its hop harvest, which prompted some farmers to use the federal government's H-2A temporary-work visa program.[24] Even with this temporary labor boost, some farms have had trouble completing timely harvests.[25] Other agricultural harvesting may pay better, and given Arizona's own strong agricultural base it is conceivable that Arizona could run into a similar problem in the near future.

Oregon, on the other hand, offers another potential glimpse into the future of Arizona's craft beer scene. Anheuser-Busch InBev recently purchased Oregon craft brewery 10 Barrel Brewing.[26] This purchase prompted a backlash from locals, many of who are (justifiably) proud of Oregon's strong craft brewing scene.[27] It is entirely possible that Arizona craft breweries might become so successful that large international breweries may purchase them, leading to similar fallout. While the goal of the Beer Bill is to facilitate a vibrant microbrewery and craft beer scene, 10 Barrel Brewing should serve as a cautionary tale, as the growth of Arizona's craft beer scene could potentially result in unique local breweries becoming just another acquisition in a major beer-industry player's portfolio.

VI. SUMMARY

The Beer Bill could significantly change the craft beer landscape of Arizona. While the Bill initially faced opposition, that opposition seems to have been eliminated via amendments to the Bill. As a result, the Bill is now essentially universally supported, and its rapid passage through the legislature and Governor Ducey serves to underscore that fact. Given the scope of expanding craft beer legislation in other nearby states, Arizona would almost certainly have been forced to change its laws to allow local breweries to stay competitive on a regional level. Fortunately, Arizona has made these changes via the Beer Bill, and as a result, Arizona breweries will continue expanding and delivering crisp, clean, refreshing beer to an ever-widening customer base.

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[24] Coral Garnick, *Craft-Brewery Boom has State's Hops Farmers Scrambling*, THE SEATTLE TIMES (Sept. 29, 2014, 12:32 PM), http://www.seattletimes.com/seattle-news/craft-brewery-boom-has-statersquos-hops-farmers-scrambling/.

[25] *Id.*

[26] Jeff Barnard, *Maker of Budweiser Buys Oregon Craft Brewery, Sparking Outrage*, THE BOSTON GLOBE, (Dec. 14, 2014), http://www.bostonglobe.com/business/2014/12/14/sale-oregon-craft-brewery-provokes-backlash/yl8h1DqUeeYWptVmjxdwTN/story.html.

[27] *Id.*

Direct Shareholder Liability for Use of Coerced Labor via Corporate Veil Piercing

Markus Risinger*

Abstract

Victims of human trafficking often struggle to recover the damages caused by the trafficking enterprise. The corporate veil fiction exacerbates this difficulty by insulating the principal beneficiaries of human trafficking from liability to the victim. By default, corporate shareholders are immune to liability for injuries caused in the ordinary course of business. Although the common law doctrine of "piercing the corporate veil" is an equitable remedy to fraud and abuse shielded by the corporate fiction, state legislatures have adopted the doctrine in limited circumstances. Typically, piercing is not available to victims in coerced labor trafficking cases unless the victim can successfully argue an existing common law theory. In Arizona, this barrier makes recovery particularly problematic due to the state's favorable legal environment for corporations and relative lack of civil penalties for human trafficking-related activities. To address this problem in Arizona the legislature should create an independent civil cause of action for victims of human trafficking that includes a statutory presumption of direct corporate shareholder liability.

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INTRODUCTION

The Arizona legislature defines human trafficking as the enticement, recruitment, harboring, provision, transportation, or obtainment of another person by deception, coercion, or force.[1] Forced labor, a form of human trafficking, is labor obtained through causing or threatening physical injury, restraining or threatening restraint, withholding documents, identification, or personal property, abuse or threatening abuse of the law, extortion, threatening financial harm, or by facilitating or controlling access to a controlled substance.[2]

Although human trafficking victims are not isolated to a particular demographic group, Arizona's proximity to Mexico and its pervasiveness of undocumented labor create vulnerability among immigrant populations. Furthermore, Arizona's statutory scheme to address human trafficking is among the worst in the United States.[3] For victims of labor trafficking, recovering is difficult at best and impossible at worst. Many victims are unaware of their right to recover for injuries sustained as a result of forced labor. Victims may fear retaliation or deportation if they testify or bring a civil action to recover their damages. Victims who bring civil claims may face difficulty in gathering enough information to establish liability among potential defendants and to overcome the heightened pleading requirements of fraud-related cases.[4] Moreover, survivors who prevail against the individuals who injured them are often unable to collect on the judgment because the defendant is insolvent, the defendant discharges the judgment in bankruptcy, or post-judgment collection is too expensive.[5]

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[1] ARIZ. REV. STAT. ANN. § 13-1308(C)(2) (2013).

[2] *Id.* at (C)(1).

[3] *2013 State Ratings on Human Trafficking Laws*, POLARISPROJECT.ORG, http://www.polarisproject.org/what-we-do/policy-advocacy/national-policy/state-ratings-on-human-trafficking-laws/2013-state-ratings-on-human-trafficking-laws (last visited Oct 17, 2013).

[4] "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally." 16 ARIZ. R. CIV. P. RULE 9(b). The Arizona rule of particularity in fraud pleadings is identical to the federal rule.

[5] EMERY G. LEE III & THOMAS E. WILLGING, Fed. Judicial Ctr., LITIGATION COSTS IN CIVIL CASES: MULTIVARIATE ANALYSIS 1 (2010). Collection remedies available to successful plaintiffs include wage garnishment, attachment of property, contempt, or a charging order. But, these rem-

In order to increase the likelihood of recovery, a labor trafficking victim might bring a civil claim directly against the corporation for which they worked, or against one that principally benefited from the criminal enterprise. This strategy, however, introduces more complications. First, corporate litigation is prohibitively expensive to most victims.[6] Second, a civil suit against a corporation may not benefit from the settled adjudication in a prior criminal case.[7] Suing a corporation might require establishing third-party liability, sometimes along multiple contractors and subsidiaries.[8] If the victim succeeds in establishing liability against a corporation, the corporation's ability to shield its assets from collection can be greater than that of an individual defendant. This list is not exhaustive; these observations illustrate threshold considerations only, and are but a small fraction of the challenges in a civil case against a corporation. Although recovering from the corporation that benefited from the trafficking enterprise is often the only means through which a victim might achieve substantial recovery, the legal obstacles associated with suing a corporation are often too difficult to overcome.

In order to address the difficulty of recovery for damages caused by labor trafficking, the Arizona legislature should create an explicit civil cause of action for trafficking victims and adopt a statutory presumption of piercing the corporate veil in civil labor trafficking cases.[9] A rebuttable presumption that parent corporations or shareholders are available as defendants will create a more favorable legal environment for victims to recover in trafficking cases. Furthermore, presumptive shareholder liability will reduce the economic incentive to engage in labor trafficking or to ignore labor trafficking among contractors, suppliers, producers, or other business partners.

Part I provides a brief overview of corporate liability in Arizona. Arizona law creates numerous corporate forms, which shield their employees, officers, directors, and shareholders from liability via the corporate veil. Courts have

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edies can trigger additional evidentiary hearings, motions, and other costly procedures. If the defendant declares bankruptcy after judgment, the plaintiff may need to open an adversary proceeding in the federal bankruptcy court to prove the validity of the judgment and prevent discharge.

6 Factors associated with higher litigation costs include higher monetary stakes, trial dispositions, greater case complexity, concern over nonmonetary stakes, and representation by larger law firms. Many of the factors associated with increased litigation costs are present in both trafficking cases and in many civil cases against corporations, generally.

7 ARIZ. REV. STAT. ANN. § 13-807 (2013).

8 *See infra* note 26.

9 Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 CORNELL L. REV. 1036 (1991). Piercing the corporate veil allows a plaintiff to overcome the legal fiction that a corporation is a distinct entity separate from its shareholders and from its parent corporation. Upon dissolving the veil, a plaintiff may recover damages from shareholders or from parent corporations notwithstanding their legal separateness.

developed a common law doctrine of piercing the corporate veil, imposing direct civil liability on employees, officers, directors, and shareholders in limited circumstances such as fraud.

Part II analyzes existing causes of action for victims of labor trafficking in Arizona, including statutory causes of action and common law torts. Federal causes of action are discussed in limited detail in order to expose weaknesses in the present remedial scheme for trafficking victims. Challenges to victims in civil trafficking cases, especially in cases against corporate defendants, are also analyzed to demonstrate the need for an enhanced statutory cause of action.

Part III proposes a civil cause of action for trafficking victims in the Arizona Revised Statutes. Key components of remedial legislation are outlined. The proposed statute includes revised model language from anti-human trafficking organizations and suggests the addition of presumptive corporate veil-piercing in human trafficking cases.

Part IV identifies challenges to implementing a statutory cause of action for labor trafficking victims and predicts the impact of the proposed statutory language on human trafficking in Arizona. This part suggests the use of existing informational tools in the workplace to spread awareness of human trafficking and the new remedial legislation. A due process objection that defendants may use in trafficking cases is also addressed.

The goal of this paper is to examine the rights of human trafficking victims in Arizona and to promote discourse about civil remedies by proposing a semi-novel legislative solution to some of the obstacles that survivors must overcome in civil actions. Although the proposal may appear ambitious in light of the piercing doctrine's historical relegation to the development of common law, the tremendous potential for harm in trafficking cases requires legislative intervention.

I. Corporate Liability in Arizona

A. *Corporate Forms*

Arizona law provides numerous corporate forms with varying degrees of liability insulation for shareholders. Although technically available in any case involving a corporate defendant, the common law doctrine of piercing the corporate veil is most often successful in cases against small corporations, including limited-liability companies and closely held corporations. Additionally, piercing the corporate veil has been successful when the corporate form is used to shield individuals or small groups from judgments and collection for acts that would otherwise subject them to personal liability. The "alter ego" theory, another form of veil-piercing, is more frequently used to establish liability against a parent corporation for the actions of its subsidiary or contractor.[10]

B. Corporate Veil

The "corporate veil" is used to describe two major obstacles to a plaintiff's case for civil damages. First, according to the principle of distinctness, the corporate veil insulates parent companies from the acts of their subsidiaries.[11] Second, the veil protects a shareholder's personal assets from collection for the corporation's liabilities.[12]

In human trafficking cases, corporations often separate themselves from the trafficking enterprise by engaging numerous subcontractors or subsidiary companies. The parent corporation is the principal beneficiary of the trafficking enterprise either through access to inexpensive materials and commodities or by reduced cost for labor. The parent corporation uses the corporate veil to protect itself from subsequent liability by declaring that it was unaware or did not authorize human trafficking by its subsidiaries or contractors.[13]

Similarly, an individual shareholder's corporate veil protection echoes the assertion that the shareholder either did not know of the trafficking enterprise or did not authorize criminal activity in the corporate business. Furthermore, a shareholder would oppose liability by disclaiming personal involvement. If it can be proven, the shareholder's argument would suggest that his knowledge, authorization, or acquiescence in labor trafficking was a result of his investment in the corporation and cannot be used to impose individual liability while the corporate veil persists. Absent an evidentiary nexus between an individual shareholder and the trafficking enterprise, the corporate veil would not allow direct liability in typical circumstances.[14]

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[10] *Id.* at 1037. For the purposes of this article, the "alter ego" theory, the "instrumentality" theory, and other similar theories are treated together as part of the common law doctrine of piercing the corporate veil, unless otherwise specified.

[11] *Id.* at 1036.

[12] *Id.* at 1039. The corporate veil and the common law piercing exception are complex doctrines that have evaded concise description since before Justice Cardozo described them as "enveloped in the mists of metaphor" almost a century ago. *See* Berkey v. Third Ave. Ry., 155 N.E. 58, 61 (1926) (opinion by Cardozo, J.), *reh'g denied*, 155 N.E. 914 (1927).

[13] *See infra* at note 26. Often, the layering of subsidiaries or contractors extends across international borders, but this article does not address issues arising from international human trafficking and supply chains.

[14] Dietel v. Day, 492 P.2d 455, 457 (Ariz. Ct. App. 1972) ("The law regarding corporate entity and the piercing of the corporate veil is more easily stated than applied. As a general rule, a corporation will be treated as a legal entity until sufficient reason appears to disregard the corporate form").

C. *Common Law Doctrine of Piercing the Corporate Veil*

Arizona courts began developing veil-piercing theories in the early-20th Century. The Arizona piercing doctrine remedies the potential abuse of the corporate fiction. Without the option to pierce the corporate veil, courts may be unable to prevent the use of the corporate form to perpetuate fraud by insulating a tortfeasor (or beneficiary) from liability, whether the tortfeasor is another corporation or an individual shareholder. Because limitation of liability is a legitimate purpose for forming a corporation, common law veil-piercing is considered an extraordinary remedy.[15] Veil-piercing is usually applied against "sham" corporations that are used as the alter ego of a shareholder or parent corporation, or against corporations that are undercapitalized upon formation or have not been faithfully maintained according to Arizona Corporation Commission requirements.[16] Because the elements are difficult to prove and courts are reluctant to pierce the corporate veil if another remedy is available, the piercing doctrine is an underutilized tool in human trafficking cases.

II. Existing Remedies for Victims of Coerced Labor in Arizona

Arizona's remedial laws for trafficking victims consistently rank among the worst in the United States.[17] According to the Polaris Project, Arizona's failure to provide statutory asset forfeiture and an explicit civil remedy for trafficking victims are among the areas in which the state must improve.[18] Arizona's lack of an explicit civil remedy for human trafficking is mostly problematic for its victims. Although traditional tort remedies are available, victims often struggle to prove the elements of recoverable claims. Furthermore, the damages suffered by victims of labor trafficking may not fit within the traditional definitions of tortious conduct.

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[15] *Id.* ("But it must be noted that a legitimate purpose of incorporation is to avoid personal liability and if the corporate fiction is too easily ignored and liability imposed, then incorporation is discouraged.").

[16] Norris Chemical Co. v. Ingram, 679 P.2d 567 (Ariz. Ct. App. 1984) (*citing* Fletcher's Cyclopedia, Corporations, Vol. 1, Ch. 2, § 44.1) ("If a corporation is organized and carries on a business without substantial capital in such a way that the corporation is likely to have insufficient assets available to meet its debts, it is inequitable that the stockholders should set up such a flimsy organization to escape personal liability").

[17] *2013 State Ratings on Human Trafficking Laws*, *supra* at note 1.

[18] *Id.* The Arizona State Report notes that the categories studied are not exhaustive of all state legislation that may be implemented to combat human trafficking. Furthermore, the Report does not assess the effectiveness or implementation of laws, nor the activities of anti-trafficking advocates. The Report analyzes existing legislation "to focus the attention of states on the statutes that still need to be enacted in order to achieve a strong anti-trafficking legal framework."

A. *Statutory Remedies*

Arizona law does not create a distinct civil cause of action for human trafficking victims; thus, leaving civil recovery almost entirely to common law and federal causes of action. Arizona does provide two statutory remedies for civil plaintiffs that may be applicable to human trafficking cases. The following is a brief description of existing statutory remedies and their respective shortcomings.

1. Restitution and Recovery of Lost Wages

The only Arizona statute that directly provides a benefit to trafficking victims is the Restitution statute.[19] Ariz. Rev. Stat. § 13-1309 requires courts to order restitution to victims for a violation of one of Arizona's anti-trafficking criminal statutes, including the prohibition against unlawful obtainment of labor, the prohibition against sex trafficking, and the prohibition against labor trafficking.[20] The statute instructs the court order restitution at "the greater of either the gross income or value to the defendant of the victim's labor or services or the value of the victim's labor as guaranteed under the minimum wage and overtime provisions of the fair labor standards act of 1938."[21] Although the Restitution statute provides relief to some trafficking victims, it is not a complete remedial scheme for the sum of damages that a victim may suffer.

First, the Restitution statute relies on three criminal statutes to trigger relief. As a threshold matter, the judge may not order restitution except after a conviction. Because of the heightened standard of proof in criminal proceedings and the prevalence of plea-bargaining, a conviction and accompanying restitution order may be more difficult to secure than in a civil case. Furthermore, the availability of restitution as a victim's remedy in the criminal case may influence the prosecutor's decision-making process regarding the kind of plea offer to extend to the defendant or the evidence to elicit on the record. If a prosecutor incorporates the victim's recovery into the strategy of the case, it may not be necessary for the victim to bring a subsequent civil action. The prosecutor, however, may have other goals, such as securing the defendant's testimony in another case, and can choose to dismiss the trafficking charge. The potential for conflict between the prosecution's interests and the victim's interests is too great for a victim to rely solely on the Restitution statute.[22]

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19 ARIZ. REV. STAT. ANN. § 13-1309 (2013).

20 ARIZ. REV. STAT. ANN. §§ 13-1306-1308. (2015).

21 ARIZ. REV. STAT. ANN. § 13-1309 (2013); 29 U.S.C.A. §§ 201-219 (2015).

22 The United Nations Office on Drugs and Crime Toolkit to Combat Trafficking in Persons contains instructions for law enforcement and prosecution of human trafficking cases. Although victim interests are mentioned and the toolkit suggests that victims should not be prejudiced, prosecutors are expected to "[r]emain unaffected by individual or sectional interests" and to "have

Second, although deriving restitution from a criminal conviction gives the judge broad discretion and may align the interests of the prosecution with the interests of the victim, the criminal trial procedure limits the victim's ability to participate.[23] Accordingly, a victim must rely on the prosecutor to provide evidence of the defendant's enrichment or wages necessary to rise to the level of the federal minimum hours that the victim worked. If the victim receives a restitution order as a result of the criminal case, they must still bring a separate action in order to plead damages not included in the unjust enrichment or lost wages calculus.[24] Again, the judge has discretion to hear the victim's evidence before calculating restitution, but there is no statutory mandate requiring a specific procedure.

Third, although a corporation can be held criminally liable for some violations, the sanctions imposed for the criminal offense may not compensate victims or deter human trafficking.[25] The fines for corporate criminal offenses are limited by statute and are not paid to victims.[26] Because a corporation cannot be imprisoned and incarcerated, and because directors, officers, or employees can be replaced, the deterrent effect of a possible criminal conviction is limited to restitution, fines, and probation orders.[27] For corporations that distance themselves from victims by layering contractors, operating through subsidiaries, or willful blindness, the fines imposed for a criminal conviction may not

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regard only to the public interest." If preserving victim interests contrasts with broader social policy, such as removing a case to another jurisdiction, the resulting conflict may result in insufficient victim representation. Toolkit to Combat Trafficking in Persons, 5.13, unodc.org, http://www.unodc.org/documents/human-trafficking/Toolkit-files/08-58296_tool_5-13.pdf (last accessed December 8, 2013).

[23] *See generally*, Peggy M. Tobolowsky, *Victim Participation in the Criminal Justice Process: Fifteen Years After the President's Task Force on Victims of Crime*, 25 New Eng. J. on Crim. & Civ. Confinement 21 (1999).

[24] *See supra* at note 19.

[25] Ariz. Rev. Stat. Ann. § 13-105(30) (2013); State v. Far West Water & Sewer, Inc., P.3d 909, 922-23 (Ct. App. 2010). The court in *Far West* upheld a corporation's criminal conviction against a challenge that a corporation is not a "person" for the purposes of criminal liability for manslaughter, aggravated assault, and endangerment, citing the broad definition of "person" in the Arizona criminal code and the accompanying sanction scheme for enterprise defendants. The court also noted that the fines imposed for Far Sewer's criminal convictions could have been higher, up to $1,000,000 per felony.

[26] Arizona law limits fines against criminally convicted enterprises to $1,000,000 for a felony and $20,000 for a misdemeanor. Ariz. Rev. Stat. Ann. § 13-803 (2013). Furthermore, fines are paid to the county treasurer, the anti-racketeering revolving fund, or the drug and gang enforcement account of the criminal justice enhancement fund, determined by the type of criminal conviction. Ariz. Rev. Stat. Ann. § 13-811 (2013). A victim in a corporate criminal case may receive a restitution order, but the order is subject to the other limitations described in this section.

[27] Mary Kreiner Ramirez, *The Science Fiction of Corporate Criminal Liability: Containing the Machine Through the Corporate Death Penalty*, 47 Ariz. L. Rev. 933, 936-37 (2005).

deter human trafficking because the risk is relatively low in comparison to potential profit.[28]

2. Issue Preclusion

The second civil statute available to victims of human trafficking is the Civil Actions by Victims or Other Persons statute ("Civil Actions" statute).[29] The Civil Actions statute essentially codifies the common law doctrine of *res judicata*, or issue preclusion. According to the Civil Actions statute, a convicted defendant in a criminal proceeding may not deny the essential allegations of the criminal offense of which he was adjudged guilty. This includes judgments of guilt resulting from a "no contest" plea. The Civil Actions statute also declares that a restitution order does not preclude a victim from proving excess damages.

The Civil Actions statute benefits trafficking victims by reducing the evidentiary burden of bringing a civil claim against a defendant. By denying the defendant the opportunity to argue the essential elements of the trafficking offense in civil court, the statute allows victims to focus more of their limited resources developing theories of liability and damages from the foundation of the criminal conviction. The statute also relieves some of the burden on the civil court by obviating the need to reestablish key facts.

Unfortunately, the Civil Actions statute suffers from many of the same shortcomings as the Restitution statute in trafficking cases. A victim is not entitled to the preclusive effect of the Civil Actions statute unless the defendant was convicted in a criminal proceeding.[30] If the defendant was not prosecuted or the case was dismissed, then the plaintiff must prove the essential elements of the trafficking offense as part of a tort-based theory of liability. Even though the standard of proof is lower for a civil claim, the victim may struggle to proffer sufficient evidence, especially if the case was not fit for criminal prosecution.[31]

Furthermore, the Civil Actions statute does not preclude argument of the essential elements by assigns, representatives, or other parties who may have been involved in the trafficking enterprise.[32] Although the victim can civilly

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[28] Marjorie Kelly, THE DIVINE RIGHT OF CAPITAL 26, 27 (2001) (explaining corporate profit motive and deferred externalities).

[29] *See supra* at note 7.

[30] *See supra* at note 19; *supra* at note 7.

[31] In re Winship, 397 U.S. 358 (1970) (holding that every essential element of criminal offense must be proved beyond reasonable doubt).

[32] Republic Ins. Co. v. Feidler, 875 P.2d 187, 192 (Ariz. Ct. App. 1993), *citing* Chaney Bldg. Co. v. City of Tucson, 716 P.2d 28, 30 (1986) (stating that collateral estoppel binds the parties and their privies, only, and can only estop a party who "had a full opportunity to litigate the matter and actually did litigate it").

litigate the criminal proceeding issues that were decided in the defendant's favor, the Civil Actions statute does not help the victim to establish liability against culpable parties other than the criminal defendant.[33] Because labor trafficking often involves the participation of many potentially culpable individuals and corporations and the solvent party is often not the criminal defendant, the Civil Actions statute adds little to the victim's list of recovery options.

B. *Causes of Action*

Human trafficking cases implicate numerous fundamental rights, especially when corporations are involved. Some tension exists between regulation of fair labor standards and the freedom of parties to contract, but human trafficking usually lies well beyond the boundaries of safety and dignity for workers. As a result, plaintiffs in trafficking cases rely on assorted sources of possible liability, including international laws, federal and state statutes, and the common law.[34]

The Trafficking Victims Protection Act of 2000 ("TVPA") is one source that victims of human trafficking may use to attempt to recover damages.[35] Although the TVPA criminalizes human trafficking and creates both a civil cause of action and permits an award of restitution, too few victims have secured recovery under the federal law.[36] The TVPA, although an affirmative step toward creating an efficacious recovery scheme for victims of human trafficking, is not sufficient.[37]

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[33] Feidler, 875 P.2d 187, 193-94.

[34] Some cases are brought to the federal district courts under the Alien Tort Claims Act ("ATCA") under either a theory of direct liability or a secondary theory of liability for "aiding and abetting" a tortious act. This article does not discuss federal claims under the ATCA, but Arizona courts recognize secondary liability for "aiding and abetting" or "substantial assistance" of another's tort. See Gomez v. Hensley, 700 P.2d 875, 876-88 (Ariz. Ct. App. 1984) (issue of material fact whether liability attaches for the tortious conduct of another if one gave substantial assistance or encouragement to the other, or if they acted in concert or pursuant to a common design).

[35] Reauthorized by the Trafficking Victims Protection Reauthorization Act of 2013, H.R. 898, 113th Cong. (2013). (P.L. 113-4).

[36] The number of civil cases brought against corporations for human trafficking is "distressingly low," emboldening corporations to continue to engage in human trafficking while shielding themselves from liability by making supply chains increasingly complex. *See* Naomi Jiyoung Bang, *Justice for Victims of Human Trafficking and Forced Labor: Why Current Theories of Corporate Liability Do Not Work*, 43 U. MEM L. REV. MEM. L. REV. 1047 (Summer, 2013); *See* also Jennifer S. Nam, Note, *The Case of the Missing Case: Examining the Civil Right of Action for Human Trafficking Victims*, 107 COLUM. L. REV. 1655 COLUM. L. REV. 1655, 1668 (2007).

[37] *See, e.g.*, Mohamed Y. Mattar, *Interpreting Judicial Interpretations of the Criminal Statutes of the Trafficking Victims Protection Act: Ten Years Later*, 19 AM. U. J. GENDER SOC. POL'Y & L. 1247, 1295 (2011) (TVPA defines trafficking too narrowly and fails to adequately address the exploitation of workers).

Another federal law that victims of human trafficking have used to attempt recovery is the Racketeer Influenced and Corrupt Organizations Act ("RICO").[38] Although primarily a criminal statute, RICO permits civil recovery for "racketeering activity," including a conspiracy to commit one of the specified acts.[39] RICO permits class action suits, treble damages, and attorney fee awards for successful claimants.[40]

In addition to the civil cause of action, RICO permits law enforcement to seize assets used in furtherance of the trafficking enterprise.[41] Seized assets are usually sold and the proceeds are used to fund victim services, to aid in civil recovery, or are otherwise redirected for the public good.[42] Asset forfeiture can be beneficial both to the victim and to law enforcement while also deterring and punishing offenders.

RICO claims, however, are often too difficult for trafficking victims to pursue for recovery. RICO pleading requirements, often sounding in fraud, require a high standard of particularity because of its elements and Rule 9(b).[43] RICO also has a short statute of limitations (four years) and requires the plaintiff to prove predicate acts about evidence that may be unavailable at the time of pleading.[44] Furthermore, RICO lawsuits are likely to be removed to federal court even if the victim pleads a cause of action under state law.[45] Because of these limitations, civil recovery for injuries related to human trafficking under

[38] Racketeer Influenced and Corrupt Organizations Act, Pub. L. No. 91-542, 84 Stat. 922 (1970) (codified as amended at 18 U.S.C. §§ 1961-1968 (2006)).

[39] 18 U.S.C. §§ 1961-62, 1964.

[40] *Id.* § 1964(a), (c).

[41] 18 U.S.C. § 1963(b)(1)-(2); *see also* ARIZ. REV. STAT. ANN. § 13-2314.04 (Arizona anti-racketeering statute).

[42] *The Attorney General's Guidelines on Seized and Forfeited Property*, 9-118.000, justice.gov, http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/118mcrm.htm (last accessed May 28th, 2015 December 8, 2013). (Federally seized assets may also be equitably transferred to state or local agencies for use within the affected jurisdiction, diverted to pay creditors, paid as rewards to informants, or used for other public purposes).

[43] *Justice for Victims* at 1074-1078, *supra* at note 20; 16 ARIZ. R. CIV. PROC. Rule. 9(b), *supra* at note 4.

[44] *Id.* at 1077; *See* Agency Holding Corp v. Malley-Duff & Assocs., 483 U.S. 143, 156 (1987) (adopting the Clayton Act statute of limitations for civil claims under RICO).

[45] Whether removal to federal court is harmful or beneficial to a plaintiff is a strategic question, the answer to which varies in each case. Regardless, a plaintiff who wishes to remain in state court, perhaps to benefit from state evidence rules or jury selection procedures, will be forced to abandon the federal claim or oppose the defendant's motion for removal. Neither result is attractive for a victim whose chance of recovery depends on broad pleading and keeping litigation costs low.

federal law, especially against corporate defendants, is not adequate to protect human trafficking victims.[46]

Arizona does not provide a statutory civil cause of action to trafficking victims; therefore, plaintiffs must resort to creative application of the common law.[47] All actions based on contract, fiduciary duty, and tort, are conceivable in trafficking cases. Because the damage suffered by a victim of human trafficking is not merely economical, however, the full array of equitable remedies available in tort cases become attractive to plaintiffs. A plaintiff may require theories of compensatory damages along with unjust enrichment, constructive trust, punitive damages, and injunctive relief to achieve near-complete recovery and secure a reasonable likelihood of collection.[48]

Fraud, in particular, is a valuable claim for a plaintiff, in part because a successful fraud judgment cannot ordinarily be discharged in bankruptcy.[49] A trafficking enterprise almost always involves some form of fraud in order to recruit victims; ostensibly, a victim will not voluntarily submit to coerced labor unless they are led to believe that, at minimum, they will receive fair pay, work in safe conditions, and enjoy physical and political security.[50]

Unfortunately for victims, a successful fraud claim can be difficult to prove because of the heightened pleading requirement under Rule 9(b) and the demanding elements of fraud. A fraud claim requires proof of nine elements: (1) a representation; (2) falsity; (3) materiality; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) the speaker's intent that the representation should be acted upon by the hearer and in the matter reasonably contemplated; (6) the hearer's ignorance of the representation's falsity; (7) the hearer's reliance on the representation; (8) the hearer's right to rely on the representation; and (9) the hearer's consequent and proximate injury.[51] Furthermore, the

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[46] Other federal statutory causes of action, such as causes of action arising under federal employment law, the Civil Rights Acts, or directly under the U.S. Constitution. However, the goal of this article is to provide a brief overview of existing causes of action to illustrate the need for legislative intervention in Arizona. Numerous articles provide a more complete analysis of federal statutes as applied to human trafficking cases, some of which are cited in this article.

[47] There may be cases in which an existing statutory cause of action, such as the Arizona Consumer Fraud Act, may be applicable, but Arizona law does not provide a cause of action designed specifically for human trafficking cases.

[48] Kathleen Kim, et al., Dan Werner & Charles Song, *Civil Litigation on Behalf of Victims of Human Trafficking*, Google Search, http://www.google.com (Search: "Civil Remedies for Victims of Human Trafficking;" follow "Civil Remedies for Victims of Human Trafficking - American Bar Association" hyperlink).

[49] 11 U.S.C.A. § 523(a)(2)(A) (2010).

[50] *See generally* Jonathan Todres, *The Private Sector's Pivotal Role in Combating Human Trafficking*, 3 CAL. L. REV. CIR. 80 (2012) (describing the role of the private sector in both creating and combating human trafficking).

[51] Nielson v. Flashberg, 419 P.2d 514, 517-18, (Ariz. 1966).

elements of fraud must occur concurrently.[52] Because Rule 9(b) requires particularity in pleading prior to gaining access to discovery, the plaintiff must possess a significant amount of information prior to filing a claim in order to avoid dismissal.

Proving fraud in an ideal labor trafficking case requires a figurative alignment of the stars. For example, a victim may not be able to point to a specific representation made by the defendant, particularly when the defendant is a corporation. Often, legitimate jobs degrade to the point of labor trafficking over a period of weeks as the employer responds to market forces or builds connections necessary to coerce a group of workers. If a victim accepts work and receives fair pay, but is later subjected to sub-standard conditions or not paid for overtime, there may not have been an affirmative representation on which the victim relied. Accordingly, the victim will not be able to prove even the first of the nine elements of fraud, nor that the representation occurred concurrently with the other eight elements.

Likewise, in cases involving multiple contractors working together, it may be impossible for the victim to prove that the hiring contractor knew the victim would be paid below minimum wage, or that the victim had a right to rely on the representation of a low-level employee of a subsidiary corporation when alleging fraud against the parent corporation.[53] Even if the victim is successful in pleading with enough specificity to satisfy Rule 9(b) in order to gain access to discovery, proving all nine fraud elements would still require the prohibitive costs of serving interrogatories and subpoenas, analyzing documents, deposing witnesses, and amending pleadings to avoid dismissal or summary judgment.[54]

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52 *Id.* at 517.

53 See United States v. Heredia, 483 F.3d 912 (9th Cir. 2007), *cert. denied*, 76 U.S.L.W. 3303 (Dec. 11, 2007)(No. 07-5762) for description of doctrine of "willful blindness" and holding that motive is not an element; ARIZ. REV. STAT. ANN. § 13-2804 (2013) (Arizona statute which prohibits knowingly inducing a witness, or prospective witness, in an official proceeding, to unlawfully withhold testimony, testify falsely, or fail to appear to a proceeding where the witness was summoned). A plaintiff may overcome a corporate officer's defense of ignorance by invoking the doctrine of willful blindness, but he still must demonstrate that the officer should have known of lower-level fraud.

54 Association of Certified Fraud Examiners, *The Fraud Trial* at 7, ACFE.COM, http://www.acfe.com/uploadedFiles/Shared_Content/Products/Self-Study_CPE/Fraud-Trial-2011-Chapter-Excerpt.pdf (last accessed December 8, 2013). *The Fraud Trial* provides the following description of common pitfalls in a fraud complaint:

> The [Federal Rules of Civil Procedure Rule] 9(b) requirement sets up a catch-22 for fraud plaintiffs. For example, suppose that the officers of Lapis Bank are convinced that a member of the bank's loan committee, Mr. Bartleby, has been arranging loans as part a kickback fraud, but they do not have the documentation necessary to levy the charge. They need access to the discovery system to get their hands on specific documents in Bartleby's control. Judges often grant leeway in civil procedure, allowing a complaint

Although trafficking enterprises often involve fraud, the likelihood of recovery using a fraud theory of liability is minimal because of the complexity of the claim and the heightened pleading requirement.

C. *Challenges to Victims in Civil Cases Against Corporations*

Notwithstanding the legal issues described in the previous section, labor trafficking victims face additional challenges that courts may not identify or address. For example, many trafficking victims simply do not know their labor rights, such as minimum wage, overtime pay, safe working conditions, or recovery for an employer's failure to adhere to the basic requirements of the employment relationship.[55] Victims who might otherwise object, may fear retaliation against themselves or their families, deportation, criminal prosecution for acts undertaken while being coerced, or damage to their reputation with potential future employers.[56] The possibility that trafficking cases may draw unwanted attention to the victim's experiences, immigration status, and criminal history exacerbate the barriers preventing the plaintiff from filing a complaint.

Unfortunately, labor trafficking remains a lucrative enterprise with relatively low risk, especially for corporations that insulate themselves from liability by a nuanced understanding of the corporate veil. Even if more victims come forward with trafficking-related claims and success rates increase, the profitability of labor trafficking will continue to tempt businesses. Corporations that refuse to engage in trafficking may nonetheless support trafficking

> to be brought pending the results of discovery. There may have to be some hearing after the original filing and some agreement to amend the complaint after discovery has produced the information necessary to state the claim with the required particularity. The 9(b) requirement shows why the initial investigation by a fraud examiner is important if the case proceeds to trial. If the fraud examiner has done his job properly, the attorney should have all the information he needs to file a proper complaint.

Often, the plaintiff in federal court will struggle to satisfy the lower "plausibility" requirement for a civil complaint without ever reaching the more demanding "particularity" requirement described above. *See* Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007) (holding that a complaint must allege facts with sufficient specificity to state a claim for relief that is plausible, not merely conceivable, on its face); Ashcroft v. Iqbal, 556 U.S. 662 (2009) (extending the Twombly plausibility requirement to all federal cases).

[55] *Resources: The Mindset of a Human Trafficking Victim*, JUSTICE.GOV, http://www.justice.gov/usao/ian/htrt/law_mindset_victim%20(2).pdf (last accessed December 8, 2013) (describing common psychological and sociological barriers to victims seeking help, including lack of awareness of rights and resources, trafficker-induced distrust of government, fear of deportation, and other issues).

[56] The reasons that a trafficking victim may have for not coming forward with their claim are innumerable, incorporating social, cultural, political, and psychological forces. The examples provided in this article are common, but do not provide an exhaustive list.

enterprises by requiring unrealistic performance from business partners, such as high-volume supply contracts with fixed prices that cannot be reached using fair labor. In fact, corporate officers are obligated by a fiduciary duty to their shareholders to achieve the widest profit margins possible.[57]

As a result, preventing labor trafficking requires targeting the factors that make the criminal enterprise profitable. Bolstering civil recovery and providing a direct path to liability against beneficiary parent corporations and shareholders will erode some of the powerful profit-related incentives by introducing significantly more severe legal ramifications and economic risk to perpetrators. Furthermore, enhanced liability for trafficking may make consumers more aware of associated human rights issues and pressure corporations to adopt more transparent labor practices.

III. Proposed Reform

A. *Suggested Language for Arizona Revised Statutes*

The need for a civil cause of action for trafficking victims is great, but the enactment of an enabling statute without extending recovery beyond the scope available at common law via liability-enhancing provisions would be a pyrrhic solution. In order to give trafficking victims a feasible opportunity to recover from individuals, corporations, and other entities that harmed them, Arizona law must broaden the number of available responsible parties and shift some of the evidentiary burden to defendants. Furthermore, expanding liability will reduce the economic incentive to coerce laborers by increasing the likelihood and amount of recovery in trafficking cases. If the threat of civil action that will disgorge trafficking profits from beneficiaries is severe enough, fewer trafficking incidents will occur.

The Arizona legislature can broaden victim recovery and reduce economic incentives to traffic in the following ways:

(1) Create an independent cause of action for victims of human trafficking that does not rely on a common law or antecedent theory of liability.
(2) Make punitive damages and injunctions explicitly available to trafficking victims in civil cases against their traffickers.
(3) Make treble damages available in the worst trafficking cases, where the defendant's conduct was willful and malicious.
(4) Extend the limitation period for a civil trafficking action by:
   (a) beginning the limitation period when the plaintiff discovers the defendant's responsibility for the trafficking incident;

[57] See, e.g., Dodge v. Ford Motor Company, 170 N.W. 668 (Mich. 1919), for holding that a corporate officer owes a profit-motive duty to shareholders, exclusively, and does not have a duty to represent employee or community interest.

(b) tolling the limitation period until the victim reaches the age of majority or while the victim is otherwise disabled and unable to bring an action; and

(c) tolling the limitation period during times in which the defendant's conduct prevents the plaintiff from bringing an action (e.g. coercion, duress, witness tampering, wrongful imprisonment, etc.).

(5) Broaden the scope of liability to include defendants who:

(a) knowingly engage in human trafficking;

(b) knowingly purchase goods or services provided by a trafficking enterprise;

(c) own, direct, or have a legal right to control an individual or corporation that engages in human trafficking; or

(d) knowingly receive economic benefit from human trafficking.

In response to the severity of harm suffered by victims of human trafficking, and the scarce availability of viable causes of action under which a victim can secure relief, the Arizona legislature should enact the following provisions:[58]

Civil Cause of Action for Victims of Human Trafficking

(A) An individual who is a victim of human trafficking may bring a civil action in the appropriate state court. The court may award actual damages, compensatory damages, punitive damages, injunctive relief, and other appropriate relief. **The court may award costs and reasonable attorney fees to the plaintiff. The court must award treble damages upon finding by clear and convincing evidence that the defendant acted willfully and maliciously.**[59]

(B) Statute of Limitations

(1) **The** statute of limitation period imposed for the filing of a civil action under this section does not begin until the plaintiff discovers:

(a) that the human trafficking incident occurred; **and**

(b) that the defendant caused, was responsible for, or profited from the human trafficking incident.

(2) If the plaintiff is a minor, then the statute of limitation period **does not begin** until **the plaintiff reaches** the age of majority.

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[58] Suggested statutory language provided by the Polaris Project. *Human Trafficking Legislative Issue Brief: Civil Remedy*, POLARISPROJECT.ORG, http://www.polarisproject.org/storage/documents/policy_documents/Issue_Briefs/Issue_Brief_-_Civil_Remedy_-_July_2013.pdf (last visited Oct. 26, 2013). Bold text indicates revisions and additions to the language provided by the Polaris Project which enhance clarity, eliminate redundancy with existing law, and include presumptive corporate veil-piercing.

[59] The attorney fees and treble damages clauses were revised to give judicial discretion regarding the propriety of attorney fees and to include an evidentiary standard for the requisite finding of willfulness and malice prior to an award of treble damages.

(3) If the plaintiff is **disabled** at the time the cause of action accrues, so that it is impossible or impracticable for **the plaintiff** to bring an action, **then the statute of limitations is tolled until the disability subsides or it becomes practicable for the plaintiff to bring an action.** Disability may include insanity, imprisonment, incompetence, **or trauma-related condition.**

(4) **Notwithstanding the requirements of subsection (B)(1) of this section,** if the plaintiff's injury is caused by **more than one occurrence** that is part of a human trafficking **incident** caused by the same defendant, then the limitation period **does not begin** until the last human trafficking **incident occurs.**

(5) **The limitation period does not run during the time in which the plaintiff does not bring an action due to** threat, intimidation, manipulation, fraud, **or witness tampering by the defendant or by a person acting for the defendant.**[60]

(6) A defendant **may not** assert a **statute of limitations defense if the plaintiff's failure to bring an action prior to the expiration of the limitation period** is due to the **[language omitted]** defendant inducing the plaintiff to delay the filing of the action or placing the plaintiff under duress.[61]

(7) **The standard of proof to overcome a statute of limitations defense with evidence pursuant to this section is a preponderance of the evidence.**[62]

[Subsection (C) omitted].[63]

(C) A person may not avoid liability under this section by **[language omitted]** conveyance of **a** right, title, or interest in real property, or by

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[60] Subpart 5 adds witness tampering to the list of types of defendant wrongdoing that toll the statute of limitations. Tampering with an individual who may testify can derail a plaintiff's case, even if the tampering occurs prior to commencement of litigation. If a defendant tampers with a potential witness, then the plaintiff's claim should be tolled to provide an opportunity to correct the damage or to secure the testimony of an alternate witness. Moreover, a defendant's wrongdoing should not be rewarded with the potential expiration of plaintiff's claim.

[61] *See* Sarah M. Buel, *Putting Forfeiture to Work*, 43 U.C. DAVIS L. REV. 1295, PINCITE (2010) (describing the doctrine of forfeiture by wrongdoing and its application in the context of intimate partner violence). Similar to intimate partner violence, human trafficking cases represent a high proportion of witness tampering incidences and other forms of wrongdoing directed toward circumventing due process. Accordingly, the defendant's misconduct should not be rewarded with dismissal on procedural grounds.

[62] Subpart 7 adds an evidentiary standard to the tolling provisions in this section. If a plaintiff proves witness tampering beyond a preponderance of the evidence, for example, then the defendant's statute of limitations defense is rebutted and the plaintiff's claim may proceed.

[63] Subsection C of the model legislation is omitted because it contains redundant joinder provisions and does not substantively add to the proposed statute.

agreement that purports to show consent of the victim of human trafficking. **(D) Successful pleading of a cause of action under this section creates a rebuttable presumption of third-party liability for a defendant who, at the time of the trafficking incident:**

(1) knowingly used the trafficked labor of a plaintiff;

(2) knowingly purchased goods or services from a defendant who used the trafficked labor of a plaintiff in the production of the purchased goods or provision of the purchased services;

(3) owned, directed, or had a legal right to control a defendant who used the trafficked labor of a plaintiff; or

(4) knowingly received material economic benefit, directly or by the receipt of a shareholder dividend, from human trafficking activity in which a defendant engaged.[64]

(E) A defendant may rebut a presumption of liability, created under subsection (D) of this section by clear and convincing evidence that the defendant lacked knowledge of the trafficking incident.

IV. Implementation and Impact

In order for the civil cause of action to have its desired effect of increasing the likelihood of recovery and subsequently preventing human trafficking, codification of the statute is a necessary but insufficient condition. Along with creating the cause of action, the Legislature should appropriate funds for programs to increase awareness of the new statute among workers and would-be traffickers. Through appropriate measures, including advertising campaigns and increased availability of information at the workplace, the legislature can reduce the prevalence of labor trafficking via a combination of stricter civil penalties and wider knowledge of basic labor rights.

Compliance poster requirements are one example of how Arizona and the federal government have spread awareness about other employment law issues. Arizona law requires, for example, that employers must display posters explaining anti-discrimination law, dangers associated with exposure to bodily fluids, workplace safety procedures, unemployment insurance provisions, workers compensation, constructive discharge, "Smoke-Free Arizona" requirements, and the current minimum wage.[65] Federal law imposes similar requirements. Notably, state agencies provide the compliance posters free of charge to

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[64] Subsection D is the liability-enhancing provision critical to the expansion of the rights of victims for the reasons described in this article.

[65] *Arizona Workplace Posters*, AZ.GOV, https://az.gov/business_workposters.html (last accessed November 1, 2013).

employers.[66] A compliance poster explaining the law against human trafficking and the availability of a civil remedy could be an effective and inexpensive way to spread awareness of the issue. Workers who are aware of their rights are more likely to object to harmful labor practices before irreparable harm is done. Alternatively, employers who engage in human trafficking, despite the poster requirement, would appear more culpable to juries. Although employers who engage in human trafficking will likely try to deny their workers access to the compliance information, the posters will also increase community awareness and give more opportunities for victims of human trafficking to learn about available remedies.

Multi-lingual radio and television announcements could also improve awareness and may be more likely to reach victims whose employers restrict their access to information. Furthermore, spreading awareness of harmful labor practices could motivate businesses and consumers to reexamine their practices, including the companies with which they contract and the products that they purchase. Even if public awareness does not directly impact buying, greater awareness of the illegality of human trafficking and harmful labor practices would likely make prospective jurors more suspicious of defendants in trafficking cases, even if the plaintiff is not particularly sympathetic.

Human trafficking training for state workers, including judges, Department of Economic Security social workers, police officers, and building inspectors could be another beneficial investment of appropriations. Because victims of human trafficking are often isolated by their employers and are both unaware of available services and unable to access them, educating state officials who are more likely to encounter trafficking and who are accustomed to handling complex legal issues further increases the likelihood that victims are made aware of their rights and can seek recovery. Ultimately, empowering more victims and potential victims of human trafficking creates more risk for employers and should reduce corporate involvement in trafficking enterprises.

A. *Liability Enhancement and Due Process of Law*

Corporations and shareholders are likely to object to a statute that recognizes liability where the common law may not. The creation of presumptions and legislative determination of evidentiary standards may appear objectionable to some corporate stakeholders and are discussed here to support their constitutionality. Specifically, the imposition of widespread liability for labor trafficking may implicate constitutional guarantees, including due process of law.

66 Existing workplace posters indicate some of the rights and resources available to individuals, but information specifically intended to combat human trafficking should be added.

The legislature has clear authority to establish presumptions and to promulgate rules regarding burden of proof, and may do so without violating the Due Process Clause of the Fourteenth Amendment, as long as those provisions are reasonable.[67] The function of a standard of proof is to "instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication."[68] Ultimately, a standard of proof "allocates the risk of error between the parties" and indicates the "importance of the ultimate decision."[69]

In the proposed statute, plaintiffs can establish a presumption of third-party liability by pleading a cause of action against the defendant who knew of the trafficking incident and nonetheless exploited it to their advantage. However, if the defendant can prove by clear and convincing evidence that the defendant did not have the requisite knowledge alleged in the complaint, then the presumption is rebutted. Further, the presumption rests on the protection of the rules of pleading, which require the plaintiff to perform a reasonable investigation of the facts and law prior to submitting a complaint to the court. In fraud-related cases, the plaintiff must also plead with particularity, granting even greater protection against frivolous claims to the defendant. However, in order to indicate the importance of the presumption relative to the gravity of the human trafficking claim, the defendant may rebut the presumption, once established, by clear and convincing evidence. This mechanism shifts the evidentiary burden to the party with access to the most information and with the financial incentive to perform due diligence prior to engaging in practices that may subject it to liability. Furthermore, the presumption of liability attaches potential liability to third-party defendants at the pleading stage and is not dispositive of the other elements of a successful injury case.

Because the presumption of liability is rebuttable and does not dispose of the entire case, the statute will not offend the due process clause. The statute's presumption scheme allows full litigation of the issues and does not deny a defendant's opportunity to have his day in court. Finally, allocating the evidentiary burden in a way that reflects the disparity of power and access to information between the parties in a type of case with grave societal implications is an appropriate exercise of the legislative power.

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[67] Hawkins v. Bleakly, 243 U.S. 210, 214 (1917).

[68] Addington v. Texas, 441 U.S. 418, 423 (1979) (*quoting* In re Winship, 397 U.S. 358, 370 (1970) (Harlan, J., concurring).

[69] *Id.*

V. Conclusion: Protecting Victims through Corporate Shareholder Liability

Arizona faces a human trafficking problem and needs ambitious solutions to reduce the impact of trafficking throughout the state. By taking a strong stance against the economic incentives associated with trafficking and expanding the availability of recovery options for victims, Arizona's legislature can communicate its disapproval of the fastest-growing business of organized crime and become a national leader in the battle against this contemporary form of slavery. Protecting victims of human trafficking by creating a distinct civil cause of action and making third-party defendants available for liability will be a powerful affirmative step in the direction of justice.

ICWA ADOPTIONS
AN INDIAN CHILD WELFARE ACT PRIMER

Gregory D. Smith*

I. INTRODUCTION

My introduction to the Indian Child Welfare Act ("ICWA")[1] occurred in 1993 because of criminal charges being brought against Aaron V. Yelloweyes and his wife, Millie Rose Yelloweyes, both registered members of the Sioux Indian Nation, for the first-degree murder of three-year-old Jeremiah Bringsplenty.[2] The tragic scenario unfolded when Jeremiah's mother left him with the Yelloweyeses so that she could attend college in South Dakota.[3] Jeremiah was not potty-trained and on May 9, 1992, Aaron Yelloweyes drowned the toddler, Jeremiah, for pooping on the floor and furniture in the Yelloweyes

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1 25 U.S.C. § 1901 (1978) *et seq.*

2 *See*, State v. Yelloweyes, 1995 Tenn. Crim. App. Lexis 396, 1-2, 10, unpub. op. (Tenn. Crim. App. May, 1995). The Yelloweyes opinion will be cited as "Yelloweyes" with a page citation to the decision.

3 Yelloweyes at 2.

home.[4] Upon realizing that Jeremiah was dead, the Yelloweyes put Jeremiah's body in a picnic cooler, transported the body from Clarksville, Tennessee to Lincoln, Nebraska, and buried Jeremiah.[5] Eventually, to cover this crime, the Yelloweyes claimed that Jeremiah had been kidnapped during a July 4th fireworks display.[6] Upon police investigation, the plan unraveled, and eventually Aaron Yelloweyes was charged with first-degree murder. Millie Yelloweyes was charged as an accessory.[7] Aaron Yelloweyes was eventually convicted of second-degree murder and given a twenty-five year sentence and Millie Yelloweyes was convicted as an accessory after the fact and received a two-year sentence.[8] This is where I came into the picture.

When Millie Rose Yelloweyes was detained, she was in the late stages of pregnancy.[9] While incarcerated, Millie Rose Yelloweyes gave birth to a baby girl. I was appointed as the guardian ad litem for the baby as the Sioux Nation requested that custody of the newborn child's case be transferred from the Tennessee juvenile court to the tribal court[10] instead of the child going into Tennessee foster care pursuant to the Indian Child Welfare Act ("ICWA").[11] Some

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[4] Yelloweyes at 2-3.

[5] *Id.*

[6] Yelloweyes at 3.

[7] Yelloweyes at 3-4.

[8] Yelloweyes at 4. Millie Yelloweyes completed her prison sentence on April 25, 1996. Aaron Yelloweyes completed his prison sentence on July 11, 2009. *See*, https://apps.tn.gov/foils-app/results.jsp.

[9] Yelloweyes at 2.

[10] *See*, Santa Clara Pueblo v. Martinez, 436 U.S. 49, 65 (1978) (A tribal court is the "appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians.""). *See also*, People v. Williams, 202 Cal. App. 3d 835, 843-44844 (Cal. Ct. App. 1988) ("Tribes may establish tribal courts as an exercise of their inherent sovereign powers, whether or not the tribal constitution allows for the creation of a tribal court.""); Bradley v. Bear, 272 P.3d 611, 616 (Kan. Ct. App. 2012); Iron Crow v. Ogallala Sioux Tribe, 129 F. Supp. 15, 18 (D.S.D. 1955). There are approximately 300 tribal court systems in the United States according to a recent law review article. *See*, Fidell, *An American Indian Supreme Court*, 2 Am. Indian L. J. 1, 2 (Fall 2013). Even where a tribal constitution allows for the creation of a tribal court, the tribal council is not automatically mandated to create a tribal court system. *See, e.g.*, Healy Lake Vill. *v.* Mt. McKinley Bank, 322 P.3d 866, 868 (Alaska 2014).

[11] 25 U.S.C. § 1901 *et seq.* (1978). Every state, the District of Columbia and several U.S. territories acknowledge that in custody, adoption and/or foster care situations where ICWA applies, the federal statute takes precedent over state legislation such as the Uniform Child Custody Jurisdiction Enforcement Act. (UCCJEA). *See*, ALA., CODE § 30-3B-104; ALASKA STAT. § 25.30.800; ARIZ. REV. STAT. § 25-1004; ARK. CODE ANN. § 9-19-104; CAL. FAM. CODE § 3404; COLO. REV. STAT. § 19-1-126; CONN. GEN. STAT. § 46b-115c; DEL. CODE ANN. tit. 13 § 1904; D.C. CODE § 16-4601.03; FLA. STAT. § 61.505; GA. CODE ANN. § 19-9-43; 7. GUAM CODE ANN. tit. 7 § 39104; HAW. REV. STAT. § 583A-104; IDAHO CODE ANN. § 32-11-104; ILL. COMP. STAT. ANN. ch. 750 tit. 36, §104; IND. CODE § 31-21-1-2; IOWA CODE § 598B.104; KAN. STAT. ANN. §§§ 23-37, 104; KY. REV. STAT. ANN. § 403.804; LA. REV. STAT. ANN. § 13:1804; ME. REV. STAT. tit. 19-A, § 1734; MD. FAM. LAW CODE ANN., Law § 9.5-103; MICH. COMP. LAWS

states have complimentary state versions of ICWA.[12] Tennessee does not, but Tennessee's version of the Uniform Child Custody Jurisdiction Enforcement Act ("UCCJEA") specifically notes that federal ICWA issues pre-empt Tennessee's UCCJEA and tribal custody rulings shall receive the same full faith and credit deference that a sister state's custody decisions receive.[13]

My daughter was born about three months prior to the Yelloweyes' baby. When I took the Yelloweyes' baby home to await the transport of the infant to the Sioux Nation, this infant wore "hand-me-down" clothes my daughter outgrew while sleeping in a borrowed crib. Although most ICWA children do not have parents facing murder charges, studies show that prior to the passage of ICWA in 1978, one-third of all Native American children were being taken from their homes and placed in either foster care homes or adopted outside of their Native American roots.[14] As one scholarly article noted, "When Indian children are removed from their tribe and reared as non-Indians, they often cease to be 'Indian.'"[15]

A better understanding of ICWA will help accomplish the dream of the famed Lakota Chief Sitting Bull, who said, "Let us put our minds together and

§ 722.1104; MINN. STAT. § 518D.104; MISS. CODE ANN. § 93-27-104; MO. REV. STAT. § 452.715; MONT. CODE ANN. § 40-7-135; NEB. REV. STAT. § 43-1229; NEV. REV. STAT. ANN. § 125A.215; N.H. REV. STAT. ANN. § 458-A:3; N.J. STAT. ANN. § 2A:34-56; N.M. STAT. ANN. § 40-10A-104; N.Y. CONSOL. LAW SERV., Dom. Rel. § 75-c; N.C. GEN. STAT. § 50A-104; N.D. CENT. CODE. § 14-14.1-03; OHIO REV. CODE ANN. § 3127.03; OKLA. STAT. tit. 43, § 551-104; OR. REV. STAT. § 109.711; 23. PA. CONS. STAT. tit. 23, § 5404; R.I. GEN. LAWS § 15-14.1-4; S.C. CODE ANN. § 63-15-306; S.D. CODIFIED LAWS § 26-5B-104; TENN. CODE ANN. § 36-6-207; TEX. FAM. CODE ANN. § 152.104; UTAH CODE ANN. § 78B-13-104; VT. STAT. ANN. tit. 15, § 1063; VA. CODE ANN. § 20-146.3; WASH. REV. CODE § 26.27.041; W. VA. CODE § 48-20-104; WIS. STAT. § 822.04; WYO. STAT. ANN. § 20-5-204; V.I. CODE ANN. tit. 16, § 118; Adoption of Arnold, 741 N.E.2d 456, 458, and 461 fn. 3 (Mass. App. Ct. 2001).

12 *See e.g.*, Re: A.W., 741 N.W.2d 793, 799 fn. 3 (Iowa 2007) and *Re:* Shayla H., 846 N.W.2d 668, 674 (Neb. Ct. App. 2014) for examples of state ICWA statues being applied. Some state ICWA statutes, such as Oklahoma, give Native Americans greater protection than the federal version of ICWA offers. *See* Trope & Smith, *The Continued Protection of Indian Children and Families After Adoptive Couple v. Baby Girl: What the Case Means and How to Respond*, 2 AM. INDIAN L.J. 434, 473 (2014), discussing OKLA. STAT. tit. 10, § 40.6.

13 TENN. CODE ANN. § 36-6-207. At the time Yelloweyes occurred, Tennessee was a UCCJA state, but the same premise, that ICWA trumped the UCCJA, applied in 1992 under the UCCJA just as it applies today in Tennessee under the updated UCCJEA. 25 U.S.C. § 1911(d) requires Full Faith and Credit for ICWA matters by federal, state and tribal courts. Interestingly, tribal courts are not absolutely required to give Full Faith and Credit to other state court rulings, but most tribal courts honor state judgments under the theory of "comity". Canby, *American Indian Law in a Nutshell*, 5th ed. at 254-255 (2009).

14 Need author's first name Graham, *The Past Never Vanishes: A Contextual Critique of the Existing Indian Family Doctrine*, 23 Am. Indian L. Rev. 1, 2, & 24 (1998/1999). *See also*, Thompson v. Fairfax Co. Dept. of Fam. Svcs., 747 S.E.2d 838, 844-45 (Va. Ct. App. 2013).

15 Need author's first name Trentadue & need author's first name DeMontigny, *The Indian Child Welfare Act of 1978: A Practitioner's Perspective*, 62 N.D. L. REV. 487, 495 (1986).

see what kind of future we can build for our children," after defeating General George Armstrong Custer at the Battle of the Little Big Horn.[16] As noted by one commentator, "Congress was acknowledging [with the passage of ICWA] that no nation or culture can flourish if its youngest members are removed. The act was intended by Congress to protect the integrity of Indian tribes and ensure their future."[17] Ironically, recent similar findings by other countries via the Hague Convention and related proclamations force American lawyers to revisit ICWA because the sharp decline in inter-country adoptions means the potential increase in adoptions of Native American children.[18]

II. Resources

The following resources are helpful to any attorney facing an ICWA case:

(A) 25 U.S.C. § 1901 *et seq.*;
(B) 25 C.F.R. § 23.1 *et seq.*;
(C) 41 Am. Jur. 2d "Indians Native Americans" § 145-153;
(D) 2 Am. Jur. 2d "Adoptions" § 112;
(E) 89 A.L.R. 5th 195;
(F) 61 A.L.R. 6th 521;
(G) 63 A.L.R. 6th 429;
(H) American Indian Law Review;
(I) American Indian Law Journal;
(J) Native Times (newspaper);
(K) Turtle Talk (website);[19]
(L) Bureau of Indian Affairs ("BIA") website;[20]
(M) Jones *et al*, *The Indian Child Welfare Act Handbook*, 2d (ABA Family Law Section, 2008); and

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16 *Id.* at 53, and 53 fn. 246.

17 *Accord*, Need author's first name Jones, *The Indian Child Welfare Act: The need for a separate law*, www.americanbar.org/content/ newsletter/publications/gp_solo_magazine_home/gp/Indian_Child_Welfare_Act_need_separate_law; Need author's first name Maillard, *Parental Ratification: Legal Manifestations of Cultural Authority in Cross-Racial Adoption*, 38 Am. Indian L. Rev. 107, 140 fn. 14 (2003/2004).

18 *See e.g.*, Need author's first name Banks, *The U.S. Market for Guatemalan Children: Suggestions for Slowing the Rapid Growth of Illegal Practices Plaguing International Child Adoptions*, 28 Suffolk Transnat'l L. Rev. 31, 56 fn. 87 (Winter 2004).

19 Turtle Talk, https://turtletalk.wordpress.com. . Turtle Talk is a blog run by several law professors which focuses on Native American legal issues. A few of the professors who run Turtle Talk, such as Professor Matthew L.M. Fletcher, also sit on tribal supreme courts. *See also, Tribal Court*, The Poarch Band of Creek Indians, (October 15, 2015, 05:25 PM),www.poarchcreekindians.org/west minister/tribal_court.html.

20 *Indian Affairs*, U.S. Dep't of the Interior, (October 15, 2015, 05:28 PM), www.indian affairs.gov. The Bureau of Indian Affairs website includes general information and resources on issues involving Native Americans including, but not limited to, ICWA resources.

(N) Canby, *American Indian Law in a Nutshell* (West).

Attorneys may wish to turn to the National Judicial College or the National Council of Juvenile and Family Court Judges, both based at the University of Nevada at Reno, for additional resources. Both organizations possess considerable information on ICWA and tribal courts.[21] Also, several tribal supreme courts publish their appellate opinions on databases such as Lexis and an attorney can research an ICWA question from the tribal court's prospective.[22] Likewise, some tribal courts of appeals publish their appellate decisions on the tribal website.[23] If a tribe publishes appellate decisions, that tribe's website should tell an attorney where to find the court's opinions.

III. Historic Background

As of October 25, 2014, there are 566 federally recognized Native American tribes in the United States.[24] Each tribe is considered an independent, sovereign nation that just happens to sit inside land commonly referred to as the United States of America.[25] There are even more state recognized Native American tribes and Native American bands.[26] Also, there are unrecognized groups of Native Americans.[27] The difference between a "tribe" and a "band" is that a "band" is a loose governmental configuration of Native Americans while a "tribe," is a more formal racial and governmental unit.[28] Of the 566 federally recognized Native American tribes, roughly 300 of the tribes have some version of a tribal court system in place.[29] American courts usually consider the tribal appellate court decisions related to that tribe's own tribal constitution as conclusive, just like state supreme court rulings are conclusive on the interpretation of a state constitution.[30] Bluntly put, "[f]ederal courts, as

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21 *See* www.judges.org *See*, www.judges.org and www.ncjfcj.org/resource-library/publications/tribal-work-and-icwa.

22 *See, e.g.*, In Re Guardianship of E.P., 2003 Northern Plains App. Lexis 1 (N.P. Intertribal App. 6/30/2003). *See also*, Westlaw's Indian Law Reporter.

23 *See, e.g.*, Hawk v. Reum, Appeal No. 43, (Ft. Peck App. 1/25/1988).

24 www.bia.gov/WhoWeAre/BIA/OIS/TribalGovernmentServices/TribalDirectory/index.htm.

25 *See generally*, Colombe v. Rosebud Sioux Tribe, 747 F.3d 1020, 1024 (8th Cir. 2014);Basil Cook Enters. v. St. Regis Mohawk Tribe, 117 F.3d 61, 66 (2nd 2d Cir. 1997).

26 *See, e.g.*, U.S. v. Pourhassen, 148 F.Supp.2d 1185, 1187 (D. Utah 2001), citing 18 U.S.C. § 1159(c)(3) (1948) and 25 CFR § 309.2(e)(2). *Cf.*, Tenn. Code Ann. § 4-32-202 for an example of how tribal enrollment in either a federally or state recognized tribe can benefit a person.

27 *See, e.g.*, Tenn. Op. Atty. Gen. 07-21, 2007 Tenn. A.G. Lexis 21 (2/27/2007).

28 *See*, Montoya v. U.S., 180 U.S. 261, 266 (1901).

29 Fidell, *An American Indian Supreme Court*, 2 Am. Indian L. J. 1, 2 (Fall 2013).

30 Prescott v. Little Six, Inc., 387 F.3d 753, 756 (8th Cir. 2004); In Re Marriage of Limpy, 636 P.2d 266, 269 (Mont. 1981), rev'd on other grounds; and Colombe v. Redbud Sioux Tribe, 835 F. Supp. 736, 752 (D.S.D. 2012). *Cf.*, Miller v. State, 584 S.W.2d 758, 760 (Tenn. 1979).

a general matter, lack competence to decide matters of tribal law".[31] A party's rights under a tribal constitution is to be decided by tribal courts[32] and unless a tribal court lacks subject matter jurisdiction, that court's decisions cannot be relitigated in American courts.[33]

A tribal court's determination of its own laws receive deference from American federal courts, but a tribal court's opinions relating to the interpretation of U.S. federal law is reviewed *de novo*.[34] Mere distrust of a tribal court's honesty or doubt about a tribal judge's competency is no reason to discount the authority of a tribal court.[35] Tribal courts have evolved in respect where today American courts take judicial notice of tribal authority such as tribal constitutions in ICWA cases.[36] A tribal court has considerable flexibility in crafting judicial remedies, potentially using, in descending order: (a) tribal law; (b) federal law; or (c) comparable state law.[37]

In 1978, Congress passed the Indian Child Welfare Act (ICWA) to curb the problem of non-tribal governmental and private agencies removing Native American children from their parents and placing these children in non-Indian foster care or adoptive homes without considering the loss of heritage or "roots" this procedure cultivated.[38] ICWA can apply to both registered tribal members as well as potentially unregistered Native Americans.[39] The lynchpin intent behind the enactment of ICWA is to protect unique cultural relation-

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[31] Basil Cook Enters. *v.* St. Regis Mohawk Tribe, 117 F.3d 61, 66 (2nd2d Cir. 1997). *Accord*, In Re Sac & Fox Tribe of Mississippi in Iowa/Meskwaki Casino Litigation, 340 F.3d 749, 763-764 (8th8th8th Cir. 2003).

[32] Glover v. U.S., 219 F. Supp. 19, 22 (D. Mont. 1963).

[33] Smith v. Babbitt, 875 F. Supp. 1353, 1367 fn. 13 (D. Minn. 1995).

[34] Duncan Energy v. Three Affiliated Tribes, 27 F.3d 1294, 1300 (8th8th8th Cir. 1994) and Prescott v. Little Six, Inc., 387 F.3d 753, 756 (8th8th8th Cir. 2004).

[35] Duncan, *Id.* at 1300-1301 as cited by Colombe, *supra*, note 25 at 1025. *See also*, Minnis & Assocs. P.C. v. Kaw Nation, 90 P.3d 1009, 1014-1015 (Okla. Civ. App. 2003).

[36] In Re: J.M., 718 P.2d 150, 154 fn. 3 (Alaska 1986), citing 25 U.S.C. § 1911(d) (1978).

[37] *See, e.g.*, Bradley, *supra* note 10 at 616.

[38] *See, e.g.*, Meehan, *Native Children in Alaska: The State of Tribal Self-Determination in Child Custody Proceedings* 32 Am. Indian L. Rev. 167, 170-171 (2007/2008);Haralambie, *The Indian Child Welfare Act*, 31 Fam. Adv. 11, 12 (Winter, 2009). *Accord*, by non-Indian authorities In Re: J.S., 321 P.3d 103, 108 (Mont. 2014). Tribal courts have noted an intentional "brainwashing" attempt by non-Indian authorities to erase Indian culture has occurred in many instances where Indian children were removed from Native American environments. *See, e.g.*, John Doe BF v. Diocese of Gallup, 2011 Navajo Sup. Lexis 16 (Navajo 09/09/2011), at page 26, fn. 5.

[39] *See*, In Re I.E.M., 592 N.W.2d 751, 755-756 (Mich. App. 1999) overruled on other grounds and Myers & Siebers, *The Indian Child Welfare Act Myths and Mistaken Application*, 83 MI. B. J. 19, 21 (July 2004). Since 25 U.S.C § 1910(8) encompasses tribes, bands and "other organized group or community of Indians. . ." For the purposes of this article, each of the stated groups will collectively be referred to as "tribe". *But see*, Adoption of Sabrina, 2008 Mass. App. Unpub. Lexis 527 Mass. App. 3/5/2008) at pages 10-11 where bald and unsubstantiated claims of tribal connection does not amount to proof of Native American heritage.

ships between Native American children and their tribes.[40] Basically, Congress made an avenue of return for Native American children that were removed from their home or tribe because a non-tribal judge or social worker had a personal belief that an Anglo home placement offered a brighter future for a child than a Native American home placement[41]. "ICWA contains a policy statement that encourages tribal input and participation in custody proceedings involving Indian children."[42]

While ICWA has a major impact on adoptions, ICWA does not apply to all Native American custody issues.[43] The application of ICWA to American jurisprudence was succinctly explained by Denver attorney, Kathleen A. Hogan, who said:

> The Indian Child Welfare Act, (ICWA) (25 U.S.C. § 1901 *et seq.*) is a federal provision governing tribal jurisdiction over proceedings involving Indian children residing on a reservation. Note that both tribal membership, and eligibility for membership, and residence on the reservation are required for this Act to come into play. As a result, ICWA claims represent a "red herring" in many state court proceedings.
>
> When ICWA is relevant, it applies to "custody proceedings" defined by the Act as proceedings relating to foster care, pre-adoptive and adoptive placements, and termination of parental rights. By its terms, ICWA does not apply to an award of custody to one of the parents in a divorce proceeding.[44]

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40 Mississippi Choctaw Indian Band v. Holyfield, 490 U.S. 30, 50 fn. 24 (1989). *Accord*, Portley *The Indian Child Welfare Act – A Primer*, 36 Arizona Attorney 24, 25 (Feb. 2000), hereinafter "Portley" with page citation. A tribe's ICWA mandate reach is extremely broad and can reach far beyond the borders of a reservation. Husband v. Wife, 2003 Mashantucket App. Lexis 3 (Mashantucket Pequot. App. 01/24/2003), at pages 35-36, fn. 14.

41 In Re C.G., 317 P.3d 936, 942 (Ore. App. 2014) and In Re: Juvenile Action No. J-10175, 736 P.2d 829, 831-832 (Ariz. App. 1987).

42 In Re Adoption of Riffle, 902 P.2d 542, 544 (Mont. 1995), citing 25 U.S.C. § 1902. (1978). .

43 ICWA does not apply to divorce custody battles, juvenile delinquency matters, or consent voluntary adoption proceedings. *See*, Navajo Nation v. Superior Court, 47 F. Supp.2d 1233, 1238 (E.D. Wash. 1999); In the Matter of Doe v. Navajo Nation, 832 P.2d 518, 520 (Wash. App. 1992); and Wexler, *Tribal Court Jurisdiction in Dissolution Based Custody Proceedings*, 2001 U. Chi. Legal F. 613, 638 (2001), hereinafter "Wexler" with page citation. *Accord*, Bahe v. Platero, 2012 Navajo Sup. Lexis 6 (Navajo 12/20/2012), at page 21;Skenandore v. Oneida Business Comm., 1999 Oneida App. Lexis 15 (Onedia App. 10/05/1999), at pages 13-15.

44 Hogan, *Custody Proceedings*, 26 Fam. Adv. 22, 24 (Winter, 2004). *Accord*, In the Matter of K.A.B.E., 325 N.W.2d 840, 842 (S.D. 1982). *See also*, In Re The Custody of C.M. Youpee, 1992 Mont. Fort Peck Tribe Lexis 8 (Ft. Peck App. 01/10/1992), at pages 8-9 for a tribal court's version of why ICWA is vital to Native American custody law.

ICWA is Congress' acknowledgment that tribal courts are oftentimes better suited to determine the best interest of Native American children than state courts.[45] Bluntly put, ". . .ICWA attempted to remedy three interrelated problems: (1) the harm done to children through custody proceedings in state court; (2) the demographic devastation wrecked on tribes through the widespread removal of Indian children; and (3) the disrespect states show for tribal sovereignty when they deny tribal adjudication of custody proceedings."[46] For those reasons, ICWA, implicitly updates the "Indian Commerce Clause" of the U.S. Constitution.[47] The passage of ICWA legislation is one of the first major steps that Congress took to release its "guardianship" over the incorrectly stereotyped helpless and hapless American Indian,[48] and it allows Native American tribes to decide their own child custody matters.[49] The first hurdle to overcome after ICWA's passage was the shortsighted presumptions by state officials espousing "American society views of Indian culture and life on the reservation as 'blots on our national character.'"[50]

IV. Avoiding ICWA Malpractice and Ethics Violation Issues

The good-faith adoption of a Native American child by non-Indian adoptive parents, where neither the court nor the parties realized that ICWA should apply, will probably withstand a later ICWA challenge.[51] Good faith and unin-

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[45] Wexler, *supra* note 43 at 634.

[46] *Id.* at 635. *See also*, 25 CFR § 23.3 (4-1-14 Ed.).

[47] U.S. Const. Art. I § 8 [3].cl. 2. *See also*, Cherokee Nation v. Ga., 30 U.S. 1, 17 (1831).

[48] *See generally*, 2 Am. Jur. 2d *Adoption* § 112 (West, 2014). *Contra*, the former mentality in American courts that "white men" must "protect" the Indian found in cases such as McCandless v. U.S. ex rel. Diabo, 25 F.2d 71, 72 (3rd Cir. 1928) and Blair v. Pathkiller's Lessee, 10 Tenn. 407, 411 (1830). The "protect this dependent people" verbiage was used as recently as 1959 by the U.S. Supreme Court in Williams v. Lee, 358 U.S. 217, 220 fn. 4 (1959). *But see*, DISH Network Serv. LLC v. Laducer, 725 F.3d 877, 882 (8th Cir. 2013) for an example of the respect tribal courts have earned in the past fifty years from American courts.

[49] *See generally*, Simmonds v. Parks, 329 P.3d 995, 1008 (Alaska 2014) for a discussion of why deference is given to tribal court custody decisions. Actually, some Native American tribes incorporate ICWA legislation by adopting reference and defer to the federal version of ICWA. *See, e.g.*, In Re A.S., 1997 Colville App. Lexis 1 (Colville Conf. Tribes App. 01/17/1997), at pages 1-2.

[50] McKoy, *The Battle of Wills: The Impact of the Indian Child Welfare Act on Parents Who Make Testamentary Appointments of Guardianships for Their Indian Children*, 28 J. Juv. L. 148, 148-149 (2007), hereinafter "McKoy" with page citation.

[51] *See* Metteer, *Pigs in Heaven: A Parable of Native American Adoption Under the Indain Child Welfare Act*, 28 Ariz. St. L.J. 589, 593 (Summer, 1996), citing In Re: A Child of Indian Heritage, 529 A.2d 1009, 1017 (N.J. Super. App. Div. 1987).

tentional violations of ICWA make an adoption order voidable, not void[52]. On the other hand, intentional violations of the mandates set out in ICWA cause major liability issues and ethics problems for the attorney, as well as tainting the validity of the adoption of a Native American child.[53]

The Missouri Court of Appeals, in *Collins v. Mo. Bar Plan*, 157 S.W.3d 726 (Mo. App. 2005), addressed a negligent misrepresentation case where the attorney for adoptive parents purportedly suggested to a birth mother that she remove any indication of her Native American heritage from adoption information forms to avoid ICWA application.[54] The adoptive parents' attorney, seeking summary judgment on his malpractice defense claim, argued that since no attorney-client relationship existed between the attorney and birth mother, reliance on the advice the attorney offered was not malpractice.[55] The Missouri Court of Appeals opined that the limited phone advice given by the attorney to the birth mother put into issue whether or not an attorney-client relationship existed between the biological mother and the adopting parents' attorney.[56] The lower courts' summary judgment ruling was reversed and this case proceeded to trial.[57]

The Alaska Supreme Court, in *Doe v. Hughes*, 838 P.2d 204 (Alaska 1992), addressed an adoption related to an artificial insemination.[58] The natural mother in this case agreed to be artificially inseminated with semen from her brother-in-law because the natural mother's sister (adoptive mother) could not conceive a child.[59] While preparing for the adoption, the law firm handling the case learned that the biological father was part Chickasaw Indian.[60] Instead of following the requirements of ICWA, according to the Alaska Supreme Court opinion, the law firm ". . .failed to secure completion of. . .the steps needed to make the mother's consent 'valid' according to [25 U.S.C.] § 1913. Instead [the law firm] recommended that the superior court be allowed to determine whether the Act applied, and was content to rest on its oars when the court concluded that [ICWA] did not."[61] About a year after the adoption, the

52 25 U.S.C. § 1914. (1978). *Accord*, In Re J.S., 321 P.3d 103, 108 (Mont. 2014); Philip A.C. v. Central Council, 149 P.3d 51, 60 fn. 44 (Nev. 2006); Tina L. v. Superior Court, 163 Cal. App. 4th 262, 268 (Cal. App. 2008).

53 *See, e.g.*, Kislowicz, *Judging the Rules of Belonging*, 44 U.B.C. L. Rev. 287, 293 (May 2011).

54 *Collins*, 157 S.W.3d at 734.

55 *Id.*

56 *Id.* at 736.

57 *Id.*

58 *Id.*

59 *Id.*

60 *Id.*

61 *Id.* Parentheticals added for clarity and context.

birth mother challenged the adoption because ICWA was intentionally ignored.[62]

After trial and appeals, the original adoption and waiver of parental rights initially approved by the birth mother was upheld, but the adoptive parents sued their original attorney to recover the expenses related to defending the attacked adoption on ICWA grounds.[63] The Alaska Supreme Court, noting that the law firm specifically admitted knowing it was intentionally violating ICWA, found ". . .the firm guilty of negligence, or professional malpractice, as a matter of law."[64] Considering the intentional malpractice acts found in this case, it appears overly generous that *Doe v. Hughes* was cited in a law review article entitled "Advice Attorneys May Not Think to Give."[65]

The California Court of Appeals, in *In Re: Briget R.,* 41 Cal. App. 4th 1483 (Cal. App. 1996), found that ICWA could not be used by a Native American biological father to invalidate an adoption when he, the biological father, intentionally suppressed his bloodlines from the court and adoptive parents. The biological father argued equal protection of the *child's* rights overcame the father's "unclean hands".[66] The gist of *Briget R.* is that the California Court of Appeals found that adopted children have a fundamental liberty interest in not being removed from a stable adoptive home. ICWA is a violation, as applied to overturn a completed adoption, to the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution because ICWA established an improper racially based class of children that are treated differently from other American children facing adoptions.[67] Other courts reach a different decision, holding that ICWA is a "limited" exception to what Equal Protection Clause mandates.[68]

When facing a potential ICWA adoption, the attorney would be wise to follow the advice declared by the Alaska Supreme Court in *Bruce L. v. W.E.*, 247 P.3d 966 (Alaska 2011). The Alaska Supreme Court opined:

> ICWA applies to any proceeding that might result in the termination of a parent-child relationship involving an Indian

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62 *Id.* The stated reason the attorney ignored ICWA was to reduce costs. *See also*, Doe v. Hughes, 838 P.2d at 807 and 807 fn. 6.

63 *Id* at 805-806.

64 *Id* at 807. *Accord*, L.D.G. Inc. v. Robinson, 290 P.3d 215, 220-221 (Alaska 2013).

65 Holleran & Mueller, *Advice Attorneys May Not Think to Give*, 36 N. KY. L. REV. 349, 374 and 374 fn. 223 (2009).

66 *See* In Re H.K., 217 Cal. App. 4th 1422, 1434-1435 (Cal. App. 2013) for a concise discussion/ summation of Briget R.

67 Briget R., 41 Cal. App. 4th at 1507-1508. *But see,* 42 U.S.C. § 2000e(b) and 25 U.S.C. § 461 *et seq.*

68 *See e.g.*, Rice v. Cayetano, 528 U.S. 495, 514 (2000). *Cf.*, Morton v. Mancari, 417 U.S. 535, 544-549 (1974).

> child. "ICWA applies to termination proceedings [even] when a party other than the state seeks the termination" of parental rights, and adoption without consent terminates parents rights.[69]

When in doubt, presume ICWA applies to all adoptions or termination of parental rights cases involving Native American children.[70] Your malpractice carrier will appreciate your efforts to meet ICWA standards.[71]

V. To Whom Does ICWA Apply?

To quote Judge Maurice Portley, the presiding judge of Arizona's Maricopa County Juvenile Court: "[t]here are two prerequisites to determining whether the [Indian] Child Welfare Act applies. First, the Act only applies to a "child custody proceeding."[72] If applicable, the second important question is whether the child is an Indian child.[73] According to 25 U.S.C. § 1903(4), an "Indian Child" is defined as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe."[74] 25 U.S.C. § 1903(3) defines "Indian" to include any federally recognized Native American tribe member, which includes many Alaskan Eskimo tribe members.[75] Native American tribes determine their own membership criteria and

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69 Bruce L., 247 P.3d at 974. Quotation marks and parenthetical in original text. Footnotes omitted. There are exceptions, such as U.S. Public Law 83-280, commonly called Public Law 280 or P.L. 280, which grants Alaska state courts civil jurisdiction in ICWA cases by federal statue. *See*, Meehan, *Native Children in Alaska: The State of Tribal Self-Determination in Child Custody Proceedings*, 32 Am. Indian L. Rev. 167, 171 (2007/2008). *See also*, Gardner and Melton, *Public Law 280: Issues and Concerns for Victims of Crime in Indian Country*, www.tribal-institute.org/articles/gardner1.htm. *Contra*, Juvenile Action No. A-25525, 667 P.2d 228, 232 (Ariz. App. 1983), where the court found ICWA does not apply until paternity is sought by a putative father. An "Indian Child" for ICWA purpose, can include children who are Native Americans, but not members of a federally recognized tribe. *See*, In Re A.W., 741 N.W.2d 793, 806 (Iowa 2007); State ex. rel. SOSCF v. Klamath Tribe, 11 P.3d 701, 707 (Ore. App. 2000).

70 *See generally*, Myers & Siebers, *The Indian Child Welfare Act: Myths and Mistaken Application*, 83 MI. B.J. 19 (July 2004) for an overview of how ICWA applies to unobvious case scenarios.

71 Although negligence and malpractice applies to ICWA cases, monetary damages related to civil rights violations do not apply to an improper taking of a child from a parent's home under ICWA. Injunctive relief may apply to "improper taking" ICWA situations. *See*, Fletcher v. State, 858 F. Supp. 169, 173 (M.D. Fla. 1994).

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73 Portley, *supra* note 22 at 25. Parenthetical added. Footnotes omitted.

74 *See, e.g.*, Matter of Baby Boy J., 944 N.Y.S.2d 871, 872 (Surrogate Ct. 2012).

75 *Id*. at 872-873.

that determination is normally conclusive on a state court for ICWA purposes.[76]

Although both state courts and tribal courts could handle an adoption involving a Native American child, when the terms of ICWA are fully met by a Native American or tribe prior to the adoption being completed, the tribal court has exclusive jurisdiction over the adoption, and the state court and the state case shall be presumptively transferred to the tribal court for adjudication unless the tribe elects to allow the case to continue in the state court.[77] Some tribes, pursuant to 25 U.S.C. § 1919 (a), enter into standing agreements with state courts for the state to handle ICWA custody cases.[78] Basically, federal law relating to Native Americans, such as ICWA, pre-empts contrary state laws.[79] American Jurisprudence Second explains this concept in the following manner:

> An Indian tribe has exclusive jurisdiction as to any state over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of the tribe, except where such jurisdiction is otherwise vested in the state by existing federal law. Where an Indian child is a ward of a tribal court, the Indian tribe retains exclusive jurisdiction, notwithstanding the residence or domicile of the child. In any state court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, is required to transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian of the Indian child's tribe, except that such transfer is subject to declination by the tribal court of such tribe. In any state court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian

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[76] In Re L.S., 812 N.W.2d 505, 509 (S.D. 2012), citing In Re Adoption of C.D., 751 N.W.2d 236, 241-242 (N.D. 2008). *See also*, McKoy, *supra* note 50 at 149.

[77] Portley, *supra* note 40 at 26, citing 25 U.S.C. § 1911(a) and (b).

[78] *See, e.g.*, Adoption of Arnold, 741 N.E.2d 456, 461 fn. 3 (Mass. App. 2001), citing 25 U.S.C. § 1919(a).

[79] Oneida County, N.Y. v. Oneida Indian Nation of New York State, 470 U.S. 226, 236-237 (1985) rev'd on other grounds; and U.S. v. N.M., 590 F.2d 323, 328 (10th Cir. 1978) overruled on other grounds. This statement is not to be construed that Congress cannot grant a state jurisdiction over some federal topics affecting tribal nations. *See, e.g.*, Jicarilla Apache Tribe v. U.S., 601 F.2d 1116, 1136 (10th Cir. 1979) and In Re Guardianship of D.L.L., 291 N.W.2d 278, 280-281 (S.D. 1980).

> child's tribe shall have a right to intervene at any point in the proceeding.[80]

A tribe's request to intervene in an ICWA case may be asserted late in ongoing court proceedings.[81] If any party knows a child facing foster care, adoption or an involuntary termination of parental rights has Native American heritage, the child's tribe and court *shall* be notified of the ongoing proceeding.[82] "Shall means shall."[83] Even a non-Indian child adopted by Native Americans can become an "Indian Child" for ICWA purposes.[84] The general rule is that tribal membership almost always requires some measure of genetic descent or residency in a tribal nation to qualify for "tribal enrollment,"[85] but each tribe decides for itself the requirements for tribal membership and that conclusion is usually binding on state courts for ICWA purposes.[86] Oftentimes, the tribal law or tribal constitution sets out the necessary requirements of blood or family relationship for a person to qualify for enrollment in a tribal nation.[87] It is important to remember that a person can be an enrolled member of a Native American tribal nation without losing his or her American citizenship.[88] ICWA is designed to protect a tribal nexus, but trial courts do not read this mandate as license to strip a non-Indian parent of access to his or her own child.[89] Each parent should be on equal footing in ICWA cases.[90] An example ICWA adoption intake sheet is attached to the end of this article as "Appendix A".

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80 Farrell, *et al.*, 2 Am Jur. 2d *Adoption* § 112 (West, 2014).

81 Thompson v. Fairfax County Dep't of Fam. Svcs., 747 S.E.2d 838, 853 (Va. App. 2013).

82 *Id.*, citing 25 U.S.C. § 1912(a). If the parent or tribe cannot be identified, the attorney should send the statutory notice to the B.I.A. Actually, it is a good idea for the attorney to send an extra copy of any ICWA notice mailed to either parents or the tribe to the B.I.A. in case the notice to the parent or tribe is lost. *Accord*, 25 CFR § 23.11 (4-1-14 Ed.). This means litigants must stop forum shopping and court jockeying and *all* interested parties receive notice of ICWA proceedings. Zuni v. Chinle Family Court, 2007 Navajo Sup. Lexis 16 (Navajo 01/12/2007).

83 Austin v. Shelby Cty., 640 S.W. 2d 852, 854 (Tenn. App. W.S. 1982).

84 *See, e.g.*, In Re Dependency and Neglect of A.L., 442 N.W.2d 233, 235 (S.D. 1989).

85 Fletcher, *Heeding Frickey's Call: Doing Justice in Indian Country*, 37 Am. Indian L. Rev. 347, 412-413 (2012/2013) (hereinafter "Fletcher" with page citation. . .).

86 In Re Adoption of C.D.K., 629 F. Supp.2d 1258, 1262 (D. Utah 2009).

87 Fletcher, *supra* note 84 at 412, fn. 207 (showing various examples of tribal descent requirements. . .). *See also*, Gorman & Paquin, *A Minnesota Lawyer's Guide to the Indian Child Welfare Act*, 10 Law & Ineq. J. 311, 373 fn. 92 (1992), for a jurisdictional survey of Midwestern tribal enrollment criteria.

88 *See, e.g.*, U.S. v. City of Salamanca, 27 F. Supp. 541, 546 (W.D.N.Y. 1939); French v. French, 52 S.W. 517, 518 (Tenn. Ch. App. 1898).

89 *See, e.g.*, Green v. The People of the Winnebago Tribe, 1994 Northern Plains App. Lexis 7, 4 (N.P. Intertribal App.1994).

90 *Id.*

VI. Notice Procedures of ICWA

ICWA does not apply to custody proceedings solely between parents (e.g., divorce cases) or to juvenile delinquency cases.[91] "ICWA applies to proceedings for guardianship, foster-care placement, status offenses, termination of parental rights, pre-adoptive placement, and adoption."[92] Parties to adoption cannot manipulate or sidestep the notice requirements of ICWA by the parents of a Native American child temporarily leaving the reservation to give birth to a child and then immediately placing that child up for adoption.[93] This point is true even if both natural parents of a Native American child join in a conspiracy to avoid providing mandatory ICWA notices in an involuntary ICWA adoption, foster care, or termination of parental rights case.[94]

The notice requirements of ICWA and tribal rulings related to ICWA qualify for "Full Faith and Credit" under the United States Constitution.[95] When an attorney or state court become aware that ICWA may apply, the following 25 U.S.C. § 1912 notice requirements are necessary:

> (A) Notify both the child's parents or custodial guardian *and* the tribe of the pending court proceedings by registered mail, return receipt requested, putting those parties on notice that they can intervene in the proceeding.
>
> (B) If the parents or tribe is unknown, the registered mail notification is sent to the Secretary of the Interior, c/o the Bureau of Indian Affairs, who in turn sends notice to the parent or custodial guardians and the tribe within fifteen days from receiving the attorney's or court's notice.
>
> (C) No foster care placement or termination of parental rights hearing can go forward until at least ten days after the parent or custodian and the tribe have received notice of the ICWA hearing. If either the parent/custodian or the tribe request a hearing continuance, the extension will be

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[91] Harlambie, *The Indian Child Welfare Act*, 31 Fam. Adv. 11, 12 (2009). *See also supra* note 43

[92] *Id.*

[93] Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 51-52 (1989). Native American children born off a reservation, who have parents that reside on an Indian reservation are considered to be domiciled on that reservation. *Accord*, In Re M.S., 237 P.3d 161, 164 (Okla. 2010).

[94] In Re T.S.W., 276 P.3d 133, 143 (Kan. 2012). Since ICWA notices to tribes are not required in most consent ICWA placements, the "conspiracy" scenario discussed above would logically only come up in involuntary cases. *Accord*, Navajo Nat. v. Super. Ct., 47 F. Supp. 2d 1233, 1238 (Wash. 1999).

[95] 25 U.S.C. § 1911(d). *Accord*, Wexler, *supra* note 43, at 635.

> granted for up to twenty days pursuant to 25 U.S.C. § 1912(a).[96]

Simply because a tribe may have mere awareness of a pending ICWA adoption, said fact does not meet notice requirements under ICWA.[97] Some sample ICWA notice forms are attached as "Appendix B" and "Appendix C" to this article.

VII. Waiting Period for ICWA Consent

Before an ICWA "consent adoption" can be valid, a waiver of parental rights by the consenting parent must be in writing, made before a judge that has jurisdiction to accept the termination of parental rights, and the judge must certify that the waiver was made knowingly and voluntarily with the waiving parent fully understanding the consequences of the waiver.[98] The time frame aspect of ICWA adoption consents is concisely explained by B.J. Jones, the author of *The Indian Child Welfare Act Handbook* (ABA Family Law Section, 1995), stating:

> A consent to the termination of parental rights cannot be executed until after the child is ten days old. If the consent is not obtained pursuant to the provisions of the ICWA, the termination will not be legal. The party obtaining custody will be barred from invoking a state court's jurisdiction to further place the child and the child will be ordered returned to the parent, unless returning the child would subject him or her to immediate danger.[99]

The language in 25 U.S.C. § 1913(a) is a bit more direct stating that, "[a]ny consent given prior to, or within ten days after birth of the Indian child shall not be valid."[100] It is important to remember that the standard of review in protecting Native Americans from coerced termination of parental rights is extremely high, so the failure to comply with ICWA teems with potential problems such

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[96] Farrell *et al.*, 2 Am. Jur. 2d *Adoption* § 112 (West, 2014); *See* In Re C.G., 317 P.3d 936, 944 fn. 11 (Ore. App. 2014) for a jurisdictional survey of ICWA notice requirements; *See* In Re Kahlen, 233 Cal. App.3d 1414, 1421-23 (Cal. App. 1991) for a checklist of ICWA notice requirements.

[97] In Re Kahlen at 1422.

[98] 25 U.S.C. § 1913(a). *See also*, Portley, *supra* note 40 at 27. Usually this requires the judge to explain the waiver to the surrendering parent in English or in the parent's tribal language according to § 1913(a) and In Re Baby Boy Doe, 902 P.2d 477, 481-82 (Idaho 1995).

[99] Jones, *supra* note 17.

[100] 25 U.S.C. § 1913(a).

as malpractice issues.[101] By way of example, the California Court of Appeals, in *In Re Damien C.*, 178 Cal. App. 4th 192 (Cal. App. 2009), overturned an ICWA dependency and neglect finding after the ruling became final because of an improper ICWA notice procedure.[102] Simply put, following the ICWA "recipe" or expecting the resulting product will be invalid. An example ICWA consent to adopt form is attached as "Appendix D" to this article.

VIII. Time to Revoke ICWA Consent

The provisions of 25 U.S.C. § 1913(c) allow a Native American parent to withdraw voluntary consent for an ICWA adoption ". . .for any reason at any time prior to the entry of a final decree of termination or adoption. . .and the child shall be returned to the parent."[103] Generally, the surrendering parents' right to revoke a voluntary consent to adopt under ICWA expires when the termination of parental rights order becomes final.[104] Courts view voluntary consent as an "assumption of the risk" scenario for adoption agencies and prospective adoptive parents in ICWA adoptions.[105] This rule is explained as follows:

> An Indian parent or custodian can revoke his or her consent at any time during the foster care placement and before the decree or adoption has been entered. After doing so, he or she will be entitled to the automatic return of custody of the child. In the case of an adoption, however, if the court has already entered an order accepting the voluntary termination of parental rights, the parent cannot revoke his or her consent. In cases where an Indian child has been in the home of an Indian custodian, not only must there be a termination of the parental rights, but also a termination of the custodial rights before the adoption will be legal.[106]

This rule boils down to allowing the biological parents to revoke consent to adopt at any point prior to the judge signing the termination of parental rights

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101 *See, e.g.*, In Re Pima Cnty. Juv. Ct. Action No. S-903, 635 P.2d 187, 192 (Ariz. App. 1981).

102 In Re Damien C., 178 Cal. App. 4th at 199-200. *Accord*, In The Matter of Baby Doe, *supra* note, 75 at 481-82.

103 25 U.S.C. § 1913(b-c) (allowing Native American parents to revoke a voluntary foster care placement); *see also* In Re Guardianship of DLL, 291 N.W.2d 278, 282 (S.D. 1980).

104 In Re Kiogma, 472 N.W.2d 13, 16 (Mich. App. 1991).

105 In Re Pima Cnty Juv. Action No. S-903, 635 P.2d 187, 192 (Ariz. App. 1981).

106 Jones, *supra* note 17.

order in ICWA adoptions.[107] An example ICWA revocation of consent to adopt form is attached as "Appendix E" to this article.

The provisions of 25 U.S.C. § 1913(d) allow final orders of adoption that were based on fraud or duress to be collaterally attacked saying ". . .the parent may withdraw consent thereto upon grounds that consent was obtained through fraud or duress and may petition the court to vacate such decree."[108] The exception to this rule is when reunification efforts "clearly would be futile."[109] The provisions of 25 U.S.C. § 1914 set out the procedure for petitioning to vacate an adoption order.

IX. Placement Preferences/Birth Mother Choice

The provisions of 25 U.S.C. § 1915(a) set a statutory preference for *adoptive* placements on the following descending options: (a) Relative placement; (b) Intra-tribal placement; and (c) Placement with Native Americans from beyond the consenting parent's tribe.[110] Foster care and pre-adoptive placements follow a similar pattern, with an emphasis on the proceeding going through licensed adoption or placement agencies that are sensitive to ICWA requirements.[111] The statutory preferences set out in 25 U.S.C. § 1915 can be modified by an ordinance or statute that is passed by the tribal council.[112] Likewise, the placement preferences in 25 U.S.C. § 1915 can be potentially avoided if the consenting parent *who has followed ICWA mandates*, makes a direct, privately arranged, voluntary placement to a specific individual or foster care placement.[113] The caveat, as noted previously, is that a parent may withdraw voluntary ICWA adoption consent at any point in time prior to a judicial order terminating parental rights.[114] While the consent to adopt can be withdrawn prior the order terminating parental rights, it is doubtful that a withdrawal of consent will be honored in ICWA adoptions after termination but prior to the adoption being final.[115]

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[107] *But see*, Adoptive Couple v. Baby Girl, 133 S. Ct. 2552, 2560-64 (2013) (holding the adoption of a non-active putative parent abandonment exception to ICWA by the U.S. Supreme Court).

[108] 25 U.S.C. .§ 1913(d). *But see* Adoptive Couple v. Baby Girl, 133 S. Ct. at 2560-64.

[109] *See, e.g.*, In Re E.G.M., 750 S.E.2d 857, 866 (N.C. App. 2013).

[110] 25 U.S.C. § 1915(a) (2001). "Relative" includes step-parents as part of an extended family. In Re: J. Coeur d'Alene Tribe, 1992 Colville App Lexis 7, 5 (Colville Conf. Tribe App. 1992)(citing 25 U.S.C. § 1903(2) (1978)).

[111] 25 U.S.C. § 1915(b) (2001). *See also*, In Re Juvenile Action No. J-10175, 736 P.2d 829, 832-34 (Ariz. Ct. App. 1987); Portley, *supra* note 40 at 27.

[112] 25 U.S.C. § 1915(c) (1978). *See e.g.*, Hawk v. Reum, 1988 Mont. Fort Peck Tribe Lexis 6, 27 (Ft. Peck App. 1988).

[113] Portley, *supra* n.40 at 26 (citing 25 U.S.C. § 1913(a) (1978)).

[114] 25 U.S.C. § 1913(b) (1978); 25 U.S.C. § 1913(c) (1978).

[115] *See* B.R.T. v. Exec. Dir. of Soc. Serv. Bd., 391 N.W.2d 594, 599 (N.D. 1986); Matter of J.R.S., 690 P.2d 10, 13-14 (Alaska 1984).

X. Tribal Rights in ICWA Adoptions

Native American tribes have a slightly different set of rights from those of Native American parents but, courts hold that it is in an Indian child's best interest to have their tribal heritage and nexus to their tribe protected.[116] If both ICWA and state adoption laws offer a Native American parent the right to consent to an adoption, whichever statute offers the parent and the tribe the greater protection, controls the proceedings under 25 U.S.C. § 1921.[117] When a tribe elects to litigate an ICWA adoption in state court, the tribe cannot later attempt to transfer or appeal the case to federal court because of dissatisfaction with the state court's decision.[118]

Native American tribes are not entitled to notice of an ongoing, private, and voluntary adoption proceeding.[119] ICWA neither applies to grandparent visitation[120] nor adoption matters involving a child with purported Native American bloodlines where neither child nor parents have any legitimate Indian family relationship for ICWA to protect.[121] The intent of ICWA is

> to protect the best interest of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique valves of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.[122]

Therefore, by definition, ICWA does not apply to divorce or custody proceedings between parents of a Native American child.[123]

According to 25 U.S.C. § 1911(c), if an Indian tribe learns about a state court proceeding for a Native American child's adoption or foster care place-

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116 In Re Adoption of K.L.R.F., 515 A.3d 33, 34 (Pa. Super. Ct. 1986).

117 In Re Baby Doe, 902 P.2d 477, 481 (Idaho 1995).

118 Comanche Indian Tribe v. Hovis, 53 F.3d 298, 304-05 (10th Cir. 1995). Some tribes have a standing agreement with a state court for the state to handle all ICWA cases pursuant to 25 U.S.C. § 1919(a) (1978). *See e.g.*, Adoption of Arnold, 741 N.E.2d 456, 461 n.3 (Mass. App. Ct. 2001).

119 Navajo Nation v. Superior Court, 47 F. Supp. 2d 1233, 1238 (E.D. Wash. 1999). *But see* Cherokee Nation v. Nomura, 160 P.3d 967, 976 (Okla. 2007) (implying that tribal notice is necessary even in voluntary ICWA adoption cases).

120 Application of Bertelson, 617 P.2d 121, 125 (Mont. 1980).

121 Matter of Adoption of Baby Boy L., 643 P.2d 168, 183 (Kan. 1982); S.A. v. E.J.P., 571 So. 2d 1187, 1189 (Ala. Civ. App. 1990); Hampton v. J.A.L., 658 So. 2d 331, 335 (La. Ct. App. 1995).

122 25 U.S.C. § 1902 (1978).

123 Malaterre v. Malaterre, 293 N.W.2d 139, 144-45 (N.D. 1980).

ment, the tribe has a statutory right to intervene in *any* state court case falling under ICWA[124]—including pending private adoptions.[125] The tribe can also seek to have state court foster care placements and termination of parental rights cases of Native American children residing off the reservation transferred to the tribal court, and the statutory presumption is that the request for a transfer of jurisdiction will be granted.[126] The right to seek transfer under 25 U.S.C. § 1911(c) belongs to the *tribe*, not tribal members, so a tribal member must ask the tribe to intervene and seek a transfer of a pending state juvenile matter to a tribal court.[127]

That being said, a non-lawyer tribal member who is familiar with ICWA regulations can speak as the tribe's representative in court proceedings and act as counsel for the tribe if the tribe prefers.[128] If any aspect of ICWA is ignored by a state court or state authorities, such as the 25 U.S.C. § 1912(d) promise of remedial and rehabilitative services for Native American families to help avoid foster care placements or termination of parental rights, the tribe can petition the state court to set aside the foster care or termination of parental rights order.[129] As a preemptive matter, a state and a tribe can make a standing agreement on how ICWA jurisdiction situations are to be handled prior to litigation originating.[130] The tribe's intervention rights under ICWA have been summed up as follows:

> Once the Act [IWCA] applies, the tribe can assert its exclusive jurisdiction and have the child custody proceeding transferred to tribal court, absent timely objection by either parent. Alternatively, if the tribe allows the state of maintain jurisdiction, it can intervene and fully participate in the state proceedings or challenge a completed proceeding.[131]

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[124] A form motion/notice for a tribe to intervene in a pending ICWA adoption is attached as "Appendix F" at the end of this article.

[125] *See e.g.,* In Re S.Z., 325 N.W.2d 53, 56 (S.D. 1982); In Re M.F., 206 P.3d 57, 63 (Kan. 2009); In Re: Desiree F., 83 Cal. App. 4th 460, 472 (Cal. Ct. App. 2000).

[126] 25 U.S.C. § 1911(b) (1978).

[127] Matter of M.E.M., 635 P.2d 1313, 1314-15 (Mont. 1981). For the purposes of domicile to determine if a tribe has standing, a legitimate Indian child is domiciled in the tribe the parents belong to, but an illegitimate child's tribe is that of the child's mother. Holyfield, *supra* n.40 at 43-48; William C. Canby, *American Indian Law in a Nutshell,* 217 (West, 5th ed. 2009).

[128] In Re Elias L., 767 N.W.2d 98, 103-04 (Neb. 2009). A form titled *Notice of Appearance by a Non-Lawyer Tribal Member to Speak as Agent of a Tribe* is attached at the end of this article as "Appendix G".

[129] 25 U.S.C. § 1914 (1978). *But see* In Re E.G.M., *supra* n.108 at 866.

[130] 25 U.S.C. § 1919(a) (1978).

[131] Portley, *supra* n.40 at 26.

A federal regulation, 25 C.F.R. § 23.13, potentially funds appointed counsel for indigent Native Americans facing an involuntary child custody proceeding, but since this clause is well-hidden in federal regulations, it generally falls on the tribe or potential attorney for a Native American to invoke this benefit for the indigent. That being said, 25 U.S.C. § 1921 does not justify expanding tribal rights at the expense of the rights of the parents or child.[132] The biggest difference between a standard adoption and an ICWA adoption is the ICWA adoption's final decree must include a reference to the Native American child's tribal affiliation so the child can re-establish their Native American heritage when the child becomes an adult, if the child so chooses.[133] A form request for tribal information by an adopted adult Native American is attached as "Appendix H" to this article.

XI. Conclusion

The Indian Child Welfare Act ("ICWA") is based on the theory that it is in the best interest of Native American children for those children and their native heritage to be protected.[134] ICWA is designed to reverse the arrogant assumption that Native American tribes cannot adequately address their own child adoption situations.[135] ICWA offers national uniformity in adoption cases relating to Native American children, so differing states can look to other states and tribal appeals courts' ICWA appellate rulings for guidance in ICWA situations similar to the application of other uniform state laws such as the Uniform Child Custody Jurisdiction Act ("UCCJA") and Uniform Child Custody Jurisdiction Enforcement Act ("UCCJEA")[136] or uniform federal legislation such as the Parental Kidnapping Prevention Act ("PKPA"), 28 U.S.C. § 1738A.[137] As stated by the Oklahoma Supreme Court, "We recognized the [ICWA] showed Congressional intent to achieve uniformity among the states where the interest of Indian children, parents and tribes are concerned."[138]

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[132] In Re N.N.E., 752 N.W.2d 1, 9-13 (Iowa 2008).

[133] 25 U.S.C § 1917 (1978); In Re C.Y., 208 Cal. App. 4th 34, 41 (Cal. Ct. App. 2012); In Re Baby Girl A., 230 Cal. App. 3d 1611, 1621 (Cal. Ct. App. 1991).

[134] Holyfield, supra n.40 at 24, 50; *Accord*, Poni-Cappo v. Poni-Cappo, 1997 N. Plains App. Lexis 15 (N.P. Intertribal App. 1997).

[135] Yavapai-Apache Tribe v. Mejia, 906 S.W.2d 152, 170 (Tex. Ct. App. 1995).

[136] Holyfield, *supra* n.40. at 45-47; In Re Quinn, 881 P.2d 795, 806-07 (Or. 1994) (Fadeley, dissenting).

[137] *See* Brown v. Brown, 847 S.W.2d 496, 499-500 (Tenn. 1993) (discussing the national scope, interaction and intent of the UCCJA and PKPA).

[138] Cherokee Nation v. Nomura, 160 P.3d 967, 975 (Okla. 2007).

Since the implementation of the Hague Convention on International Adoptions, inter-country adoptions have drastically decreased.[139] Although ICWA's 1978 passage curtailed non-Indian adoption placements throughout the United States,[140] since international adoptions are at the lowest point in a decade,[141] one can anticipate that attempts to adopt Native American children by non-tribal related people will increase. A review of the rules and procedures of the ICWA is prudent. The intent of ICWA is to protect "the stability and security of Indian tribes and families by establishing minimum federal standards for removing Indian children from their families."[142] The trend that led to the creation of ICWA was described in Senate hearings as, "[t]he wholesale removal of Indian children from their homes . . . the most tragic aspect of Indian life today."[143] During those same Senate hearings, a Native American Chief bluntly testified:

> Culturally, the chances of Indian survival are significantly reduced if our children, the only real means for the transmission of the tribal heritage, are to be raised in non-Indian homes and denied exposure to the ways of their People.[144]

Simply put, "[t]he Indian Child Welfare Act (ICWA) is federal legislation addressing the adoption and custody of Indian children. It sets out criteria for tribal intervention and for the transfer of state adoption and custody actions to tribal courts."[145] Since non-Indian judges and social workers often do not fully understand or appreciate ICWA, "the need for lawyers to understand the ICWA is fast becoming imperative."[146]*Americans*, both those of Native American and European immigrant dissent, should view the protection of Native American heritage under ICWA as vitally important because "[c]hildren, like land, are

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[139] Rebecca Worthington, *The Road to Parentless Children is Paved with Good Intentions: How the Hague Convention and Recent Intercountry Adoption Rules are Affecting Potential Parents and the Best Interest of Children*, 19 Duke J. Comp. & Int'l Law, 559, 586 n.29 (2009); Joseph M. Isanga, *Surging Intercountry Adoption in Africa: Paltry Domestication of International Standards*, 27 B.Y.U. J. Pub. L. 229, 298 n.14-15 (2012).

[140] *See* Barbara A. Atwood, *Achieving Permanency for American Indian and Alaska Native Children: Lessons from Tribal Traditions*, 37 Cap. U. L. Rev. 239, 292 n.146 (2008).

[141] Rachel L. Swarns, *American Adoptions From Abroad At Their Lowest Level In Years*, The New York Times (Jan. 24, 2013), www.nytimes.com/2013/01/25/world/us-adoptions-from-abroad-decline-sharply.html?_r=O.

[142] People ex rel. A.R., 310 P.3d 1007, 1012 (Colo. App. 2012) (citing 25 U.S.C. § 1902. (1978)).

[143] *Id.*

[144] Wexler, *supra* n.43 at 637 (quoting Chief Isaac).

[145] Kroner v. Oneida Seven Generations Corp., 819 N.W.2d 264, 271 n.7 (Wis. 2012) (Patience Drake Roggensack, J. concurring) (citing In Re: B.G.J., 111 P.3d 651, 656 (Kan. 2005); 25 U.S.C. § 1903 (1978)).

[146] Jones, *supra* n.17.

incommensurable resources for Indian tribes."[147] "Congress made it very clear the ICWA is intended to protect the rights of Indian tribes as well as those of Indian children and families."[148] Prudent counsel will go and do likewise. Hopefully, this primer on the nuances, terms, and dictates of ICWA adoptions will help.

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[147] Barbara A. Atwood, *Identity and Assimilation*, 4 Minn. L. Rev. 927, 940 (1999).
[148] In Re Baby Girl A, 230 Cal. App. 3d 1611, 1618 (Cal. Ct. App. 1991).

Appendix A- ICWA Adoption Intake Form

1) Client's Name: ______________________
Address: ______________________
____
Phone Number: ______________________

2) Client is:
A) Adoptive Parent ________
B) Biological Mother ________
C) Biological Father ________

3) Adoption is:
A) Voluntary ________
B) Step-Parent ________
C) Involuntary ________

4) Adoption is:
A) Private ________
B) State ________
C) Agency Placement ________

5) Do either biological parents have any Native American heritage to include American Indian, Eskimo, or Southwest Spanish ancestors? Y ____ N ____ If yes, state the name and location of tribal connection:
____
____

6) Is this an international adoption or state side re-adoption? Y ____ N ____ If yes, which country?
____

7) Names and addresses of biological parents:
____
____

8) Names and addresses of adoptive parents:
____
____

9) Agencies that are involved (*e.g.*, placement agency or group doing home study):
____
____

10) What money is being paid to facilitate this adoption?
____
____

11) Name/DOB/SSN of child or children being adopted:
____
____

12) Other relevant information:
____
____

Appendix B- Tribal Notice of ICWA Adoption

IN THE ____________________ COURT
FOR ____________________ COUNTY, _______ *(state)* _______
AT _______ *(city)* _______

IN RE: __________________________) **Case No.:** ________________________
A Minor) **Judge** ____________________________
(DOB: _______**)**)

TRIBAL NOTICE OF ICWA ADOPTION

Comes now ____*(name)*____, attorney for the ____*(party)*____, pursuant to 25 USC § 1912 of the Indian Child Welfare Act (ICWA), and puts ____*(name)*____, as ICWA notification agent for the ____*(tribe name)*____ Nation, on notice of this proceeding at the following address:

__________*(tribe name)*__________ Nation
Attn: ____________________ ICWA Notification Agent
__________*(address)*__________
____

Please take notice that the above-cited minor may have Native American heritage connections with your tribe through the child's natural ____*(mother/father)*____. You have the right, under ICWA, to participate and/or intervene in the above-cited proceeding.

Counsel for ____(party)____, also pursuant to 25 USC § 1912, is putting both natural parents, at the addresses listed below, on notice that they can participate and/or intervene in this case:

__________*(name)*__________, Mother
__________*(address)*__________
____

__________*(name)*__________, Father
__________*(address)*__________
____

All notices herein are being sent by registered mail, return receipt requested on this ____ day of _____________, 20____.

This is the ____ day of _____________, 20____.

Respectfully Submitted,

____
Name
Attorney for ______________________________
Address
Phone Number

CERTIFICATE OF SERVICE

I, ____*(attorney)*____, hereby certify that I mailed a true copy of this pleading, postage pre-paid in the U.S. Mail, by registered mail, return receipt requested, to all parties listed above. Further, a true copy of this notice was mailed, postage prepaid in the U.S. Mail, to the Bureau of Indian Affairs, MS-3642-MIB, 1849 C Street, NW, Washington, DC 20240, this ____ day of ____________, 20____.

____
(Attorney)

Appendix C- BIA Notice of ICWA Adoption

IN THE ________________ COURT
FOR ________________ COUNTY, ____*(state)*________
AT ______*(city)*______

IN RE: ______________________) **Case No.:** ____________________
A Minor) **Judge** ____________________
(DOB: ______))

BIA NOTICE OF ICWA ADOPTION

Comes now ____*(name)*____, attorney for the ____*(party)*____, pursuant to 25 USC § 1912 of the Indian Child Welfare Act (ICWA), and puts the Bureau of Indian Affairs (BIA) on notice that the above-cited proceeding involves a child that may have Native American ancestors that fall under the umbrella of ICWA but neither this attorney, nor the adoptive parents (*or biological mother if applicable*) know the tribal affiliation relevant to this case, so the BIA is being noticed in this matter.

This is the ____ day of ____________, 20____.

Respectfully Submitted,

____
Name
Attorney for ____________________
BPR #__________________________
Address
Phone Number

SWORN CLIENT ACKNOWLEDGEMENT

I, ____*(client's name)*____, do hereby make oath that I do not know the tribal affiliation of either the above-cited child, nor either parent and after a good faith inquiry, I could not locate said answer, but I believe the above-cited child may have a Native American heritage. I make this acknowledgement under penalty of perjury.

State of ____________________________
County of ___________________________

SWORN TO AND SUBSCRIBED before me, the undersigned Notary Public, on this the ____ day of ____________, 2014.

____
Notary Public
My Commission Exp:________________

CERTIFICATE OF SERVICE

I, ____*(attorney)*____, hereby certify that I mailed a true copy of this pleading, postage pre-paid in the U.S. Mail, by registered mail, return receipt requested, to the Bureau of Indian Affairs, MS-3642-MIB, 1849 C Street, NW, Washington, DC 20240, this ____ day of ____________, 20____.

____
(Attorney)

APPENDIX D- ICWA CONSENT TO ADOPT

IN THE ____________________ COURT
FOR ____________________ COUNTY, _____*(state)*_____
AT _____*(city)*_____

IN RE: ________________________) **Case No.:** ____________________
A Minor) **Judge** ____________________
(DOB:________))

CONSENT TO ADOPT CHILD WITH ICWA APPPLICATIONS

Comes now ___*(name)*___, the Petitioner/biological parent of ___*(child's name)*___, pursuant to 25 USC § 1913, and makes the following acknowledgment:

*(initials)* 1) Petitioner is the biological parent of ___*(child's name)*___, who was born on the ____ day of ____________, 20____.

*(initials)* 2) This consent is being presented in open court pursuant to the terms set out in this consent.

*(initials)* 3) Petitioner has completed ____ years of school and can read or has had someone read this document, word-for-word, to Petitioner.

*(initials)* 4) Petitioner and Petitioner's attorney have reviewed this consent together, word-for-word, and my attorney has fully explained both this document and the ramifications of my consenting to adopt to me prior to court.

*(initials)* 5) The judge in this case, the Honorable ___*(name)*___ has jurisdiction to terminate my parental rights to my minor child, ____________, and Judge ____________ has fully explained to me personally in ___*(chambers or open court)*___, that if I consent to having my parental rights to ____________, my minor child terminated, I will no longer have any ties whatsoever to the care, control or affections of said child.

*(initials)* 6) Judge ____________ further explained to me that pursuant to the Indian Child Welfare Act (ICWA), 25 USC § 1913(c), I can withdraw my consent to terminating my parental rights to my child at any point in time prior to the judge signing an order terminating my parental rights.

*(initials)* 7) This wavier was either presented and explained to me in English (Y ___ N ____), which I understand (Y ____ N ____) or was presented in my native tongue of ____*(language)*____, which I understand.

*(initials)* 8) I hereby give up all of my parental rights to ____*(child)*____, who was born on the ____ day of ____________, 20____, which is over ten (10) days ago, so that said child may be placed for adoption. I take this action with full knowledge of the consequences and of the results of this consent to terminate parental rights so that my child may be adopted. This action is being done of my own free, knowing and voluntary accord with no third party pressuring me to make this decision.

This is the ____ day of ______________, 20____.

____
Petitioner

JUDGE'S CERTIFICATION

I, ____*(name)*____, Judge of the ____________ Court, hereby acknowledge that I fully and completely explained the consequences of this termination of parental rights to Petitioner, ____________, the biological parent of the above-cited child who may be an "Indian Child" for the purposes of the Indian Child Welfare Act. It is my personal and professional opinion that Petitioner, ____*(name)*____, makes this consent to terminate Petitioner's parental rights knowingly and voluntarily with Petitioner fully understanding the consequences of this waiver and knowing that this wavier can be revoked at any point prior to my signing an order of termination of parental rights. I have subject matter jurisdiction, as well as personal jurisdiction, to accept this waiver.

This is the ____ day of ____________, 20____.

____
Judge

Appendix E- ICWA Withdrawal of Consent to Adopt

IN THE ________________ COURT
FOR ________________ COUNTY, ____(state)____
AT ____(city)____

IN RE: ______________________) **Case No.:** ____________________
A Minor) **Judge** ____________________
(DOB: ________))

WITHDRAWAL OF CONSENT TO ADOPT CHILD WITH ICWA APPPLICATIONS

Comes now ___(name)___, the biological parent of the above-cited child, pursuant to pursuant to 25 USC § 1913(c), and hereby withdraws my consent to adopt, which was made before the Honorable ___(Judge's name)___, of the ___(name of court)___ Court of ___(name of county)___ County, ___(State)___ on the ____ day of ___________, 20____. To the best of my knowledge, no court has signed a termination of parental rights order ending the parent/child relationship I enjoy with the above-cited child.

This is the ____ day of ___________, 20____.

____
Parent

CERTIFICATE OF SERVICE

I, ___(Parent)___, hereby certify that I mailed a true copy of this pleading, postage pre-paid in the U.S. Mail, to ___(attorney for adopting parents)___, this ____ day of ___________, 20____.

____
(Parent)

APPENDIX F- TRIBES ICWA ADOPTION

IN THE __________________ COURT
FOR ____________________ COUNTY, ______ *(state)* ______
AT ______ *(city)* ______

IN RE: ________________________) **Case No.:** ____________________
A Minor) **Judge** ________________________
(DOB: ________))

TRIBE'S MOTION/NOTICE TO INTERVENE

Comes now the ___ *(tribe's name)* ___ Nation, pursuant to pursuant to 25 USC § 1911(c), and hereby respectfully moves and notices the Court that the tribe is hereby exercising its right under the Indian Child Welfare Act (ICWA) to intervene in and participate in the above-cited case.

This is the ____ day of _____________, 20___.

Respectfully Submitted,

____
Attorney Name
Counsel for Tribe
BPR #__________________________________
Address
Phone Number

CERTIFICATE OF SERVICE

I, ___ *(attorney name)* ___, hereby certify that I mailed a true copy of the this pleading, postage pre-paid in the U.S. Mail, to ___ *(all other attorneys in the case)* ___, this ____ day of ____________, 20____.

____
Attorney

APPENDIX G- NON-LAWYER TRIBAL REPRESENTATIVE NOTICE

IN THE ________________ COURT
FOR ________________ COUNTY, ______ *(state)* ______
AT ______ *(city)* ______

IN RE: ______________________) **Case No.:** ____________________
A Minor) **Judge** ____________________
(DOB: ________))

NOTICE OF APPEARANCE

Comes now ____*(name)*____, a non-lawyer who is familiar with the Indian Child Welfare Act (ICWA) and tribal law to announce he/she is the representative/agent for the __*(tribe's name)*__ Nation. Although ____*(name)*____ does not have a law license, cases such as In Re: Elias L., 767 N.W.2d 98, 103-104 (Neb. 2009) allow a Native American tribe to be represented in state ICWA cases by a non-lawyer tribal agent so long as said agent is familiar with ICWA and tribal law. I hereby certify that the Tribe has designated the undersigned as tribal agent/representative for this case and I am familiar with both ICWA and tribal laws and customs of the ____*(tribe's name)*____ Nation.

This is the ____ day of ____________, 20____.

Respectfully Submitted,

____
Tribal Representative/Agent
Address
Phone Number

CERTIFICATE OF SERVICE

I, ____*(name)*____, hereby certify that I mailed a true copy of the this pleading, postage pre-paid in the U.S. Mail, to ____*(all other attorneys in the case)*____, this ____ day of __________, 20____.

____
Tribal Representative/Agent

Appendix H- Adopted ICWA Child's Request to Reunite With Tribe

IN THE ________________ COURT
FOR ____________________ COUNTY, ______ *(state)* ______
AT ______ *(city)* ______

IN RE: ____________________________)
A Minor)
(DOB: ________))

Case No.: ____________________
Judge ________________________

REQUEST TO REUNITE WITH TRIBE

Comes now Petitioner, ____*(name)*____, an adult citizen of the United States that was adopted as a minor, pursuant to 25 USC § 1917, and respectfully petitions this Honorable Court to unseal Petitioner's adoption records so that Petitioner may re-establish the heritage bond Petitioner once enjoyed with Petitioner's Native American ancestry. Petitioner was adopted through this Honorable Court and would show unto the Court the following:

1) Petitioner is an "Indian Child" as defined by the Indian Child Welfare Act, 25 USC § 103 (4);

2) Petitioner was adopted through this Honorable Court on the ____ day of ___________, __*(year)*__, in case number ______________________;

3) Petitioner is now an adult and respectfully seeks to re-establish ties with Petitioner's Native American tribe and heritage by granting Petitioner access to closed adoption records information related to Petitioner as ***specifically*** allowed in 25 USC § 1917.

This is the ____ day of ____________, 20____.

Respectfully Submitted,

____
Petitioner
Address
Phone Number