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Indian Law on State Bar Exams: A Situational Report

IN 2002, NEW MEXICO became the first state to include questions about Indian law on the bar exam, thus advancing the formal recognition of the functional role that Indian law has within national and international law. Three states (New Mexico, Washington, and South Dakota) now include knowledge of the basics of how the indigenous sovereigns intersect with state and federal sovereigns when assessing attorneys' competence.

Some Reasons Why Indian Law Matters

Including Indian law on state bar exams formally recognizes and legitimates Indian law and thus challenges the disrespect to which tribal governments are often subjected in the United States. Indian law is often characterized as federal Indian law—essentially the law that an external authority has passed in order to control the lives of tribes and their members. However, Indian law also involves the laws that indigenous peoples have enacted for the purpose of self-government. Tribal laws affect the relationships between people who are not Indians and states as well as those of individuals who are not members and are customers, employees, contractors, and partners in tribal ventures. Everyday life in Indian country involves relationships and movement within multiple jurisdictions in a geographical area. For example, in the urban Phoenix area, the simple act of crossing a traffic light can determine if the person is within the jurisdiction of the state or the tribe.

Assessing attorneys' knowledge of Indian law when evaluating their competence affirms the historical fact that there are three sovereigns within U.S. borders (tribes, neo-state colonies that became states, and the federal government). The Euro-American practice of treaty-making affirmed the political status of tribal nations. The new federal government's exclusive relationships with tribes, enforced by statutes such as the Trade and Intercourse Acts,¹ manifested the importance of the political relationship that was essential for maintaining peaceful conditions and ceding land. Even though Congress and the U.S. Supreme Court have redefined indigenous sovereignty over the years, the political status of tribes has en-

dured. The legal status of tribes continues to relate to the subject matter and the parties over which tribes can exercise jurisdiction.²

Twenty-first century life involves compelling interests of mutual concern to all jurisdictions in Indian country, and these interests benefit from common efforts anchored in the government's acknowledgment of Indian law. States, their municipal units, and Indian tribes cannot sufficiently fund the responsibilities that governments have for the safety and security of persons within their jurisdiction. The significant size of tribal lands cannot be ignored if non-Indian jurisdictions expect to provide an orderly civil environment.

Cooperation, via compacts and agreements, expands the services available to secure the health, safety, and welfare of *all* people within a geographical area. Public discourse and court decisions can create the impression that litigation over turf lines is ever-present in all of Indian country, yet reality belies this picture. Enabled by policy and statutes, the cross-deputizing of law enforcement and other officials demonstrates that life on the ground in Indian country frequently occurs without inflexible borders. Roadway safety is a significant common concern, because vehicular offenses, especially those involving driving while intoxicated, cause injuries and deaths for everyone. This interest makes cooperating, cross-deputizing, and sharing offender databases a productive approach. Pre-emptive statutes, such as the Indian Child Welfare Act (ICWA),³ have removed some jurisdiction from states. Thus, if the best interests of children are to be protected, states and tribes should collaborate on legal matters. Some states have integrated ICWA into state law and further expanded the legal protection provided to Indian children.

Ultimately, each state, its history, and its contemporary circumstances provide the basis for why familiarity with Indian law can strengthen the knowledge that licensed attorneys use to serve their clients and the public interest. State legislatures and courts make laws that expand the situations in which private and public decisions require an understanding of Indian law because of its impact on other issues, which include—but are not limited to—family law, education, public safety, criminal prosecutions, civil actions, environmental regulation, natural resources, and economic development.

State Experiences in Including Indian Law on State Bar Exams

In New Mexico, assessing knowledge of Indian law via the state bar exam was a response to the evident lack of competence on the topic among the state's licensed attorneys. The New Mexico Native American Bar Association (NABA), through its officer, William Bluehouse Johnson, initiated a request for the Southwest Indian Law Clinic at the University of New Mexico's School of Law to conduct research on past or potential placement of Indian law on the state bar exam.⁴ The request led to a proposal to add Indian law to the state bar exam—a step that was supported by reasons and data. Johnson and the NABA submitted the proposal to the New Mexico State Board of Bar Examiners in December 2001,⁵ and this board unanimously voted to recommend the proposal to the New Mexico Supreme Court.⁶ On Feb. 28, 2002, the New Mexico Supreme Court approved the inclusion of Indian law in the state bar exam as of February 2003. Thus the historical first in Indian law was achieved. Questions dealing with Indian law have been included three times since then and have covered ICWA, tribal jurisdiction over non-members in civil and criminal matters, and sovereign immunity.

The process of including Indian law in New Mexico's state bar exam, which took seven months, was the result of the confluence of social, cultural, and legal relationships in the state's history. Other attorneys in the state joined the NABA in advocating the change, thus providing a non-Indian voice from practitioners in other areas of law. Private conversations among attorneys revealed incidents of attorneys providing legal services in ignorance of Indian law, which then required timely intervention by another attorney who had knowledge of Indian law in order to salvage the situation. Also critical was the pioneering work of the University of New Mexico's School of Law in Indian law since 1967, when it established the Pre-Law Summer Institute to prepare American Indian students for law school and to include Indian law in the basic curriculum.

New Mexico's success triggered similar efforts in other states. In 2004, the National Congress of American Indians passed a resolution encouraging the inclusion of Indian law in state bar exams, especially those 21 states that have "large populations of Indian people and/or a significant presence of Tribal lands."⁷

After about two years of trying to add questions on Indian law to the state bar exam, on Oct. 22, 2004, Washington became the second state to do so, when the Washington Board of Governors voted unanimously for the inclusion. In spring 2006, Gabriel S. Galanda, who led the effort in Washington, stated that bar leaders in Arizona, Oklahoma, Wisconsin, Montana, Oregon, Idaho, and California were considering whether to add Indian law.⁸ Wash-

ington's experience revealed concerns that can challenge advocates of including Indian law on the bar exam. While generally receptive to adding this subject, one concern voiced by the Washington Board of Governors was how meaningful questions would be drafted.

South Dakota became the third state to add Indian law to the bar exam, effective Jan. 1, 2007. Unfortunately, information on how the advocacy for this inclusion was conducted and reactions to the decision have not surfaced in public statements from the South Dakota Board of Bar Examiners or in newspaper articles.

The efforts that are under way in other states point to the barriers that must be overcome and the need to include Indian law in state bar exams. In Montana, a staff attorney for the Montana state legislature reports a 10- to 15-year struggle to include questions on Indian law on the bar exam. However, the chair of the Montana Board of Bar Examiners questioned whether all lawyers need to know Indian law, which he categorized as a "detailed subspecialty" like securities law. In Minnesota, the need to test knowledge of Indian law was highlighted when Gov. Tim Pawlenty, a lawyer, made an inaccurate statement about treaty hunting and fishing rights. Efforts to add Indian law to the exam have also been reported in Arizona and Oklahoma, but these have not been successful. All the "possible" states have law schools where Indian law is taught; therefore, including questions on Indian law in the bar exam will have an impact on these schools and the way they train their students.

Plans and Efforts to Include Indian Law on Bar Exams

A review of the efforts to add questions about Indian law on bar exams reveals that planned advocacy and collaborative relationships are key. The advocacy for this integration of Indian law requires structuring as to how advocates will undertake the tasks in a way that will result in successfully persuading the official bodies that make the decision to do so. Generally, a board of bar examiners must consider and act on proposals to modify bar exams. This board's action may produce a recommendation to place questions on Indian law on the exam that is sent to the state's highest court or supreme court, which is the ultimate body that must authorize the addition and amend the rules that govern the state's bar exam.

The advocates' proposal must directly and simply state the principles or reasons for including questions on Indian law and provide the facts that support the addition. The proposal is a persuasive document, yet its function and language are not the same as a legal brief or law review. It may be helpful to include principles that have been articulated as part of the state's legal system. The reasons should be based on

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funds. Many states, for example, include tribal populations, land bases, and risk assessments in their requests to DHS for funding, but they do not then share the allocated portion of the funds with tribal governments. Some states, such as Arizona, work well with the tribal governments that are within their borders, but many other states, such as California, have not provided any DHS funding to tribal governments. As another example, Connecticut is withholding grants specifically allocated to tribes in that state until tribal governments sign unrelated restrictive agreements of interest to the state government.

Tribal governments have been concerned for some time that they have not been fully integrated into the Department of Homeland Security's system. The current structure not only goes against the basic nature of tribal sovereignty and the relationship between the tribal government and the federal government but also has been ineffective from a practical standpoint. Consequently, tribal governments have been advocating for a direct relationship with DHS and a direct funding path for tribes.

Accordingly, problems arising in both the context of meth use and homeland security in Indian country are examples of how the jurisdictional maze in Indian country cripples effective law enforcement. In order to address these and other problems in Indian country, the current jurisdictions framework should be reformed. **TFL**

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the state's history of legal, social, and cultural relationships involving Indians and non-Indians. In addition, negative experiences in the past can be acknowledged, thereby providing an opportunity to correct or move beyond unproductive offensive events. Positive experiences can also be invoked as a way to strengthen the argument and demonstrate effective prior relations.

Advocacy efforts must point to the interface connecting Indian law, the tribal governments, and the interests of the state and explicitly identify the benefits that will accrue to the state and the state's citizens who are not Indians. Indian law must be considered an appropriate fit as part of the laws affect-

ing public and private decisions, not as remote "sub-specialty" law. To strengthen the advocates' position, lawyers and legal organizations that are not directly involved in Indian law but have affinity interests need to be included in the effort. For example, natural resources and environmental law are areas that have intersecting interests with Indian law. Other public-interest groups that advocate for persons affected by Indian law can also be allies; for example, organizations that advocate for children continuously note that attorneys need knowledge of the Indian Child Welfare Act in order to provide competent legal services to Indian clients.

Persuading decision-makers that testing attorney's

Endnotes

¹Taken from a poem entitled "I Am Meth," which was distributed during the Drug-Endangered Children Conference sponsored by the state of Michigan in Lansing, Mich., Aug. 1-2, 2006. The poem is attributed to an Indian girl who was in jail and addicted to methamphetamine.

²National Congress of American Indians, "Methamphetamine in Indian Country: An American Problem Uniquely Affecting Indian Country" (November 2006) (citing Substance Abuse and Mental Health Services Administration, Office of Applied Studies, (Sept. 16, 2005)). See also National Survey on Drug Use and Health Report: "Methamphetamine Use, Abuse, and Dependence," 2002, 2003, and 2004.

³Kathleen W. Kitcheyan, Chair of the San Carlos Apache Tribe, Testimony Before the U.S. Senate Committee on Indian Affairs (April 5, 2006).

⁴Ivan D. Posey, Chair of the Eastern Shoshone Business Council, Testimony Before the U.S. Senate Committee on Indian Affairs (April 5, 2006).

⁵New Mexico Investigative Support Center, National Methamphetamine Initiative Survey, "The Status of the Methamphetamine Threat and Impact on Indian Lands" (April 12, 2006) (prepared for the Bureau of Indian Affairs, Department of Law Enforcement Services).

⁶Matthew H. Mead, U.S. attorney for the District of Wyoming, Testimony Before the U.S. Senate Committee on Indian Affairs (April 5, 2006).

⁷Tribal Law Enforcement Aid Agreement Between the Washoe Tribe of Nevada and California, the County of Douglas, and Carson City, Nevada, 1 (June 1, 2006).

⁸Matthew H. Mead, *supra*, note 6.

⁹See, generally, U.S. General Accountability Office, "Border Security Agencies Need to Better Coordinate Their Strategies and Operations on Federal Lands," Report No. GAO-04-590 (June 2004); see also *Border Security and the Southwest Border: Background, Legislation, and Issues*, CRS Report to Congress, Order Code RL33106 (Sept. 28, 2005).

knowledge of Indian law serves the general interests of the state and its citizens requires that advocates develop collaborative relationships with officials of tribal governments, who can certainly aid the effort in appropriate ways. In addition, opportune use of contacts with state government officials and judges can help establish a climate that is receptive to changing what a competent lawyer is expected to know. Existing relationships, as well as new contacts, can educate decision-makers in each state.

Even though efforts to add questions on Indian law to a state bar exam will vary in respective states, the need for testing this knowledge is constant. Recognizing and adding Indian law to the attorney's basic knowledge will advance the delivery of justice to indigenous peoples as well as to the non-Indians who share interests and the neighborhood. TFL

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Endnotes

¹Stat. 137 (1790); 2 Stat. 139 (1802); and 4 Stat. 729 (1834).

²See, e.g., *United States v. Lara*, 541 U.S. 193 (2004), where the Supreme Court upheld the congressional authority to shrink or expand criminal jurisdiction over nonmember Indians in misdemeanor prosecutions for on-reservation offenses; and *Montana v. United States*, 450 U.S. 544 (1981), where the Supreme Court denied civil jurisdiction over non-Indians on land owned in fee by non-Indians within the reservation unless the tribe can establish a consensual commercial relationship or the non-Indians' conduct threatens or affects the political integrity, economic security, health, and welfare of the tribe.

³25 U.S.C. § 1901 *et seq.*; see 25 U.S.C. § 1911.

⁴Gloria Valencia-Weber and Sherri Nicole Thomas, *When the State Bar Embraces Indian Law: Teaching Experiences and Observations*, 82 THE UNIVERSITY OF NORTH DAKOTA LAW REVIEW 101 (2006).

⁵The proposal stated that knowledge of Indian law was increasingly necessary for competent representation in the face of the following specific key conditions in New Mexico:

1. The important role of American Indians in New Mexico, where the individuals constitute 9.5 percent of the state's population (173,483 persons according to the 2000 census);
2. The control of New Mexico's 23 tribes and pueblos over 10 percent of the state's land area (some 8,169,407 acres in trust), where complex jurisdictional issues arise among the tribal, state, and federal governments;
3. The increase in Indian economic activities

that involve non-Indian parties as business participants or employees in areas of gaming, taxation, and natural resources development;

4. The New Mexico legislature's and courts' additions to Indian law of laws relating to the tribes and pueblos, with cross-border enforcement and collaboration in the areas of child support, education, taxation, and crime control;
5. The long-established training in Indian law at University of New Mexico's School of Law across the curriculum as well as in specialized courses in Indian law so that any student can learn the basics;
6. The need for fair and informed discourse of Indian law in which attorneys, judges, and legislators acknowledge inexperience in this area of law that handicaps the legal decisions that are made; and
7. The improved conditions for a fair trial when the attorneys and judges can engage in informed processes on issues related to Indian law and can educate the public about these matters so as to reduce misunderstandings about the tribal and state relations.

⁶Justice Gene E. Franchini of the New Mexico Supreme Court, who attended the board meeting on behalf of the Supreme Court, considered the recognition and inclusion of Indian law as long overdue: "I am just real happy that we are the first in the nation to get off the dime on this issue. ... This is a real important area of law and applicants for the New Mexico Bar should be aware of significant questions of law which arise in this area." Kris Axtman, *New Status for Indian Law: It'll Be on the Bar*, THE CHRISTIAN SCIENCE MONITOR, June 4, 2002 at 3. This is a noteworthy statement, as Justice Franchini was the attorney for the plaintiffs in *Morton v. Mancari*, in which Indian preference in hiring and promotion at the U.S. Bureau of Indian Affairs was held to be a political status preference and not racial discrimination.

⁷National Congress of American Indians, Resolution #MOH-04-001, June 23, 2004, available at www.ncai.org/ncai/data/resolution/midyear2004/04-001.pdf. This body identified the following states as appropriate states for this effort: Washington, Oregon, California, Idaho, Montana, Colorado, Arizona, Nevada, Utah, North Dakota, South Dakota, Oklahoma, Minnesota, Wisconsin, Michigan, New York, Maine, Connecticut, Louisiana, and Florida.

⁸Gabriel S. Galanda, *Bar None! The Social Impact of Testing Indian Law on State Bar Exams*, 30 FED. LAWYER at 31 (Mar-Apr. 2006).