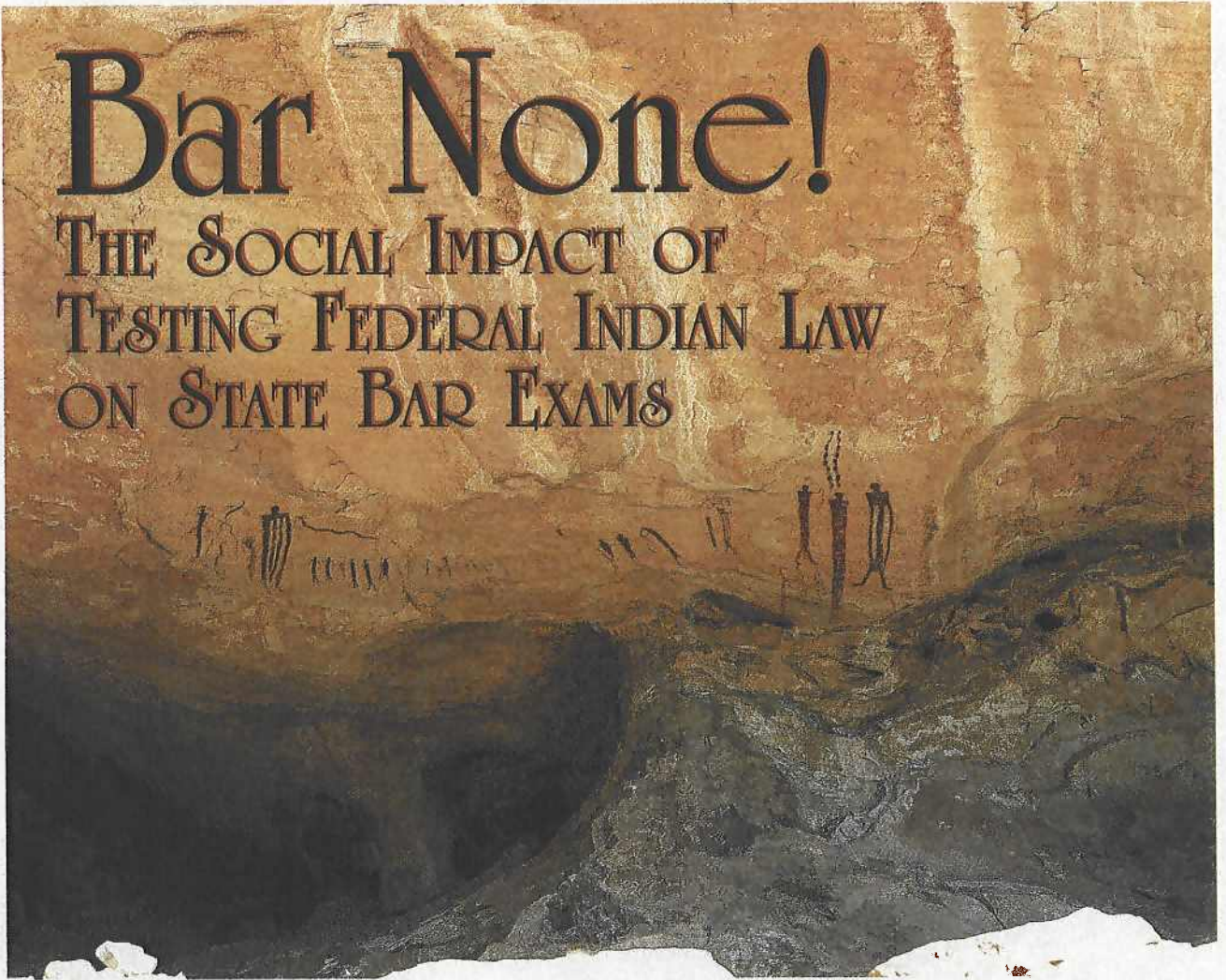


Bar None!

THE SOCIAL IMPACT OF TESTING FEDERAL INDIAN LAW ON STATE BAR EXAMS



The Wild Horse Canyon Site, Utah. Photo by Lawrence R. Baca.

Indian rights will never be justly protected by any legal system or any civil society that continues to talk about Indians as if they are uncivilized, unsophisticated, and lawless savages.

—Robert A. Williams Jr., *Like a Loaded Weapon*¹

What's federal Indian law got to do with it? Probably something in the many states that are Indian country. Indian law has become so prevalent that New Mexico and Washington have included the topic on their bar exams. At least seven other states are considering following suit. Bar testing Indian law is making, and will continue to make, a profound impact on our society.

By Gabriel S. Galanda

Federal Indian law is sweeping the nation.

Prompted by a resolution passed by the National Congress of American Indians in 2004, bar leaders in Arizona, Oklahoma, Wisconsin, Montana, Oregon, Idaho, and California are now considering whether to test knowledge of federal Indian law on their bar exams.² In 2002, New Mexico became the first state to include items dealing with Indian law on a bar exam. In 2004, Washington state followed New Mexico's precedent and will begin including federal Indian jurisdictional issues on its bar examination in summer 2007.

Bar testing is, first and foremost, a matter of promoting an effective legal system that is accessible to all state citizens and is designed to foster and maintain high standards of competence, professionalism, and ethics within the legal profession. Yet, the national legal community cannot ignore the significant positive social impact that the decision to test knowledge of Indian law is having on the citizenry of New Mexico and Washington and reservation communities in those states — and of any other state bar that follows suit.

This article explains how New Mexico and Washington's new bar exam policy related to Indian law will help ensure the protection of the public; allow indigent native and non-native persons access to justice in the ever-increasing number of disputes arising out of Indian country; increase the diversity of the legal profession; and enhance historically strained relations between state and tribal sovereigns.

Enhancing Lawyer Competence

At its core, the issue of including items on federal Indian law on bar examinations is one of ensuring the competence and professionalism of new attorneys. As Tim Woolsey, an attorney specializing in Indian law in Washington, D.C., writes:

Including American Indian law on the bar exam will produce new attorneys that can spot issues and competently represent tribal and non-tribal clients. ... [I]t is our professional responsibility to be skillfully and thoroughly aware of these issues to uphold minimum standards of competence ... [and] to zealously advocate for all clients to the best of our ability.³

Various state rules of professional responsibility make it crystal clear that every lawyer has an ethical obligation to provide competent representation to his or her clientele and thus to obtain the legal knowledge that is reasonably necessary for the representation.

According to the National Conference of Bar Examiners and the American Bar Association's Section of Legal Education and Admission to the Bar:

The bar examination should test the ability of an applicant to identify legal issues ... such as may be encountered in the practice of law, to engage in a reasoned analysis of the issues and to arrive at a logical

solution by the application of fundamental legal principles. ... Its purpose is to protect the public.⁴

As New Mexico and Washington acknowledge, testing knowledge of fundamental federal Indian law in the bar exam will serve to protect the American public — Indians and non-Indians alike — from the unknowing or unwitting practice of Indian law.

In this era of tribal self-determination and self-reliance, tribes throughout the country are increasingly exercising their inherent sovereignty and regulatory authority to become an influential economic force. Consider these statistics:

- Tribes occupy more than 55 million acres of land in 30 states.
- Tribes that are involved in gaming enterprises alone — 228 of the 560-plus federally recognized tribes — contributed \$32 billion in revenue, \$12.4 billion in wages, and 490,000 jobs to the U.S. economy in 2001.⁵
- Indian gaming generated \$19 billion in gross revenues in 2004.

Indeed, money talks. As the *Seattle Times* framed the issue in the subtitle of a front-page article that ran on the morning of Washington's decision to test Indian law: "With Indian tribes contributing more than \$1 billion to the state's economy each year, the state bar is considering whether Washington should require aspiring lawyers to understand the basics of Indian law."⁶

With the growth in tribes' economic development and corresponding increase in the number of non-Indian citizens seeking business, employment, or recreation on tribal lands comes an array of litigation and transactional matters that involve federal Indian jurisdiction. Accordingly, a lawyer practicing in any of the many states that have such tribal activity will encounter questions about whether a tribal, state, and/or federal court — if any court — has or would have the authority to adjudicate a dispute arising out of Indian country.

Recognizing that a two-day exam should not force prospective lawyers to learn all that makes up a body of highly complicated domestic federal Indian law that is more than 200 years old, New Mexico and Washington agree that new lawyers must, at a minimum, learn the following four tribal jurisdictional principles to ensure the protection of the public.

Indian Self-Governance

Indian tribes are "distinct, independent political communities, retaining their original natural rights" in matters of local self-government.⁷ Even though in the federal government's eyes Indians are no longer "possessed of the full attributes of sovereignty," tribes remain a "separate people, with the power of regulating their internal and social relations."⁸ Indians have "the right ... to make their own laws and be ruled by them."⁹ As such, counsel cannot mistakenly presume that a business or litigation matter involving a tribe or one or more tribal members

and/or implicating tribal self-governance are par for the course and thus subject to state law and state jurisdiction.

Tribal Jurisdiction in Civil and Criminal Matters

Tribal subject matter jurisdiction over civil and criminal matters arising in Indian country depends predominately on (1) whether the defendant is a tribal "member" or "nonmember" (the latter being a person who is not enrolled as a member of the tribe that seeks to assert jurisdiction); (2) whether the events at issue arose on fee, trust, or allotted lands; and (3) whether federal laws such as Public Law 280 or the Major Crimes Act give tribal, state, and/or federal courts authority to adjudicate the dispute. These highly complex and fact-sensitive issues need be the first area of inquiry for lawyers handling a dispute arising on the reservation.

Sovereign Immunity

Tribes and tribal agencies, entities, and enterprises are generally immune from civil suit — whether in tribal, state, or federal courts — for alleged acts or omissions arising on or off the reservation. For any tribunal to have jurisdiction over a claim against a tribe, the tribal sovereign or U.S. Congress must have waived the tribe's immunity clearly and unequivocally. "Sovereign immunity is not a discretionary doctrine that may be applied as a remedy depending upon the equities of a given situation."¹⁰ Thus, lawyers should know better than to file even the most compelling suit against a tribe unless they have cogent proof of a tribal immunity waiver; otherwise, their client's claims could be summarily dismissed for want of subject matter jurisdiction.

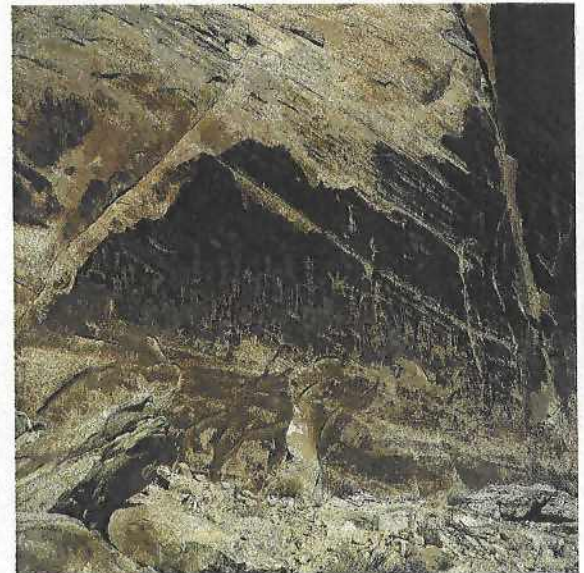
Indian Child Welfare Act

Jurisdiction over the adoption or custody of Indian children is governed by the Indian Child Welfare Act (ICWA), which "was enacted to counteract the large-scale separations of Indian children from their families, tribes, and culture through adoption or foster care placement, generally in non-Indian homes."¹¹ Certain state and tribal courts have concurrent jurisdiction over matters involving the adoption or custody of Indian children, but ICWA makes clear that "[i]n 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 child's tribe shall have a right to intervene at any point in the proceeding."¹² The failure of a family lawyer (or a judge) to facilitate the intervention of the child's tribe in such a proceeding could lead to a reversal of the adoption or custody decree and, sadly, removal of the Indian child from the family that was awarded custody.

Indian bar exam policy like that enacted in New Mexico and Washington will help the legal profession protect that which is sacred to all citizens — health, freedom, home, economic security, and family.

Ensuring Tribal Access to Justice

The failure of local and state bars to understand funda-



The Kachina Panel, San Juan River, Utah. Photo by Lawrence R. Baca.

mental Indian law and resulting anxiety about handling matters that involve tribal jurisdiction deprive indigent residents of the states that have high concentrations of tribal people or land from obtaining legal counsel and, in turn, from gaining access to tribal and state judicial systems for the resolution of matters affecting basic familial and property rights. This discrimination applies to both Indians and non-Indians with low incomes or no income.

A study by the American Bar Association published in 1994 estimated that three-quarters of the nation's low-income families facing civil legal issues do not get legal assistance.¹³ Nationally, tribal legal aid lawyers estimate that only 20 percent of Indian peoples' legal needs are met. As John Sledd, former director of the Northwest Justice Project's Native American Unit in Washington, writes:

[Legal aid] intake lawyers tell me that *three-quarters of volunteer lawyer programs and most staff legal service lawyers will not handle Indian or tribal law cases*. Ignorance of the law is a major reason why. As a result, *poor Native Americans [in Washington] get help for only one in [10] important legal problems*, according to the statewide legal needs study. Non-Natives get help for one problem in seven. Both statistics are shocking, but *the disparity for Native people is an intolerable discrimination*.¹⁴

The knowledge of basic Indian law that will be instilled in new lawyers through bar examination will translate into legal help for indigent Indian and non-Indian people throughout America.

Diversifying the Bar

Native Americans are without question the most under-represented ethnic demographic in the legal profession. Depending on whom you ask, Indian attorneys make up between 0.02 and 0.07 percent of the Washington State Bar Association's 29,000 members. Nationally, even

though the U.S. Census reports that there are 2.6 million self-identified Native Americans and 1 million lawyers in the our country, only 1,800 — yes, eighteen *hundred* — are Indian attorneys.

Every year 35,000 individuals pass state bar exams. Still, in this era, which is widely known as the era of tribal self-determination, the legal profession has only 1,800 Indian lawyers. New Mexico and Washington's new bar exam policy has sent — and will continue to send — a loud and clear message to Indian country that the practice of law is relevant to life on the reservation. As a result, Indian youth in those states will increasingly consider the legal profession as a career option, and Indian citizens there will some day see their faces reflected in state (and tribal) bar associations.

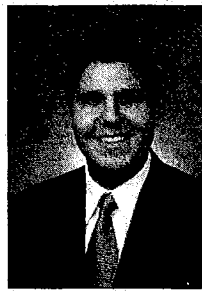
Strengthening State-Tribal Relations

In 2004, the National Congress of American Indians followed the lead of the Association of Washington Tribes and the 54 Pacific Northwest tribes that constitute the Affiliated Tribes of Northwest Indians and resolved that 22 states should include questions on Indian law on their states' bar exams. The organization declared that "if attorneys for the American public, particularly federal, state and local government, better understood the legal concepts of [tribal self-governance and tribal jurisdiction, there would be fewer disputes and government-to-government dialogue would be greatly enhanced."¹⁵

By October 2004, Washington state Governor Christine Gregoire joined the successful lobby to include federal Indian jurisdiction on Washington's bar exam. As reported by *Indian Country Today*, state and tribal elected officials and dignitaries later joined one another in celebration of that milestone in state-tribal relations.¹⁶

More than 100 years ago, the U.S. Supreme Court famously wrote that "[b]ecause of the local ill feeling, the people of the states where [tribes] are found are often their deadliest enemies."¹⁷ And, to varying degrees, that ill feeling between states and tribes still exists today. In New Mexico, state bar leaders explain that "including Indian law as a testable subject for the bar exam shows respect for a significant minority whose ancestral lands we happen to occupy" and thus helps quell any ill will.¹⁸ Few in Washington state would have imagined that in that state — "a state that hanged Indian leaders, strong-armed treaties, burned villages, beat up Indian fishermen and launched a notorious Indian opponent, Slade Gorton,"¹⁹ — bar exam policy, of all things, would harmonize state and tribal voices and exemplify government-to-government dialogue in the new millennium, as it did.

Now, as state and tribal bar leaders throughout the nation discuss whether similar policy should be adopted in their states, the national legal community should appreciate that including items on Indian law on the bar exam could not only help ease the historical ill will among neighboring sovereigns but also heighten the bar for legal professionalism and diversity while lowering the bar that indigent people must overcome to secure access to justice in Indian country. **TFL**



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He thanks Professor Robert Williams and Debora Juarez for empowering him to affect change in legal America for the benefit of Indian people. © 2006 Gabriel S. Galanda. All rights reserved.

Endnotes

¹See LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA xxviii (2005).

²See Leigh Jones, *A New Bar Exam Hurdle: Indian Law*, NAT'L. L.J., Nov. 1, 2004; Kris Axtman, *New Status for Indian Law: It'll Be on the Bar*, CHRISTIAN SCI. MONITOR, June 4, 2002; and Richard Walker, *American Indian Law Added to Washington State Bar Exam*, INDIAN COUNTRY TODAY, Nov. 17, 2004.

³See Washington State Bar Association's DE NOVO magazine, June 2004, at p. 3; available at www.wsba.org/media/publications/denovo/archives/denovojune2004.pdf.

⁴See Comprehensive Bar Admission Requirements 2004, at p. 9; available at www.ncbex.org/pub.htm.

⁵See Alan Meister, THE ECONOMIC IMPACT OF INDIAN GAMING IN THE UNITED STATES, 2002.

⁶See Sara Jean Green, *Should Indian Law Be on the Bar Exam?* SEATTLE TIMES, Oct. 22, 2004, at B1.

⁷*Worcester v. Georgia*, 31 U.S. 515 (1832).

⁸*U.S. v. Kagama*, 118 U.S. 375 (1886).

⁹*Williams v. Lee*, 358 U.S. 217, 220 (1959).

¹⁰*Chemebevi Indian Tribe v. California State Bd. of Equalization*, 757 F.2d 1047, 1052 n.6 (9th Cir. 1985).

¹¹*Matter of Adoption of Crews*, 118 Wn.2d 561, 567 (1992); 25 U.S.C. 1902.

¹²25 U.S.C. 1911(c).

¹³Cited in Chet Brokaw, *Indians Lack Access to Legal Services*, BISMARCK TRIBUNE, June 14, 2005.

¹⁴See letter from John Sledd to the Washington State Bar Association Board of Governors, Oct. 11, 2004 (emphasis added; on file with author).

¹⁵See Resolution MOH-04-001, "The Examination of Indian Law on State Bar Examinations," Feb. 6, 2004; available at www.ncai.org/index.php?id=105&select_pro_resid=25.

¹⁶See Richard Walker, *Leaders, Lawyers Celebrate Inclusion in State Bar Exam*, INDIAN COUNTRY TODAY, May 11, 2005.

¹⁷*Kagama* at 384–385.

¹⁸See letter from New Mexico bar examiner Michael P. Gross to Gabriel S. Galanda, Oct. 21, 2004 (on file with author).

¹⁹See Rob McDonald, *Move Invalidates Long-Ignored Legal Principles*, SPOKESMAN-REVIEW, B1, Oct. 29, 2004.