

And justice for all, someday: Indians, Alaska Natives face unique obstacles

By Professor Maylinn Smith

American Indians and Alaska Natives experience many of the same barriers to legal services that other similarly situated individuals encounter. Poverty, unemployment, transportation issues, communication difficulties, limited access to attorneys, the rural nature of communities, and limits on technological resources are barriers commonly identified when analyzing gaps in legal services. American Indians and Alaska Natives often experience these same limitations, but additional barriers regularly exist that can profoundly impact both the quality and quantity of the legal services received by this segment of society.

For many American Indians and Alaska Natives there are additional factors affecting their ability to adequately address legal needs. Conditions such as implicit biases within governing legal systems; a lack of cultural awareness among service providers and the various court systems; a lack of awareness of, or appreciation for, tribal customs and traditions, and communication styles that can differ significantly from those utilized in dominant society all impact the experiences of American Indians and Alaska Natives involved in state and federal justice systems. Within tribal systems there is an inadequate number of attorneys with knowledge of Indian law principles even licensed to practice in any tribal court; a minimum number of law enforcement officers monitoring activities within Indian country; and complex jurisdictional provisions that must be evaluated and navigated when a matter occurs within Indian country all affect delivery of legal services in Indian country. Regardless of the justice system involved, there can be a reluctance to trust outsiders due to the past policies and practices of non-Indian entities toward tribal people that makes information gathering more challenging. These are just a few of the conditions making access to justice more problematic for American Indians and Alaska Natives.

Seven Indian reservations are located in Montana. These areas are the homelands to 11 federally recognized tribes. In addition, Montana has recognized the Little Shell Tribe which continues its efforts to obtain federal recognition. More than eight million acres of land in Montana are Indian country and nearly two-thirds of the Indian population, which makes up approximately 6.5 percent of Montana's population, is domiciled within Indian country.

Whether an American Indian or Alaska Native resides within or outside of Indian country, there can be significant challenges obtaining adequate legal assistance. The following scenarios illustrate some of the unique challenges associated with handling legal matters involving American Indians and Alaska Natives.

■ **An individual residing within Indian country experiences domestic violence by a partner.** Which sovereigns will have jurisdiction over this matter? Tribal, state or federal? What law enforcement division should be notified of the situation? How will the victim notify law enforcement? The answers require an appreciation of factors beyond what is experienced outside of Indian country.

Initially, a factual determination regarding the status of both parties must be made. If the victim is Indian and the perpetrator is Indian, the tribal system will have jurisdiction over any criminal charges filed in association with this offense. Depending on the severity of the violence, the federal system may exercise concurrent jurisdiction over the perpetrator under dual sovereignty theories. If a state has assumed criminal jurisdiction within Indian country, in accordance with 280 requirements¹, a state may have concurrent jurisdiction over the perpetrator instead of the federal system. In Montana, the Confederated Salish and Kootenai Tribes is the only tribe which has consented to limited P.L. 280 jurisdiction on its reservation. If the victim is Indian and the perpetrator is non-Indian, the federal system historically has had exclusive criminal jurisdiction in the absence of a P.L. 280 situation. Responding to statistics showing violence against American Indians and Alaska Natives had reached epidemic proportions, and a significant number of the perpetrators were non-Indian who were systematically not being prosecuted, in 2013 Congress amended

the Violence Against Women's Act, 25 U.S.C. § 1301, *et. seq.* Now tribal governments may exercise criminal jurisdiction over certain non-Indian defendants when the tribal system ensures the identified due process guarantees are provided. Currently in Montana, only the Assiniboine and Sioux Tribes of the Fort Peck Reservation

Without adequate knowledge of tribal cultures, contemporary and historical issues impacting Indian peoples, and the laws applicable to Indian country, access to justice for American Indians and Alaska Natives can never be achieved.

¹ Enacted by Congress in 1953, Public Law 83-280, (P.L. 280), is a transfer of jurisdictional authority from the federal government to state governments which significantly changed the division of legal authority among tribal, federal, and state governments.

have taken the required steps to exercise special domestic violence jurisdiction over non-Indian defendants.

This level of jurisdictional complexity means individuals involved in domestic violence related situations may be subject to interviews from numerous justice systems; require assistance from someone with legal knowledge about the operations of all three possible justice systems; and, will need to insure that any protective orders issued will in fact be recognized by all three sovereigns in accordance with federal statutory requirements.

■ Assume now that the parties in the above situation wish to obtain a dissolution. Even though the federal court system is no longer implicated, a complex jurisdictional analysis must occur for purposes of determining whether the matter should be filed in a state court or in a tribal court. Depending on where the parties are domiciled, whether the parties are members of a tribe, what the tribal code allows, and whether any involved children are members of a tribe, more than one tribal court could possibly exercise jurisdiction in this matter, in addition to possible state court jurisdiction. Navigating legal systems becomes even more challenging when multiple jurisdictions are involved and there may be intra-tribal or inter-tribal conflicts associated with the legal issues that involve tribal customs and traditions.

Finding an attorney willing to assist in this type of family law matter is difficult even if the parties have resources to pay for services. Now imagine the difficulties associated with obtaining a divorce when someone is asking for free legal representation in a small rural community and there are Indian law issues associated with the action. Although Montana Legal Services Association can assist victims of domestic violence with dissolutions, only three MLSA attorneys are currently providing direct services in Indian country. The number of attorneys licensed to practice in the tribal courts on any of the seven reservations found within Montana remains disproportionately low compared to the legal needs in Indian country. This number shrinks further when those reluctant to practice in the area of family law are eliminated from this select group.

■ Now assume, as a result of the domestic violence situation, the children of this family have been removed by protective services. This removal can involve tribal social services programs, Bureau of Indian Affairs social services, or state social services programs. If the removal involves a state action and the parents or Indian custodian is not domiciled within Indian country, the requirements of the Indian Child Welfare Act, 25 U.S.C. §1901 *et. seq.*, are triggered. This federal statute establishes the minimum standards that must be followed in state custody proceedings involving an Indian child. There are very specific notice provisions under this statute that must be followed, higher standards of proof required and detailed placement preferences imposed on state actions. Without access to legal representation from someone with an adequate knowledge of the federal requirements, the dual purposes of the Indian Child Welfare Act may not be realized. As a result both Indian parents and tribes may suffer the loss of an Indian child.

■ Due to injuries inflicted in the domestic violence situation, an Indian parent dies. This parent had fractionated interests in trust lands located on three different reservations, as well as personal property. The parent had no will. Determining the children's inheritance will involve an understanding of the American

About the Gaps and Barriers series

This is the fourth installment in a series of articles giving an in-depth look at "The Justice Gap in Montana: As Vast as Big Sky Country," a study authorized by the Montana Access to Justice Commission. Past articles in the series looked at veterans and victims of domestic violence as populations in particular need of consideration. Future installments will examine other populations the study identified as needing particular consideration: the mentally ill or mentally disabled, Native Americans, and people with limited English proficiency or who are hearing impaired.

Indian Probate Reform Act, possibly three different tribal codes, and the customs and traditions for handling the property of a deceased tribal member. Finding legal representation in this matter is probably going to be difficult due to the multi-jurisdictional situation, the need to have a working knowledge of tribal customs and traditions, and a lack of resources to pay for the services of an attorney given the nature of tribal trust property.

These examples illustrate some of the challenges faced by American Indians and Alaska Natives dealing with legal issues both within and outside of Indian country. They do not reflect the legal impacts of implicit bias that contributes to disproportionate incarceration of American Indians and Alaska Natives; to the disproportionate removal of Indian children from their families by state agencies; to voting rights issues within Indian country; to disparities in educational achievements of American Indians and Alaska Natives, nor to racism and discrimination directed toward American Indians and Alaska Natives in housing, employment and health and welfare situations.

Access to justice for many Indian peoples remains an unattainable goal. This reality for American Indians and Alaska Natives can be changed by creating pipelines to employment, higher education and alternative dispute processes that utilize traditional community-based problem-solving techniques, which are not based on the adversarial state and federal justice systems model. Without adequate knowledge of tribal cultures, contemporary and historical issues impacting Indian peoples, and the laws applicable to Indian country, access to justice for American Indians and Alaska Natives can never be achieved. This reality can be changed by expanding the Montana constitutional Indian Education for All requirements to reach beyond K-12 education. Incorporating this principle into the higher education system; making it part of governmental training obligations, and covering it through professional licensing requirements could meaningfully improve access to justice issues for American Indians and Alaska Natives. Montana has a sizeable population of American Indians and Alaska Natives, and significant amount of Indian country within its borders. If Montana is going to fulfill its constitutional commitment to preserving the cultural heritage of American Indians, it must address the fact that access to justice issues can adversely impact cultural preservation efforts.

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