Bar None! The Social Impact of Bar Testing Federal Indian Law in Washington

Guest Columnist Gabriel Galanda writes about a WSBA historic first

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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]

Last month we, the WSBA and all of Washington state, celebrated a historic first — an occasion that will mark the beginning of meaningful social changes in our bar and our state. On July 24 and 25, 2007, aspiring Washington lawyers sat for the bar exam, with the possibility of being tested on federal Indian law for the first time in the history of the WSBA.

In October 2004, the WSBA Board of Governors (BOG) unanimously agreed that, effective this summer, the 23 possible bar exam topics would include Indian law jurisdictional topics. While the WSBA followed precedent set by the New Mexico Supreme Court — which, in 2002, made their state the first to bar test Indian law — it is Washington's bar-exam policy that galvanized national interest in the topic. Consider that in the wake of the BOG's decision:

- Washington's bar-exam change was covered by such national news media as *USA Today*, *National Law Journal*, and *Indian Country Today*;
- South Dakota became the third state to include Indian law on its bar exam in 2006, and Oklahoma recently included one Indian law question on its summer test; and
- Bar leaders in Arizona, Oklahoma, Wisconsin, Minnesota, Montana, Oregon, Idaho, and California are now considering whether to also test the topic.

Indian law — and tribal bar-exam-policy — is sweeping legal America.

Our legal community must pause to consider the *significant* positive social impact of bar testing Indian law in Washington state. This article explains how our new Indian bar-exam policy helps ensure the protection of the public; allows indigent Native and non-Native persons access to justice in an ever-increasing number of disputes arising out of Indian Country; increases the diversity of the legal profession; and heals the historically strained relations between state and tribal sovereigns.

This article explains how our new Indian bar-exam policy helps ensure the protection of the public; allows indigent Native and non-Native persons access to justice in an ever-increasing number of disputes arising out of Indian Country; increases the diversity of the legal profession; and heals the historically strained relations between state and tribal sovereigns.

Enhancing Lawyer Competence

At its core, the issue of including Indian law on bar examinations is one of competence and professionalism. As Tim Woolsey, a tribal attorney for the Colville Nation, 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.[2]

Further, according to the National Conference of Bar Examiners and the ABA 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.[3]

Fundamental to WSBA's Indian bar-exam policy is that including basic Indian law among the topics on our bar exam will serve to protect the Washington public — Indians and non-Indians alike — from the unknowing, unwitting, or unethical practice of Indian law.

With the upsurge in tribal economic development in Washington — and a correlative direct contribution of $3.2 *billion* and 30,000 jobs to the state economy in 2004[4] — comes a sharp

increase in non-Indian citizens seeking business, employment, or recreation on tribal lands. Such interactions give rise to an array of litigation and transactional matters that implicate federal Indian jurisdictional questions. I have no doubt that every lawyer practicing in our state *will* some day encounter questions about whether a tribal, state, and/or federal court, if any, has or would have authority to adjudicate a dispute arising out of tribal lands in Washington.

Recognizing that a two-day exam should not force prospective lawyers to learn *all* that is a 200-plus-year-old body of highly convoluted federal Indian law that comes to bear in Washington courts, the BOG agreed that new lawyers must at a minimum learn the following four tribal jurisdictional principles to ensure the protection of the public:

1. Tribal self-governance — the legal notion that Washington tribes possess "the right... to make their own laws and be ruled by them."[5]
2. Tribal criminal and civil jurisdiction — i.e., whether tribal, state, and/or federal courts have adjudicatory authority to adjudicate a dispute arising out of Indian Country.
3. Sovereign immunity — common law holding that tribes and tribal agencies, entities, and enterprises are generally immune from civil suit, whether in tribal, state, or federal court and/or arising on or off the reservation, as recently affirmed by the Washington State Supreme Court in *Wright v. Colville Tribal Enter. Corp.*[6]
4. Indian Child Welfare Act — a federal statute which, *inter alia*, mandates 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."[7]

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Ensuring Access to Justice

Our state and local bars' failure to understand basic Indian law, and resultant anxiety about handling matters that implicate tribal jurisdiction or practice, deprives indigent Washingtonians from obtaining legal help. In turn, the poor, be they Indian or non-Indian, are not allowed access to tribal, state, or federal courts for the adjudication and resolution of matters affecting basic familial and property rights. An ABA study published estimated that some 75 percent of the nation's low-income families facing civil legal issues do not get legal assistance. 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:

> [Local 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 get help for only one in ten 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*. [emphasis added]

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

Diversifying the WSBA

Indians remain the single most underrepresented pan-ethnic demographic in our legal profession. Depending who you ask, Native attorneys comprise between 0.02 to 0.07 percent of the WSBA's 30,000 members. Nationally, although the U.S. Census reports that there are 2.6 million self-identified Native Americans and one million lawyers in the United States, there are only 1,800 — yes, eighteen *hundred* — Indian attorneys. And, there is but one Indian jurist sitting on the state or federal bench; he sits on the Utah Court of Appeals.

Our 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, Washington tribal members, particularly Indian youth, will more seriously consider the legal profession as a career option. In time, we will see more Native faces

reflected throughout our bar, as well as the state and federal judiciary.

Strengthening State-Tribal Relations

In 2004, the National Congress of American Indians, following the lead of the Association of Washington Tribes and the 54 Pacific Northwest tribes comprising the Affiliated Tribes of Northwest Indians, resolved that Washington (and 21 other states) should bar-test Indian law, declaring that:

> [I]f 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.

Indeed, one result of the new bar-exam policy will be that tribal leaders and lawyers will no longer have to spend valuable time and resources educating assistant attorneys general and other state lawyers about the basics of tribal sovereignty.

By October 2004, incoming Governor Christine Gregoire signed onto the successful lobby to bar-test federal Indian jurisdiction in Washington — a profound moment in WSBA history. And, shortly after the BOG rendered its decision, state and tribal elected officials and dignitaries, including the likes of Swinomish Chairman Brian Cladoosby, longtime fishing-rights activist Billy Frank, Attorney General Rob McKenna, former U.S. Attorney John McKay, and King County Prosecutor Norm Maleng, joined one another in celebration of that milestone in state-tribal relations.

Over 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."[8] That ill feeling between states and tribes still exists today, to varying degrees. 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 that ill feeling.[9] The same holds true in Washington: In "a state that has hanged Indian leaders, strong-armed treaties, burned villages [and] beat up Indian fishermen,"[10] our bar-exam policy helps harmonize state and tribal voices and exemplifies modern government-to-government relations.

Now, as bar leaders throughout America discuss whether to join the Indian bar-exam movement galvanized by the WSBA, we should pause to appreciate not only how our policy has already helped ease the historical ill feeling amongst tribes and their fellow Washingtonians; but how it will heighten the bar for legal professionalism and diversity while lowering the bar indigent people must overcome to secure access to justice here.

Come one and all to the WSBA. And we will bar none.

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NOTES

1. *See Like A Loaded Weapon: The Rehnquist Court, Indian Rights, and The Legal History of Racism in America* xxviii (2005).
2. *See* WSBA's *De Novo* (WYLD's newsletter), June 2004, at p. 3, available at: www.wsba.org/media/publications/denovo/archives/denovojune2004.pdf.
3. *See* Comprehensive Bar Admission Requirements 2004, at p. ix (www.ncbex.org/pub.htm).
4. *See* Jonathan B. Taylor, "The Character and Effects of the Indian Economy in Washington State," June 2006.
5. *Williams v. Lee*, 358 U.S. 217, 220 (1959).
6. 159 Wn.2d 108, 114-115 (Wash. 2006).
7. 25 U.S.C. 1911(c).
8. *U.S. v. Kagama*, 118 U.S. 375, 384-85 (1886).
9. *See* letter from New Mexico bar examiner Michael P. Gross to Gabriel S. Galanda, October 21, 2004 (on file with author).
10. *See* Rob McDonald, "Move invalidates long-ignored legal principles," *Spokesman-Review*, B1, October 29, 2004.