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Washington State
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Indian Law in the Era of Tribal Self-Determination

Special Indian Law Issue

What can an attorney learn from a fish?

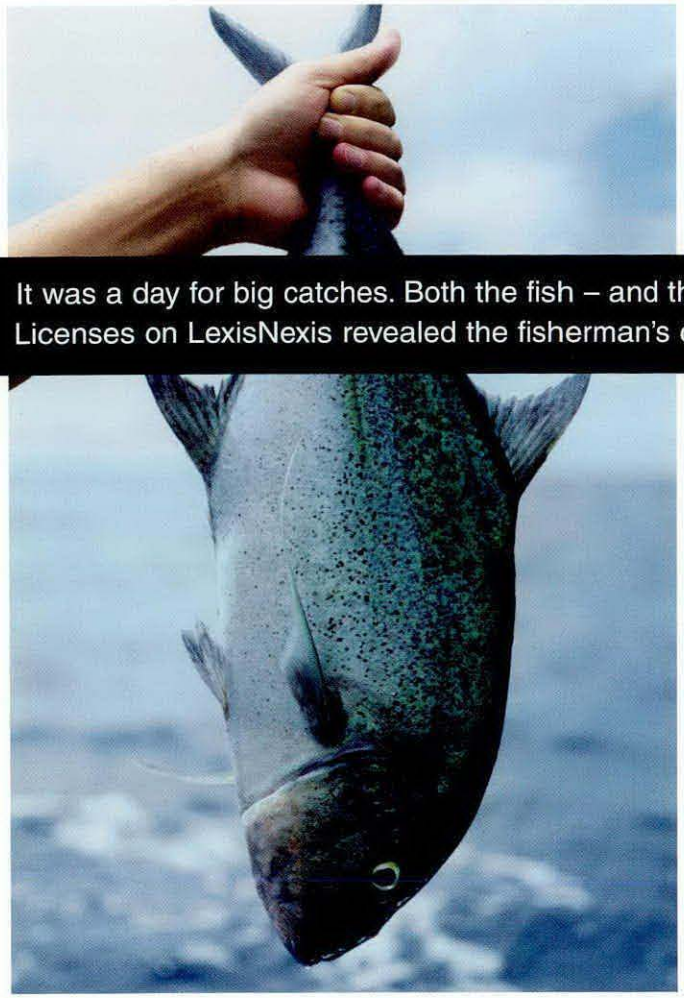

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Photo credit: Northwest Museum of Arts & Culture/Eastern Washington State Historical Society, Spokane, Washington

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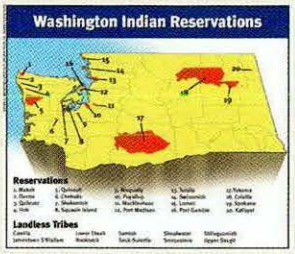

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Working together to champion justice

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Readers are invited to submit correspondence and articles. They may be sent via e-mail to comm@wsba.org or provided on disk in any conventional format with accompanying hard copy and sent to *Bar News* Editor, 2101 Fourth Avenue, Suite 400, Seattle, WA 98121-2330. Article submissions should run approximately 1,500 to 3,500 words. Graphics and photographs are welcome. The editor reserves the right to edit articles as deemed appropriate.

BarNews

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Letters

A Wonderful Life

Editor:

Three things happened during the first part of this year. I completed over 66 years of practice, all in Yakima and in the same office. I also reached the ripe old age of 90. As a result of this, I elected to become inactive in the Bar Association. However, before I sneak into the shadows of oblivion, I want to thank the Washington State Bar Association and its members for allowing me to serve on the Board of Governors, to be the delegate to the ABA, to serve as president of the Bar Association, etc., etc., etc.

I wish to thank the Bar and its members for allowing me to have a wonderful life as a lawyer. So, many thanks to you.

E. Frederick Velinkanje
Yakima

Member Proposes CLEs

Editor:

My paralegal showed me a form listing the CLEs now required of all attorneys over the next three years. Included are "six hours of ethics and substance abuse." I know you believe this will help the drug-addicted thieves who practice law. The purpose of this letter is to make suggestions for other mandatory topics.

I hear a rumor that some old, white, male attorney had found humor in a joke about females. I think you should mandate specific CLE hours to gender-based sensitivity and discrimination. This should take care of the sex harassers and wife beaters. May I suggest three days of CLEs with 24 hours' credit.

There's also a rumor of a joke told by attorneys about an Islamic terrorist. Two days or 16 hours should be enough to educate the racists who peddle these hurtful tales.

Finally, I should tell you that there is another vicious rumor circulating that what was once our Bar Association has been hijacked by a bunch of feel-good, politically correct, socialist nitwits who have no real idea how to practice law. I think the entire Bar Association should be sent to your re-education camps — I mean to another CLE to dispel these false rumors. After all, where would we be without you to tell us what's good for us.

Gregory G. Staeheli
Spokane

Washington Law & Politics Responds to Editorial

Editor:

After five years of publishing our magazine for Washington's legal community, it's exciting to see *Washington Law & Politics* finally mentioned in your publication (September *Bar News*, p. 15).

True, we're a little hurt you would devote two full pages to Patricia Novotny's error-laden, vitriolic screed attacking the reputation of our magazine and the credibility of our Super Lawyer selection process. And yes, it seems unfair that you would provide her this forum when 1) she admits "to not reading the magazine," and 2) she never gives us an opportunity to comment and respond. But we choose to look on the bright side. Despite the many errors in her piece, she did manage to spell *Law & Politics* correctly.

The sad truth is, had Ms. Novotny spent one minute actually reading our August/September Super Lawyer issue, or had she bothered to check facts with us, she would have spared herself and the WSBA the embarrassment of the errors and omissions cited below:

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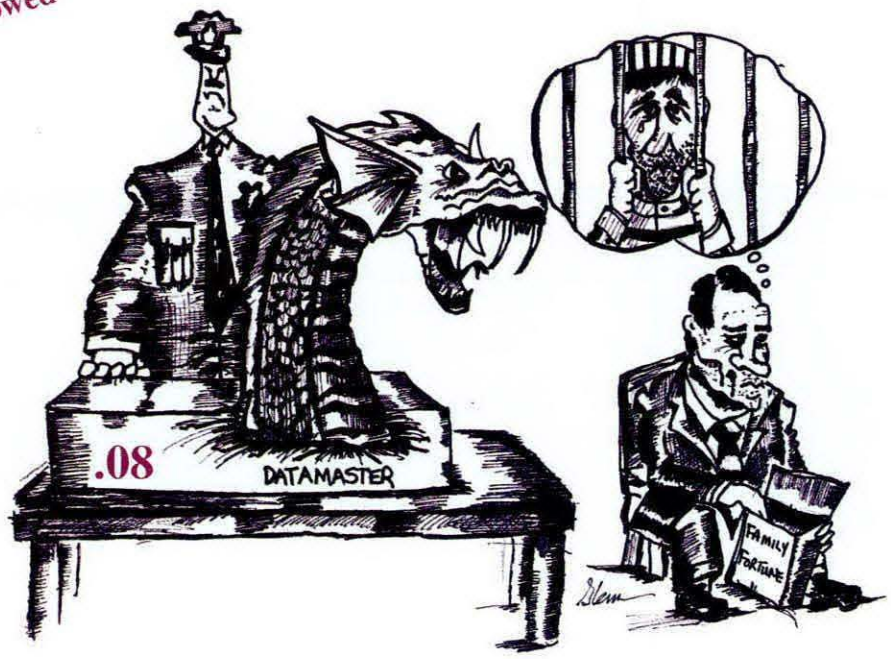

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1. She states that we mailed out 6,500 ballots. Her number is more than 300 percent off the mark. In fact, we sent out more than 20,000 ballots and it clearly says so in the first sentence of the first paragraph of our explanation on page 57 of our August/September issue. We also publish this explanation on the opening page of our Super Lawyer Web site at superlawyers.com.

2. She states that 5,000 votes were cast. Here she does better, erring by only 240 percent. The actual number of votes cast was 12,000. This number is found two paragraphs later, on page 57 (and on our Web site).

3. She raises a good point about how lawyers often answer the question of "Who are the best lawyers?" by naming the most well-known lawyers. But then she goes on to incorrectly assert that our Super Lawyer process "capitalizes" on this tendency. Again, if she read the magazine or looked at the Web site, she would see that our ballot specifically directs respondents to vote for the best lawyers they have *"personally observed in action"* and to *"avoid voting for others based purely on reputation or hearsay"* (italics in original).

4. She asserts that without a banner disclaimer stating the list is both under and over inclusive, "the magazine is perpetrating a hoax." As a nonreader of the magazine, she obviously missed the language that accompanied both the 2000 and 2001 Super Lawyers lists where we make disclaimers similar to the one she suggests here.

5. She states the members of the Blue Ribbon Panel are the "final arbiters," and that this is "the most obvious clue to a lack of rigor in the survey." Where does it say that the Blue Ribbon panelists are the final arbiters? Not in the magazine. Not on the Web site. As we point out in the magazine and the Web site, the Blue Ribbon Panel simply casts a second set of votes for the lawyers nominated in each panelist's area of practice. These votes are another factor we consider, but certainly are not decisive in determining who is and who isn't a Super Lawyer.

6. She claims she "learned from *Law & Politics* that they don't preserve samples of their ballots," implying we discard the documents a la Arthur Andersen. A very cheap (and off-the-mark) shot. The truth is, we box and store all ballots and save them for at least one year beyond the date of publication. Had Ms. Novotny simply informed us she was writing this article and needed to see a ballot to get her facts right, we would have jumped through hoops to accommodate her.

7. She writes that lawyers who don't run a profile have "only their name listed" in the issue. Wrong again. In addition to the lawyer's name, we publish firm names and phone numbers for *all* lawyers. And this information appears twice in the magazine, once under the practice area listing, and once under the alphabetical listing. What's more, we feature this same information on the Web site.

8. A nit-picky point, but one that reflects the overall carelessness of her approach — "Super Lawyers" is a registered trademark (the ® appears next to "Super Lawyers" at least 20 times in the August issue). We always present it as two words, not one. Ms. Novotny, as a lawyer, should get details like this correct.

9. A final point concerning Ms. Novotny should be clarified. She begins her ar-

ticle by telling us she was *nominated* a Super Lawyer. What she fails to reveal, however, is that while she was nominated, she is not, and never has been *selected* a Super Lawyer. In other words, she was rejected by the very process she is criticizing. In the interest of full disclosure, this fact should have been revealed to the reader.

We are proud of our Super Lawyer selection process. It is the most accurate, exhaustive and comprehensive process of its kind we know of. Ms. Novotny's misguided commentary not only reflects poorly on her, it denigrates the accomplishments of those chosen by their peers to be on the list.

Ms. Novotny makes one point I fully agree with: "We should be more careful," she says. "We should insist, in ourselves and in others, on more precision...." We couldn't have said it any better.

William C. White
Publisher
Washington Law & Politics

Ms. Novotny's response:

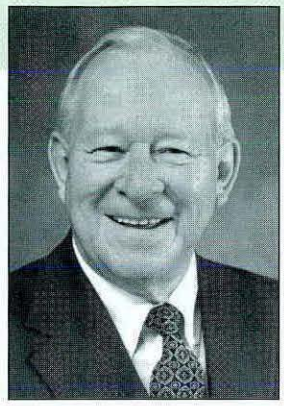
Mr. White misses the point of my editorial, which addresses a larger issue than Super Lawyers®. So, I'm not going to debate the numbers with him, except to say that I drew my information from the *Law & Politics* Web site in early summer (when I wrote the piece). The site has now been changed (and the numbers with it).

I *did* ask *L&P* for a survey (referred to in Mr. White's letter as a "ballot"), and was told the ballots had been "purged." I was also told that I'd receive a survey next year. Judging from the positive response I have received from lawyers (including Super Lawyers®), the questions I raised about the methodology of the selection process were not especially original. (One lawyer confirmed that some law firms play the process like a game.)

L&P is not so much the problem as it is a symptom. By discussing it, I did not intend to offend Mr. White. My concern remains enhancing the integrity and effectiveness of the justice system. For that reason, when I received my Super Lawyer® "nomination" last March, I declined to participate until I better understood the process. I wasn't rejected, as Mr. White claims. However, I don't expect another invitation.

Patricia Novotny
Seattle

Readers are invited to submit letters of reasonable length to the editor via e-mail at comm@wsba.org, by fax (206-727-8319), or mail. Due date is the 10th of the month for the second issue following, e.g., November 10 for publication in the January issue. Letters to *Bar News* will usually be published, unless the writer specifically asks to withhold publication. The editor reserves the right to edit letters as deemed appropriate.



The Image of a Lawyer

by Dick Manning
WSBA President

He was a young lawyer trying a case against a city attorney. The city attorney spoke with a lisp. It was difficult for him to speak. The young lawyer even wondered why the city attorney was a lawyer. After the young lawyer lost the case and talked with some of the jurors, he found they identified with the utter sincerity and belief of the city attorney in his case. They also detected some arrogance in the young lawyer's approach to trying the case. Today this lawyer exudes sincerity and credibility. Claims adjusters and defense lawyers put him and his team of partners in a uniquely separate category when negotiating a settlement — the ante automatically is much higher. The young lawyer of some years ago is now one of the winningest trial lawyers in the country: Paul Luvera.

Most of the bad jokes circulated about lawyers are told by those who view the justice system with a cynical eye.

There are many, many other lawyers in this state who possess the same qualities of sincerity and credibility. I single out Paul, a law school classmate of mine at Gonzaga University, because he is so visible and a very apt role model. In a recent national publication, *Lawyers Weekly USA*, he looks back on what he has learned: "The single biggest mistake that trial lawyers make is that they are not honest about how they are, and truthful about what their case is about.... It's an old saw, but it's true — if you're acting like someone else, or guarded, the jury perceives it immediately. So, skillful lawyers who appear skillful lose cases to those who appear unskillful but who are totally themselves and radiate credibility." Well said, Paul!

Most of the bad jokes circulated about lawyers are told by those who view the justice system with a cynical eye. Dave Kurtz, Snohomish County Bar president, explains why: "Compare our friends in the medical profession ... they are still rated far above attorneys.... Their primary opponent is the disease. All the people involved are ... on the same side.... With our adversarial legal system ... half of the lawyers involved ... are on the opposite side." He points out that most people like and value their own lawyer but tend to dislike the opposing attorney. Like Luvera, absolute integrity and a desire to fight for individual rights is what sustains Kurtz and makes him proud to be a lawyer.

Contrast this with a recent letter solicitation by a lawyer to condominium owners faced with substantial repair costs because of water intrusion into the outside shell of their building. The lawyer did not represent anyone involved in the problem. He touted the benefits of filing a Chapter 13 bankruptcy and how he had the expertise to assist the owners. The lawyer did not appear to be concerned about the financial burden this would place on unit owners who would have to pick up more than their share of rehabilitation costs if other owners filed Chapter 13 proceedings.

The credibility, integrity and sincerity that Luvera and Kurtz promote in their relationships with the public carry over to our relationships with other members of the profession. I have never forgotten the lessons I learned as a young lawyer. In the first superior court case I tried in 1961, George Stuntz was the judge and Willard Hatch was opposing counsel. I represented a general contractor who had received and used the bid of the defendant subcontractor in getting a construction-project award from an owner. The defendant subcontractor had withdrawn his bid after the prime contract award, and my client sued to hold the subcontractor to his bid.

Promissory estoppel was not firmly rooted in case law at that time, and my client lost the case. Before I left the courtroom, Willard Hatch thanked me for excellent trial work; his praise was sincere. And before I had even returned to the office, Judge Stuntz had telephoned Bill Ferguson, the founding senior partner of the law firm, to explain what a fine job young associate Manning had done. I've never forgotten those gestures of collegiality — particularly to or by opposing counsel. Win or lose, it is a practice I have tried to continue throughout my career.

There is no doubt that the collegiality which springs from sincerity and credibility seems to be more prevalent in less-populous communities. In a recent tour of the beautifully restored Grays Harbor County Courthouse, Presiding Judge Mark McCauley commented on bench-bar relationships: "In this community, the judges and lawyers all know each other. Uncivil behavior is rare and not tolerated."

That environment is not unlike another experience I had in the 1960s representing an 18-year-old who had his heart set on becoming a U.S. Marine career officer. While skiing at

White Pass, part of the sheave assembly on a Poma lift came crashing down on his leg, badly fracturing it. As a result, he could not pass the physical. The insurance company offered only medical specials (about $700 in those days), so we went to trial. John Gavin Sr. was the defense lawyer designated by the insurance company.

Since I was trying the case in Yakima, 150 miles from my office, Gavin went out of his way to make sure that I had everything I needed to carry on our representation of the plaintiff — including the use of his offices, library, etc. The jury later came in with a $10,000 verdict, a lot of money for a broken leg in 1964 (especially in Yakima, where several jurors were members of the ultra-conservative John Birch Society). Because of John Gavin's collegiality, I left Yakima feeling very good about lawyers and the legal profession.

I believe that today the vast majority of lawyers have the same instincts for the pursuit of justice, with the qualities of sincerity, integrity, credibility and collegiality. (I see it constantly in that part of my practice where I serve as an arbitrator or mediator.) Much too often, judges and lawyers see a lack of civility (let alone collegiality) toward other litigants and their lawyers. Perhaps so much focus is put on "winning" that some lawyers think it is a weakness to show collegiality or respect for anyone other than the lawyer's own client. That is unfortunate. The opposing party may be wrong, but we must never abandon the tenets of our profession by not according that party respect for their human dignity.

The Rules of Professional Conduct are minimum standards for relationships with our clients, the courts and other lawyers. And that is why last year the WSBA partnered with county bar associations in distributing an aspirational Creed of Professionalism to every courtroom in the state:

> I will be forthright and honest in my dealings with the court, opposing counsel and others.
>
> In my dealings with lawyers, parties, witnesses, members of the bench, and court staff, I will be civil and courteous and guided by fundamental tenets of integrity and fairness.

Dick Manning's e-mail address is jmb@seanet.com; telephone 206-623-6302; fax 206-624-3865. Send him your questions or comments.

An Angle of Repose in Unsettling Times

by Jan Michels
WSBA Executive Director

During the past week, I have talked with my friends Anaïs Winant, vice-president of the Seattle-King County Convention and Visitor's Bureau; Jan Levy, executive director of Leadership Tomorrow; and Marcia Holland-Risch, executive director of the Washington Society of CPAs. We are all experiencing the same demanding, stressful and overwhelming workload. I'm speculating that we are not alone. Harder economic times tighten everything. Fashion becomes conservative, hemlines get longer; wages and benefits freeze, consumers delay purchases, everyone thinks longer before incurring debt or risk; and there is more reluctance to make commitments. People hold back to do what matters most.

We need friends and family and spirituality, however we choose to express it, to find a new angle of repose.

The man I married just out of college, lived with during my "hippie" years, divorced 25 years ago, and had no contact with for the last 15 years, recently called. He was experiencing his own personal downturn in prosperity and wanted a brief connection to old times.

The Board of Governors has decided to restrict growth in license fees and programs for the years 2004-2006. Their annual evaluation of me suggested that I learn to say "no" when the WSBA cannot take on new projects and initiatives without staff or fiscal increases.

The hard times are settling in, not just for a post-September episode, but for a full-market downturn and overall market correction. We're in for a long haul. With these conditions we can expect to do more without additional resources. We can expect more anxiety and stress. We need friends and family and spirituality, however we choose to express it, to find a new angle of repose.

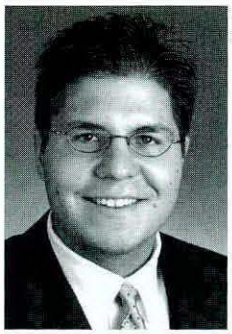
WSBA staff and I experienced the sudden and unexpected loss of one of us in September. Clare Cox, our desktop publisher, died. We were left feeling we wanted to thank and appreciate each other more — wanting community and family and friends, an angle of repose against fragility.

The paradigms we had grown accustomed to — the '50s and the "greatest generation," the '60s sense of "freedom and exploration," the '70s and '80s sense of "self-care and personal purpose," and even the '90s "newest professionals" with their realistic and pragmatic approach — have been replaced by unsettling times. The '00s appear to call for restraint — centrifugal forces toward comforts and essentials.

My husband interrupted me as I was writing this article, and we shared a long hug and a few words of love. These are unsettling times, things are different, and we don't know what will happen next. We're frightened of, whether we favor it or not, a possible confrontation with Iraq that may bring intended and unintended consequences. My 84-year-old mother's simple phrase about Roosevelt's December 1941 declaration of war against Japan and Germany (she was 23 at the time and engaged to a medical student in Chicago) rings clearly to me: "We all knew things would never be the same again."

These are unsettling times and many of us are nervous, anxious or stressed. A bubble of optimism and invulnerability has burst, and our collective identity is searching for new definition. The child in me doesn't like it, gets angry and resistant. My grownup self is scared, more cautious, and more conservative. I'm more social than usual, drawn to my friends for solace and comfort. An era seems to have passed, and I seek a new angle of repose.

The WSBA is an association of 27,000 members who share common dedication to the preservation of an orderly social contract. That focus and our attention to the higher moral order will keep us in focus on what truly matters. We will ride this tide of uncertainty and change. While nothing may ever be the same again, we can recommit ourselves to the rule of law, integrity, friendship and family. A new angle of repose.



What's Indian Law Got to Do with It? [An Introduction]

by Gabriel S. Galanda

Indian lawyers and judges from across the state traveled to the Quinault Beach Resort in Ocean Shores and met with the WSBA Board of Governors (BOG) on July 26, 2002, to discuss the unique nature of Indian law and tribal-court practice. Through a dynamic question-and-answer presentation, the tribal attorneys and judges highlighted the relevance of issues of federal Indian law and tribal law, not only to reservation advocates, but to general practitioners, in-house corporate counsel and public lawyers in Washington. The synergy present at Quinault among Indian practitioners and BOG members fueled a joint effort to educate the WSBA at large about the significance of Indian law and tribal practice in Washington.

The meeting with the BOG was the first of several developments that have raised the profile of Indian law and its practitioners within the WSBA. In September 2002, Fawn Sharp (Quinault), reservation attorney for the Quinault Indian Nation, was appointed to serve as the first Indian woman on the Board of Governors. The Northwest Indian Bar Association and the WSBA Indian Law Section have initiated a discussion among state bar leaders as to whether Indian law should be tested on the Washington bar exam, as it is in New Mexico. Finally, with the assistance of the Washington State Trial Lawyers Association BOG liaison Randy Gordon, the WSBA has dedicated this edition of *Bar News* to Indian law and tribal-court practice, to provide Indian lawyers and judges an opportunity to share with all members of the state bar their perspectives on an array of Indian legal issues. In the following paragraphs, I seek to provide a brief legal, political and economic context for the articles that follow.[1]

Tribal Self-Governance

Instructed by two centuries of U.S. Supreme Court precedent, Indian tribes in Washington are recognized by federal, state and local government as "distinct, independent political communities, retaining their original natural rights" in matters of local self-government. *Worcester v. Georgia*, 31 U.S. 515, 559 (1832). Washington tribes are a "separate people, with the power of regulating their internal and social relations." *U.S. v. Kagama*, 118 U.S. 375, 381-82 (1886). In short, the tribes possess "the right ... to make their own laws and be ruled by them." *Williams v. Lee*, 358 U.S. 217, 220 (1959). Furthermore, like other sovereign governmental entities, the tribes enjoy common-law sovereign immunity and probably cannot be sued. An Indian tribe in Washington is subject to suit only where Congress has "unequivocally" authorized the suit or the tribe has "clearly" waived its immunity. *Kiowa Tribe v. Manufacturing Technologies*, 523 U.S. 757 (1998).

Much like the Washington state government, tribal governments are elaborate entities, consisting of executive, legislative and judicial branches. The office of the tribal chairman (like that of the state governor) and the tribal council (like the state Legislature) govern the tribe under a tribal constitution and code of laws. The tribal court interprets and applies the tribe's law. Although the tribal court may resemble Anglo-American courts, it operates in a significantly different way. The article by tribal judges Edythe Chenoisis (Quinault), Jane Smith (Colville) and Cynthia Jordan poignantly describes the unique strength and spirit of Washington's 25 tribal courts.

Join the Northwest Indian Bar Association

The Northwest Indian Bar Association (NIBA) is a nonprofit organization of Indian attorneys, judges and advocates in Alaska, Idaho, Oregon, Washington, British Columbia and the Yukon Territory. The association aspires to improve the legal and political landscape for the Pacific Northwest Indian community. For more information about joining NIBA, contact Gabriel S. Galanda at 206-628-2780 or ggalanda@wkg.com.

Juxtaposed with the judges' firsthand observations about the integrity of tribal courts, however, are recent U.S. Supreme Court decisions, explained by Professor Robert Anderson (Minnesota Chippewa, Bois Forte Band), that have diminished tribal self-governance and jurisdiction relative to the conduct of non-Indians within tribal territory.

Washington Tribes in the 21st Century

Over the past decade, Washington tribes have exercised their sovereignty and become an influential economic force. The tribes in Washington are creating and operating new businesses in the areas of real estate development, banking and finance, media, telecommunications, wholesale and retail trade, tourism and gaming. Consider these facts:

- Washington tribes occupy more than 3.2 million acres of reservation lands.
- Washington tribes currently employ nearly 15,000 Indian and non-Indian employees. (By comparison, Microsoft employs 20,000 Washingtonians.)
- In 1997, Washington tribes paid $57 million dollars in federal and state taxes.
- Annually, Washington tribes contribute $1 billion to the state's overall economy.

A corollary to the dramatic rise in tribal economic development is the increased interaction of Indian tribes and non-Indians who seek business, employment or recreation on reservations within Washington. In turn, an array of legal matters between Washington tribes and non-Indian persons and entities arises, thereby interjecting Indian law issues into virtually every area of law.

The Relevance of Indian Law

Indian law principles underlie each and every business transaction involving Indians and their land. Thus, any attorney representing corporate entities or individuals dealing with tribes must possess a basic understanding of Indian law. Indian lands within Washington are now being developed by corporations such as Wal-Mart, Home Depot and Bill Graham Enterprises. The partnerships between Washington tribes and such national corporations are generating billions of dollars in income and tax revenue. The articles by Rion Ramirez (Turtle Mountain Chippewa) and Jill Conrad (Nez Perce) highlight some of the transactional and related federal litigation issues that corporate attorneys in Washington should understand when conducting business on the reservation.

Indian law issues are not confined to tribal business transactions and employment situations. Litigation arising from an adoption involving an Indian child, a bequest of real property within the exterior boundaries of a reservation, or an automobile accident on the reservation potentially involve complex jurisdictional and choice-of-law issues. Enforcement of a judgment in a consumer-collection matter involving a tribal member or his property on the reservation presents jurisdictional obstacles that do not exist in state or federal court. A slip-and-fall case arising in a tribally owned casino or business enterprise will implicate, as a threshold issue, the defense of tribal sovereign immunity. The applicability of state taxes to the sale of products or services to non-Indians on the reservation may hinge upon a detailed reading of both taxation law and federal Indian common law. Even the development of non-Indian-owned land adjacent to or near reservations or waterways may implicate Indian law issues, particularly tribal treaty-based rights. The general practitioner or public lawyer in Washington will in all likelihood become involved in a case that will require an analysis and application of federal Indian law. For attorneys in Washington, Indian law's got everything to do with it.

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NOTE

1. For a more thorough introduction to Indian law in this state, *see Reservations of Right: A Practitioner's Guide to Indian Law in Washington* at http://www.wsba.org/DeNovo/2001/06/galanda.htm (May 2002).

Spokane tribal leaders meet Justices Sandra Day O'Connor and Stephen Breyer in 2001.

Just Like a "Real" Court!

by Judges Edythe Chenoisis, Jane M. Smith and Cynthia A. Jordan

The laws of each tribe reflect the values and traditions that the tribe has determined are most relevant to it.

"You operate just like a real court!" exclaimed the attorney on the other end of the line. The tribal court administrator had just finished explaining the procedure for being admitted to practice before the tribal court. "Of course," thought the court administrator, "that's because we *are* a real court!"

The tribal court is the Colville Tribal Court in north central Washington, on the Colville Indian Reservation. This conversation, which took place 18 years ago, occurred frequently back then. Unfortunately, it still happens with regularity in 2002, because many attorneys do not have the opportunity to learn about how tribal courts work until they find that the proper jurisdiction for one of their cases is in tribal court. The purpose of this article is to assist WSBA members in familiarizing themselves with modern tribal court.

From Historic to Modern Tribal Courts

The judicial systems that exist on many reservations today have little in common with traditional Indian methods of dispute resolution. Rather, today's tribal court has its roots in the externally imposed Anglo system for "keeping order" in Indian country. In 1883, the commissioner of Indian Affairs authorized the creation of Courts of Indian Offenses. These courts operated under rules and regulations developed by the Bureau of Indian Affairs, and were run by the government's Indian agents. Although many Indian agents appointed Indian judges, the agent had to approve all court decisions, which clearly limited the courts' independence. These courts later became known as "CFR courts," be-

cause rules relating to them can be found in 25 CFR pt. 11. Under the Indian Reorganization Act of 1934, tribes were given the opportunity to draft their own constitutions and laws, and set up their own court systems — modern tribal courts. These courts operate under the residual sovereignty of the tribes, rather than as agencies of the federal government.

Currently there are more than 360 fully operational tribal courts throughout the continental United States and Alaska. They range in size from very small to very large, and they handle everything from the theft of lawn chairs to multimillion-dollar construction-project disputes. Some tribal courts are constitutional courts, while some are statutorily created by tribal councils, which are the governing bodies of the tribes. Each tribe is unique and therefore so is the court system of each individual tribe. It is important to remember that what is appropriate for one tribal court may not be acceptable in another. A smart practitioner would be well-advised to take the time and make the effort to investigate the tribal court they wish to practice in prior to actually making an appearance. It will be well worth the effort in the long run.

First of all, due to the inherent sovereignty enjoyed by the tribes, each tribe has its own set of statutory authority and regulations, along with its own court rules. Some coastal tribes may have extensive and complex fishing laws, which may not be found in many inland tribes. Big game may not be as big of an issue for suburban tribes as for rural tribes, so suburban tribes may not have extensive big-game laws, but may have complex traffic laws. The laws of each tribe reflect the values and traditions that the tribe has determined are most relevant to it.

Practicing in Tribal Court

Clearly, you must know a tribe's law before you can adequately represent your client in tribal court. Although it is simple logic, attorneys new to tribal court often fail to do their homework. Many an attorney has made the mistake of quoting state or federal statutory or case law while presenting a case in tribal court, and has lost on an issue, or maybe even the entire case, because tribal law differed significantly from its state or federal counterpart. Generally speaking, state and federal case law is persuasive authority only, except where the federal courts of appeal or the U.S. Supreme Court has issued an opinion dealing directly with tribal matters, or Congress has enacted a statute dealing specifically with a tribe or tribes.

How does an attorney seeking to practice in tribal court research tribal law? First, obtain a copy of the tribe's law-and-order code and study it carefully. Most law-and-order codes will have a section listing applicable law and the order in which various types of persuasive authority will be considered. A tribal court may look first to tribal law; then tribal case law and custom; then state or federal law and case law. In some areas a tribe may, without waiving its sovereignty, incorporate sections of the applicable state statutory law into its own codes.

After obtaining the tribal code, the next step is to determine the availability of the tribe's own court decisions. For example, the Colville Tribal Court has an extensive collection of case law from both the trial court and the court of appeals. It has been organized and is available on disk. There is even a citation system which can be used to check on the status of the cases.

Alternatively, the largest repository of

tribal case law is the *Indian Law Reporter,* published monthly and now available at law libraries. Some tribes have their decisions online. The FindLaw search engine (http://www.findlaw.com) is one place to start your online search. If you are unable to find case law on point from the particular tribal court that your case is in, look to the tribal case law from other tribes. While case law from another tribe is persuasive rather than binding authority, just like most state and federal case law, it is only natural that tribal judges are more likely to be persuaded by case law from a similarly situated tribal court.

Admission to the Tribal-Court Bar

The next issue that a successful tribal court practitioner must address is admission to the tribal court bar. The requirements to practice law vary from tribe to tribe. Most tribal courts require some type of bar fee, ranging from $10 to $150 or more; many tribes are now requiring bar examinations. Don't worry — the exams usually can be completed in a couple of hours.

To prepare for the exam, in addition to specific tribal laws, you should have some knowledge of general Indian law and the content of major cases affecting tribes. Recommended reading would be Felix S. Cohen's treatise *Handbook of Federal Indian Law* (1982); William C. Canby's *American Indian Law in a Nutshell* (1981); and *The Rights of Indians and Tribes* by Steven L. Pevar, published by the American Civil Liberties Union. These sources will give you an overview of Indian law to better enable you to understand the setting in which tribal courts exist and maintain their jurisdiction. Once you have successfully completed the bar exam, if required, you will be asked to sign an oath affirming that you will faithfully obey the laws and ethical standards of the tribe.

Spokane Tribal Court Chief Judge Mary Pearson with Spokane Tribal Court Judge Conrad Pascal.

Having obtained the ability to practice in tribal court, and having determined the applicable law in your case, you are now ready to head for the courthouse door. Be advised that in tribal courts, as with state and federal courts, the clerk (or administrator) is usually the heart of the system. If you have questions, most of the time the clerk or administrator will be able to give you an answer or send you in the right direction. They won't do your job for you, but are usually willing to help out, especially if it makes their job easier. "Please" and "thank you" are very welcome, since court clerks don't hear this a lot. Find the

... because most tribal courts are overburdened and understaffed, tribal judges often need to move a long docket along as quickly as possible.

fine line between "needy" and "trying to be prepared" and stay on the correct side — it will make the system run smoother and your experience better. The court clerk or administrator is also an excellent resource for information on tribal customs and traditions. If they can't help you, they usually can tell you who can.

In addition to learning about proper procedures from court clerks or administrators, the successful tribal-court practitioner needs to know that tribal courts operate on a great deal less money than their state and federal counterparts. Though most tribal courts have computer access, many are not yet on the Internet or are only beginning to explore the technology. While it may be easy for you to e-mail information, it might not be easy for court staff to download or process it. Find out the capabilities of each court you are practicing in front of, including their rules, then follow them to the letter. If faxing is an option, find out when and how you are allowed to file information.

Tribal-Court Judges

What does the successful tribal-court practitioner need to know about tribal judges? Many of these judges are some of the sharpest attorney and lay judges you will ever have the opportunity to practice before. Often, they have been on the tribal bench for many years and know the applicable law inside and out. However, because most tribal courts are overburdened and understaffed, tribal judges often need to move a long docket along as quickly as possible. For this reason, tribal-court judges appreciate presentations in plain English, without a great deal of jargon or legalese. The judges exhibit a high degree of common sense and practicality, and they do not suffer grandstanding easily. They expect attorneys to come before them fully prepared and with a respectful attitude toward the tribal court and court staff.

Many tribal-court judges do not have access to stocked law libraries. Often, tribal court judges don't have law clerks, so any research has to be conducted by the judge at a law school or county law library. If you can submit case law with your documents, do so. It helps speed up the review process, and the judge will appreciate the extra effort. Finally, and maybe most importantly, the successful tribal-court practitioner needs to know that being a lawyer whose practice takes him into tribal court has both a rewarding and challenging adventure ahead. Many attorneys believe that tribal courts are the best to work in, because they are client friendly, and the system is faster and easier to negotiate. Moreover, in tribal court the law often is still in the process of being developed, and litigants and their attorneys may be in a position to have a significant impact on tribal law. In addition, as noted above, tribal court resources are limited, so tribal courts have had to find alternative ways to settle disputes and punish offenders. Most of the time the remedy focuses on rehabilitation and healing rather than

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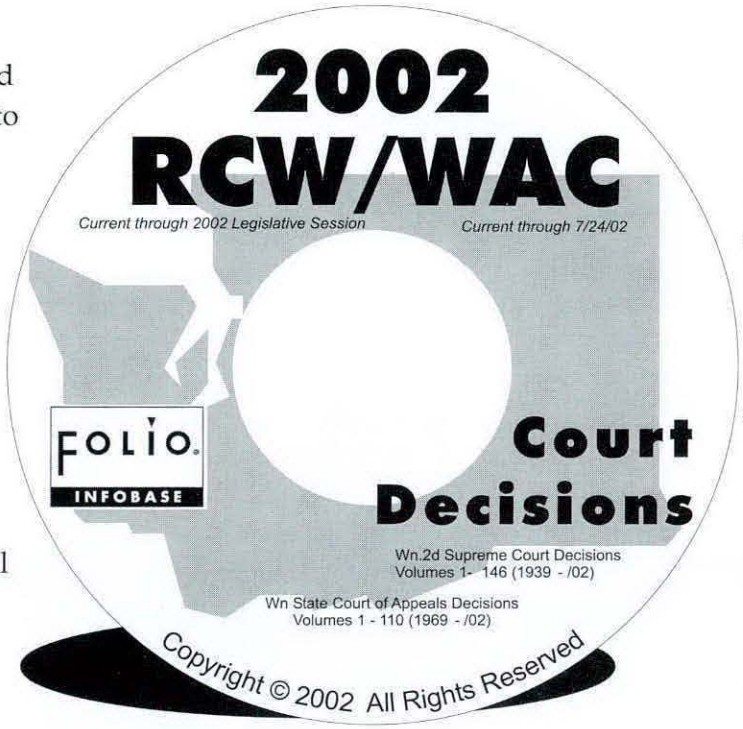

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solely punishment and money damages. A smart practitioner will be flexible and learn to adapt his way of thinking, rather than remain rigid in his approach to cases.

Conclusion

This latter fact may explain why tribal courts have many dedicated staff members. They are not in their jobs for the money or the prestige. They are there to help their people, whether they are Indian or non-Indian. Most love their jobs because the tribal-court environment can be so varied and challenging. Many of the staff have risen through the ranks and know the system inside and out. They wear many hats and perform many functions. Most have a great sense of humor, although it may sometimes get lost in the cultural translation. Don't worry — they aren't laughing at you — they're laughing with you!

Yes, tribal courts are just like "real" courts. You are expected to know their laws, respect their systems, and help bring harmony and order to their people. Not everyone is cut out to practice before a tribal court, but if you are one of the lucky ones, you are a very special person indeed.

We thank you for your contribution, salute you for your dedication, and welcome you to our family.

Judge Edythe Chenoisis has served as the chief judge of the Quinault Tribal Court for 22 years, and as judge or associate judge for numerous tribal courts and courts of appeal. She is past-president of the Northwest Tribal Court Judges' Association, and serves on the board of directors for the National American Indian Court Judges Association.

Judge Jane M. Smith has worked in the tribal-court system for more than 20 years. She is a judge for the Puyallup Tribal Court and the Quinault Tribal Court and their courts of appeal; and appellate judge for the Suquamish and Tulalip Tribal Courts. She serves on the WSBA Practice of Law Board, and is the administrator and law clerk for the Colville Court of Appeals.

Judge Cynthia A. Jordan is an attorney and judge for the Nez Perce Tribal Court of Appeals. She has worked for the Coeur d'Alene tribe as a public defender and GAL; the Kootenai Tribe of Idaho as a tribal attorney and TERO officer; the Spokane Tribe as a special prosecutor; the Colville Tribe in the Legal Service Office; and for the Mohegan Tribe.

Blurring the Boundaries of Tribal and State Jurisdiction

by Robert T. Anderson

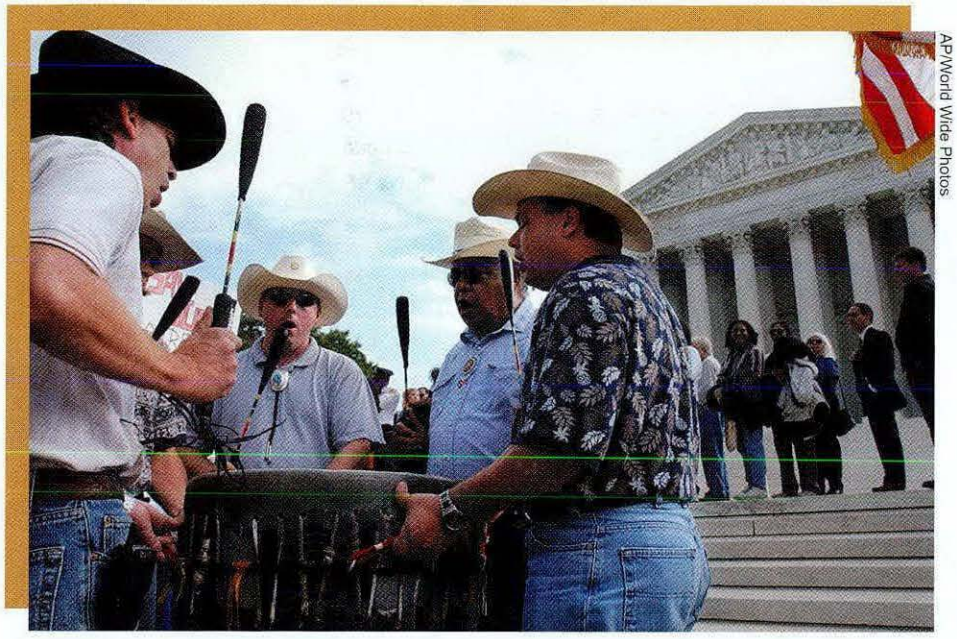
A spate of decisions adverse to Indian tribes in 2001 put an exclamation point on the run of defeats tribes have suffered in recent years before the U.S. Supreme Court. In response, the Senate Committee on Indian Affairs held an unprecedented "Hearing on Rulings of the United States Supreme Court Affecting Tribal Government Powers and Authorities," and heard testimony arguing that "the Supreme Court is abandoning its enshrined principle of deferring to Congress and is itself re-shaping and diminishing tribal rights and undermining Indian policy."[1] This article gauges the correctness of this assertion by reviewing some basic principles of Indian law, shifting congressional policies, and the Supreme Court's recent rulings. The examination reveals that change has indeed been significant with respect to tribal authority over non-Indians on non-Indian land. However, the Court has continued to be protective of tribal water rights, hunting and fishing rights, and most tribal regulation of members and non-members on tribal lands.

Most of the "permanent" homelands promised in treaties, however, were dramatically reduced in size when non-Indian settlers clamored for land previously "guaranteed" by treaty.[8]

The Supreme Court developed the defining principles in Indian law in the early 19th century under Chief Justice John Marshall in cases known as the "Marshall Trilogy."[2] One of the most famous statements respecting tribal, state and federal relations is set out in *Worcester v. Georgia*, a case rejecting Georgia's assertion of criminal jurisdiction over a non-Indian present within the Cherokee Nation. Chief Justice Marshall's majority opinion succinctly explained the status of Indian tribes under international and federal law in the following terms.

> The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed.... The Cherokee nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress. The whole intercourse between the United States and this nation is, by our constitution and laws, vested in the government of the United States.[3]

This hard and fast rule has been modified over the years, so that by 1973 the Supreme Court noted: "The status of the tribes has been described as an anomalous one and of complex character, for despite their partial assimilation into American culture, the tribes have retained a semi-independent position ... not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided."[4] The complexity has come in part because Congress has exercised its "plenary power" over Indian affairs in wildly



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Indian tribe members perform an honor song outside the United States Supreme Court on October 7, 2002, in Washington, D.C., during a rally for tribal sovereignty. The Supreme Court will have two tribal-control issues before it this session.

divergent ways over the course of U.S. history.

Shifting Congressional Policies

One of the first acts of Congress was the Indian Trade and Intercourse Act of 1790, which secured tribal lands from state or private-party acquisition without the consent of the U.S. Congress.[5] This protective measure, however, was soon augmented by a contradictory federal effort in the 1820s to "remove" Indian tribes from the East to the Oklahoma Territory and other parts of the West.[6] The Indian-removal statutes were supplemented by treaty negotiations with western tribes to achieve peaceful relations with the tribes, and more importantly, to gain cessions of vast areas for land-hungry settlers. In exchange, the United States promised permanent homelands and often recognized off-reservation hunting and fishing rights.[7] Most of the "permanent" homelands promised in treaties, however, were dramatically reduced in size when non-Indian settlers clamored for land previously "guaranteed" by treaty.[8] There were frequent allegations by tribes of fraud on the part of the United States in negotiation of the treaties, but the Supreme Court deferred such questions to Congress.[9] Treaty-making with tribes ended in 1871 when the House of Representatives refused to appropriate funds to implement existing treaties unless the Senate agreed that it would no longer participate in the treaty process with tribes. Thereafter, Congress more frequently legislated to change the jurisdictional rules when it saw fit, or when it disagreed with Supreme Court decisions. Major congressional acts were often adopted without even the veneer of agreement that surrounded many of the treaties.

Congress embarked on an aggressive "assimilation policy" in an attempt to end tribalism and make more land available for non-Indian settlement. The primary vehicle for the assimilation policy was the General Allotment Act of 1887,[10] which gave the president of the United States authority to assign communal tribal lands to individual tribal members, and restore remaining "surplus lands" to the public domain. As a result of the allotment policy, the Indian land base was reduced from 140 million acres in 1887 to 48 million acres in 1934. By the New Deal era, it was clear that the forced assimilation of Indian people and the destruction of their governments were not going to occur. This was acknowledged by the federal government in the congressionally mandated Merriam Report,[11] which proclaimed the allotment policy an unmitigated disaster and prompted passage of the Indian Reorganization Act of 1934 (IRA).[12]

The IRA was intended to strengthen tribal governments and to ensure permanent protection for the remaining Indian land base. To that end, it offered tribes the opportunity to reorganize their governmental structure pursuant to federally approved constitutions, and stopped the breakup of the tribal land base. Not long after passage of the IRA, Congress again reversed course and called for the termination of a number of tribes. The termination policy was accompanied by the adoption of Public Law 280, which authorized (and in some instances required) states to extend their jurisdictional reach into Indian country. In response, Indian tribes organized on a national level to fight for their political existence, causing the termination experiment to fizzle out by the early 1960s.[13] Formal repudiation of the termination policy was not long in coming.

President Nixon's dramatic message to Congress in 1970 announced the policy of "self-determination without termination." H.R. Doc. No. 91-363, 91st Cong., 2d Sess. (July 8, 1970). Congress followed suit by adopting the Indian Self-Determination Act of 1975,[14] which revived the pro-sovereignty spirit of the Indian Reorganization Act and provided for direct tribal administration of certain federal programs. A host of federal statutes adopted in the current self-determination era provide directly for the exercise of delegated federal authority over tribal territory and all those within it.[15]

Given the number of 180-degree turns in federal Indian policy, it is dangerous to speculate that no other will occur. However, the consistent congressional support for tribal self-government in the past 30 years, combined with greatly increased tribal economic and political influence, makes another reversal seem unlikely.

The Supreme Court in the Modern Era

The "modern era" in Indian law commenced in 1959, when the Supreme Court relied on the rule of *Worcester v. Georgia* to hold that contract disputes arising on Indian reservations must be heard in tribal court, i.e., state court jurisdiction would not be allowed.[16] The fact that the conduct at issue occurred on the reservation and one party was an Indian was sufficient to defeat state jurisdiction. The Court's ruling was the first of many in which tribes

and their members maintained their traditional insulation from state judicial and regulatory jurisdiction.

When tribal lands are involved, the Supreme Court has frequently (and recently) affirmed that Indian tribes exercise governmental powers "not by virtue of any delegation of powers, but rather by reason of their original tribal sovereignty."[17] Applying this reasoning, the Court upheld the taxing authority of the Jicarilla Apache Tribe and the Navajo Nation over non-Indian corporations doing business on tribal lands in two hotly contested cases.[18] The Court echoed *Worcester v. Georgia*, and held that tribes possess inherent powers, including "the power of taxation [which] may be exercised over members of the tribe and over nonmembers."[19] In *New Mexico v. Mescalero Apache Tribe*,[20] the Court relied on these same principles to uphold tribal regulatory authority to regulate non-Indian hunting and fishing on the Mescalero Apache reservation. The Court struck down conflicting state regulations, noting that "State jurisdiction is preempted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the State interests at stake are sufficient to justify the assertion of State authority."[21]

The string of tribal victories, however, included some significant defeats that foreshadowed the current Court's apparent hostility to tribal jurisdiction over nonmembers. The first major defeat for tribal authority is found in a case out of the Seattle area — *Oliphant v. Suquamish Indian Tribe*.[22] The Court held, for the first time in 150 years, that incorporation of tribes into the United States deprived the tribes of an inherent governmental power. The Court thus rejected the rule that incursions on tribal authority would only be found when explicitly authorized by Congress. Although the loss of criminal jurisdiction over non-Indians was a significant blow, what was most damaging was the fact that the Court *implied* the loss of inherent tribal authority. It would not be long before this approach was transported to the civil jurisdiction context.

In *Montana v. United States*,[23] the Court announced a presumption against the exercise of tribal jurisdiction over nonmembers on non-Indian land within Indian country. *Montana* involved a challenge to the Crow Tribe's claim of ownership of the Big Horn River and regulation of non-Indian hunting and fishing on the river. After rejecting the tribe's claim of ownership of the bed and banks of the river, the Court held that the tribe lacked jurisdiction to regulate non-Indians on what were held to be state lands. The decision did not cause much alarm among Indian tribes, since the Court set out two exceptions to the general rule: when the non-Indian has entered into consensual relations with the tribe or its members; or when the non-Indian's activities have a significant effect on the political integrity, the economic security, or the health or welfare of the tribe or its members.[24] The exceptions seemed quite broad, and many tribal advocates assumed that most assertions of tribal authority would fit within the notion of health or welfare regulation.

Ten years later, in *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*,[25] a fractured Court held in plurality opinions: 1) that the Yakima Nation lacked authority to zone non-Indian land in a portion of the Yakima reservation that was predominantly non-Indian in character; and 2) that the Nation did have authority over non-Indian land in an area of

President Nixon's dramatic message to Congress in 1970 announced the policy of "self-determination without termination."

the reservation that was said to have retained its "Indian character." Four members of the Court would have denied tribal authority in both instances based on the policies embodied in the General Allotment Act. Although the allotment policy is long gone, its effects are not. The Supreme Court described the effects of allotment on the Yakima Reservation in a way applicable to many other reservations:

> The reservation is located in the southeastern part of the State of Washington. Approximately 1.3 million acres of land are located within its boundaries. Of that land, roughly 80% is held in trust by the United States for the benefit of the Yakima Nation or individual members of the Tribe. The remaining 20% of the land is owned in fee by Indian or non-Indian owners. Most of the fee land is found in Toppenish, Wapato, and Harrah, the three incorporated towns located in the northeastern part of the reservation. The remaining fee land is scattered throughout the reservation in a "checkerboard" pattern.[26]

Conflicts between tribal and state jurisdiction in the most contentious cases come out of fact patterns reflective of this checkerboard land-holding pattern. These include conflicts over competing tribal and county zoning schemes, dual taxation of private business, and state taxation of tribal land and regulation of water use. In all of these areas, the courts are called on to reconcile the conflicting implications of the abandoned allotment policy with current congressional policies protective of tribal authority. Congress has authority to reconcile the conflicting policies, but has not acted — thus leaving the Supreme Court as the final arbiter of tribal-state jurisdictional conflicts. The *Brendale* decision created great uncertainty that reigned until the Court's recent and frequent forays into the area.

Recent Supreme Court Decisions Highlight Break with Past

The Senate Committee hearing focused on three recent cases in which the Supreme Court sharply limited the authority of Indian tribes to adjudicate cases involving non-Indians, or to regulate their conduct on non-Indian land within Indian country. It is no coincidence that the change in the Court's approach was accompanied by the retirement of Justices Brennan, Marshall and Blackmun, all of whom were known for their thoughtful treatment of Indian law issues. It must also be pointed out, however, that up until the decision in *Oliphant*, the Court rarely heard cases involving the exercise of tribal authority over non-Indians. The rapidly expanding governmental capacity of tribal governments and courts in the modern era led to increased conflict with non-Indians regulated by tribes or haled into tribal courts.

In *Strate v. A-1 Contractors*,[27] the Court denied tribal-court jurisdiction to adjudicate a tort claim arising from injuries suffered in an automobile accident on an Indian reservation. The plaintiff was a non-Indian reservation resident married to a

tribal member. The Supreme Court held that because the accident took place on state highway right of way, the *Montana* presumption against tribal jurisdiction applied. The right of way was said to be the equivalent of non-Indian land, although the tribe held the underlying interest and thus had granted the right of way. Applying the second exception announced in *Montana*, the Court held that tribal regulation of highway safety was not necessary to protect "the political integrity, the economic security, or the health or welfare of the tribe [or its members]."

Next, in *Atkinson Trading Company v. Shirley*,[28] the Court ruled that the Navajo Nation lacks authority to impose a hotel occupancy tax on non-Indian guests of a hotel on non-Indian land within the Navajo reservation. The hotel is surrounded by tribal land and is served by the Nation's police, fire and emergency health services. The Nation argued that the availability of the services constituted consensual relations between the Nation and hotel guests. In addition, the hotel's presence was claimed to have a significant effect on the political integrity of the Nation because of the need to administer various services to patrons of the hotel. The Court ruled that neither *Montana* exception applied:

The Supreme Court has made big changes in the law respecting the relative bounds of tribal and state jurisdiction, and it is unlikely to reverse course any time soon.

> The consensual relationship must stem from "commercial dealing, contracts, leases, or other arrangements," [citation omitted] and a nonmember's actual or potential receipt of tribal police, fire, and medical services does not create the requisite connection.... [Second], whatever effect petitioner's operation of the Cameron Trading Post might have upon surrounding Navajo land, it does not endanger the Navajo Nation's political integrity.

The plurality opinion that rested on demographics and the "Indian character" of the area in *Brendale* appeared to support the Navajo position, but the Court brushed that argument aside without analysis.

Even more striking was the result in *Nevada v. Hicks*, 533 U.S. 353 (2001), which involved a tribal-court action against a state officer pursuant to 42 U.S.C. § 1983 and tribal tort law. A county law-enforcement officer sought a warrant from a state court judge to search a tribal member's home on a reservation for evidence of an alleged off-reservation crime. The state court issued a search warrant, but informed the officer that the warrant would not be valid on the reservation without endorsement by the tribal court. The county officer obtained tribal-court permission for a search, but exceeded the terms of the tribal warrant. A second search was conducted without tribal-court authorization, and the county officer damaged the tribal member's property. The 9th Circuit ruled that the tribal court had jurisdiction to hear the suit against the state officer. The Supreme Court reversed, holding that state officials may enforce state-issued search warrants against tribal members on tribal land when investigating alleged off-reservation crimes. Since tribes accordingly lacked jurisdiction to regulate the state official while engaged in his official duties, it followed, according to Justice Scalia, that the tribal court could not hear the action. This ruling

prompted Judge William C. Canby Jr. to tell the Senate Committee on Indian Affairs that:

> the recent decades have seen a significant change in the Supreme Court's view of the inherent power of Indian tribes. Many decisions, culminating in last term's *Atkinson* and *Hicks*, have substantially changed what has long been assumed to be the boundaries of tribal and state power in Indian country. The new restrictions on tribal power represent a judicial trend only; they have not been paralleled by any changes in congressional or executive policies concerning Indian affairs. None of the changes in the boundaries of state and tribal power affected by Supreme Court decisions are based on the Constitution; they accordingly are subject to modification at the will of Congress in the exercise of its power over Indian affairs.[29]

Big Change in a Small Area?

The Supreme Court has made big changes in the law respecting the relative bounds of tribal and state jurisdiction, and it is unlikely to reverse course any time soon. The changes, however, have greatest effect on tribal control of non-Indians on non-Indian lands within reservations. The exercise of delegated federal authority by tribes may limit the import of the decisions as would the tribal acquisition of non-Indian land. *Nevada v. Hicks* is more troubling, but it may best be viewed as a limited aid to enforcement of off-reservation crimes. It is important, however, to note that the Court did not question other relatively recent rulings confirming tribal regulatory authority over non-Indians on tribal lands.

At the same time, tribes may be encouraged by the fact that the Court has remained faithful to important tribal property rights embodied in treaties and agreements with the United States. In the landmark case construing the fishing rights of most Indian tribes in Washington, *Washington v. Washington Commercial Passenger Fishing Vessel, Ass'n.*,[30] the Court upheld Judge George Boldt's holding that the tribal rights extended to up to 50 percent of the harvestable surplus of fish passing usual and accustomed tribal fishing sites.[31] The Court adhered to these principles in 1999 when it rejected the state of Minnesota's attempt to regulate off-reservation treaty fishing rights in *Mille Lacs Band of Chippewa Indians v. Minnesota*.[32] The Court in 2001 also rejected states' rights arguments and upheld tribal ownership of the bed of Lake Coeur d'Alene.[33] The current Supreme Court is likely to continue to be protective of tribal property rights guaranteed by treaty or agreement, although the hostility it has exhibited toward the exercise of tribal jurisdiction in some limited contexts makes prediction hazardous.

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NOTES

1. Testimony of Professor David H. Getches, Hearing on Rulings of the United States Supreme Court Affecting Tribal Government Powers and Authorities, Sen. Comm. on Indian Affairs, 107th Cong. 2d Sess. (Feb. 27, 2002). The author of this article and the Honorable William C. Canby Jr. also testified at the hearing.
2. Johnson v. McIntosh, 21 U.S. 543 (1823) (tribal conveyances of land to private party in 1773 and 1775 not valid because not approved by the discovering Nation); Cherokee Nation v. Georgia 30 U.S. 1 (1831)(tribes are "domestic dependent

Nations," not states or foreign nations and thus may not bring original actions in the Supreme Court under Art. III of the Constitution).
3. Worcester v. Georgia, 31 U.S. 515, 560-61 (1832).
4. McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 173 (1973)(internal citations omitted).
5. 1 Stat. 137. The act was temporary, but was continued in various forms and is now codified at 25 U.S.C. § 177.
6. Ch. 148, 4 Stat. 411-12.
7. *See* Washington v. Passenger Fishing Vessel Ass'n., 443 U.S. 658 (1979).
8. *See* United States v. Shoshone Tribe, 304 U.S. 111 (1938).
9. *See* Prucha, *American Indian Treaties* 173-74 (1994).
10. General Allotment Act of 1887 (Dawes Act), Ch. 119, 24 Stat. 388.
11. Institute for Government Research, *The Problem of Indian Administration* (1928); *see also,* F. Cohen, *Handbook of Federal Indian Law* 144 (1982 ed.).
12. *See* 25 U.S.C. §§ 461- 479.
13. *See* Stephen Cornell, *The Return of the Native* 123-124 (1988).
14. 25 U.S.C. §§ 450-450n, §§ 455-458e.
15. Examples include Indian liquor laws, 18 U.S.C. 1152; the Clean Air Act, 42 U.S.C. 7401-7642; the Clean Water Act, 33 U.S.C. 1251-1377. *See* Nance v. EPA, 645 F.2d 701 (9th Cir. 1981); City of Albuquerque v. Browner, 97 F.3d 415 (10th Cir. 1996); and Montana v. EPA, 137 F.3d 1135 (9th Cir. 1998).
16. Williams v. Lee, 358 U.S. 217 (1959); *see* Wilkinson, *American Indians, Time, and the Law* (1987) (describing the "modern era" as commencing with the Court's decision in Williams v. Lee).
17. United States v. Wheeler, 435 U.S. 313, 323-24 (1978).
18. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982); Kerr-McGee Corp. v. Navajo Nation, 471 U.S. 195, 198 (1985).
19. *Id., citing* Powers of Indian Tribes, 55 I.D. 14, 46 (Oct. 25, 1934); *see also* Felix S. Cohen, *Handbook of Federal Indian Law* 123 (1941).
20. 462 U.S. 324 (1983).
21. *Id.* at 334.
22. 435 U.S. 191(1978).
23. 450 U.S. 544 (1981).
24. 450 U.S. 544, 566. The rule also has no application if Congress has delegated authority to the tribe to regulate in an area. *See* note 18, *supra.*
25. 492 U.S. 408 (1989).
26. Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408, 415 (1989).
27. 520 U.S. 438 (1997).
28. 532 U.S. 645(2001).
29. *See* Note 1, *supra.*
30. 443 U.S. 658, 666 (1979).
31. *Citing,* Tulee v. Washington, 315 U.S. 681; Seufert Bros. Co. v. United States, 249 U.S. 194 (1919); and United States v. Winans, 198 U.S. 371 (1905).
32. 526 U.S. 172 (1999).
33. Idaho v. United States, 533 U.S. 262 (2001). The Court similarly ruled in favor of the Quechan Tribe's reserved water rights in the latest iteration of Arizona v. California, 530 U.S. 392 (2000).

Doing Business in Indian Country

by Rion Ramirez

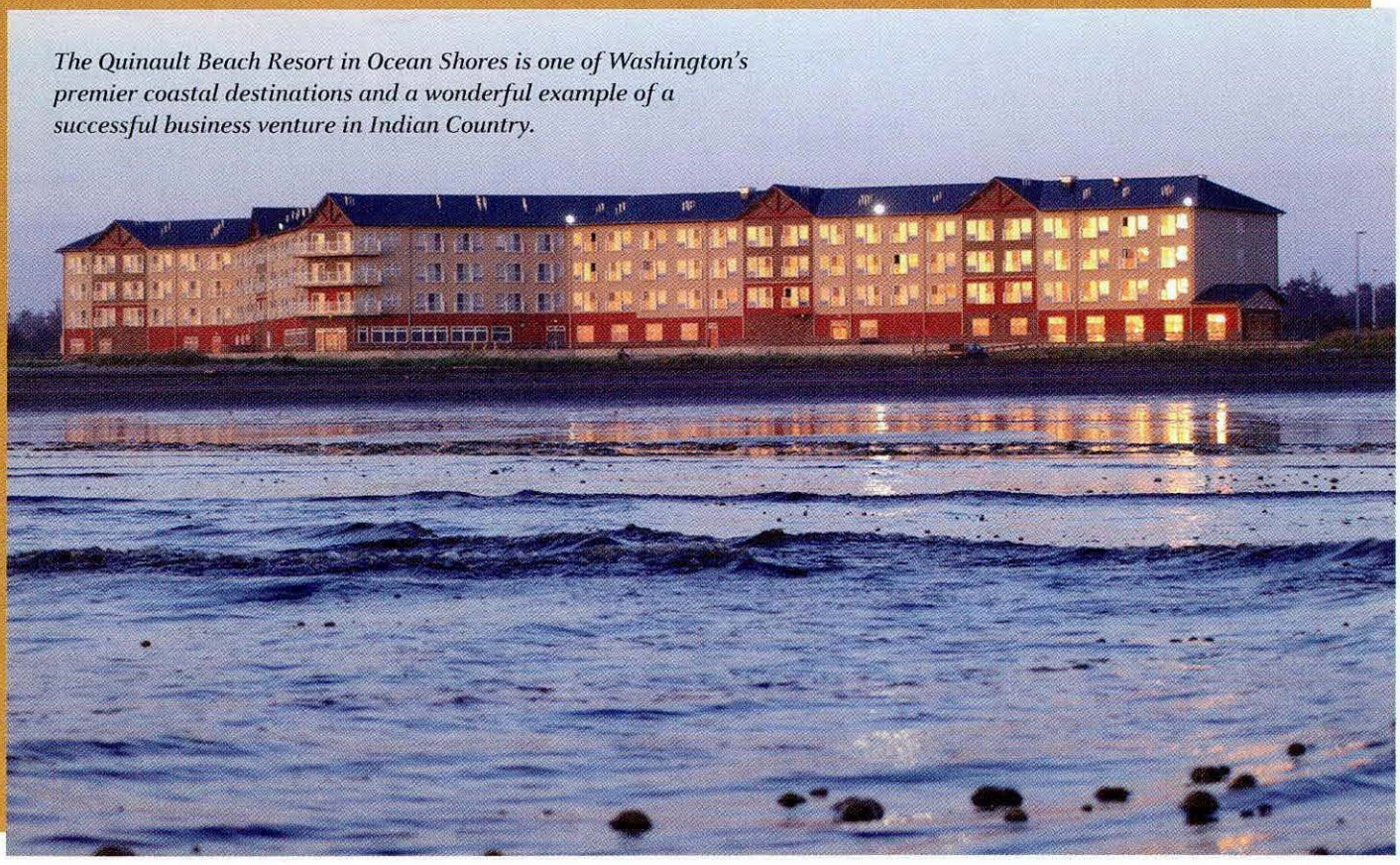
This article sets forth some of the issues to be considered and addressed by non-tribal parties when entering into commercial transactions with federally recognized Indian tribes or tribal entities; tribally controlled business enterprises; or Indian-owned, reservation-based business enterprises.

The method of a tribe's organization affects how powers are distributed; who can act for the tribe; and what, if any, approvals may be necessary to carry out a transaction.

Organization of an Indian Tribe

Indian tribes are organized in different ways. The method of a tribe's organization affects how powers are distributed; who can act for the tribe; and what, if any, approvals may be necessary to carry out a transaction.

If a tribe is organized under Section 16 of the Indian Reorganization Act of 1934 (IRA), 25 U.S.C. Section 461, *et seq.*, the tribe will be governed by a constitution adopted under Section 16 of the IRA, 25 U.S.C. Section 476. The constitution will normally describe the governing body of the tribe and set forth the powers and au-



The Quinault Beach Resort in Ocean Shores is one of Washington's premier coastal destinations and a wonderful example of a successful business venture in Indian Country.

thority that the governing body has. It may grant to the governing body all power and authority to adopt legislation and carry on the activities of the tribe, or it may reserve some or all of the powers to the adult members of the tribe as a whole (often referred to as the General Council).

Many tribes are not organized under the IRA. In those cases, the tribe's governing instruments may consist of tribal history, ordinances, resolutions or other actions. These must be reviewed carefully in order to determine the identity of the governing body, the powers that governing body has, and the extent to which powers are reserved to the members of the tribe as a whole.

Any tribe, whether or not organized under Section 16 of the IRA, may also be incorporated under Section 17 of the IRA, 25 U.S.C. Section 477, whereupon it will also have a charter issued by the U.S. secretary of the interior. Incorporation is significant in that it creates a separate, somewhat parallel legal entity with respect to which the powers to contract, pledge assets, and be sued may differ from the governmental entity. The constitution (for an IRA tribe) or tribal law (for a non-IRA tribe) and the charter will sometimes draw distinctions between the governmental entity (organized under the constitution or tribal law) and the business entity (organized under the charter) in terms of the responsibility for carrying out certain functions. A Section 17 corporation may be used by a tribe as its vehicle for carrying out business activities, as discussed in more detail below. Actions of the Section 17 corporation may require approval by the governing body of the tribe or, again, by the General Council.

A corporation created under state law is a creature of the state, notwithstanding the fact that the owners of the corporation may be a tribe or tribal members.

Business Organization

The nature of the entity with whom one is dealing affects the legal rights and remedies available to the non-Indian party.

Government or Governmental Instrumentality

Tribal governments and their governmental instrumentalities (e.g., housing authorities, utility commissions, land commissions) contract directly for goods and services. In these cases, the issues of governmental organization and who may act to bind the governmental entity are paramount. In addition, the sovereign immunity, court jurisdiction and remedy issues discussed below are most clearly present.

Section 17 Corporations

A tribe that has established a Section 17 corporation may have transferred to that entity some or all of the responsibilities of carrying out tribal business activities. Many Section 17 corporations exist, but most have been inactive since creation. This is the result of the use, in the early years after passage of the IRA, of standard-form corporate charters promulgated by the Bureau of Indian Affairs (BIA) that were quite restrictive in what a Section 17 corporation could do, and quite expansive in the oversight and approval powers granted to the secretary of the interior. The restrictive nature of the BIA-generated charters is not required by the statute, and

some tribes have adopted new charters for their Section 17 corporations that are designed to make those entities useful tools for tribal business activity.

Much as a state-chartered corporation's articles of incorporation and bylaws spell out the corporation's authorized purposes and its method of acting, a Section 17 charter spells out the authorized purposes of the Section 17 corporation; its ability to borrow money, to encumber its assets, to sue, be sued and to waive its sovereign immunity; and how autonomous it is from tribal governmental control. When dealing with a Section 17 corporation, it is essential to review the charter provisions and any bylaws of the corporation, to determine any limits on the corporation's powers to act, who can act for the corporation, the extent to which corporate action must be approved either by tribal government or the secretary of the interior, the extent to which assets of the corporation can be used as collateral to secure corporate obligations, whether the corporation enjoys sovereign immunity, and the ability of the corporation to waive sovereign immunity.

Tribally or State-Chartered Business Entities

In several cases, tribes have formed corporations or other legal entities organized under tribal or state law, rather than Section 17 of the IRA, to conduct business operations. In these instances, it is necessary to examine the charter, bylaws or other organizational documents of the entity in question as well as the state or tribal laws, ordinances or resolutions under which it is organized.

If the entity is created under tribal law, the tribe will probably have enacted a corporation code or similar tribal statute or ordinance governing the ability of tribal corporations to be formed, the procedures to be followed, and the powers and immunities of tribal corporations. Tribal law may distinguish between tribal corporations owned by the tribe itself (which then serve as vehicles for tribal business activity) and tribal corporations wholly or partially owned by tribal members. In the case of tribally owned corporations, the corporation may share in the sovereign immunity and other privileges of the tribe itself, the powers of the corporation to sue and be sued may be restricted, and the tribal government may exercise some oversight and control. In the case of individually owned tribal corporations, sovereign immunity may not be present, but tribal law may specify the forum in which it may be sued. Thus, when entering into a business transaction with a tribally created entity, one must investige and review organizational documents, including authorizing resolutions of all governmental and business entities involved, to ensure that the entity with whom you are contracting is properly organized and is acting within its power, and that all necessary steps have been taken to approve and authorize the execution, delivery and performance of the contract by the tribal entity.

If the entity is created under state law, the general laws of the state apply. A corporation created under state law is a creature of the state, notwithstanding the fact that the owners of the corporation may be a tribe or tribal members. Thus, as a general rule, such a corporation may be sued in state court, as may any other state-created entity, and judgment may be obtained against corporate assets.[1] However, a few courts have extended sovereign immunity to tribal not-for-profit corporations formed under state law.[2] Nonetheless, actions against the corporate owners (in an attempt to pierce the corporate veil) would be subjected to the same defenses those owners would have if sued in other situations. For these reasons (and for tax considerations), tribes and tribal members generally find the use of state-chartered entities less desirable than entities created under tribal law.

Reservation or Trust Land

Title to reservation lands is generally held by the United States in trust for the tribe. Under applicable federal law, such tribal trust lands generally may not be sold, taxed or encumbered. It is possible, with the approval of the BIA, for a tribe to lease tribal trust lands (e.g., to a tribal entity or tribal member for business or residential purposes or to a nontribal party for business purposes) and for the lessee to grant a leasehold mortgage on his leasehold interest; this approach can give a lender the right, upon a default, to exercise dominion and control over the land in question for the remaining term of the underlying lease. By federal regulation, such leases are generally limited to a term of 25 years with

the right to grant one renewal option for an additional 25 years. On some reservations, such leases may have a term of up to 99 years.

Land held in trust for individual Indians, or land held in restricted-fee status by individual Indians, cannot be sold, mortgaged or encumbered without the approval of the secretary of the interior. A determination of the trust status of particular lands involves reviewing treaties, Acts of Congress, secretarial proclamations, title records maintained by the Land Titles and Records Offices of the BIA, and other documents.

Tribes and tribal members also have projects on their fee lands within their reservation. Absent exceptional circumstances, land use and permitting jurisdiction over those properties and projects fall within the tribe's jurisdiction.[3]

Federal Approval

Under 25 U.S.C. Section 81, no contract with any Indian tribe that encumbers (for a period of seven or more years) lands held by the United States in trust for the tribe, or lands held by the tribe subject to a federal restriction against alienation, is valid unless the contract bears the approval of the secretary of the interior or his designee. Such approval is usually obtained from the director of the BIA regional office having jurisdiction over the reservation or trust land involved. Violation of the Section 81 approval requirement renders the contract in question null and void.

Leases of trust lands, and mortgages of the resulting leasehold estate, require approval of the secretary of the interior under 25 U.S.C. Section 415 and the related regulations separate and apart from Section 81.

Sovereign Immunity

Indian tribes enjoy sovereign immunity from suit similar to that of the United States.[4] "Tribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation."[5]

The U.S. Supreme Court has held that the sovereign immunity of tribes may be waived by Congress. The Court has also ruled that an Indian tribe has the power to waive its sovereign immunity from suit, provided that such waiver is clear, explicit and unambiguous.[6] To maximize the likelihood that a waiver of sovereign immunity will be enforced by the courts, the waiver should be limited to specific assets of the tribe or tribal entity, and those assets should be expressly pledged or made available to satisfy claims growing out of the transaction.

A tribe that has incorporated under Section 17 of the IRA, or has formed a corporation under state or tribal law, has created a separate legal entity which, under applicable authorities, may have broader power to sue and be sued. If the entity involved is wholly owned by the tribe, the tribe's sovereign immunity may well extend to that entity; an examination of the tribe's Section 17 charter or other organizational documents and governing statutes, ordinances or resolutions, as discussed above, would be necessary in order to determine the extent of immunity and the power to sue and be sued. If the entity is individually owned, it is unlikely that it would have sovereign immunity; sovereign immunity is an attribute of a tribe itself, not of individual tribe members.

In all cases, a party dealing with a tribal entity must identify the assets to which it

wants recourse in the event of a default, determine which legal entities have or may have control over those assets, and obtain effective waivers of sovereign immunity from all such entities, tied specifically to the assets so identified. As a part of this process, one should conduct appropriate inquiries to determine the extent to which such assets may have been pledged or set aside to secure other obligations of the tribe.

It is important to approach this issue with respect, as tribes often regard the assertion of their sovereign immunity as an essential feature of their sovereign status.

Court Jurisdiction

Federal Courts

Federal courts are courts of limited jurisdiction. The parties to a contract cannot, by agreement, give a federal court jurisdiction over a matter ("subject matter jurisdiction"). With the exception of certain specific jurisdictional grants regarding land (e.g., 25 U.S.C. Sections 345, 346; 28 U.S.C. Section 1353), civil rights (e.g., 28 U.S.C. Section 1343) and other matters, federal court jurisdiction must be established by showing that the case presents a federal question (28 U.S.C. Section 1331) or is based on the diversity of state citizenship (28 U.S.C. Section 1332).[7]

An Indian tribe "is not a citizen of any state and cannot sue or be sued in federal court under diversity jurisdiction."[8]

It is unlikely that most disputes or remedial actions arising under business transactions with tribes or tribal entities will present a federal question. Therefore, that method for obtaining federal court jurisdiction would not usually be available.

Diversity jurisdiction is not available to an in-state plaintiff, and may not be available to an out-of-state plaintiff in an action involving an Indian tribe. An Indian tribe "is not a citizen of any state and cannot sue or be sued in federal court under diversity jurisdiction."[8] The same would hold true for a tribal enterprise that does not have a separate legal existence; a tribe that has incorporated under Section 17, a tribally or state-chartered corporation would all be subject to the normal rules and would be considered citizens of the state of their principal place of business.[9] Individual Indians born in the United States are U.S. citizens (8 U.S.C. Section 1401b) and citizens of the state in which they reside (U.S. Constitution, Amendment XIV, Section 1).

State Court

Under *Williams v. Lee,* 358 U.S. 217 (1959), state courts lack subject-matter jurisdiction over suits brought by non-Indians against Indians, with respect to matters arising in Indian country when such jurisdiction would infringe "on the right of reservation Indians to make their own laws and be governed by them." Thus, as a matter of federal law, state courts are without jurisdiction to hear lawsuits brought by non-Indians against tribes, tribally created entities and reservation Indians with respect to transactions arising on a reservation. (This rule should not bar suits in state court against state-chartered entities, even if owned by tribes or tribal members.) An exception to this lack of jurisdiction is applicable to suits with respect to most reservations in the states of Alaska, California, Minnesota, Nebraska, Oregon and Wisconsin, as well as certain Indian lands in certain other states under Public Law 280; 28 U.S.C. § 1360.[10] In Washington, this exception ranges from full state court civil jurisdiction over all matters that arise in Indian country to no jurisdiction at all, depending upon the specific reservation involved. Thus, it is essential that one carefully review this issue on a tribe-by-tribe basis.

Public Law 280 reads, in relevant part:

> Each of the States listed ... shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed ... to the same extent that such State has jurisdiction over other civil causes of action....[11]

Thus, a state court in a Public Law 280 state may exercise civil adjudicatory jurisdiction over a matter that arises within Indian country to the same extent it would otherwise have jurisdiction over the same civil action not involving Indians or Indian mat-

ters. Public Law 280 expressly provides, however, that nothing in the statute confers jurisdiction upon state courts "to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of [trust] property or any interest therein."[12]

In order to avoid the effect of *Williams v. Lee*, non-Indian parties have tried to take steps that would bolster the contention that the transaction in question did not "arise on" the reservation. Those steps (e.g., having the contract documents signed off the reservation, delivering the goods in question off the reservation) are of questionable effectiveness.

Tribal Court

Many tribes have established tribal courts, which may be courts of general or limited jurisdiction. If a tribal court has jurisdiction over a case or controversy, federal and state courts with jurisdiction will often abstain until the tribal-court proceedings have concluded.[13] Thus, it is quite likely that if the tribe has an established, functioning tribal court, it is the court which will have subject-matter jurisdiction over any suit to enforce a reservation-related contract, regardless of whether a federal court or a state court would have jurisdiction under Public Law 280.

Subject Matter Jurisdiction, Personal Jurisdiction and Immunity

The foregoing discussion addresses only the question of which court or courts would have subject-matter jurisdiction over a cause of action brought against a tribe or a tribal entity to enforce a contract. The fact that a court may have subject-matter jurisdiction does not mean that court has personal jurisdiction over the tribe or tribal entity. Personal jurisdiction requires an effective waiver of sovereign immunity, as discussed earlier. Thus, unless the organizational documents of the tribal entity waive the immunity of the entity at the outset, it is essential that a contractual waiver be obtained, even if limited in scope.

Contractual Forum Selection Provisions

Some non-Indian parties insist that their contracts with tribal entities contain waivers of tribal-court jurisdiction or agreements to submit disputes to federal or state courts. These provisions are unenforceable in at least some instances and will almost certainly be viewed as offensive by tribes with functioning court systems. A balanced approach requires review of the make-up, operation, organization, powers, procedures and historical performance of each tribal court to evaluate its suitability as a forum for dispute resolution. If the non-Indian party is unwilling to submit the resolution of disputes to tribal court, an ordinance or resolution of the tribal government may be necessary to remove the contract at issue from the tribal court's jurisdiction; however, the tribal government may likely be without power to take this step, particulary if the tribal court is established by the tribe's constitution. In addition, this approach must be taken with caution, not only because of the resentment that it is likely to generate, but also because, if successful, it might result in no forum having jurisdiction to decide disputes under the contract. Indeed, some tribes insist that their contracts contain an agreement that any dispute or enforcement action be brought in tribal court. In most instances, tribes are unwilling to submit their disputes to the jurisdiction of state courts, and, as discussed above, federal courts are often without jurisdiction in contract-enforcement actions. In practice, an agreement to submit to binding arbitration is often a mutually agreeable

The fact that a court may have subject-matter jurisdiction does not mean that court has personal jurisdiction over the tribe or tribal entity.

alternative to court proceedings, although it would still be necessary to resort to a court in order to enforce the agreement to arbitrate and any resulting arbitration award.

Judgment and Remedies

The extent to which a creditor (secured or unsecured) of an Indian tribe can execute against tribal property is limited by the extent of the tribe's waiver of sovereign immunity with respect to the matter. Section 16 of the IRA authorizes an IRA tribe to include provisions in its constitution "to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the Tribe." Accordingly, in order to enforce a judgment, lien, or right of repossession against assets belonging to or in the possession of an IRA tribe, the tribe must first have waived its sovereign immunity with respect to such action, and have provided that the creditor may exercise recourse against such assets to the satisfaction of its claim. This same issue is present in transactions with a Section 17 corporation; the extent to which a creditor may exercise remedies against corporate assets is often limited by the terms of the Section 17 charter. With respect to actions against tribally created entities, one must consult both tribal law and the entity's organizational instruments.

The extent to which particular remedies may be available to a creditor — including, particularly, the right of repossession of property — is often a matter of tribal law.[14] Tribal law must be consulted and, in some cases, new ordinances or resolutions must be drafted and enacted by the tribal government in order to ensure that the desired remedies are, in fact, available. In many instances, legal remedies drafted into a contract can be given the force of law by the adoption of an ordinance or resolution specifically affirming the enforceability of the contract in accordance with its terms as a matter of tribal law. This approach may not always be adequate to address matters affecting the rights of third parties, such as perfection and priority of security interests. It may be necessary to have the tribe adopt an ordinance, either applying the state Uniform Commercial Code (UCC) closely patterned after certain provisions of the UCC, addressing these concerns in a way that will establish the perfection, and protect the priority, of a secured party's security interest vis-à-vis other claimants of interests in or liens against the same property.

In the end, it is important, upon entering into the transaction, for the parties to consider how, and against what assets, recourse will be available in the event of a default, and to ensure that the necessary tribal and contractual vehicles for achieving the desired ends are in place.

Governing Substantive Law

State laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that state law shall apply.[15] Public

Law 280 (discussed earlier) is an example of such congressional action. It applies only in certain jurisdictions, and there is considerable uncertainty regarding its scope even in those jurisdictions, particularly as it relates to tribal entities.

There is no body of general, substantive federal law similar to the UCC governing private equipment sales, leasing and financing agreements with Indian tribes. Although contracts might be drafted to provide that state law governs the rights and obligations of the parties, such provisions may be unenforceable, particularly with respect to remedies against collateral located on a reservation, and offer no protection against third-party claims to the collateral. It is probable that tribal law will ultimately be found controlling, notwithstanding contrary contractual language. The prudent course, therefore, is to ensure, prior to entering into a business transaction, that tribal legislation is in force and adequate to protect each party's interests as a matter of tribal law. This legislation could take the form of the adoption of state substantive law — including the UCC — as positive tribal law. Such law can then be specifically identified in the contract as the governing law, thus eliminating much uncertainty.

Financing Concerns

With the recent dramatic increase in income and economic activity on many Indian reservations brought about, in part, by the expansion of Indian gaming, many institutional lenders are becoming more interested in, and knowledgeable about, financing Indian enterprises. While the legal complexities are significant, they are by no means insurmountable, as evidenced by the number of casino construction and expansion projects recently completed or now underway on reservations throughout the country.

A large potential lending market exists which could accommodate the financing of business activities by tribes and tribal entities. The key to success in obtaining financing lies, in part, in convincing lenders of the ability of the parties, both Indian and non-Indian, to identify and deal effectively with the legal issues and circumstances which make business transactions with an Indian tribe or tribal entity different from off-reservation transactions.

Conclusion

The foregoing is only a brief summary of some of the major issues involved in entering into business transactions with tribes and tribal entities. The author would be most interested in discussing particular issues, or issues that people have encountered that are not discussed herein, relating to business transactions with tribes and tribal entities.

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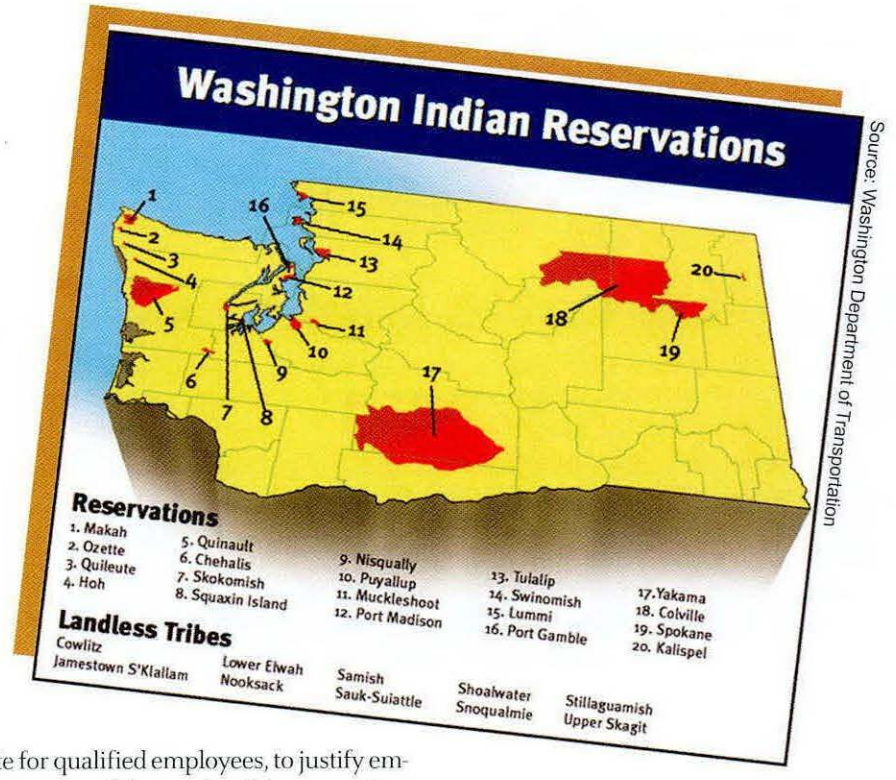
NOTES

1. *See generally,* Cohen's *Handbook of Federal Indian Law,* 1982 edition, pps. 355-356.
2. Huron Potawatomi, Inc. v. Stinger, 574 N.W. 2d 706, 709 (Mich. App. 1997); Ransom v. St. Regis Mohawk Educ. & Cmty. Fund, Inc., 658 N.E.2d 989, 993 (N.Y. App. 1995).
3. Gobin v. Snohomish County, __F.3d__, 2002 WL 31062667, (9th Cir. September 18, 2002).
4. Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 U.S. 751, 754 (1998).
5. Kiowa at 760.
6. C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 532 U.S. 411 (2001).
7. *See,* Weeks Construction Inc. v. Ogala Sioux Housing Authority, 797 F.2d 668, 671 (8th Circuit 1986).
8. Standing Rock Sioux Indian Tribe v. Dorgan, 505 F.2d 1135, 1140 (8th Circuit, 1974); Gaines v. Ski Apache, 8 F.3d 726 (10th Circuit, 1993); Stock West, Inc. v. Confederated Tribes of the Colville Reservation, 873 F.3d 1221, 1226 (9th Cir.1989).
9. Gaines at 729.
10. *See also,* Kennerly v. District Court, 400 U.S. 423, 91 S.Ct. 480 (1971).
11. 28 U.S.C. Section 1360(a).
12. 28 U.S.C. Section 1360(b).
13. *See,* Iowa Mutual Insurance Company v. La Plante, 480 U.S. 9 (1987); National Farmers Union Insurance Cos. v. Crow Tribe of Indians, 471 U.S. 845 (1985); Drumm v. Brown, 716 A.2d 50 (Conn. 1998); Klammer v. Lower Sioux Convenience Store, 535 N.W.2d 379 (Minn. App. 1995)).
14. *See,* Babbitt Ford Inc. v. Navajo Indian Tribe, 710 F.2d 587 (9th Circuit, 1983).
15. *See,* McClanahan v. Arizona State Tax Commission, 411 U.S. 164 (1972); Bryan v. Itasca County, 426 U.S. 373 (1976); Three Affiliated Tribes v. Wold Engineering, 467 U.S. 138 (1983). *See generally,* Cohen at 273.

The 9th Circuit Approach to Applying Federal Law to Indian Tribes

by Jill Conrad



Source: Washington Department of Transportation

In the 21st century most attorneys run into a question of Indian law at some point, especially in the Northwest, which includes 52 federally recognized tribes. With the advent and success of tribal enterprises, tribes have become top employers. For example, tribes in Washington employ more than 15,000 people.[1] This expansion in business has spilled over to the need for more employees, with an increasing number of nontribal employees. Part of the fallout from this success is the scrutiny of tribes as employers, as well as the pressures on tribal employers to compete for qualified employees, to justify employment policies, and to litigate employment issues.

The 9th Circuit Court has adopted a strong view of tribal sovereignty where a tribal government is involved.[2]

This article discusses employment and labor laws, and the treatment by federal courts in applying these federal laws to tribal employers. The 9th Circuit Court has adopted a strong view of tribal sovereignty where a tribal government is involved.[2] However, it has become clear that the 9th Circuit is unwilling to extend the notions of tribal sovereignty to tribal commercial enterprises when it comes to the application of employee and labor-related federal statutes.[3]

Discrimination Claims Against Tribes, Tribal Businesses and Organizations

Title VII of the Civil Rights Act of 1964

Enacted in 1964, Title VII of the Civil Rights Act (Title VII)[4] is the most common statutory basis for a lawsuit, and was the first piece of legislation broadly prohibiting discrimination in private-sector employment. Under Title VII, an employer may not discriminate against a person because of the person's race, color, religion, gender or national origin. An employer with more than 15 employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year is covered by Title VII. Indian tribes are specifically excluded from the definition of "employer[s]" who may not discriminate for the above reasons in Title VII.[5] Title VII states that the term "employer" does not include "... the United States, a corporation wholly owned by the government of the United States, Indian Tribe, or any department or agency of the District of Columbia...."[6]

The cases in this area address the defi-

nition of employer in light of the many tribal entities and organizational structures. In 1998, the 9th Circuit defined a tribal clinic as an Indian tribe in *Pink v. Modoc Indian Health Project.*[7] An employee filed suit against the tribe's clinic seeking damages for violations of Title VII, among other things. The plaintiff's suit was grounded in both federal and state laws. State laws generally do not apply to Indian tribes.[8] The clinic is a nonprofit corporation created and controlled by two tribes. The court determined that since the health clinic operated as an arm of two sovereign tribes, it could be defined as an Indian tribe.

There are also two 10th Circuit decisions on point. *Wardle v. Ute Tribe*[9] involved a nonmember police officer who brought suit under the Indian Civil Rights Act.[10] The court held that Title VII's exemption of Indian tribes controlled over more general prohibitory provisions contained in other statutes. The second case is *Dille v. Council of Energy Resource Tribes,*[11] which held that a female employee could not bring a sex-discrimination suit under Title VII against an organization composed solely of Indian tribes. The court reasoned that it was unlikely Congress intended to protect individual Indian tribes but not the collective efforts of the tribes.

The key case involving a tribal business is *Myrick v. Devils Lake Sioux Manufacturing Corp.,*[12] where the tribe was a majority owner of a corporation. Here, the court ruled that the corporation's attempt to be defined as an Indian tribe under Title VII was without merit. In doing so, it differentiated *EEOC v. The Cherokee Nation,*[13] stating that the decision did not consider the "present situation of non-tribal reservation employees."[14] In *Cherokee Nation,* the action was against the Nation itself.

In sum, the question of whether Title VII applies to Indian tribes as governments is an easy one. The more intriguing question is who fits under that definition. For now, tribal commercial enterprises will likely not be seen as Indian tribes under the definition of employer in Title VII as is apparent in *Myrick.* However, tribal organizations operated by tribes will likely be classified as Indian tribes as in *Dille.*

Age Discrimination in Employment Act

The Age Discrimination in Employment Act (ADEA)[15] prohibits discrimination in employment on the basis of age. Employees and job applicants are protected under the ADEA if they are age 40 or over. The ADEA is silent regarding its application to Indian tribes.

In 2001, the 9th Circuit decided the ADEA's applicability to a tribal housing authority in *EEOC v. Karuk Tribe Housing Authority.*[16] In *Karuk,* the Equal Employment Opportunity Commission (EEOC) tried to subpoena information related to an age-based claim from the housing authority, which refused to comply on the grounds that the ADEA did not apply to it. The court determined the housing authority was a governmental arm of the tribe, and, as such, enjoyed the tribe's sovereign status. The court employed the *Tuscarora* approach that: "General acts of Congress apply to Indians as well as to all others in the absence of a clear expression to the contrary," as well as the *Coeur d'Alene* exceptions (see p. 41). The court went on to find that the ADEA did not apply to the housing authority because the tribal member's employment relationship was with the tribe's governmental arm, and therefore it touched on "purely internal matters" related to the tribe's self-governance.

The court used the legislative history and purpose of the Native American Housing Assistance and Self Determination Act (NAHASDA) to reach its conclusion. First, it found that housing funding "should be provided in the manner that recognizes the right of Indian self-determination and tribal self-governance." Second, it concluded that the housing authority occupied a role "quintessentially related to self-governance." Third, the court stated that the intramural nature of the dispute was underscored by the fact that the tribe has an established internal process for adjudicating such matters; and finally, the court embraced a more general notion that tribal self-government encompassed a tribe's ability to make certain employment decisions without interference from other sovereigns.[17]

For guidance, the court reached back seven years to the 8th Circuit case of *EEOC v. Fond du Lac Heavy Equip. & Constr. Co., Inc.*[18] *Fond du Lac* affirms the general principal that when the matter involves a tribal member and the business is located on the reservation, then it is strictly an internal matter.[19] As such, "subjecting such an employment relationship between the tribal member and his tribe to federal control and supervision dilutes the sovereignty of the tribe."[20] The court went on to state that: "The consideration of a tribe member's age by a tribal employer should be allowed to be restricted (or not restricted) by the tribe in accordance with its culture and traditions."[21]

The key case involving a tribal business is *Myrick v. Devils Lake Sioux Manufacturing Corp.*,[12] where the tribe was a majority owner of a corporation.

Prior to *Fond du Lac*, the 10th Circuit addressed the second exception articulated in *Coeur d'Alene* in the case of *EEOC v. Cherokee Nation.*[22] As discussed briefly earlier, *Cherokee Nation* also dealt with the ability of the EEOC to issue a subpoena on a tribe in an action against a tribal official. Relying on *Donovan v. Navajo Forest Products*, the court held that the ADEA was not applicable to the tribe because its enforcement would directly interfere with the Nation's treaty-protected right of self-government.[23] Further, it found the ADEA's silence was equal to an ambiguity, and applied the ruling of *Merrion v. Jicarilla Apache Tribe*:[24]

> [I]f there [is] some ambiguity ... the doubt would benefit the tribe for ambiguities in federal law have been construed generously in order to comport with ... traditional notions of sovereignty and with the federal policy of encouraging tribal independence.[25]

As with Title VII, courts have construed the ADEA to apply to tribal commercial enterprises, but they are more reluctant to cast aside organizations with some tribal government connection.

Americans with Disabilities Act

The Americans with Disabilities Act (ADA)[26] was enacted in 1990. The ADA prohibits intentional discrimination in employment on the basis of a physical or mental impairment. Title III of the ADA creates a private right of action against individuals who own, lease or operate places of public accommodation, and who fail to comply with the act's accommodation requirements.[27] The ADA also requires employers to provide "reasonable accom-

modation" to otherwise-qualified disabled employees, unless doing so would impose an undue hardship.

The 9th Circuit has not yet reached this issue, but the 11th Circuit held that Title III applies to businesses operated by an Indian tribe in the case of *Florida Paraplegic Ass'n, Inc. v. Miccosukee Tribe.*[28] The court noted the absence of a tribal exemption in Title III, and therefore found that no exceptions were applicable to the presumption that statutes of general operation apply to Indian tribes relying on the *Tuscarora* approach. The court also held that the ADA did not express clear congressional intent to waive tribal sovereign immunity, and that the tribe was therefore not amenable to a private cause of action under Title III. The court went on to note that while sovereign immunity barred private suits under Title III, the U.S. attorney general could nonetheless compel the tribe's compliance with the statute.

Statutes of General Applicability

The *Tuscarora* Approach

In 1960, the U.S. Supreme Court made a landmark decision regarding what is commonly referred to as "statutes of general applicability," or federal acts that do not mention Indian tribes one way or another. The case was *Federal Power Commission v. Tuscarora,*[29] and it involved the interpretation of a congressional act allowing the Federal Power Commission to issue a license for a power project on the Niagara River, partially owned by the Tuscarora Indian Nation. This Supreme Court decision provides the premise that "general acts of Congress apply to Indians as well as to all others in the absence of a clear expression to the contrary," or the *Tuscarora* approach. The *Tuscarora* approach has been adopted by many circuits deciding applicability issues between Indian tribes and federal acts. It has often served as the core of finding against Indian tribes.

The act, requiring interpretation, was a broad general statute and did not mention how Indian tribes would be dealt with in the case of a licensure. The Nation relied on *Elk v. Wilkins,*[30] which held that: "General Acts of Congress did not apply to Indians, unless so expressed as to clearly manifest an intention to include them."[31] However, the court disagreed, stating that it was well-settled by many decisions of the court that a general statute in terms applying to all persons includes Indians and their property interests.[32] In its analysis, the court turned to an unrelated section of the act which stated "tribal lands embraced within Indian reservations," to find that Congress intended the act to apply to Indians. In his dissent, Justice Hugo Black criticizes the opinion not only as a violation of our Nation's long-established policy of recognizing and preserving Indian reservations for tribal use, but also as a breach of the Tuscarora Treaty.[33]

The Acts of General Applicability

1. The Occupational Safety and Health Act

The Occupational Safety and Health Act (OSHA)[34] is a statute of general applicability designed to "assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources...."[35] Current OSHA regulations expressly adopt the *Tuscarora* approach, stating that: "It is well settled that under statutes of general applicability, such as [OSHA], Indians are treated as any other person, unless Congress expressly provided for special treatment."[36]

The 9th Circuit had to decide whether to embrace the *Tuscarora* approach in a dispute over the application of the OSHA

in the case of *Donovan v. Coeur d'Alene Tribal Farm.*[37] In *Coeur d'Alene*, the Occupational Safety and Health Review Commission attempted to cite a business owned by the Coeur d'Alene Tribe for alleged violations of the act. The court looked at how the business operated, noting that it sold its products off the reservation to the open market and it employed a number of non-Indian workers. The court starts with the premise that "Indian tribes possess only a limited sovereignty that is subject to complete defeasance."[38] It goes on to adopt the *Tuscarora* approach as the general rule while at the same time recognizing it as dictum. The court takes one step further by announcing exceptions to the *Tuscarora* approach. It holds that a statute of general applicability will apply to tribes unless:

> (1) the law touches "exclusive rights of self-governance in purely intramural matters"; (2) the application of the law to the tribe would "abrogate rights guaranteed by Indians' treaties"; or (3) there is proof "by legislative history or some other means that Congress intended [the law] not to apply to Indians on their reservations...." In any of these three situations, Congress must expressly apply a statute to Indians before we will hold that it reaches them.[39]

The Coeur d'Alene Tribe argued that the application of OSHA regulations interfered with its right of tribal self-government. This argument was dismissed by the court, which found that acceptance of such a premise would exempt all tribal businesses. The court then narrowed the first exemption to include only "purely intramural matters such as conditions of tribal membership, inheritance rules, and domestic relations."[40] The court denied the application of the second exception because the Coeur d'Alene Tribe did not make a treaty with the U.S. government.

In 1991, the 9th Circuit was faced again with the application of OSHA in *Dept. of Labor v. OSHA Review Comm'n.*[41] Once again, the Occupational Safety and Health Review Commission was attempting to apply OSHA standards to a sawmill owned and operated by the Confederated Tribes of the Warm Springs Reservation. However, unlike the Coeur d'Alene Tribe, the Warm Springs are a treaty tribe, and the question was whether that treaty would change the analysis.

In this case, a tribal sawmill located on the reservation processed cut timber for sale in interstate commerce. Employees were both Indian and non-Indian, and sales were off the reservation. The court applied the *Coeur d'Alene* exceptions to determine OSHA's applicability. It found the first exception did not apply because the actions were not "purely intramural." With regard to the second exception, the court said that whether the treaty-rights exception applies depends on two questions: whether the treaty contains a general right to exclude non-Indians from the reservation, and, if so, whether such a general right of exclusion is sufficient to bar application of the act? Because it found no conflict between the tribe's right of exclusion and the entry necessary to enforce OSHA, that exception would not apply. Finally, the court did not find any legislative history to support the application of the third exception.

The most recent case involving OSHA is *Reich v. Mashantucket Sand & Gravel.*[42] A tribally owned and operated construction business was cited and fined for OSHA violations. The court adopted the

Coeur d'Alene exceptions and found that OSHA did not affect the tribe's exclusive right of self-government in purely intramural matters, and thus it applied to this tribal construction business.

In sum, similar to the antidiscrimination cases, federal courts have found that OSHA will apply to tribal businesses, regardless of where the business is located. *Coeur d'Alene, Dept. of Labor* and *Reich* each involved tribal businesses engaged in work that is inherently dangerous, so it is not surprising the courts would rule that OSHA did not apply. What is not clear is whether it would reach the same conclusion for a different type of business, organization or tribal governmental entity.

2. *Fair Labor Standards Act*

The Fair Labor Standards Act (FLSA)[43] authorizes the U.S. secretary of labor to set and enforce standards for minimum wages and terms of payment for overtime work of the nonprofessional labor force, prohibits sex discrimination in compensation, and regulates the employment of children. The FLSA makes no mention of Indians, and is therefore a statute of general applicability.

There is only one case specifically addressing the FLSA, and it arose in the 7th Circuit in 1993. In the case of *Reich v. Great Lakes Indian Fish and Wildlife Commission*,[44] the Department of Labor sought to enforce a subpoena against the Great Lakes Indian Fish and Wildlife Commission, seeking evidence the commission was violating the FLSA. In this instance, the tribal organization is a consortium of 13 tribes. The organization had employees who sometimes worked around the clock in excess of 40 hours. The court noted that if employed by state or local governments, the employees would not be covered by the FLSA.

... similar to the antidiscrimination cases, federal courts have found that OSHA will apply to tribal businesses, regardless of where the business is located.

While the *Reich* court notes that general federal statutes regulating employment have been applied to Indian agencies, it does not take the *Tuscarora* approach or apply the *Coeur d'Alene* exceptions. Instead, it turns to the history of the act. The court opines that during 1938, Indians were not at the forefront of the political scene and were therefore probably overlooked and not mentioned in the act. The court also finds that nothing in the legislative history suggests that Congress thought about "the possible impact of the act on Indian rights, customs, or practices."[45] It then goes on to rectify what the court construes as an oversight and refuses to apply the act, partly as a symbol of comity and partly in recognition of sovereignty. However, the court is careful to narrow its holding to that of government employees who are exercising the powers of the tribal government.

3. *Family Medical Leave Act*

The Family Medical Leave Act (FMLA)[46] was passed in 1993. It requires covered employers to grant eligible employees 12 weeks of unpaid leave for family and medical reasons in a given 12-month period. The statute and its accompanying regula-

tions are technical and complex. Though it was passed after the *Tuscarora* and *Coeur d'Alene* decisions, it does not mention Indian tribes. To date, there are no court decisions regarding its applicability to tribes. However, the secretary of labor has adopted the 9th Circuit's approach and taken the position that the FMLA applies to Indian tribes.[47] The secretary stated the department's position that "these exceptions [to the *Tuscarora* Approach] do not apply to the FMLA, consistent with the reasoning of the 9th Circuit in *Donovan v. Coeur d' Alene Farm.*"[48]

4. Employee Retirement Income Security Act

The Employee Retirement Income Security Act (ERISA)[49] is a federal statute designed to protect retirement plans and welfare-benefit plans maintained by employers. ERISA does not expressly state that it is applicable to Indian tribes, but ERISA is unique because "governmental entities" are generally exempt from ERISA, so employee-benefit plans maintained by tribal governments are likely to come with this governmental exemption.[50] Tribal employers who are not governmental entities or that contain a significant number of nongovernmental employees are unlikely to come within this exemption.

A recent ERISA case, *Colville Confederated Tribes v. Somday,*[51] reached a favorable result for the tribe. At issue in *Somday* was an amendment to a retirement plan approved by the Colville Tribe that reduced the rate at which employees earned a benefit under the retirement plan. The tribe argued that its retirement plan was a governmental plan and, therefore, exempt from most of ERISA's restrictions on changes to benefit accruals.[52]

In its opinion, the court discussed two opinion letters by the Pension Benefit Guaranty Corporation (PBGC), a federal agency that protects benefits under defined-benefit retirement plans. One letter concluded ERISA did not apply to a plan because the plan was governmental. The second letter concluded that operating a factory was not related to tribal self-governance and, therefore, ERISA did apply to the plan.[53] In addition, the court cited two earlier opinions that held ERISA applicable to Indian tribes: *Lumber Industry Pension Fund v. Warm Springs Forest Product Industries,*[54] where the 9th Circuit held that ERISA applied to a pension plan at a tribally owned and operated sawmill, and *Smart v. State Farm Insurance,* where the court found ERISA applied based on the broad scope of ERISA, and rejected the argument that the application of ERISA would interfere with the tribe's right of self-governance in intramural matters.

Although not entirely settled, the federal guidance to date has found that ERISA is applicable to the employee-benefit plans maintained by Indian tribes. The cases and opinion letters indicate that if an employee-benefit plan covers solely tribal employees employed in traditional governmental roles, then the employee-benefit plan may be defined as a "governmental plan" and will be exempt from most ERISA requirements. Employee-benefit plans that cover employees in a for-profit tribal business probably will be subject to ERISA.

5. National Labor Relations Act

The National Labor Relations Act (NLRA)[55] permits employees of businesses to form unions and to collectively bargain with their employers. All employers with at least $50,000 annual business volume are covered by the act. The act does not contain language either expressly applying the act to Indian tribal governments or ex-

pressly exempting such governments from the act's coverage; however, the act does expressly exempt certain governmental entities.[56]

The National Labor Relations Board (NLRB), which hears disputes brought under the act, has addressed the issue of whether the act applies to Indian tribal governments and has consistently held that a tribally owned and operated enterprise located on Indian lands is exempt under the act's exemption for government entities. In *Robinson v. Confederated Tribe*,[57] at least one court has ruled that the NLRA does not apply to tribal governments.

Currently pending before the NLRB is an unfair labor-practice charge issued by the California regional director against the San Manuel Band of Serrano Mission Indians. The charge involves a claim that the tribe selectively denied access to one labor organization but allowed access by another, thus interfering with employees' rights to freely and independently seek union representation. Many practitioners in this field are concerned that the NLRB will determine that it applies to a commercial venture of the tribe, thereby opening the door to the unionization of tribal enterprises, particularly the larger, successful tribal gaming operations.

This decision will come against the backdrop of many other NLRB decisions involving tribes, tribal businesses and tribal organizations. U.S. District Court for the District of New Mexico ruled in the case of *National Labor Relations Board v. Pueblo of San Juan*[58] that despite the lack of reference to tribes in section 14(b) of the NLRA, which allows states and territories to prohibit agreements requiring membership in a labor organization as a condition of employment, the San Juan Pueblo Indian Tribe could enact such a prohibition. This has the effect of treating tribal governments the same as states for this purpose.

In 1961, the Court of Appeals for the District of Columbia touched on the applicability of the NLBA in the case of *Navajo Tribe v. N.L.R.B.*,[59] when it decided that the board had jurisdiction over a privately owned plant on the Navajo Indian Reservation. Similarly, the board has applied the NLRA to a joint venture between a tribal employer and a nontribal employer on a reservation in the case of *Devils Lake Sioux Manufacturing Corporation*.[60] Finally, in *Sac & Fox Industries, Ltd.*,[61] the board held that the act applies to an enterprise wholly owned and operated by a tribe if the enterprise is located outside the boundaries of a reservation.

Conclusion

Navigating through the many federal acts that govern employment and labor issues is a complex maze for the tribal employer. Generally, tribal government employees may not be covered by these federal laws, but tribal commercial employees are. On a practical level, this means each tribe must recognize this distinction and separate its employment policies and procedures to reflect that difference. Given the present posture of the U.S. Supreme Court on any Indian issue, all tribal employers should comply with these federal acts unless there is some compelling reason not to. Otherwise, the Supreme Court will get an opportunity to further infringe on the sovereign rights of tribes and other tribal entities.

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NOTES

1. *See* Tiller, Veronica and Robert E. Chase, *Economic Contributions of Indian Tribes to the State of Washington*, http://www.goia.wa.gov/econdev/index.html.
2. *See* EEOC v. Karuk Tribe Housing Authority, 260 F.3d 1071 (9th Cir. 2001), *but see also* Donovan v. Coeur d' Alene Tribal Farm, 751 F.2d 1113 (9th Cir. 1985).
3. *See* Colville Confederated Tribes v. Somday, 96 F.Supp.2d 1120 (E.D. Wash. 2000) and Florida Paraplegic Ass'n, Inc. v. Miccosukee Tribe, 116 F.3d 1126 (11th Cir. 1999).
4. 42 U.S.C. §§ 2000-2000e-16 (1988).
5. 42 U.S.C.§ 2000e(b)(1988).
6. 42 U.S.C. § 2000e(b)(1988).
7. 157 F.3d 1185 (9th Cir. 1998).
8. California v. Cabazon Band of Mission Indians, 480 U.S. 202, 208 (1987).
9. 623 F.2d 670 (10th Cir. 1980).
10. 25 U.S.C. §§ 1301-1303 (1988 and Supp. 1992).
11. 801 F.2d 373 (10th Cir. 1986).
12. 718 F.Supp. 753 (D.N.D. 1989).
13. 871 F.2d 937 (10th Cir. 1989).
14. 718 F.Supp. 753, 754 (1989).
15. 29 U.S.C. §§ 621-634 (1967).
16. 260 F.3d 1071 (9th Cir. 2001).
17. *Citing* Penobscot Nation v. Fellencer, 164 F.3d 706, 709-11 (1st Cir.), *cert. denied*, 527 U.S. 1022 (1999). Pink v. Modoc Indian Health Project, Inc. and Reich v. Great Lakes Indian Fish and Wildlife Commission.
18. 986 F.2d 246 (8th Cir. 1993).
19. 986 F.2d at 249.
20. *Id.*
21. *Id.*
22. 871 F.2d 937 (10th Cir. 1989).
23. 871 F.2d at 938.
24. 455 U.S. 130, 152 (1982).
25. 455 U.S. at 152.
26. 42 U.S.C. §§ 12101-13.
27. 42 U.S.C. § 12181.
28. 166 F.3d 1126 (11th Cir. 1999).
29. 362 U.S. 99 (1960).
30. 112 U.S. 94 (1884).
31. 112 U.S. 99-100.
32. 362 U.S. at 116 *citing* Superintendent of Five Civilized Tribes v. Commissioner, 295 U.S. 418; Blackbird v. Commissioner, 38 F.2d 976; Oklahoma Tax Comm'n. v. United States, 319 U.S. 598.
33. 362 U.S. 99, 125.
34. 29 U.S.C. 651-678 (1988).
35. 29 U.S.C. 651 (b) (1982).
36. 29 C.F.R. § 1975.4(b)(3).
37. 751 F.2d 1113 (9th Cir. 1985).
38. 751 F.2d 1113, 1115 *citing* Rice v. Rehner, 463 U.S. 713 (1983); and National League of Cities v. Usery, 426 U.S. 833 (1976).
39. 751 F.2d 1113, 1116 *citing* United States v. Farris, 624 F.2d 890, 893-894 (1980), *cert. denied*, 449 U.S. 1111 (1981).
40. *Id.* at 1116.
41. 935 F.2d 182 (9th Cir. 1991).
42. 95 F.3d 174 (2nd Cir. 1996).
43. 29 U.S.C. 201-219 (1938).
44. 4 F.3d 490 (7th Cir. 1993).
45. 4 F.3d at 493.
46. 29 U.S.C. 2601-2654 (1993).
47. *See* 60 Fed. Reg. 2181 (1995).
48. *Id.*
49. 29 U.S.C. § 1001 et. seq. (1994 & Supp. 1998).
50. 29 U.S.C. § 1002(32) defines "governmental plan" as "a plan established or maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing."
51. 96 F. Supp. 2d 1120 (E.D. Wash. 2000).
52. *Id.* at 1121; *see* ERISA § 4(b)(1) (exempting governmental plans from Title I of ERISA).
53. PBGC Op. Ltr. 89-9.
54. 939 F.2d 683 (9th Cir. 1991).
55. 29 U.S.C. 141-187 (1988).
56. Specifically, the NLRA states: "... employer shall not include the United States or any wholly owned Government corporation, ... or any State or political subdivision thereof...."
57. 103 LRRM (BNA) 2749 (D.Or. 1980).
58. 159 LRRM (BNA) 2975 (D.N.M. 1998).
59. 288 F.2d 162 (D.C. Cir.), cert. denied, 366 U.S. 928 (1961).
60. 243 NLRB 163 (1979).
61. 307 NLRB 241 (1992).

The State of Indian Education and New Schools of Thought

by Melissa Campobasso

"Indians, indians, indians." She said it without capitalization. She called me "indian, indian, indian." And I said, "Yes, I am. I am Indian. Indian, I am."
— Sherman Alexie, "Indian Education," *The Lone Ranger and Tonto Fistfight in Heaven*, 173 (1994).

Many conditions for effective learning for Indian students are not being met, including culturally appropriate curriculum, sufficient recognition of the contributions of Indian culture, effective communication between students and teachers, and a welcoming atmosphere. Students who are grounded in their culture and have culturally appropriate relationships have supportive environments that help them perform academically. Schools have a role in cultivating this learning environment.

This article examines the state of K-12 education of Indian students in the public schools, and ways tribal communities and educators can work to improve the situation.

The federal government established boarding and day schools, both on and off reservations, which "aimed to denigrate and devalue Indian culture and religion and coercively assimilate Indian students into the dominant American society."[6]

Background of Indian Education Law

Tribal Control

Before contact with non-Indians, tribes had full and effective authority over the education of their children. This education did not take place in modern-type classrooms. Education emphasized learning by application, imitation, sharing, cooperation and etiquette, including an abiding respect for elders.[1] It did not consist of memorization of basic information. The duty to transmit "an accumulated fund of cultural and social knowledge to the succeeding generations of a community's members"[2] was placed in the hands of parents, uncles, aunts, elders and peers. Today, tribes recognize their responsibility for regulating elementary and secondary education within their borders.

Federal Laws

The U.S. Constitution conferred on the federal government the right to regulate Indian commerce and land, and make treaties with tribes, which to this day are sovereign governments with the right to provide and govern education. In the 18th century, the federal government[3] assumed the role of educating Indians for several purposes: educating and "civilizing" Indians in the ways of Euro-Americans (including conversion to Christianity and indoctrination in values of possessive individualism), neutralizing resistance to colonization and westward expansion, and preparing Indians for the subservient role non-Indians expected them to play in American society.[4] The policy was to replace Indians' ways with those of white Americans."[5]

The federal government established boarding and day schools, both on and off reservations, which "aimed to denigrate and devalue Indian culture and religion and coercively assimilate Indian students into the dominant American society."[6] This was done without any consideration for the opinions of Indians.

Studies have shown this policy has wreaked tragic and disgraceful consequences. For example, the 1928 Meriam Report[7] and the 1969 Kennedy Report[8] found that the federal education policy "had disastrous effects on Indian children's education, leading to such results as '[a] dismal record of absenteeism, dropouts,

negative self-image, low achievement, and, ultimately, academic failure for many Indian children.'"[9]

There were more problems: "The classroom becoming a battleground in which children tried to protect their identity; schools failing to understand, and often denigrating, cultural differences; schools blaming their own failures on Indian students; schools failing to recognize the importance of the Indian community."[10]

The reports recommended a vast increase in funding, which, because of increases in incomes, was expected to more than offset reductions in Indian unemployment and welfare participation rates, and other social ills. As far back as 1928, certain educators called for the school experience to be reflective and relevant to Indian students' lives.

> The Report noted the importance of teaching Indian geography, history, and arts in the schools and of using good reading materials that related to Indian interests and contemporary Indian experiences. Elementary schools in particular were faulted for their almost exclusive focus on learning English, a longstanding key component of government assimilation efforts, and for the antiquated methods that they used in teaching the language. The Report recommended abandoning the standardized curriculum and prescribed textbooks, and freeing teachers to draw materials from the lives of the Indian students themselves.[11]

Despite these conclusions, from the 1930s to the 1970s, policy shifted from federal schooling to state public schools without much weight given the recommendations. Instead of addressing the identified problems, the measures merely focused on funneling money to the public schools.[12]

The Johnson-O'Malley Act of 1934 (JOM) authorized the U.S. Department of the Interior to contract with a state for the education of Indians in such a state.[13] To assimilationists, this shift had many benefits: state schools would meet Indians' educational needs; it would cut federal expenses because it was cheaper to pay state school expenses than to run federal schools; Indian students would assimilate quicker if they were educated along with non-Indians.[14] For many reasons, however, public schools have not met the academic needs of Indian students.[15]

... from the 1930s to the 1970s, policy shifted from federal schooling to state public schools without much weight given the recommendations.

Besides the JOM act, Congress enacted a multitude of other Indian education laws. The Impact Aid Act,[16] first passed in 1950, provided funding assistance to public school districts that had a reduced tax base because of the location of federal installations, now including Indian reservations. The School Facilities Construction Act of 1950, as amended, authorized federal funding for the construction of schools in districts with increased enrollment of Indian students.[17] The appropriations under these acts declined over the years or were regularly late.

Some improvements have been made, however. The Indian Education Act of 1972[18] provides grants to local educational agencies for special remedial and cultural enrichment programs, grants for teacher training, and development of a special curriculum. The Indian Self-Determination and Education Assistance Act of 1975[19] provided authority for tribes to operate federally funded programs currently operated by the federal government, amended the JOM act to require the contractor to have plans to address Indian students' academic needs before contracting,[20] amended the JOM act to provide that if the contracting school's school board was not composed of a majority of Indians, Indian parents could elect an Indian parent committee to develop, and approve or disapprove, programs to be conducted under the act.[21]

A report in 1997 by the U.S. Department of Education National Center for Education Statistics revealed that some improvement had been made in certain areas, but many problems still plagued Indian education in the 1990s.[22]

Washington State Laws

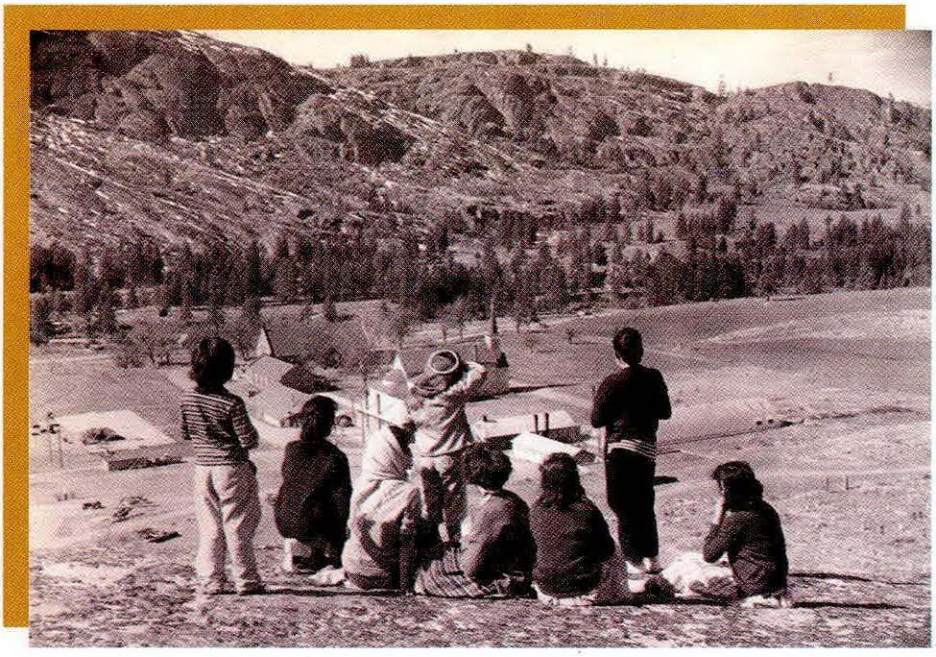
Sections 1 and 2 in Article IX of the Washington Constitution establish and define the public school system. Section 1 provides: "It is the paramount duty of the state to make ample provision for the education of all children residing within its borders, without distinction or preference on account of race, color, caste, or sex."[23] Section 2 provides: "The Legislature shall provide for a general and uniform system of public schools." The state Supreme Court has said that the uniformity requirement means that every child should have the same advantages as every other child.[24]

The state has enacted basic education requirements that apply throughout the state.[25] Common schools must comply with the rules and regulations of the state board of education, including certain minimum standards.[26]

The basic education act requires instruction in the "essential academic learning requirements."[27] It allows, however, some discretion in the school districts. Students can receive instruction in "such other subjects and such activities as the school district shall determine to be appropriate for the education of the school district's students enrolled in such program."[28]

School boards identify and offer courses.[29] The state board of education may prescribe studies other than the basic courses.[30] Instruction shall be in the English language; however, teaching students in another language is not precluded "when such instruction will aid the educational advancement of the student."[31]

Some local variation of the basic education requirements is permitted.[32] School districts and schools can seek a waiver from basic education-act requirements where necessary to successfully implement "a local plan to provide for all students in the district an *effective education system* that is designed to *enhance* the educational program for each student. The local plan may include *alternative ways* to provide *effective* educational programs for students who experience difficulty with the regular education program."[33] School districts also can establish schools or programs with special standards, such as required parental involvement.[34] For students who are "academically at risk,"[35] school boards may contract with "alternative educational service providers"[36] to help them achieve specific learning standards. These service providers could include a tribally controlled program.[37]



Colville girls stand on a bluff overlooking St. Mary's Mission School (Omak, WA, 1959).
Northwest Museum of Arts & Culture/Eastern Washington State Historical Society, Spokane, WA

Specific Washington state law on Indian studies is limited. Most of the provisions have to do with language-study requirements. "If the essential academic learning requirements include a requirement of languages other than English, the requirement may be met by students receiving instruction in one or more American Indian languages."[38] A class in state history may or may not encompass Indian studies. "Any course in Washington state history and government used to fulfill high school graduation requirements is *encouraged* to include information on the culture, history, and government of the American Indian peoples who were the first inhabitants of the state."[39]

Local history and government coursework that students studying for their teaching degree are required to take must include an Indian facet. "Any course in Washington state or Pacific Northwest history and government used to fulfill this requirement *shall* include information on the culture, history, and government of the American Indian peoples who were the first human inhabitants of the state and the region."[40]

School boards have the duty to determine policy on instructional materials and approve or disapprove those materials,[41] including specifying procedures for the selection of materials; establishing an instructional materials committee (which may include parents at the board's discretion); receiving complaints regarding the materials; experimenting with materials before formal adoption; and, within the limits of board policy, school administrators may buy materials to meet deviant needs or rapidly changing circumstances.[42] A school board also is responsible for stocking school libraries as it "deems necessary for the proper education of the district's students or as otherwise required by law or rule or regulation."[43]

In sum, under current state law, positive steps can be taken to make the educational experience more reflective and relevant to Indian interests and issues. If every child in the state school system is to have the same advantages as every other child, the system should provide more and better instruction, programs and training on Indian subjects. School districts have discretion to tailor subjects to meet the particular needs of the students. Course instruction may be in an Indian language when it will help the educational advancement of the student. Schools can seek approval of a local plan to better suit their students, including focusing on those students who are experiencing difficulty within the current structure. Schools can also provide education on Indian issues. Current laws may or may not be amenable to the measures recommended in this article, and educators should consider whether to seek legislative or regulatory change.

Jurisdiction Over Education Today

Legal authority over public schools located off Indian reservations is with the state. Authority over public schools on reservations may also reside with the state because school districts are political entities of the state, and federal law has sanctioned the on-reservation location. In addition, legal precedent may favor state jurisdiction.[44] Jurisdiction over Indian students, however, may be concurrent in both the tribe and the state.[45]

Rather than debating jurisdiction, states and tribes can best serve students by collaboration, keeping in mind that students are the concern of both jurisdictions.

The Present State of the Education of Indian Students

In 1993-94, about 491,936 Indian students were enrolled in elementary and secondary schools in the United States.[46] About 187,365 (38 percent) of these Indian students were enrolled in approximately 1,244 public schools with 25 percent or more Indian students, and 41,911(nine percent) of these students were enrolled in 170 BIA/tribal schools. The remaining 262,660 Indian students (53 percent) in public schools were scattered across 79,500 public schools. This means about 91 percent of Indian students attended public schools[47] and were a significant proportion of the student body in nearly half of the schools they attended.[48]

There are 29 federally recognized Indian tribes in Washington.[49] Indians are 2.7 percent, or 158,940, of the state population of 5,894,121.[50]

Available data reveal that tribal students suffer from disproportionately low achievement scores, graduation rates, educational attainment levels and attendance rates, and high dropout rates.[51] This educational dearth hurts tribal communities and society at large.

The one-size-fits-all teaching methodologies do not work for all students, especially Indian students. The mainstream culture, which constructed the public education system, is incongruent and conflicts with tribal culture.[52] Because of cultural differences, Indian students in the public schools are alienated by the system itself. Thus, the public school system, as it represents and imposes the mainstream culture, impedes the schooling of Indian students.

Achievement Levels Low

Every day in public schools, Indian students are exposed to alien learning styles through the use of non-Indian language, examples, illustrations and text materials,[53] and usually have a non-Indian teacher. Because of cultural incongruency in the school environment, many Indian students are reluctant to actively participate in classroom activity, and this reluctance hurts their academic achievement. They have a difficult time interacting with their teachers or actively engaging in class activity,[54] which hinders their learning.[55] These and other communication differences between students and teachers may bias teachers' perceptions of their students and lower their expectations of student academic performance.[56] All of this negatively affects student achievement.

Attendance and Dropout Rates

Indian students drop out of school at higher rates (35.5 percent) than students from other groups in America.[57] Parents and communities should look at all contributing factors to this problem. Schools, especially, should examine themselves to determine school-related causes of dropouts, and to find solutions. Students have cited several problems: "... failure or inability to get along with teachers, dislike of school, inability to get along with other students, boredom, feelings of not belonging, and suspension."[58]

These problems may manifest in negative experiences: "[W]hen there is a cultural incongruity between the school and the student, miscommunication and confrontation often occur among students, teachers, and families, resulting in hostility, alienation, and eventual dropping out."[59] Often, school administrators view Indians in a negative way, and students feel this attitude. These factors contribute to Indian students' feeling unwelcome, and ultimately avoiding the situation entirely.

No Voice

Historically, Indian families and communities have not been a part of the education process, Indians rarely having served on school boards.[60] Indian studies are taught only in some schools on a limited basis. Schools lack material recognizing Indian culture, history and languages, and often the curriculum is derogatory toward Indians.[61] Tribal languages are not offered consistently, and there is a lack of trained or certified Indian language teachers. To summarize, the Indian voice is missing in the schools.

Tribal governments have a responsibility to educate local schools in the tribal services available to Indian youth and their families.

Goals and Measures

Reversing this dismal state of Indian education requires educational reconstructing. Some of the measures described below are thought to be effective approaches for improving academic and other educational results for students, empowering them to develop to their fullest potential.

Indian Community Influence

Indian families and communities can help select texts and determine other learning tools and instructional technique in the public schools. Indian educators should also participate in the production of texts, ensuring that the Indian community, and most importantly its children, will have a sense of ownership and a resulting acceptance of the education system in the public schools.[62]

Tribal Education Laws

Tribes have primary responsibility for ensuring an appropriate education for their children, and a paramount interest in their well-being. About 80 tribes have education departments that perform functions such as implementing tribal education law and policy; administering education programs, developing education reports; and communicating with local school boards, parents, and state and federal education departments.[63] There are several federal laws authorizing direct funding for tribal education departments.[64]

Tribes can enact relevant laws and make agreements with local school districts. For example, in 1991, the Rosebud Sioux Tribe enacted an education code and established an education department.[65] The code regulates all school and education programs — federal, state and tribal — on the Rosebud Reservation.[66] Areas addressed are Indian language instruction, curriculum, teacher and school administrator qualification and retention, education standards, community and parental involvement, tribal social-service programs, tribal student-tracking systems, truancy intervention, and statistical reporting. The tribe also provides teacher recertification courses at its tribal college. The tribal code applies tribal law as well as South Dakota law to school boards, and reports on compliance of local schools with curriculum.[67] The tribe has cultivated relationships with the local districts to implement these provisions. The department and code have demonstrated a positive impact on Indian education by improving attendance, decreasing dropout rates, and increasing community involvement.[68]

States and tribes should actively work together to find solutions, and may want to formalize this in written agreements. "Given the fact that so many Indian students today attend public schools, more cooperative and reciprocal agreements between tribes and school districts need to be developed and implemented."[69] The law may dictate or guide, in some cases, the process by which tribes and states work together;[70] schools and tribes will need to examine federal requirements.

If tribal communities are ultimately dissatisfied with attempts at improvements, they may consider other avenues such as making an agreement for public-school students to be educated by a tribal school,[71] seeking restructuring of school districts, seeking to operate as a school district or school board,[72] establishing charter schools, or operating their own schools.

Develop and Use Indian-Studies Curriculum and Teaching Methods

Many studies conclude that students perform better when the studies reflect their culture. "This growing body of research suggests that better learning occurs when teachers transform their educational practices and the curriculum reflects the home culture from which children come."[73] A culturally relevant curriculum contributes to student performance, engagement in the classroom, self-validation, and acceptance of public-school paradigm. Cultural congruence in curriculum is a necessary condition of academic success.

Although the curriculum must meet state requirements, this does not preclude a culturally appropriate curriculum. Indian communities and parents, as well as educators, want Indian children to succeed academically, to understand certain mainstream values embedded in the school system, and be prepared for life after schooling. At the same time, they want these students to be exposed to their own cultural values and knowledge while at school. They want sufficient recognition of the contributions that their home cultures bring to the world. "Minority children need to be able to internalize both their own culture and that of the school."[74]

Indian parents and communities are critical in curriculum development. Aside from compiling research on Indians that has already been done, non-Indian educators may not know how to best distill information from a tribal community.[75] Community members can fulfill this role.

Extreme gaps exist in the educational record. The content of the materials should include, at appropriate levels, education on history, prehistory, life ways, laws, climate, politics and government; understanding and uses of the physical environment of the local tribes; and the relationship between tribes, states and federal governments. The lessons should include cultural topics where appropriate.[76]

Along with efforts in Indian homes and communities, schools can help ensure language survival. The formal public-education system helped nearly, if not completely, to annihilate the use of Indian languages. Because of this past role, the system should now devote ample resources to restoring them. "Because schools played such a powerful role in the decline of Native languages, it is reasonable to expect they can play a powerful role in restoring languages."[77]

The state board of education is working with a group of tribal educators on developing rules for state teacher certification of Indian language teachers.[78] These teachers possess rich cultural backgrounds. Many tribes have already developed extensive curriculum, which can be used by new state-certified language teachers in the public schools. This is a positive example of cooperation between the state and tribes.

Innovative teaching methods should be used. One example, teaching mathematics terms and concepts in English and in the Indian tongue, helps children better understand the subject.[79] Educators can also involve students in community events, such as exposure to tribal-court proceedings, tribal government meetings on specific issues, and tribal detention facilities.[80]

A culturally relevant curriculum will enhance the course requirements of public schools, and will give "a challenging, relevant, thought provoking, and most importantly responsive education for Native children in American schools."[81]

Teacher-Student Relationships

The relationship a student has with his teacher is probably the most crucial in the academic process. Teachers generally choose how to present materials and how to interact with their students. They have their own biases, and these inform how they perceive their students.

Teachers of Indian students, studies suggest, effectively serve their students with "culturally responsive pedagogical repertoire" or "culturally relevant teaching."[82] They should have an understanding of the history, culture and contributions of tribes, especially local tribes. Innovative models exist for the professional development of teachers. Educators, parents and tribes, as well, can create innovative training programs to strengthen the professional competency of teachers.[83] Some Indian students may be "under intense peer pressure not to learn or use their tribal language."[84] Teachers can provide encouragement in learning Indian languages and other subjects. "Teachers can encourage the preservation and maintenance of American Indian languages by modeling and encouraging their use in schools."[85]

When the situation arises, teachers also need to understand the social and health services that are available within local communities. Tribal governments have a responsibility to educate local schools in the tribal services available to Indian youth and their families.

More Indian Teachers

There are not enough Indian teachers to serve as role models and share the cultural background. Only 15 percent of teachers in high-Indian-enrollment schools and less than one percent of teachers in low-Indian-enrollment schools are Indian,[86] and 70 percent of high-Indian-enrollment schools and five percent of low-Indian-enrollment schools have at least one Indian teacher.[87] Indian teachers, who share the cultural background not provided by teachers of other ethnicities, serve as positive role models and have an insight into programs specifically designed for Indian students.

> Though important to all schools, it is vital that all schools serving a high percentage of Indian students increase the number of American Indian and Alaska Native administrators and teachers who are tribally enrolled. The presence of Native people in school leadership positions brings much-needed positive role modeling and training in how to design programs for Native students.[88]

States and districts should actively educate, recruit and hire Indian teachers to fulfill this need.

Conclusion

With the implementation of these measures, once again Indian students and communities will feel a sense of ownership, belonging, and familiarity with their lessons. Tribal education departments and codes, agreements between tribes and schools, and concrete measures to provide a culturally relevant curriculum for Indian students have been shown to work. The state, tribes and society have a great interest in successful educational systems. Putting the necessary resources behind this interest will decrease costs in other social areas. It is time for these jurisdictions to pull together to achieve this end.

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NOTES

1. Raymond Cross, *American Indian Education: The Terror of History and the Nation's Debt to the Indian Peoples*, 21 U. Ark. Little Rock L. Rev. 941, 947-48 (1999).
2. Cross at 943-44.
3. Religious organizations greatly assisted the government in this work.
4. Allison M. Dussias, *Let No Native American Child Be Left Behind: Re-Envisioning Native American Education for the Twenty-First Century*, 43 Ariz. L. Rev. 819 (2001).
5. Felix S. Cohen's *Handbook of Federal Indian Law*, 139 (1982) (Cohen).
6. Dussias at 829.
7. Inst. for Gov't Research, *The Problem of Indian Administration* 8 (1928) (Lewis Meriam, technical director).

8. Senate Special Subcomm. on Indian Educ., Comm. on Labor & Public Welfare, *Indian Education: A National Tragedy — A National Challenge*, S. Rep. No. 91-501 (1969).
9. Dussias at 845, *citing* Kennedy Report at 21.
10. Dussias n.220, *citing* Kennedy Report at 21.
11. Dussias at 835-36.
12. For an extensive review of these laws and why they are not enough, *see generally* Dussias.
13. Ch. 147, 48 Stat. 596 (codified as amended at 25 U.S.C. §§ 452-454). It also allows for tribes to contract.
14. *See* Cohen at 141.
15. For one reason, federal funds may not have been used for their intended beneficiaries: Indian students. "[I]t was common practice for the public schools to misuse, at least before the mid-1960's, JOM funds intended to underwrite the unique educational needs of the Indian children by devoting those funds to meet the general educational program needs of the schools involved." Cross at 961.
16. *See* Impact Aid Act of 1950, ch. 1124, 64 Stat. 1100 (codified as amended at 20 U.S.C. §§ 236-46, repealed by Improving America's Schools Act of 1994, Pub. L. No. 103-382, tit. III, § 331(b), 108 Stat. 3965 (1994), which created its own impact aid program, replacing the Impact Aid's provisions. See § 101, 108 Stat. 3749-73 (codified as amended at 20 U.S.C. §§ 7701-14).
17. Pub. L. No. 81-815, ch. 995, 64 Stat. 967 (1950) (codified as amended at 20 U.S.C. §§ 631-47), repealed by Improving America's Schools Act of 1994, Pub. L. No. 103-382, tit. III, § 331(a), 108 Stat. 3965 (1994).
18. 20 U.S.C. §§ 241aa-241ff, 1211a, 1221f-1221h, 3385-3385b, repealed by Indian Education Act of 1988, 25 U.S.C. § 2601; repealed by Improving America's Schools Act of 1994, Pub. L. No. 103-382, § 367, 108 Stat. 3976 (1994).
19. Act of Jan. 4, 1975, Pub. L. No. 93-638, 88 Stat. 2203 (codified as amended at 25 U.S.C. §§ 450-450n, 455-458e).
20. 25 U.S.C. § 455.
21. *Id.*
22. Dussias at 873. Two later documents tried to address the problems: the *Comprehensive Federal Indian Education Policy Statement* (http://www.niea.org) and President Clinton's *1998 Executive Order on American Indian and Alaska Native Education*, Exec. Order No. 13,096, 63 Fed. Reg. 42,683 (Aug. 6, 1998). The Bush administration has a No Child Left Behind policy; see http://www.nochildleftbehind.gov, which one author thinks may "have positive effects on Indian education in at least some areas, particularly school construction, but raises some concerns about possible adverse effects in other areas." Dussias at 898.
23. Tribal students are distinct from other minority students in that they are members of tribes, which are distinct political entities. *See* Morton v. Mancari, 417 U.S. 535, 555 (1974) (conferring preference for Indians in employment did not violate the Fifth Amendment and was not prohibited racial classification).
24. *See* School Dist. No. 20 v. Bryan, 51 Wash. 498, 502, 99 P. 28, 29 (1909).
25. Wash. Rev. Code §§ 28A.150.220-.500 (Basic Education Act), §§ 28A.230.010-.260 (Compulsory Coursework and Activities). *See* Seattle School District No. 1 v. State, 585 P.2d 71, 93-95 (1978).
26. Wash. Rev. Code § 28A.305.130(8).
27. Wash. Rev. Code § 28A.150.220(a), (b). These EALRs are codified at Wash. Rev. Code § 28. A.655.060.
28. *See* Wash. Rev. Code § 28A.150.220(a), (b).
29. Wash. Rev. Code § 28A.230.010.
30. Wash. Rev. Code § 28A.230.020. Such basic instruction includes reading, arithmetic, geography, U.S. history, English grammar, science. *Id.*
31. Wash. Rev. Code § 28A.230.030.
32. Wash. Rev. Code § 28A.305.140.
33. *Id.* (emphasis added).
34. Wash. Rev. Code § 28A.320.140. The Puyallup School District and Chief Leschi School, a Puyallup tribal school, have had an agreement under this provision which provided that the school would provide educational services and the district would provide funds for the services. *See Tribal-State Partnerships: Cooperating to Improve Indian Education*, paper prepared for the National Congress of American Indians (June 2000) (NCAI paper) Part VII Appendices, available to order at http://www.narg.org/nill/. One author argued that these provisions might not meet the uniformity requirement of article IX, § 2. *See* L.K. Beale, Note, *Charter Schools, Common Schools, and the Washington State Constitution* 72 Wash. L. Rev. 535, 544-59 561-66, n.232 (1997).
35. Wash. Rev. Code § 28A.150.305(2).
36. Wash. Rev. Code § 28A.150.305(1).
37. *See id.*
38. Wash. Rev. Code § 28A.150.220(c). *See also* Wash. Rev. Code § 28a.230.090(3) (Indian languages meeting graduation requirements).
39. Wash. Rev. Code § 28A.230.090(1) (emphasis added).
40. Wash. Rev. Code § 28B.10.710 (emphasis added.
41. Wash. Rev. Code § 28A.320.230.
42. *Id.*
43. Wash. Rev. Code § 28A. 320.240.
44. The question has not been resolved conclusively. *Compare*, however, Glacier County Sch. Dist. v. Galbreath, 47 F. Supp. 2d 1167, 1171 (D. Mont. 1997) (under the facts of this case, a tribe could not regulate the administration and operation of a public school located on non-Indian-fee land within a reservation); Lewis County v. Allen, No. 93-0382, Slip Op. at 28 (D. Idaho 1994) ("by creating a school district and constructing and operating schools with the reservation, ... [a state] creates a 'consensual relationship' with the tribe") aff'd on other grounds, County of Lewis v. Allen, 163 F. 3d 509 (9th Cir. 1998) (en banc). *See also* Montana v. United States, 450 U.S. 544 (1981), and its progeny (tribes generally have no jurisdiction over non-Indians on non-Indian-fee land unless they meet two exceptions).
45. One treatise explained: "Where a state school is located within a reservation, state laws govern the operations of the school [citing Prince v. Board of Educ., 543 P.2d 1176 (N.M. 1975)], even though tribal laws will apply to the social relations of its Indian students [citing Fisher v. District Court, 424 U.S. 382 (1976)]." Cohen's *Handbook* at 279.
46. D. Michael Pavel, *Schools, Principals, and Teachers Serving American Indian and Alaska Native Students*, at 3, ERIC Digest, found at http://www.ael.org/eric/digests/edorc989.htm, discussing Nat'l Center for Educ. Statistics, U.S. Dep't of Educ., *Characteristics of American Indian and Alaska Native Education: Results from the 1990-91 and 1993-94 Schools and Staffing Survey* (1994), which is based on surveys of teachers and principals. A new study has been released.
47. *See also* NCAI paper.
48. Dussias at 867.
49. http://www.goia.wa.gov/directory. This author has not found data specific to Washington state on the number of Indian students in the state, their achievement levels, or attendance and dropout rates.
50. http://www.factfinder.census.gov. This figure includes people who checked that they were both Indian and another race. People only claiming Indian were 93,301, or 1.6 percent, in the state.
51. *See* Dussias at 869-74.
52. *See* Yazzie generally.
53. Yazzie at 89.
54. Yazzie at 88.
55. Yazzie at 88.
56. Yazzie at 88.
57. Ardy SixKiller Clarke, *Social and Emotional Distress Among American Indian and Alaska Native Students: Research Findings* 3, Jan. 2002, available at http://www.indianeduresearch.net/edorc01-11.htm. *See also* Cross at 943. The overall dropout rate in Washington is 13 percent. See http:censtats.census.gov.
58. Clarke at 3.
59. Clarke at 3.
60. Indians sometimes were subjected to threats when running for school boards. Kennedy Report at 24-25.
61. *See* Dussias *generally*.
62. Many education scholars encourage more tribes to operate their own schools to help fix these problems.
63. *See* the Web site of the state Office of Superintendent of Public Instruction, Indian Education Office at http://www.k12.wa.us/indianedu/leg/brief1.asp.
64. For a citations list and summary, *see* http://www.k12.wa.us/indianedu/leg/pfl.asp.
65. *See* http://www.narf.org. This site has extensive materials on tribal education codes and cooperative agreements with school districts.
66. *See* RJS & Assocs., External Evaluation Final Report, *Rosebud Sioux Tribal Education Department & Tribal Education Code*, 6-7 (1999), available to order at http://www.narf.org.
67. Other tribes, such as the Assiniboine Sioux Tribe of the Fort Peck Reservation in Montana and the Three Affiliated Tribes of the Fort Bert-hold Reservation in North Dakota, are taking similar approaches.
68. RJS & Assocs. at 15-16.
69. Dussias at 899.
70. NCAI paper at 2, 4.
71. NCAI paper at 3, describing the Lummi Tribal Schools and Ferndale School District agreement.
72. NCAI paper at 5.
73. Tarajean Yazzie, *Culturally Appropriate Curriculum: A Research-Based Rationale* (1999), in K. Swisher and J. Tippeconnic III (eds.), *Next Steps: Research and Practice to Advance Indian Education* 83, 87, available at http://www.ael.org/eric.
74. Yazzie at 88.
75. For resources for classroom teaching activities, history of Indian education, best teaching practices, *see* http://www.oiep.bia.edu and click on "resources" and http://indianeduresearch.net.
76. Yazzie at 91.
77. Thomas D. Peacock & Donald R. Day, *Teaching American Indian and Alaska Native Languages in the Schools: What Has Been Learned*, ERIC Digest, Dec. 1999, at http://www.ael.org/eric/digests/edorc9910.htm.
78. The draft regulation, proposed as Wash. Admin. Code ___ is planned for public comment beginning in January 2003.
79. Yazzie at 92.
80. Several methods beyond the scope of this article are available.
81. Yazzie at 98.
82. Letitia Hochstrasser Fickel & Ken Jones, *The Tundra is the Text: Using Alaska Native Contexts to Promote Cultural Relevancy in Teacher Professional Development* 3, paper presented at annual meeting of American Educational Research Association, 2002, available at http://www.indianeduresearch.net.
83. *See, e.g.*, Fickel & Jones, describing two-week institutes where teachers are immersed in Native village life and learn from communities on targeted subjects.
84. Peacock & Day at 2.
85. *Id.*
86. NCES Report at B-22 to B-23, tbl. B10.
87. NCES Report at B-65, tbl. B29.
88. D. Michael Pavel, *Schools, Principals, and Teachers Serving American Indian and Alaska Native Students*, at 3, ERIC Digest, found at http://www.ael.org/eric/digests/edorc989.htm.

The Board's Work

Seattle, September 12-13

by Judith Berrett
Director of Member and Community Relations

The board approved two bylaw changes — both related to BOG elections. Feeling that the 20-signature requirement on governor petitions may, on occasion, be an impediment to running for the board, the governors voted to eliminate this requirement. The other change permits governors to vote by secret ballot when electing governors (governors elect the replacement when a vacancy on the board occurs).

The board interviewed 12 candidates for at-large governor to replace **Dave Savage**, who now serves as president-elect. After public-session interviews, comments and questions from governors and liaisons, and executive-session discussion and voting, President **Dale Carlisle** announced the election of **Fawn Sharp** as the new governor at large. Ms. Sharp serves as lead counsel for the Quinault Indian Nation.

Jerry Boyd, of the Court Rules and Procedures Committee, presented several rules for consideration. Following a fair amount of discussion by board members and liaisons, the board, acting against the recommendation of the Court Rules Committee, unanimously voted to recommend to the Supreme Court the adoption of CrR 4.2 and CrRALJ 4.2. These two proposed rules would standardize guilty-plea statements. The board also unanimously voted recommendation of proposed rule CrR 4.7, which would allow release of redacted discovery materials to defendants. There followed a discussion of proposed ER 412, concerning extending the inadmissibility of evidence of prior sexual conduct unless ruled relevant by a judge (essentially adopting Federal Rule of Evidence 412 as to civil cases). The proposal originated with the Civil Rights Committee. **Michael Subit** and **Maria Fox**, co-chairs of the Civil Rights Committee, and **Gayle Barry**, representing Washington Women Lawyers, spoke in favor of the proposed rule. The Court Rules Committee, however, did not recommend the change, stating that ER 403 grants relief through seeking a judicial ruling on the admissibility of this type of evidence. After noting the difficulty when faced with opposing recommendations from two committees, the board voted to submit the proposed rule to the Supreme Court.

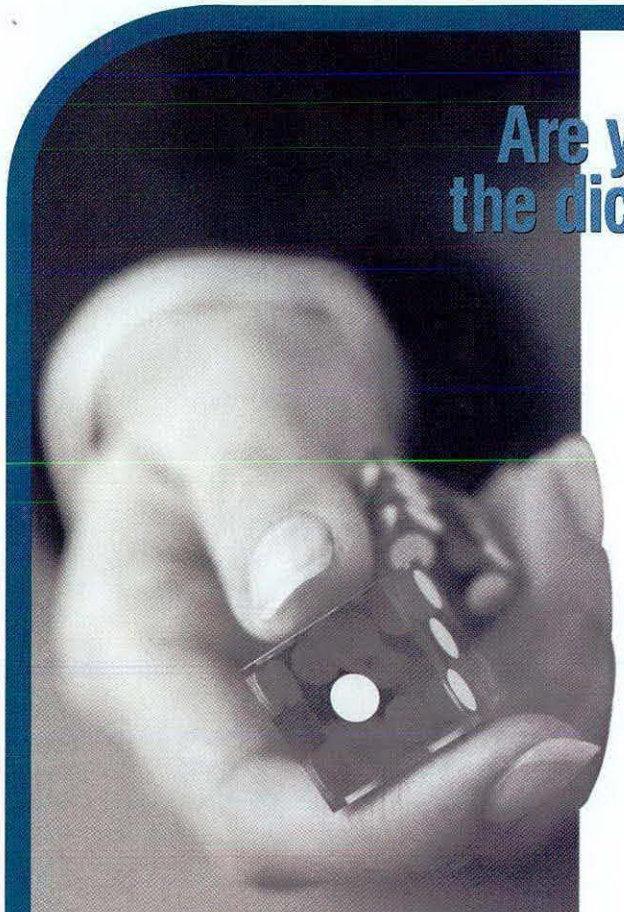
Back on the board's agenda after 16 months was consideration of a change to RPC 1.8(e) that would allow humanitarian loans to clients under certain limited conditions. **Eric Dickman**, chair of the WSTLA Maritime Section, and **John Merriam**, a maritime practitioner, spoke about the desperate needs of some of their clients for funds to cover emergency living expenses. **Mike Pontarolo**, representing the RPC Committee, spoke about the committee's unanimous opposition to the change, stating that attorneys are permitted to give gifts to needy clients under the current rules, and that introducing a lawyer's financial interest into the attorney-client relationship would pose many ethical dilemmas. The board was sympathetic to the plight of clients in need, but was concerned that allowing lawyers to loan money to their clients would "open up a Pandora's box," and that lawyers' professionalism, ethics and integrity were potentially at stake, since loaning money to clients could possibly result in lawyers' "buying cases." The board also pointed out that there are services available that lawyers could recommend to their clients in need, and many other ways to help clients apart from loaning money. A motion recommending a change to RPC 1.8(e) to allow humanitarian loans to clients was defeated by a vote of two in favor, 10 opposed, and one abstaining.

WSBA Director of Legislative Affairs **Gail Stone** alerted the board that the 2003 Legislature is likely to face a revenue shortfall of at least $2 billion as it writes a budget for the 2003-2005 biennium — an even greater shortfall than the $1.2-plus billion last year. The WSBA's legislative priority continues to be funding for the courts and civil legal services. Later this fall, the Supreme Court's Task Force on Civil Equal Justice Funding will be making recommendations for future funding mechanisms.

Wilda Heard, vice-chair of the Lawyers' Fund for Client Protection Committee, presented the committee's annual report and recommendations. Last year, the board (who are the fund's trustees) and the Supreme Court approved increasing the maximum fund payment cap from $30,000 to $50,000 per application, and increasing the committee's authority to approve payments without trustee review from $3,000 to $10,000. When these changes were approved, the trustees asked that in one year the committee review the fiscal impact of these changes, as well as whether they created any inequities for applicants. The committee unanimously recommended that the current $50,000 per application cap and committee authority of $10,000 be continued, and the board unanimously approved permanent adoption of these limits.

Former WSBA President **Jan Eric Peterson** reported on the activities of the Proud to Be a Lawyer Task Force. Accomplishments include "Legally Speaking" on KING TV and Northwest Cable News; "You Have Rights: Lawyers Protect Them" radio and airport campaign; "Proud to Be a Lawyer" features on the WSBA Web site and in *Bar News*; development of the "Truths about Lawyers" pamphlet; and the local-hero program. All have become institutionalized. Upon Mr. Peterson's recommendation, the board voted to sunset the task force.

Washington State Bar News **Extent and Nature of Circulation**	**Average No. Copies Each Issue During Preceding 12 Months**	**Actual No. Copies of Single Issue Published Nearest to Filing Date**
Total Number of Copies (net press run)	23,802	24,034
Paid/Requested	15,927	23,889
Paid In-County Subscription	7,732	0
Sales Through Dealers and Carriers, Street Vendors, Counter Sales, and Other Non-USPS Paid Distribution	0	0
Other Classes Mailed Through the USPS	0	0
Total Paid and/or Requested Circulation	23,659	23,889
Free Distribution by Mail	65	70
Free Distribution Outside the Mail	0	0
Total Free Distribution	30	30
Total Distribution	23,754	23,989
Copies not Distributed	48	45
Total	23,802	24,034
Percent Paid and/or Requested Circulation	100	100



Are you rolling the dice on your firm's future?

Chances are, you've taken some steps to protect your practice from the financial devastation a lawsuit can bring. *But have you done enough?*

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NEW!

The Washington State Bar Association is pleased to announce three new health plan options now available to WSBA members and your staff. Each plan offers choice of coverage and competitive group rates—which fit both your needs and your budget.

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Don't gamble with your firm's future.
Call today for FREE INFORMATION on the Professional Liability Program and new health plan options.

Pamela Blake—1-800-552-7200, ext. 7802
or
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A link to your Web site can be added to your directory listing, so current and potential clients can find out more about you and your practice at the click of a button.

The fee is $75 annually ($50 if you sign up July 1 or later). If your firm has seven or more lawyers, you'll save through our special pricing structure. Special pricing is also available for those who work for nonprofit or government agencies. For more information and sign-up instructions, see www.wsba.org/directory/addlink.

Usury Rate

The average coupon equivalent yield from the first auction of 26-week treasury bills in October 2002 is 1.562 percent. The maximum allowable interest rate for November is therefore 12 percent. Compilations of the average coupon equivalent yields from past auctions of 26-week treasury bills and past maximum interest rates for June 1988-June 1999 appear on page 53 of the June 1999 *Bar News*. Information from January 1987 to date is on the WSBA Web site at www.wsba.org/barnews/usuryrate.html.

New Discipline Rules Adopted

On September 5, the Supreme Court adopted the Rules for Enforcement of Lawyer Conduct (ELC), replacing the Rules for Lawyer Discipline. The rule changes include related amendments to the Rules of Professional Conduct and the Admission to Practice Rules. The changes were effective upon publication (the October 1 advance sheet of *Washington Reports*). The changes, published for comment in April, were developed by the Discipline 2000 Task Force and were recommended by the Board of Governors. A link to the new rules is available on the WSBA Web site at www.wsba.org/rules, and cross-reference tables between the old and new rules are available at www.wsba.org/2001/d2k/report.htm.

BOG Meetings

December 6-7 – Everett
January 17-18 – Olympia
February 6 – Seattle

With the exception of a one-hour executive session the morning of the first day, BOG meetings are open, and all WSBA members are welcome to attend. RSVPs are appreciated but not required. Please contact Lisa KauzLoric at 206-733-5944 or lisak@wsba.org. The complete BOG schedule is available on the WSBA Web site at www.wsba.org/bog/schedule.htm.

Proud to Be a Lawyer Task Force Receives National Recognition

The Proud to Be a Lawyer Task Force received the National Association of Bar Executives (NABE) "Luminary Award" for excellence in public relations. The award was announced at the NABE Communications Section Conference held in Alexandria, Virginia, in September. Director of Member and Community Relations Judy Berrett accepted the award on the task force's behalf.

The task force was created by 2000-2001 WSBA President Jan Eric Peterson with the dual goals of instilling pride in WSBA members, and increasing the public's understanding of the law and lawyers. Members of the task force are Jan Eric Peterson (chair), Bill Bailey, Tom Campbell, Carl Carlson, Mary Fairhurst, Jay Flynn, Randy Gordon, Steve Henderson, Juliet Jones, Don Logerwell, Harry McCarthy, Mike McKasy, Sal Mungia, Sonia Rodriguez, Ron Ward; non-lawyer members Patt Schwab and Mary Elizabeth Stritmatter; and WSBA staff members Judy Berrett and Allison Parker.

LOMAP on the Road — Smart Strategies for Improving Efficiency

WSBA's Law Office Management Assistance Program (LOMAP) has kicked off its annual traveling seminar series. Topics include case-management software and client management, plus a segment about transitions in lawyers' careers. The course offers 4.0 credits, including 2.0 ethics credits. Cost is $69. For more information, please see www.lomap.org or contact the WSBA Service Center at 800-945-WSBA or 206-443-WSBA. Reference event code LOM1102. "LOMAP on the Road" will visit:

November 5 – Vancouver, WA, Phoenix Inn Vancouver
November 6 – Ocean Shores, Quinault Beach Resort
November 7 – Olympia, Phoenix Inn Olympia

Information Updates

Now is the ideal time to make sure the WSBA has your correct contact information in its database. You can check by going to the online lawyer directory at http://pro.wsba.org. If any of your contact information has changed, please notify the WSBA Service Center as soon as possible. You may contact us by e-mailing questions@wsba.org, faxing the change to 206-727-8319, or calling 800-945-WSBA or 206-443-WSBA.

Department of Licensing Online

The Department of Licensing (DOL) has implemented a system that allows drivers to schedule DUI hearings online. Persons with a valid Washington driver's license and credit card may fill out a form at http://www.dol.wa.gov/ds/hrnginfo.htm and submit it to the DOL. A hearing will be scheduled in two to four weeks.

Third-Party Liability Information

If your client is involved in a personal-injury case and has received or is receiving medical-assistance payments for his medical care, you are required to contact the Department of Social and Health Services (DSHS). RCW 43.20B.060 places a lien for the reimbursement of the medical bills that have been paid by public assistance against any settlement of judgment your client receives from a third party responsible for your client's injuries. Before settling your client's claim with the third party or their insurance company, please contact the COB Casualty Unit of DSHS at 800-562-6136 or COB Casualty Unit, PO Box 45561, Olympia, WA 98504-5561. Failure to pay any lien imposed by the department may subject you to personal liability for funds improperly distributed (RCW 43.20B.070).

Community Justice Center Opens in Central District

Residents of Seattle's Central District now have access to free legal advice and information through the new Community Justice Center, a project of the Access to Justice Institute at Seattle University School of Law. The center is open Tuesdays from 4:30 p.m. to 6:30 p.m. in the Catholic Community Services building at 100-23rd Ave. S. (at Yesler Way). Each week, local lawyers provide educational presentations on legal issues. Following the presentations, anyone desiring further assistance is interviewed by Seattle University law students and is given an appointment to meet with a lawyer the following week. Four more Community Justice Centers are planned for low-income neighborhoods in King and Pierce counties. For more information, contact Eric Walter at 206-296-6114.

2001-2002 Committee Reports

Alternative Dispute Resolution

Additional law arbitrators were added to the ADR panel, and a training seminar is scheduled later this year. The committee will continue to recruit and train arbitrators, as well as publicize the Fee Arbitration Program.

Character and Fitness

The committee considered all petitions for reinstatement and all applicants for admission that were referred by the WSBA executive director. It prepared written findings regarding the fitness of each applicant and petitioner considered by the committee, and provided written recommendations for action to the Board of Governors for consideration by the Washington State Supreme Court. Formal hearings were conducted for seven individuals. Members considered the character and fitness of six bar-exam applicants and one petitioner for reinstatement.

Civil Rights

The committee spent significant time reviewing proposed state legislation and federal regulations regarding "anti-terrorism" matters and advising the BOG about them. A civil-rights brochure was developed, and several thousand copies will be produced and distributed to the general public. In an effort to diversify the committee, outreach to minority bar associations and individual lawyers of color was conducted.

Court Improvement

The committee initiated efforts with the Board for Judicial Administration and the Administrative Office of the Courts to add members of the judiciary to the committee, and began its consideration of the Walsh Commission/judicial independence group of recommendations that the committee had previously identified as priorities. However, upon announcement of the BOG's decision to sunset the committee, its efforts turned to preparing a final report and developing final recommendations. The committee monitored and supported the King County Bar Association's Services to the Public Workgroup, addressing the judiciary, public education, legislation and *pro bono* services.

Diversity

The committee worked to increase diversity within the WSBA and on the BOG, revitalize communication between the Minority Bar Coalition and the committee, and increase the WSBA's visibility with stakeholders in the legal community and the community at large. The committee participated in the 10th Annual Law and Diversity Program at Western Washington University, a minority job fair, and the WYLD Pre-law Student Leadership Conference in Yakima.

Editorial Advisory Board

The goals of the EAB this year were to help ensure the timely production of *Bar News*, and to provide ideas to staff and the editor to enhance the quality and readership of the magazine. The EAB adopted a policy whereby authors will assign copyright of their articles to *Bar News*. Another policy was adopted stating that *Bar News* will not publish articles by authors involved in pending litigation.

Electronic Communications (EC2)

The committee hosted a debate regarding the utility of universal case citation in the state's case law between a representative of the Supreme Court's Reporter of Decisions Office and a representative of the UW law library. The committee submitted a resolution to the BOG urging them to petition the Supreme Court to advocate a change in the state's method of case citation from the traditional volume-and-page-reference method to a universal (media-neutral) format.

Law Clerks

This committee is responsible for running the WSBA Law Clerk Program, which includes supervising law clerks enrolled in the program. In the future, the committee will explore the possibility of including law-clerk graduates in the WSBA reciprocity agreement.

Law Examiners

The committee's main task is to prepare and grade the best bar examination possible, and streamline the bar-exam training, preparation and grading process. The committee continues to maintain its goal of having a full exam in its "question bank," which serves as an excellent training tool for new examiners and provides a reserve of approved questions when the need arises. The committee hosted Jackie Mullenger, director of bar admissions for the Nova Scotia Barristers' Society, which has patterned its exam process after Washington's.

Legal Assistants

One of the committee's goals for the year was to participate in the selection process of Practice of Law Board (PoLB) members. The committee presented comments to the PoLB Implementation Committee on selection criteria. As a result of the committee's focus on education, a presentation was created for Seattle University law students to learn about paralegal utilization.

Legal Services to the Armed Forces

The committee was instrumental in the passage of an amendment to APR 8(g), allowing JAG officers a limited license to represent indigent members of the military in civilian courts. In September, JAG officers had the opportunity to attend a two-day CLE to learn how to comply with the amendment. The committee also participated in Operation Enduring

LAMP, an ABA-sponsored program for military personnel. In the next year, the committee will consider sponsoring an amendment to the RCWs for a rent-termination clause in leases for personnel receiving military orders.

LOMAP

Services available from the WSBA Law Office Management Assistance Program (LOMAP) include phone and on-site consultations, statewide seminars (including an annual "roadshow"), speaking engagements, a lending library, a software laboratory, and the Lawyer-to-Lawyer program. The committee identifies, pursues and publicizes programs for delivering law office management services to WSBA members. Committee members worked on updating the LOMAP manual, *Up and Running*, to include additional information about marketing, technology and how to close a practice.

MCLE Board

The general goal of the board is to assure compliance of MCLE regulations by WSBA members. In part, that involves interpreting the regulations in light of individual situations that are brought to the board's attention. The board may also make recommendations to the BOG regarding changes to MCLE regulations. During the last year, the board began developing guidelines that WSBA-MCLE staff could use in making decisions in response to routine requests by WSBA members.

Professionalism

The committee focused on disseminating the Creed of Professionalism (adopted by the WSBA Board of Governors in 2001). Working with local bar associations, good progress was made on the goal of having Creed of Professionalism plaques in all Washington courtrooms (46 percent of county bars have participated or have definite plans to do so). The committee also presented the highly successful CLE seminar "Ethics, Professionalism and Civility: The Hard Questions." Subcommittees focused on lawyers, the judiciary, law schools and citizens.

Pro Bono and Legal Aid

The committee continues to work to implement the Volunteer Attorney Legal Services Action Plan adopted by the BOG in 1994. After significant process by the Corporate Counsel subcommittee in establishing the infrastructure for a videophone project, the project has been put on hold because of insufficient participation by corporate counsel. As a result, the subcommittee will focus on how to encourage the development of a *pro bono* culture in corporate law departments. The committee proposed an amendment to RPC 6.1 that includes voluntary reporting of *pro bono* hours.

2001-2002 Section Reports

Administrative Law

The section produced three newsletters and hired a law student to serve as assistant editor. Membership was increased by eight percent, growing from 255 to 275. The section hosted two CLEs, "Insider Tips for Effective Advocacy During Agency Rulemaking," and "Evidence" with the Honorable Dean Morgan. The allocation of $3,000 to help fund a legal-needs study of Washington residents was approved by the section. A subcommittee of the board of trustees revised the section bylaws. The section raised $1,325 in revenues through its continued publication of the section deskbook.

Antitrust, Consumer Protection and Unfair Business Practices

The section presented its annual CLE, and completed work on the update of the consent-decree index. Progress is being made on creating a list serve. The section will continue their work on creating an electronic version of their newsletter.

Business Law

The section issued a joint report on the proposed Uniform Money Services Act; voted to oppose amendments to the Non-Profit Corporation Act proposed by the Association of Realtors; proposed amendments to the Washington Business Corporations Act (WBCA) authorizing electronic notices and other communications; proposed amendments to the WBCA, the Washington Limited Partnership Act, and the Washington Limited Liability Company Act revising the definition of "person"; provided input regarding amendments to the Washington Securities Act proposed by the Washington Securities Division; formed a subcommittee to review proposed revisions to Articles 1 and 2 of the Uniform Commercial Code; sent a representative to the August ABA Annual Meeting; organized *pro bono* efforts among business lawyers; and distributed a CLE-needs assessment survey to many WSBA members.

Construction Law

The section's midyear CLE focusing on construction litigation was one of the best-attended construction CLEs presented in years. Three successful forum meetings were also held this year. The speakers included Justice Philip Talmadge; Lee Evey, program director for "Operation Phoenix;" and three attorneys general. Section members are enjoying their newly created list serve. Two newsletters were produced.

Dispute Resolution

Section accomplishments include development of a draft brochure on dispute-resolution alternatives submitted to the Board for Judicial Administration (BJA) for review; hosting an ABA Section of Dispute Resolution Conference in Seattle; remodeling the section Web site and directory of ADR service providers to permit online updating by section officers and providers; endorsing the proposed Revised Uniform Arbitration and Uniform Mediation acts; and sponsoring three law-student summer clerkships in ADR organizations.

Elder Law

In September 2001, a grant program was established to provide access to legal services for Washington's senior residents by providing support to organizations throughout the state offering legal assistance to seniors with limited resources. A total of $10,000 has been awarded to five senior-services organizations. The program has received national recognition, including a feature article in the *ABA Bulletin*. An annual meeting, CLE, and multi-disciplinary symposiums are offered throughout the year. The section will continue their ongoing collaborative efforts with the King County Bar Association

Elder Law & Guardianship Section and the Washington Chapter of NAELA (National Association of Elder Law Attorneys) on shared activities and monthly elder law forums.

Family Law

The section enjoyed a renewed commitment to increasing membership — now at a little over 1,000 members. The 2002 annual meeting and CLE seminar were held in June in Wenatchee. The section also created a list serve for its members. The Skills Training Workshop CLE was presented in April, focusing on providing affordable training to attorneys new to family law.

Indian Law

The section presented the full-day CLE, "Indian Resources and Authorities in 2002 — Challenges and Opportunities for Indian Country," in May; published a newsletter; awarded two scholarships to Indian tribal members attending Washington law schools; assisted in presenting training on Indian law issues at the Access to Justice Conference in Yakima; and posted substantial Indian law materials on the section's Web pages.

International Practice

The section hosted a year-long program of mentoring for foreign lawyers (LLM candidates in the UW School's Asian Law Program); gathered contributions from more than 30 section members for inclusion in the *Doing Business in Washington State — Guide for Foreign Business and Investment* handbook, which will be published this year; awarded a scholarship to a Gonzaga Law School student in memory of former section chair Rob Huneke; published a newsletter; and continued to hold bimonthly members' forums.

Labor and Employment Law

The first annual meeting and CLE were held on October 19 at Seattle University School of Law. Program topics included recent developments in state and federal law, trial technique, contract arbitration and ethics.

Law Practice Management & Technology

The section presented its annual "Winning Strategies" CLE seminar and co-sponsored the Law Office Management Expo and Technology Institute. Three newsubcommittees were formed to focus on education, communication and membership, and marketing and participation. The section publishes a quarterly newsletter and sponsors semi-monthly "brown bag" luncheon seminars.

Senior Lawyers

The section held its annual seminar and meeting; considered adding an annual additional mini-seminar; considered possible joint participation with the ABA Senior Lawyers Division; and published *Life Begins.*

Taxation

The section's goals are to improve its page on the WSBA Web site; create list serves for section members and committees; improve communication with section members regarding legislative developments; and revive the international tax committee.

Calendar

Please check with providers to verify approved CLE credits. To announce a seminar, please send information to:

WSBA *Bar News* Calendar
2101 Fourth Avenue, Suite 400
Seattle, WA 98121-2330
fax: 206-727-8319
e-mail: comm@wsba.org

Information must be received by the 1st day of the month for placement in the following month's calendar.

ANTITRUST

Antitrust Section Annual Meeting & CLE
November 1 – Seattle. CLE credits TBD. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

CREDITOR/DEBTOR

How to Create, Perfect, Foreclose and Defend Liens
December 6 – Spokane; December 13 – Seattle. CLE credits TBD. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

EMPLOYMENT

Employee Benefits/Employee Handbooks
December 4 – Seattle. CLE credits TBD. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

ADA/FMLA
December 12 – Seattle. CLE credits TBD. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

ESTATE PLANNING

47th Annual Estate Planning Seminar
November 14-15 – Seattle. 15.5 CLE credits, including .75 ethics. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

RPPT Estate Planning
December 11 – Seattle; December 12 – Mount Vernon. CLE credits TBD. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

ETHICS

The Curse of the Virtuous Lawyer
November 6 – Seattle. CLE credits TBD. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

The Mystery of the Virtuous Lawyer
November 7 – Seattle. CLE credits TBD. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

Tele-CLE: Ethics Issues for Estate Planners
November 7 – telephone. CLE credits TBD. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

Successful Ethical Marketing
November 12 – voice/data conference. 1.5 ethics credits. By WSTLA; 206-464-1011.

10th Annual Professional Responsibility Institute
November 16 – Seattle. 7 CLE credits pending. By UW-CLE; 800-CLE-UNIV.

Tele-CLE: The Son of Halibut Klutz
November 21 – telephone. CLE credits TBD. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

Tele-CLE: Ethics and Technology in the Office
November 26 – telephone. CLE credits TBD. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

Ethical Dilemmas
December 3 – Seattle. CLE credits TBD. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

Tele-CLE: Ethics for Family Law
December 5 – telephone. CLE credits TBD. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

Tele-CLE: Pozner & Dodd: Litigation Ethics
December 12 – telephone. CLE credits TBD. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

Ethics Triple Play (a.m and p.m. sessions)
December 18 – Seattle. 4 ethics credits (a.m.); 3.5 ethics credits (p.m.). By WSTLA; 206-464-1011.

Tele-CLE: Negotiation Strategies: Ethics *(with M. Latz)*
December 18 – telephone. CLE credits TBD. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

GENERAL PRACTICE

Defense Upgrade 12.02
December 6 – Seattle. 6.75 CLE credits, including 1 ethics. By WACDL; 206-623-1302.

Best of CLE
December 10 – Seattle. CLE credits TBD. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

Last Chance Video Roundup
December 16, 17, 19, 23 – Seattle. CLE credits TBD. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

LABOR & EMPLOYMENT LAW

Employee Benefits (a.m.)/Employee Handbooks (p.m.)
December 6 – Spokane. CLE credits TBD. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

LAW OFFICE MANAGEMENT

LOMAP on the Road
November 5 – Vancouver; November 6 – Ocean Shores; November 7 – Olympia. 4 CLE credits, including 2 ethics. By WSBA-LOMAP; 800-945-WSBA or 206-443-WSBA.

LAND USE

Advanced Training for the Experienced Land-Use Lawyer
December 11 – Seattle. CLE credits TBD. By UW-CLE; 800-CLE-UNIV.

Professionals

LITIGATION

Pozner & Dodd: Liller Cross-Exam
November 22 – Seattle. CLE credits TBD. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

Trial Stars
December 5 – Seattle. 6.25 CLE credits, including .5 ethics. By WSTLA; 206-464-1011.

REAL ESTATE

Financially Distressed Real-Property Issues
November 7 – Spokane; November 8 – Seattle. CLE credits TBD. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

Real Estate Conference
December 5 – Seattle. CLE credits TBD. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

WATER

Water Law
November 21-22 – SeaTac. CLE credits TBD. By WSBA-CLE; 800-945-WSBA or 206-443-WSBA.

DISCIPLINARY INVESTIGATION AND PROCEEDINGS

Patrick C. Sheldon,
former member of the Washington State Bar Association Disciplinary Board, is now accepting referrals for attorney disciplinary investigations and proceedings.

FAIN SHELDON ANDERSON & VANDERHOEF PLLC
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999 Third Ave., Ste. 3610
Seattle, WA 98104
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Former law clerk,
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Washington State Supreme Court

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Former law clerk to the Washington State Supreme Court and the Washington State Court of Appeals

Passed CPA exam in 1982

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INSURANCE

Richard Gemson,
former adjunct professor of law at UPS and former in-house counsel for North Pacific Insurance Co., is available for consultation, association or referral in matters involving all types of insurance coverage.

1001 Fourth Ave., Ste. 3278
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206-467-7075
Fax: 206-342-9650

MEDICAL OR DENTAL MALPRACTICE

John J. Greaney
is available for consultation and referral of plaintiffs' claims of medical or dental malpractice against health-care providers and hospitals.

BELLEVUE
425-451-1202
E-mail: john@greaneylaw.com

LABOR AND EMPLOYMENT LAW

William B. Knowles
is available for consultation, referral and association in cases involving employment discrimination, wrongful termination, wage claims, unemployment compensation and federal employee EEOC or Merit System Protection Board appeals.

206-441-7816

INTELLECTUAL PROPERTY TRANSFERS

Maggy Bailly
is available for consultation, workshops, contract, association, or referral in IP transfer agreements (licensing, assignment, donations, teaming).

206-726-1645
E-mail: maggybailly@hotmail.com

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Leland G. Ripley,
former WSBA chief disciplinary counsel (1987-94), represents and advises lawyers in all aspects of legal ethics and lawyer discipline.

866-890-3525
E-mail: leland.ripley@verizon.net

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E-mail: bettyjschall@qwest.net

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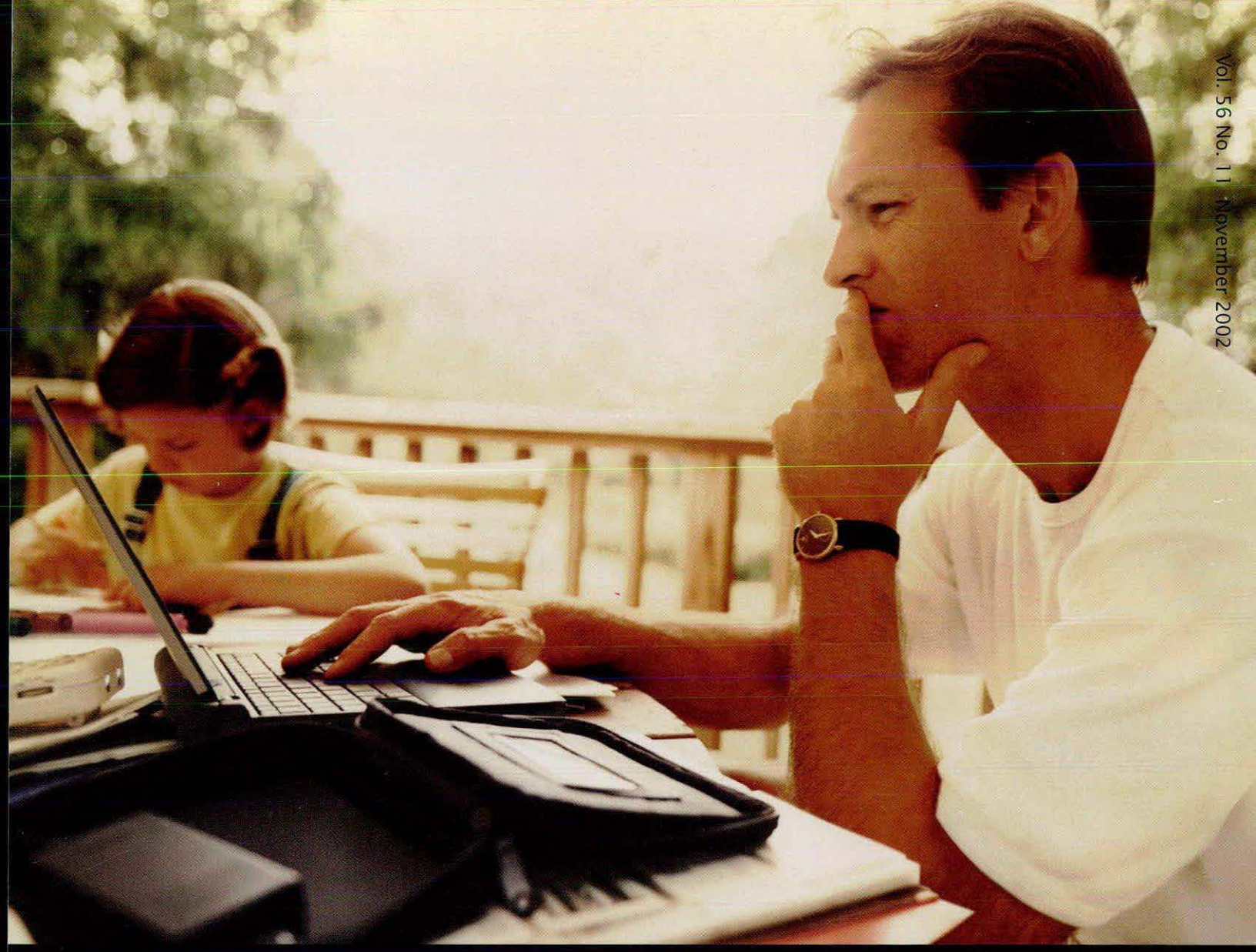

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