INDIAN LAW

A NEEDED ADDITION TO THE ARIZONA BAR EXAM

Bar examinations evolve over time, adding or omitting topics that wax or wane in relevance to law practice. Is it time for a new topic—Indian law—to be added to that test?

We are currently in a comment period until May 20 for a proposed Supreme Court rule change. To understand the proposal better, we asked rule-change proponents to explain the recommendation and its importance to practice.

Arizona and the Tribes

Indian law must be added to the Arizona State Bar Examination for practical and professional reasons.

State and tribal interactions are increasing at an exponential rate. In Arizona today, attorneys need to have at least a modicum of Indian law knowledge to serve their clients competently. And learning at least some Indian law will ensure that Arizona's attorneys meet the requirements of the Arizona Rules of Professional Conduct.[1]

There are 22 tribes in Arizona. As sovereign entities, collectively, they have jurisdiction over approximately 28 percent in the state. These include the majority of the large Navajo and Tohono O'odham Nations, whose reservations occupy areas larger than West Virginia and Connecticut, respectively. They also include the Salt River Indian and Gila River Indian Communities, which abut the Phoenix metro area. In fact, with its almost 22 million acres, Arizona has the greatest percentage of Indian reservation land in the country.

Arizona tribes are expanding their economic activities and developing their reservations at a rate similar to their municipal neighbors. The tribes are actively engaging in energy, real estate development, natural resource development, agriculture, finance, telecommunications, wholesale and retail trade, tourism and gaming—all of which contributes billions to Arizona's economy. The tribes' gaming operations alone contribute approximately $500 million to the state's economy.

With all of this economic activity, tribes interact with non-Indian entities and individuals with increased frequency. Non-Indian businesses are seeking to locate and work within Indian country. Some Arizona tribes have developed partnerships with top Fortune 500 companies, including Wal-Mart, AT&T, Bank of America, Peabody Energy, El Paso Gas and John Deere. Moreover, the only places in the Valley that construction has not slowed are on the Indian reservations. Each transaction occurs with a backdrop of Indian law.

Growth issues are affecting tribes, cities and towns within the state. Arizona's municipalities and tribes physically abut each other. This proximity engenders more civil claims and criminal complaints that require some knowledge of Indian law—namely, how federal, state and tribal jurisdiction and law interact.

In this interactive climate, a lawyer's inadequate understanding of Indian law will lead to inadequate representation. Testing Arizona's lawyers on Indian law will ensure general competence in the areas of jurisdiction and sovereign immunity, and help avoid malpractice claims.

Laws' Intersection

Jurisdiction

A plethora of Indian law issues may arise in Arizona, and knowing what forum to resolve them in is key. For instance, litigation concerning the adoption of Indian children, probate of real property on tribal lands, or auto accidents on reservations may involve complex jurisdictional issues, which will turn on the status of the land where the action took place and the race and tribal membership of the parties.

Each of the 22 tribes is a sovereign entity that exercises governmental powers over its membership and territory—including criminal and civil regulatory and adjudicatory authority. The U.S. Supreme Court's holding in *Williams v. Lee*,[2] which originated in Arizona, made clear that disputed transactions occurring on reservations are appropriately settled in tribal courts. In fact, the primacy of jurisdiction in Indian Country is tribal, then federal, and then state.

Moreover, after disputes have been adjudicated in tribal court, parties may have those judgments recognized and enforced by Arizona courts. In 2000, Arizona's Supreme Court adopted the Rules of Procedure for the Recognition of Tribal Court Civil Judgments to "govern the procedures for recognition and enforcement by the superior courts of the State of Arizona of tribal court civil judgments of any federally recognized Indian tribe."[3] The rules address collateral estoppel and state court default judgments stemming from tribal court decisions.[4]

At least seven federal statutes mandate that state courts provide full faith and credit to tribal court decisions.[5] Of these seven, Arizona lawyers are more likely to encounter three—the Indian Child Welfare Act, the Parental Kidnapping Prevention Act and Section 2265 of the Violence Against Women Act. The last of these directs the states to extended full faith and credit to tribal protective orders, which are common legal orders.

For public and transactional attorneys, especially those who deal with non-Indian businesses and zoning, knowing who and what the tribe, state or federal governments may properly regulate is key. While very rare, the state may tax and regulate certain entities and areas in the reservation.

Even when the state arguably may tax or regulate an area, federal law may preempt state regulation. To determine if federal law preempts state law, one must employ a balancing test and consider state, tribal and federal interests, a complex pattern of factors that suggest federal support for—or supervision of—Indian activities.[6] Moreover, under *Central Machinery Co. v. Arizona State Tax Comm'n*,[7] state sales taxes may be preempted by peripherally related federal statutes, such as those regulating Indian trading. An attorney who lacks the ability to spot basic jurisdictional issues can create great headaches for everyone involved.

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Tribal Sovereign Immunity

If suing a tribe or tribal entity, a practitioner must identify sovereign immunity issues. Pursuant to *Santa Clara Pueblo v. Martinez*,[8] a tribe cannot be sued unless it or the federal government has waived its sovereign immunity. Some recent Arizona cases provide examples of claims that were brought against tribes only to be dismissed under sovereign immunity.[9] Claims barred by sovereign immunity are easy to spot with only a modicum of Indian law knowledge, but they are costly if missed.

The Ethical Rules

If their competence in Indian law is not tested, Arizona's lawyers will be less likely to fulfill their duties under the Rules of Professional Responsibility:

- Rule 1.1: "Competent representation requires the legal knowledge … reasonably necessary for the representation."
- Rule 1.4(b): Lawyers must explain matters thoroughly enough "to permit the client to make informed decisions."
- Rule 2.1: "A lawyer shall exercise independent professional judgment and render candid advice."
- Rule 1.5: Factors for determining the reasonableness of a fee include the "skill requisite to perform the legal service properly … [and the] ability of the lawyer" performing the legal services.

With this bar exam change, Arizona clients would be assured that their attorneys are competently rendering valid, candid advice because they have been tested to ensure they have an understanding of Indian law and its interaction with other areas of the law. Moreover, they will be assured that this advice will allow them to make thoroughly informed decisions, and that fees charged are reasonable.

Legal Education Today

A working knowledge of Indian law does not require a specialized understanding of the area. The proposal is aimed only at ensuring that licensed attorneys can identify and adequately confront fundamental issues, such as jurisdiction and sovereign immunity.

Indian law will not unduly burden Arizona's law schools, students and curricula. The state's three ABA-accredited schools—the James E. Rogers College of Law at the University of Arizona, the Sandra Day O'Connor College of Law at Arizona State University, and the Phoenix School of Law—all offer Indian law courses. In particular, the first two have nationally renowned Indian legal programs, and the state's newest law school, the Phoenix School of Law, offers a Federal Indian Law course and may expand its course offerings in the future. Therefore, Arizona's law schools can readily provide an understanding of the basic tenets of Indian law.

Of course, many attorneys are trained outside Arizona. But many law schools in the country offer Indian law courses. A survey of the top 100 law schools found that 55 offer at least one course in Indian law.[10] And the most commonly used bar preparation course, BAR/BRI, has a study curriculum for Indian law. In fact, attorneys in Arizona are presently working with BAR/BRI to construct a "leaner" version that will educate test-takers on Indian jurisdiction and sovereign immunity issues.

Conclusion

Other states already have recognized the significance of possessing a general competence in Indian law. In 2003, New Mexico became the first state to include Indian law on its bar exam. In 2004, Washington's State Bar Association Board of Governors unanimously approved Indian law for its exam. South Dakota has approved the requirement to have at least one essay question on Indian law. Other states with significant Indian lands and populations are actively working to add Indian law to the exam.[11]

In April 2008, Arizona's State Bar Board of Governors voted to file a petition in support of this change. Arizona—the state with the largest percentage of Indian lands in the country—should not fall behind.

COMMENT PERIOD OPEN NOW

Last May, after hearing from various Bar members, the State Bar filed a rule change petition with the Arizona Supreme Court, seeking to include Indian law as a topic to be tested on the Arizona Bar Examination. The public comment period runs until May 20, 2009.

To read the Bar's petition and to comment, go to www.dnnsupremecourt.state.az.us, click "Court Rules Forum," click "View or File Rule Change Petitions," then on "Rules of the Supreme Court" and finally on "R-08-0016."

endnotes

1. The Arizona Rules of Professional Conduct substantially mirror the Model Rules of Professional Responsibility, and this article addresses lawyers' obligations under both.
2. 358 U.S. 217 (1959).
3. Ariz.R.P.Tribal Ct. Civ. Judgment 1.
4. *Beltran v. Harrah's Arizona Corp.*, No. 2 CA-CV 2007-0169, 2008 WL 2931392, at * 3 and *6 (Ariz. Ct. App. July 31, 2008).
5. Full faith and credit mandated in various areas: 18 U.S.C. § 2265(a)(2000) (tribal court protection orders); 25 U.S.C. § 1911(d)(2000) (public acts, records and judicial proceedings of any Indian tribe applicable to Indian Child custody proceedings); 25 U.S.C. § 2207 (2000) (tribal actions under tribal ordinances limiting descent and distribution of trust and restricted or controlled lands); 25 U.S.C. § 3106(c) (2000) (tribal court judgments regarding forest trespass); 25 U.S.C. § 3713(c) (2000) (tribal court judgments regarding Indian agricultural lands trespass); 28 U.S.C. § 1738A (2000) (tribal court child custody and visitation determinations); 28 U.S.C. § 1738B (tribal court child support orders); *see* Robert N. Clinton, *Comity and Colonialism: The Federal Courts' Frustration of Tribal–Federal Cooperation*, 36 Ariz. St. L.J. 1, 23 n.55 (2004).
6. *New Mexico v. Mescalero Apache Tribe,* 462 U.S. 324, 334 (1983) ("State jurisdiction is pre-empted 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").
7. 448 U.S. 160 (1980).
8. 436 U.S. 49 (1978).
9. *Beltran v. Harrah's Arizona Corp.*, *supra* note 4; *Cook v. Avi Casino Enterprises, Inc.*, No. 1 CA-CV 07-0110, 2008 WL 4108121 (Ariz. Ct. App. Mar. 20, 2008); *Filer v. Tohono O'odham Nation Gaming Enters.*, 129 P.3d 78 (Ariz. Ct. App. 2006).
10. Aeryn Heidemann, *The Question of Federal Indian Law on the Arizona Bar Exam*, The Arrow (State Bar of Arizona Indian Law Section), Fall 2005, at 1.
11. Idaho, Montana, Michigan, Oklahoma, Oregon and Wisconsin are considering whether to add Indian law to their states' bar examinations.