Indian Law

by Paul Spruhan

Indian Law on State Bar Exams In the Age of the Uniform Bar Examination

In 2002, with much fanfare, New Mexico became the first state to adopt Indian law as a testable subject for its state bar examination. Advocates for its adoption touted the need for practitioners throughout the state to have basic knowledge of the principles of Indian law to competently represent their clients, regardless of the type of law they practiced. With its adoption, a member of the state's board of bar examiners predicted more states would follow suit until Indian law would be tested by many jurisdictions in the United States.[1] Two other states, Washington and South Dakota, did adopt Indian law, in 2004 and 2006, respectively. Movements in several other states have urged bar associations to adopt it for their exams.[2]

However, Indian law as a bar exam subject is in trouble. Arizona and several other states have rejected its adoption. Further, in 2013, Washington eliminated it as an essay subject, relegating it instead to one multiple-choice subject on a different part of the test. More surprisingly, in October, New Mexico eliminated it altogether, at least temporarily, from its exam. Therefore, as of this writing, South Dakota is the only state that continues to test Indian law as an essay subject.

What explains this decline? Indian law has been swept up in national trends of reciprocity and uniformity for bar admissions, as the recession and resulting law school crisis have irreversibly changed the legal profession. In the face of these problems, states are loosening or eliminating barriers to entry by outside attorneys by recognizing reciprocal bar admissions with other states. Under such rules, an outside attorney does not need to sit for the state-specific bar examination. Further, and most important for Indian law, states are revising their bar examinations to make them more uniform across the country to allow exam takers to use their test scores for admission to other states.

The most significant change is the widespread adoption of the Uniform Bar Examination (UBE). The UBE is a test created by the National Conference of Bar Examiners with three components: (1) the Multistate Bar Examination (MBE), a multiple-choice test; (2) the Multistate Essay Examination (MEE), an essay test; and (3) the Multistate Performance Test (MPT), a skills-based legal writing test. The test is the same in all states that adopt the UBE, and the subjects tested are standard, national law school subjects, such as contracts, torts, constitutional law, and civil procedure—though, interestingly, a 2007 MPT problem involved tribal civil jurisdiction under *Montana v. United States*.[3] The UBE is scored the same way across the country, with the MBE counting for 50 percent of the total score, the MEE 30 percent, and the MPT 20 percent. The main benefit for test takers is that they can take the exam in any UBE state and transfer the score to any other state, creating portability for exam results that did not exist before.

Interestingly, western states were early adopters of the UBE. UBE states currently include Alaska, Arizona, Colorado, Idaho, Utah, Montana, Washington, Wyoming, Nebraska, North Dakota, and Minnesota. In fact, 11 of the 14 current UBE jurisdictions have significant tribal populations.

While adopting the UBE facilitates uniformity and therefore portability, nothing prevents a UBE jurisdiction from adding other requirements for admission to its state bar. Missouri and other UBE states have added state-specific requirements to the general UBE examination to retain some uniqueness and autonomy over their bar admissions.[4] There is then nothing per se inconsistent with adopting the UBE and still including Indian law as an additional requirement for bar admission. Still, the UBE has directly affected those states that have adopted Indian law, and other states that have considered it.

Before the UBE, the three states required Indian law on their state-specific essay exams. In New Mexico and Washington, Indian law was not guaranteed to appear on the examination but was fair game for bar examiners to use, or not, on any given test. It has appeared several times on the exam in both states.

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Unlike the other two states, South Dakota required it as an essay subject on every bar examination, meaning exam takers in that state knew that every test would include Indian law. As a result, thousands of exam takers in all three states have learned basic jurisdictional principles of Indian law as an integral part of their exam preparation, introducing many future lawyers to the concept of tribal sovereignty who would otherwise not have studied Indian law.

However, the UBE has driven decisions to change the use of Indian law or to deny its use altogether. Consideration of the adoption of the UBE was the stated reason by the Arizona Supreme Court for not adopting Indian law, despite support from the state bar association, then-Gov. Janet Napolitano, and other prominent lawyers in the state.[5] Washington, though adopting the UBE and eliminating it as an essay subject, created the Washington Law Component, its own unique add-on, open-book, multiple-choice test that includes Indian law among a number of state-specific subjects.[6] By order of the state supreme court, New Mexico adopted the MEE in lieu of the state-specific essays it had used before, therefore eliminating Indian law, as well as other subjects like community property.[7] It did not adopt the UBE but will use the MEE for at the least the next bar examination to decide whether to adopt the complete UBE for future exams.[8] Though South Dakota's bar exam includes all three components of the UBE already, it has not yet adopted the UBE and shows no sign of changing its requirement for Indian law as a state-specific add-on essay.

All is not lost for Indian law, though the argument to include it becomes more difficult in the age of the UBE. The Washington approach shows Indian law can co-exist with the UBE as part of a separate testing component. South Dakota could adopt the UBE for portability purposes, yet still require it for admission to its own bar association. Further, though New Mexico eliminated it as a bar exam subject, it is experimenting with requiring it as an independent course required outside the test itself. The State recently adopted rules for reciprocity for other states, and as one requirement for admission by motion, will require all outside attorneys to take a one-day course in Indian law and community property as a condition of admission.[9] According to the executive director of the board of bar examiners, if New Mexico adopts the UBE, the board of bar examiners will propose the same requirement for all those who pass the exam so that all attorneys admitted to the bar will have to take a free-standing Indian law course as a separate requirement for admission.[10]

The question for supporters of Indian law as a required bar exam subject is how best to adapt to this new environment. Specifically, does Indian law need to be a subject on the exam for a state bar association to require some minimum knowledge of the field? The New Mexico experiment suggests it does not. If a state board of bar examiners does not want to burden test-takers with an additional subject, particularly one as complex as Indian law, it doesn't have to. It could create a separate requirement to take a course on Indian law, as New Mexico appears it will.

There are several potential advantages to requiring a free-standing course instead of testing it on the exam itself. First, Indian law doctrine is notoriously complex with little black-letter law to easily test in a bar exam setting.[11] Having taught Indian law for Barbri in both New Mexico and South Dakota, I can attest to the difficulty in drafting outlines and giving lectures that simply explain federal, tribal, and state jurisdiction. Consequently, for those who have not taken an Indian law course in law school, requiring Indian law as one possible subject on a bar exam may not be the best way to instill the fundamental principles of the field. Teaching Indian law in a course outside of the pressures of the exam may better create the understanding and respect for tribal governments advocates for Indian law seek. Indeed, an interactive course can facilitate discussion among participants about the application of fundamental Indian law principles to their practice in ways a one-sided exam essay cannot.

Conclusion

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June 30. The question now before the Supreme Court is whether and to what extent a court may enforce the EEOC's duty to conciliate Title VII claims before filing suit. The Court heard oral argument in the case on Jan. 13, 2015, the date this article went to publication.

III. Conclusion

It is hard to predict what the Supreme Court will do with the current circuit split. On the one hand, it is true that Title VII's pre-suit enforcement scheme embodies a preference for voluntary compliance and informal, confidential resolution—a process not intended to be carried out under the eyes of the courts. And the ability of employers to derail Title VI litigation—whether meritorious or not—with judicial inquiries into the EEOC's pre-suit efforts is a plausible concern. In *EEOC v. CVS Pharmacy,* it was undisputed that the EEOC had failed to attempt conciliation with CVS, making dismissal an almost easy call for the district court; but it is still true that the inquiry into the EEOC's efforts was capable of derailing a more substantive ruling on the validity of CVS' severance agreements. At the same time, there are those who would say that the case only reached the courts as a product of an overly aggressive, even coercive EEOC set on challenging the practices of a large employer—the kind of behavior that calls for checking by the courts.

Ultimately, this balancing of policy considerations perhaps begs a more fundamental question—that is, whether conciliation should be mandatory at all. Indeed, if, as they say, the EEOC is determined to stake out new ground by challenging employer practices in the courts, making its pre-suit efforts little more than a formality, and if, as they say, inquiries into the EEOC's pre-suit efforts are not only inherently subjective but capable of derailing litigation and the vindication of employee rights, an inevitable question becomes: What purpose do those pre-suit efforts serve?

Absent legislative change, pre-suit conciliation is likely to remain mandatory. But, the Supreme Court's decision with respect to the case now before it will have to stake out some position as to whether that process should be trusted solely to the EEOC or whether, instead, the courts should be invited in via a judicially reviewable affirmative defense or motion to dismiss. The case is thus most certainly one for the EEOC, employers, and employees alike to watch.

Endnotes

[1]The other case is *EEOC v. CollegeAmerica Denver Inc.,* Civil Action No. 14-cv-01232, United States District Court, District of Colorado. In that case, on Dec. 2, 2014, the district court granted in part and denied in part the defendant's motion to dismiss. More specfically, the court dismissed the EEOC's claim related to the defendant's separation agreement due to the EEOC's failure to engage in pre-suit conciliation efforts with respect to that claim.

[2]On Dec. 5, 2014, the EEOC filed a notice of appeal in the district court indicating that it would seek review of the court's decision from the Seventh Circuit Court of Appeals.

[3]*Occidental Life Ins. Co. v. EEOC,* 432 U.S. 355, 359 (1979); *see also Alexander v. Gardner-Denver Co.,* 415 U.S. 36, 44 (1974).

[4]*See* 42 U.S.C. § 2000e-5(b).

[5]*See,* e.g., *EEOC v. Agro Distribution LLC,* 555 F.3d 462, 468 (5th Cir. 2009).

[6]*See Id.* at 468 and n.6.

[7]*Mach Mining,* 738 F.3d at 182.

[8]*Id.* at 184.

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now have three different models they can review to see how best to accomplish that goal: (1) Washington's multiple-choice question model; (2) South Dakota's essay model; and (3) New Mexico's stand-alone course model. Time will tell whether one or those models, or some other model yet to be created, most successfully instills a minimum of Indian law knowledge throughout the practicing attorney community. ⊙

Endnotes

[1]Michael Gross, *New Mexico Pioneers Indian Law on the Bar Exam,* 71 Bar Examiner No. 3, 25, 30 (August 2002).

[2]*See* Angelique EagleWoman, Sherri Fremont, Gloria Valencia-Weber, and Joseph Williams, *Recognizing the Importance of Indian Law on State Bar Examinations,* 60-APR Fed. Law 30 (April, 2013).

[3]*See* Matthew Fletcher, *July 2007 NY State Bar Exam Indian Law Question,* Turtle Talk (Jan. 18, 2008), turtletalk.wordpress.com/2008/01/18/july-2007-ny-state-bar-exam-indian-law-question.

[4]*See* Cindy L. Martin, *Local Law Distinctions in the Era of the Uniform Bar Examination: The Missouri Experience (You Can Have Your Cake and Eat It Too),* 80 Bar Examiner No. 3, 7 (September 2011).

[5]*See* Felicia Fonseca, *In Arizona, Push for Indian Law on State Bar Exam,* Associated Press, Sept. 27, 2009, www.native-times.com/index.php/life/education/2439-in-arizona-push-for-indian-law-on-state-bar-exam.

[6]*See* Washington Law Component Research Materials, January 2013, www.wsba.org/~/media/Files/Licensing_Lawyer%20Conduct/Admissions/WASHINGTON%20LAW%20COMPONENT.ashx (containing description of test and substantive outlines for state-specific subjects, including Indian law).

[7]New Mexico Supreme Court Order No. 14-8500, at 1 (Oct. 10, 2014).

[8]*Id.*

[9]*See* NMRA 15-107 (as amended by New Mexico Supreme Court Order No. 14-8300-001, April 3, 2014).

[10]Email correspondence with New Mexico Board of Bar Examiners Executive Director Carol Skiba.

[11]*See generally* Phil Frickey, *Adjudication and its Discontents: Coherence and Conciliation in Indian Law,* 110 Harv. L. Rev. 1754 (1997) (discussing incoherence in federal Indian law doctrine).