



LIFE BEGINS

A Publication of the
Washington State Bar Association
Senior Lawyers Section

Volume 6

Winter 2004

Number 1

Save the Date!

Senior Lawyers Section 2004 Annual Meeting & CLE Seminar

Friday, April 16, 2004 – Seattle Marriott SeaTac Airport

by Robert A. Berst

Here is the tentative schedule of speakers and subjects for the Senior Lawyers Section Seminar on Friday, April 16, 2004. Again, this year, the seminar tuition is \$100, which includes the seminar, materials, lunch, social hour, and parking.

Time	Speaker	Subject Matter
8:30	Pete Francis	Introductory remarks by Senior Lawyers Section Chairman
8:35 - 9:15	Scott Osbourne	Reverse Mortgages, Disclosure Form, and Other Essentials of Real Estate
9:15 - 9:45	Chris Sutton	Ethics for the Senior Lawyer
9:45 - 10:15	Odine Husemoen	Healthy Aging For Practicing Lawyers
10:15 - 10:30	<i>Break</i>	
10:30 - 11:15	Colonel Betz	Current Estate Planning Issues
11:15 - 11:35	Ray Siderius	<i>Hemphill v. Dep't of Revenue</i> and Its Effect on Collecting Inheritance Tax
11:35 - 12:15	Gail McMonagle	Ethics in Domestic Relations Practice
12:15 - 1:15	Lunch (included)	Annual meeting of Senior Lawyers Section; Election of Officers. Luncheon Speaker is Retired Supreme Court Justice Robert Utter – Training Iraq's Legal Profession.
1:15 - 1:45	Cheryll Russell	Recent Appellate Decisions Important to the Practitioner
1:45 - 2:35	Peter D. Preston & Wolfgang Anderson	Life and Law Lessons Learned – With Bernice
2:35 - 3:05	Harry Schneider	Hints on Avoiding Malpractice
3:05 - 3:20	<i>Break</i>	
3:20 - 3:35	Phil DeTurk	Cruising – Can It Be Deducted?
3:35 - 4:05	Barbara Jo Levy	Considerations on Leaving the Practice of Law
4:05 - 4:35	Jim McClendon	Finance and Investment for the Senior Lawyer
4:35	Adjourn to cocktails and conversation	

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Back to the Basics: Best Practices for Drafting Charitable Bequests

By Felicia Value, La Conner, Washington

(Ms. Value wishes to thank Mr. Elliot Johnson, Esq., and Mr. Michael Cunningham, CPA, for their help with this article.)

Ed. Note: This article is printed from the Real Property Probate & Trust newsletter, with permission of the author, and with our thanks.

You may not be one of the elite planned giving experts Washington is so fortunate to have, but you regularly assist clients with their estate plans. A common client scenario is that of the single older individual who has named the various generations of his family as successive beneficiaries under his will. Because you are a thorough and conscientious practitioner, you ask, as always, whether the client would like to name a charitable organization as the ultimate contingent beneficiary. Impressed by your comment that he might as well pick his own fall-back beneficiary, rather than letting the laws of intestate succession decide for him, your client ponders some causes which he believes in and then decides to name his church and a nationally-known animal-welfare organization as contingent residuary beneficiaries of his estate.

Are you done? Do you simply plug in the names that the client has given you and call it good? No. Because in drafting charitable bequests, best practices require that you establish your client's intent and in so doing, dodge potential estate tax disasters.

I. Playing the Name Game

While many clients try to do good by naming charities in their wills, without proper legal assistance, some, when they fail to use the proper legal names of the charities or proper bequest language, create problems that will only later appear. It is up to you to make certain that your philanthropic clients' desires and wishes will be properly carried out.

First, you must identify the correct legal name of the charitable organization. Do not assume that your client has provided you with the correct name. Many national charitable organizations have names that sound the same, and some charities have legal names that are different from their popular names. Ask your client to give you literature or a mailing from the charity or phone the charity yourself and ask for material to be sent to you. You may also access the

charity's website for the pertinent information. In conducting such research, I have two goals: (1) to make certain that the charitable organization that I

am naming in the client's will is the one my client actually wants to name; and (2) to make certain that I am designating the charity in the will by its correct legal name so that there will be no confusion later. For example, I had a client who wanted to make a gift to "Meals on Wheels" in Whatcom County. The proper name for the beneficiary turned out to be "The Northwest Regional Council." It took some phone calls to identify the core charity.

In addition to the charitable beneficiary's name, it is good practice to include in the will some other identifying information, such as the charitable organization's current business address. Perhaps the best way to pin down a charitable beneficiary's identity is to include in the will its tax identification number (EIN). Resources for finding charities' tax identification numbers are mentioned later in this article.

II. Remembering the Tax Angle

Besides accurately expressing your client's intent, there is another reason to be a stickler for properly naming a charitable beneficiary. In so doing, you may avoid potential estate tax problems. Generally speaking, your client's best tax advantages will come from naming a 501(c)(3) entity – that is, a charity that has been approved by the IRS as qualifying for exemption from federal income taxation. A gift to a 501(c)(3) charitable organization will be entitled to a charitable estate tax deduction in the amount of the full fair market value of the gift.

Be alert to the fact that some organizations, such as Planned Parenthood, have a political action branch. Which is not a 501(c)(3) organization, and a non-political branch, which is a 501(c)(3) organization. If your client has a taxable estate, specifying the proper name or branch of an organization could make the difference between zero estate taxes and big estate taxes. IRS Publication 78 lists all charities registered with the IRS as tax-exempt 501(c)(3) organizations. You can find Publication 78 at your local library or request it from the IRS by calling (800) 829-1040. You can also find it at the IRS website, <http://www.irs.gov> by going to the "Search For" box and typing in "Publication 78." This publication may be downloaded and searched online.

There can be exceptions to the rule that naming a 501(c)(3) entity is best, and the interacting tax rules can become complex. Perhaps your client wants to give some real property to Western Washington University. The Univer-

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sity has established the Western Washington University Foundation to receive charitable gifts. The Foundation is listed with the IRS as a 501(c)(3) organization, but Western Washington University is not. In this instance, this distinction may not matter. In terms of tax consequences to the donor, gifts to a public university are treated the same way as gifts to a 501(c)(3) foundation. Moreover, if your client gives her real property to the Foundation, the Foundation may have to pay real estate taxes on the property. If instead Western Washington University is named as the donee of real property, no real estate taxes will be due because Western Washington University is a public institution that is exempt from payment of real estate taxes. In this case, naming the entity that's *not* the 501(c)(3) organization might be best for the donor and the beneficiary.

Your client also should consider where the charitable beneficiary will direct the gift. If the gift is given to the University, it may become part of the general fund when it is sold, thus serving as an offset to legislative funding. If it is instead given to the Foundation, it can become part of the permanent endowment.

There are still other rules that can come into play depending on the use the University could make of the property, and whether it will be kept or sold. Thus, you may find that best practices dictate that you initiate a dialogue with the charitable beneficiary to discuss your client's charitable intent as well as the charity's needs.

As a rule, I like to contact a charity's planned giving department and talk to someone in the know. The professionals in the planned giving department should be able to advise you on how to properly name the organization in a client's will and if there are any restrictions or tax considerations for the particular types of gifts that your client is considering. It is also a good opportunity to ask for the organization's tax identification number. Many planned giving departments have sample bequest language that they will send to you. You may glean more options for your client by reviewing such material. For example, you may discover a campaign for capital improvements that the client might favor, a recognition system for gifts over a certain amount, or a memorial program. Be advised that planned giving officers almost always ask you to identify the donor who you are representing. I always decline to say unless my client has specifically given me permission to reveal his identity.

III. Expressing Your Client's Charitable Intent

You are now confident that you have identified the charitable beneficiary that your client wants to benefit and have structured the gift in the best tax-saving manner. You still have one more important task - to ask your client to specify the purpose, or the place, for the gift's intended

use. I recently worked on a large estate of which an international environmental organization was the sole beneficiary. The decedent was a Washington resident, and her surviving spouse explained that the decedent had wanted her gift used in Washington. Unfortunately, there was no such specification in the will. The gift went to the charitable organization's national office. A portion was eventually returned to the Washington branch, but the decedent's intent was frustrated, time and money were wasted, and the surviving spouse was needlessly burdened.

Ask your client whether the gift may be used by the designated charity "wherever need is greatest" or if it is her intent that it be restricted in some manner. I have had clients specify that their gifts must be used in Washington, in Skagit County, and in the town of La Conner. Others have specified that their gifts must be used to buy toys for Children's Hospital in Seattle, to provide scholarships for older women returning to school, or to pay for a new roof for the client's church. Charities generally prefer unrestricted gifts, but you should at least make certain the gift is going to the right branch of the charity.

Be wary if your client wants to give specific property with a specific use in mind. The charity may not want the gift or may use it for something that your client did not intend. More than once I have called a museum or university for a client who wished to make a bequest of art, only to be told that the art was not wanted and that it would be sold, not kept. You may be told that a proposed gift of books or a music collection to a local library will be more of a burden than a blessing.

Be especially careful when a client wants to give real property to an environmental organization on the assumption that the organization will keep the property and never develop it. Most environmental groups with which I have dealt keep ownership only of truly exceptional real property. More often, when they receive real property as a bequest they will sell it and use the proceeds to further their work elsewhere. If that is acceptable to your client, gift away - but if your client has definite ideas about the property's use, you will need to get the charity involved in the process of structuring the gift.

Ask the charitable organization to view the property and then discuss prospective uses of it with your client. Even if the organization agrees to accept the gift and not develop it, it is a good idea to add a clause in the client's will that directs an alternative gift in case things change. For example, you may state that if the named charity cannot or will not accept the gift and promise to keep it undeveloped, the charity shall select as an alternate beneficiary an organization which will hold the property in accordance with your client's terms and conditions. National environ-

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AN UNFINISHED LIFE is the Latest of the JFK Sagas

by Phil DeTurk

Where were you on November 22, 1963, which is around forty years ago? If you are similar to most of the people in our section, you were around 25-38 years of age; you were probably a lawyer, and working somewhere in Seattle. You may not have voted for John Kennedy, but you were aware of his efforts during his 1000 days of being president and probably admired him. You were devastated when he was assassinated.

Now there is another book about his life. Published in 2003 by Little Brown, it is entitled *An Unfinished Life*, and was written by Robert Dallek. It tells the story with which most of us are familiar, but most of which we may have forgotten. Yet it is more complete since the author had access to Mr. Kennedy's medical records. He weaves them into the 710-page biography detailing the Addison's disease, the back problems, and the abdominal pain. Not only that, but if JFK didn't have sexual relations every three days, he suffered headaches.

All of this material is detailed in the book. Yet it is not an exposé. Rather it is a well-written tome detailing not only the well-known history of the rich youth who became president in 1960, but also some little publicized background about the man that was not publicized while he was president.

In 1953 he underwent a three-hour operation at George Washington University to have a metal plate installed to stabilize his lumbar spine. There were many problems causing him to be constantly medicated; yet the public was never aware of the majority of his health handicaps.

By page 294 JFK has been elected president over Nixon by only 118,574 votes. Of course, fraud is alleged in Illinois and Texas but for naught: the 43 year-old Catholic has made election history.

Part four of the book devotes itself to the presidency of this amazing and humorous man, winner of a Pulitzer Prize for his book *Profiles in Courage*, and the husband of Jackie, who was still not yet 35 when her husband died.

This is interesting reading as each of the various crises of Kennedy's tour of office is explicitly discussed, all of which events transpired while we were in our early years of involvement with the law.

"His management of one international crisis after another to avert what he described as 'the ultimate failure' was the greatest overall achievement of his presidency" (page 348).

We had the Bay of Pigs – his worst time – the Viet Nam decisions, the efforts to get Russia to agree to nuclear inspections and destruction, the Berlin Wall, and all of the

problems with Castro. I found the latter paragraphs most interesting (pp. 535-574). It is revealed that the military wanted to attack, invade, bomb, or do whatever was needed to destroy Castro. There were weapons of mass destruction on the island, which is less than 100 miles from Florida. Russia was attempting to aim them at our country. These men of action wanted such.

While there was no discussion of the cost of a war and whether or not we would have to rehabilitate the country after such a war, it is plainly explained that this president did not want a war – probably a nuclear war – and did everything he could to prevent it. He succeeded, but if he had listened to his military advisers, the history of our world would be different than it is. Would other presidents have acted the same?

There are extensive discussions of civil rights which follow directly behind those covered so thoroughly in the recent Lyndon Johnson book *Master of the Senate*. James Meredith appears at page 514, and we relearn about Birmingham and the march of thousands on the U.S. Capitol. It was during this event in late August forty years ago that Martin Luther King had his famous "dream" (page 644).

This is a book to read in order to refresh your memories; to relive those days when a potential doomsday was only minutes away, and that was not the loss of a jury trial, but ultimate destruction of millions of people.

While we may not be completely sympathetic towards a man whose philosophy was that his extramarital sex took less time than tennis (page 480), there can be little doubt upon completion of the work, that you will accept that "[d]espite almost constant stress generated by international and domestic crises, he survived a presidency that was more burdened with difficulties than most" (page 705).

Speak Out!

Wanted: Lawyers to volunteer to speak to schools and community groups on a variety of topics. For more information about the WSBA speakers bureau call Amy O'Donnell at 206-727-8213.



Indian Law for Washington's Business Attorney

by Gabriel S. Galanda, Associate, Williams Kastner & Gibbs, PLLC

Ed. Note: Our thanks to Gabe Galanda for reprinting his article from the Business Law Section publication.

Mr. Galanda is an attorney in Seattle with Williams Kastner & Gibbs, PLLC. His practice focuses on the litigation of complex, multi-party commercial and Indian law matters, and consultation with tribes and non-tribal parties doing business in Indian Country. He is a descendant of the Nomlaki and Concrow Tribes, and an enrolled member of the Round Valley Indian Confederation in Northern California. He served as President of the Northwest Indian Bar Association for two terms from 2002-2003, and is now chair of the Washington State Bar Association Indian Law Section.

Washington tribes are not merely casino entrepreneurs or cigarette wholesalers. In conjunction with America's largest corporations, Indians are now engaged in real estate development, banking and finance, telecommunications, wholesale and retail trade, and tourism. By 2003, Washington tribes had become an economic, legal, and political force to be reckoned with. Consider these facts:

- Many of *Fortune* 500's top 20 companies now do business in Washington Indian Country, including Wal-Mart (#1), Verizon, AT&T, Home Depot, and Bank of America.
- In 2002, Washington's twenty-one gaming tribes generated \$648 million in revenue, contributing \$2.9 million to local government.
- Washington tribes employ nearly 15,000 Indian and non-Indian employees. By comparison, Microsoft employs 20,000 Washingtonians.
- Washington Indian tribes occupy 3.2 million acres of land in the state.

Both the cause and effect of the dramatic rise in Indian economic development in Washington is the increased interaction of tribes and non-tribal parties who seek business, employment, or recreation on Indian reservations. Conse-

quently, Washington Indian tribes and non-Indians are executing billions of dollars in commercial transactions and at times litigating those deals. Washington Indian Country is beginning to look a lot like Corporate America.

The body of tribal, state, and federal law known as "Indian law" is the foundation for every transaction in Indian Country. Indian law now intersects virtually every arena of commercial practice – tax, finance, merger and acquisition, antitrust, debt collection, real estate, environmental, land use, employment, and, of course, litigation. Because Indian law has become so prevalent in corporate lawyering, every business attorney in Washington should have some working knowledge of Indian law. If you represent a non-tribal party doing business in Indian Country, you *must* understand basic Indian law before brokering the deal.

The Third Sovereign. Washington tribes are "distinct, independent political communities, retaining their original natural rights" in matters of local self-government. *Worcester v. Georgia*, 31 U.S. 515 (1832). While no longer "possessed of the full attributes of sovereignty," tribes remain a "separate people, with the power of regulating their internal and social relations." *U. S. v. Kagama*, 118 U.S. 375 (1886). Essentially, Indians possess "the right ... to make their own laws and be ruled by them." *Williams v. Lee*, 358 U.S. 217, 220 (1959). Much like the federal and state gov-

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mental organizations are constantly working with the Department of Natural Resources, city, county and state parks departments, and Washington's many land trusts to preserve undeveloped land.

IV. Doing the Research

In searching for the names, addresses, and tax identification numbers of charitable organizations, there are a number of good websites now accessible. An excellent local resource is LEAVE A LEGACY® of Western Washington (<http://www.leavelegacy.org>). This organization, which promotes planned giving, includes more than 550 nonprofits in Western Washington. LEAVE A LEGACY®

of Western Washington offers tips to lawyers, certified public accountants, financial planners and potential donors. Also helpful are <http://www.guidestar.org> (hosted by Philanthropic Research, Inc.) and <http://www.give.org> (hosted by the Better Business Bureau Wise Giving Alliance). These websites offer a wealth of information, including the percentage of each donation that is used by each charity for administration versus charitable work, financial reports, and links to many charities' websites.

It is worth the time and effort to do follow best practices in this aspect of estate planning. You get to help clients do good and help a huge variety of causes do their work. It's a true win/win situation.

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ernments, tribal governments are elaborate entities, consisting of executive, legislative, and judicial branches, the office of the tribal chairperson or president (like that of the President or a governor) and the tribal council (a legislature) operate the tribe under a tribal constitution and/or code of laws, and tribal courts adjudicate most matters arising under tribal law.

Tribal Corporations. Frequently, an Indian tribe is organized pursuant to the Indian Reorganization Act of 1934 (IRA), 25 U.S.C. § 461. Under Section 16 of the IRA, a tribe will have adopted a constitution and bylaws that set forth the tribe's governmental framework and the authority that each facet of its government possesses. A tribe may also be incorporated under Section 17 to the IRA, 25 U.S.C. § 477, by which the Secretary of Interior issues the tribe a federal charter. Through Section 17 incorporation, the tribe creates a separate legal entity to divide its governmental and business activities. The Section 17 corporation has articles of incorporation and bylaws that identify its purpose, much like a state-chartered corporation. Alternatively, an Indian corporation may have been organized under tribal or Washington law. If the entity was formed under tribal law, the tribe will have done so pursuant to its corporate code. Under federal common law, the corporation likely enjoys immunity from suit, as discussed below. If the entity was created under state law, the tribal corporation exists as a state-entity and state law governs the corporation and its activity. Thus, the state-chartered tribal corporation is generally not immune from suit and may be sued in state court. When negotiating a tribal business transaction, you should first review the tribe's organic documents and code of laws, which taken together identify the entity with which you are dealing and your client's legal rights and remedies.

Tribal Courts. While generally modeled after Anglo-American courts, the Indian courts in Washington are significantly different. Tribal judges, who are often tribal members, may not necessarily have law degrees. Tribal courts operate under the tribes' written and *unwritten* set of laws. Most tribal codes contain procedural rules specific to tribal court, as well as tribal statutes and regulations. Increasingly, Washington tribes are adopting commercial laws modeled after the Uniform Commercial Code. Tribal procedural laws outline the tribal court's adjudicatory authority and may set forth limitations on tribal jurisdiction. Tribal laws also include traditional practices, including commercial customs, which are based on oral history but may not be codified.

Tribal judges generally follow their own precedent and, although each and every tribal court and the tribal laws they follow are distinct from the next, tribal judges give significant deference to the decisions of other Indian courts. However, because there is no official tribal court reporter

and not all tribal courts keep previous decisions on file, finding such case law can be difficult. While federal and state court opinions can serve as persuasive authority, particularly in business litigation, tribal judges are not bound by such precedent. Nevertheless, many state courts extend full faith and credit to tribal court orders (CR 82.5), and federal courts generally grant comity to tribal judges' rulings. When negotiating contractual choice-of-forum clauses, one must appreciate the character of Washington's tribal courts, understand pertinent tribal laws, and acknowledge both the differences and inter-relatedness of tribal, state, and federal courts.

Tribal Sovereign Immunity. Like other sovereign governmental entities, Washington tribes enjoy federal common law sovereign immunity. A tribe 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). Tribal immunity generally extends to tribal casinos and businesses, and to Section 17 and tribally chartered corporations. Tribes and their officials, however, can be subject to suit under various exceptions recognized by courts. For example, courts have applied the *Ex Parte Young* doctrine to tribal officials, creating an exception to the general rule of immunity when an official acts outside of the government's authority.

Washington tribes retain immunity from suit when conducting business both on- and off-reservation. As a general proposition, a tribe can only be sued in contract if the parties expressly negotiated a sovereign immunity waiver into the four corners of the contract. Nonetheless, the U.S. Supreme Court held in *C&L Enterprises v. Citizen Band Potawatomi Tribe of Oklahoma*, 532 U.S. 411 (2001), that an agreement to arbitrate disputes constitutes a clear waiver of immunity. While the Court held that a tribe's waiver must be "clear," it expressed for the first time that a waiver need not include the express terms "waiver of sovereign immunity" and that an arbitration clause was sufficient to evidence such intentional waiver.

Tribal immunity generally shields tribes from suit for damages and requests for injunctive relief. Tribes have also been held immune from subpoena enforcement to compel production of corporate witnesses or tribal documents. Last year, the Ninth Circuit Court of Appeals, in *Bishop Paiute Tribe v. County of Inyo*, 275 F.3d 893 (2002), *certiorari granted*, 123 S. Ct. 618, reaffirmed that tribes are immune from subpoena enforcement in barring the execution of a warrant to obtain confidential payroll records for casino employees. The Supreme Court heard argument on *Bishop Paiute* earlier this year. Though expected by many tribal advocates to reverse the Ninth Circuit and, consistent with *C&L* and

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other recent Indian law opinions, further erode the tribal immunity defense, the court remanded the case for reconsideration of other issues.

Waiver. In this modern age of Indian commerce, many Washington tribes agree to clear limited waivers of immunity in agreements with non-Indian parties. To further encourage commercial dealing, some tribes have created state-chartered corporations or subordinate entities, with the express understanding that the assets of such institutions are not immune from suit, levy, or execution. Still other tribes have specifically waived immunity for tribal businesses incorporated under the IRA.

Negotiation of limited waivers of immunity is a widely practiced prerequisite to contracting with Washington tribal governments and their businesses. However, many attorneys fail to even spot the immunity issue when negotiating tribal contracts and thus risk finding their clients without a remedy in the event of a breach. When initiating a tribal contract, you should first consider practical remedies to any problems that may arise from the deal, such as bonding, insurance and/or lines of credit. If no practical solutions exist, you should ask the tribe for a limited waiver and stand prepared to negotiate explicit waiver, dispute resolution and choice-of-law clauses.

Tribal Lands. The Secretary of Interior must approve any contract providing for payment or grants of benefits by a tribe, in consideration of services for tribal people "relative to their lands." 25 U.S.C. § 81. Leaseholds for Indian lands in Washington, which typically run 25 years in duration, also require secretarial approval. 25 U.S.C. § 415. If the transaction implicates tribal lands, most of which do, counsel should analyze whether the Secretary of Interior

must approve the underlying contract or lease. Failure to secure secretarial approval could render the agreement null and void.

Labor & Employment. Labor and employment issues affect the possibility and practicability of every tribal contract. Both Title VII, 42 U.S.C. §2000e(b), and the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213, expressly exclude Indian tribes. Likewise, state discrimination laws usually do not apply to tribal employers. Tribal officials are also immune from suit arising from alleged discriminatory behavior, so long as they acted within the scope of the tribe's authority. The circuits, however, are split regarding whether federal regulatory employment laws apply to reservation employers. The Tenth and Eighth Circuits have refused to apply to tribes such laws as the Occupational Safety and Health Act (OSHA), Employee Retirement Income Security Act (ERISA), Fair Labor Standards Act (FLSA), and National Labor Relations Act (NLRA), because doing so would encroach upon well-established principles of tribal sovereignty and tribal self-governance. Conversely, the Ninth, Seventh and Second Circuits have applied OSHA, ERISA and NLRA to tribes, reasoning that such statutes of general applicability govern tribal employment activity because Indian tribes are not explicitly exempted from the laws. Nevertheless, state labor laws and workers' compensation statutes generally remain inapplicable to tribal businesses. Given that U.S. tribes now provide employment for nearly half a million Americans, it will not be long before the Supreme Court is asked to resolve the conflicting circuit court decisions. Until then, a business attorney should evaluate pertinent federal precedent at the outset of any tribal negotiation and determine to what extent labor and employment issues will impact the deal.

Tribal Court Jurisdiction. Tribal jurisdiction depends largely upon (1) whether the defendant is Indian or non-Indian; and (2) whether the events at issue occurred in Indian Country, particularly tribal or non-Indian lands within the boundaries of a tribal community. These two highly complex issues should be the first area of inquiry for any jurisdictional question involving a business dispute arising on a Washington reservation.

Generally speaking, Washington tribal courts have jurisdiction over a suit by any party - Indian or non-Indian - against an Indian defendant for a claim arising on the reservation. However, under *Montana v. U.S.*, 450 U.S. 544 (1981), a

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CLE Credits for Pro Bono Work?

Limited License to Practice with No MCLE Requirements?

Yes, it's possible!

Regulation 103(g) of the Washington State Board of Continuing Legal Education allows WSBA members to earn up to six (6) hours of credit annually for providing *pro bono* direct representation under the auspices of a qualified legal services provider.

APR 8(e) creates a limited license status of Emeritus for attorneys otherwise retired from the practice of law, to practice *pro bono* legal services through a qualified legal services organization.

For further information contact Sharlene Steele, WSBA Access to Justice Liaison, at 206-727-8262 or sharlene@wsba.org.

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tribal court can assert jurisdiction over a claim against a non-Indian defendant only when "necessary to protect tribal self-government or to control internal relations." Essentially, an Indian court has jurisdiction only over non-Indian parties "who enter consensual relationships with the tribe ... through commercial dealing, contract, leases, or other arrangements." The Supreme Court has made clear that a private contract qualifies as a consensual relationship under the so-called "*Montana* rule," thus affirming that tribal courts have jurisdiction over non-Indian parties to tribal contracts. However, parties to a tribal contract should not be required to litigate in tribal court so long as the agreement includes an express waiver and specific dispute resolution provisions permitting adjudication in another forum.

Washington state courts may exercise jurisdiction over non-contract claims against a non-Indian party that arises in Indian Country, or contract disputes involving a state chartered tribal corporation or a tribal entity for which the tribe has waived immunity. Federal courts can assert jurisdiction over claims arising from reservation business activities if there a federal question under 28 U.S.C. §§ 1131, 1343, or diversity under § 1332. While tribes generally destroy diversity because they are not state citizens, a state chartered tribal enterprise can be sued in diversity.

While tribal courts retain personal jurisdiction over non-Indian parties to tribal contracts and subject matter jurisdiction over disputes concerning the agreement, a series of recent Supreme Court cases casts serious doubt as to whether tribal authority over non-Indian business reservation activity remains "necessary to protect tribal self-government or to control internal relations." In *Nevada v. Hicks*, 533 U.S. 353 (2001), the Court held that tribes lack adjudicatory jurisdiction to hear claims under 42 U.S.C. 1983 arising from the activities of state officials on reservation land but expressly left open "the question of tribal court jurisdiction over nonmember defendants in general." The Court explained, however, that "we have never held that a tribal court had jurisdiction over a nonmember defendant," observing that it had previously dodged the question of whether tribes may generally adjudicate claims against non-Indians arising from on-reservation transactions. As a result of *Hicks*, many tribal attorneys are now counseling their clients to consider settlement of business disputes with non-Indians, rather than litigation, for fear that the next appellate or high court decision will outright foreclose tribal adjudicatory jurisdiction over non-Indians.

Tribal Exhaustion Doctrine. When sued in Washington tribal court, non-Indian parties can challenge tribal jurisdiction in federal court. The question of whether a tribe has jurisdiction over a non-Indian party must be answered by federal law and thus poses a federal question under

Section 1331. *National Farmers Union v. Crow Tribe*, 471 U.S. 845 (1985). Ordinarily, however, "a federal court should stay its hand 'until after the tribal court has had a full opportunity to determine its own jurisdiction.'" *Strate v. A-1 Contractors*, 520 U.S. 438 (1997). If the tribal court determines it has jurisdiction, it will proceed to rule upon the merits of the case. The non-Indian party can then file suit in federal court, where the district court will review de novo the federal question of tribal jurisdiction. The district court is guided but not controlled by the tribal court's jurisdictional determination. If the federal court decides the tribal court had jurisdiction, it will not relitigate issues already determined on the merits. *Iowa Mutual v. LaPlante*, 480 U.S. 9 (1987).

There are several exceptions to the requirement that a federal court should stay its hand - where "an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith ... or where the action is patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction." *National Farmers*, *supra*. Moreover, "when ... it is plain that no federal grant provides for tribal governance of nonmembers' conduct on land covered by *Montana's* main rule," exhaustion "would serve no purpose other than delay." *Strate*, *supra*. While these exceptions to the exhaustion rule can assist non-Indian defendants in getting into federal court, they offer little assistance to non-Indian parties to tribal contracts, who, absent negotiated choice-of-forum or dispute resolution provisions, remain subject to tribal jurisdiction under *Montana*. Because a tribal court could be the only trier of fact in a contractual dispute, a non-Indian party should thoroughly present the merits of its case to the tribal judge, being ever mindful of the unique aspects of Washington's tribal courts described above.

Conclusion. Corporate America is witnessing firsthand both the tremendous rise in Indian economic development and an array of business dealings and commercial litigation matters arising in Indian Country. With *Fortune* 500 companies increasingly doing business on Washington reservations, Indian law has been transformed from a niche practice to a body of law intersecting every area of practice and engaging attorneys and clients of all types. Notwithstanding, Indian law defies boilerplate contract language, standard business negotiations, and common understandings of civil procedure and jurisdiction in the commercial litigation arena. For these reasons, it is vital that Washington's business lawyers have some understanding of basic Indian law, particularly those whose clients are doing business or seek to do business in Indian Country.

Three Spectacular Gettysburg Days

by Bob Berst

Sunday, September 22, 2002

The next morning, a leisurely breakfast, pack, obtain our rental car, and traverse M Street through Georgetown, again, and then on to the Canal Road, Freeways 495, 270, and 15, on the way to Gettysburg.

Our lunch stop was at Frederick, Maryland. Our route into Frederick was on Rosemont Avenue, lined with splendid Federal-style homes located well back off the Avenue. All of Frederick appeared beautiful, quaint, and interesting. I would guess that Frederick probably has a similar-sized population to Everett, Washington. We had lunch at Tauraso's, in the Bistro. As we arrived, two families with active, young children (there seemed to be about twenty, but by actual count, there turned out to be only five) were just leaving. Evalie enjoyed a frittata, slightly overdone, but nevertheless delicious, and I had bites of the frittata and a Caesar salad. We took a short drive around town, picked up some bottled water and wine, and were on our way to Gettysburg.

We arrived at our Gettysburg destination, the Battlefield B & B. We were given a warm welcome by one of the innkeepers, and a brief history. The older portion of the B & B is part of an 1809 farmhouse. We were in the Graham's Artillery Battery Room, on the main floor, with a fireplace, freestanding oval mirror, a couple of very comfortable wing-backed chairs, chestnut floor, antique quilt, and five simulated antique lamps. The clock on the mantelpiece is a "Gilbert 1807." The room is decorated with various civil war photographs and memorabilia. From the window of our room, we can see the location where Graham's artillery was positioned at the time of the battle.

As I am dictating this, I am seated in one of the wing-backed chairs, having nibbled one of the cookies that are placed in the lobby for the guests, sipping some of the lemonade that is also provided – a tough life.

This evening, out at the Dobbin House Tavern, Evalie enjoyed probably the best onion soup we have ever tasted, and I had the delectable char-grilled marinated chicken, but it really didn't compete with the onion soup.

In the middle of the 1800's the Dobbin House was a "way station" for hiding runaway slaves. The secret slave hideout is viewable from part of the upstairs stairway. All in all, this is a place you would not want to miss when visiting Gettysburg.

We came back to our B & B and had a wonderful evening conversation with two other couples, one from California and one who was intensely involved in the study of the Civil War.

Monday, September 23, 2002

Monday, the 23rd of September, at our home away from home, the Battlefield B & B, started with an hour-long description by David of the day in the life of a Union infantry soldier. David demonstrated all of the pouches that would carry the food and personal items of the soldier, the canteen, ammunition pouches, and of course, his best friend, the all-important rifle. He discussed, with interaction from the group, the living conditions, thoughts and actions, and motivations of this Union soldier. We gathered under a walnut tree at the corner of the Green Meadow, and upon command, each of us fired that mighty fourteen-pound rifle.

As we gathered at the breakfast table, all of us reflected upon how different our lives were at this moment, with fruit compote served over a gentle sauce, our folded egg omelet accompanied by spicy country sausage and pan-fried potato quarters, with home-baked muffins.

Evalie and I then drove to the National Military Park, where we first saw an electronic display showing where and how the battles took place. The electronic display was on a sunken stage, a square probably 30 feet on each side, with lights that showed all of the events and locations. The narration was excellent, and as night fell, it was depicted by the red campfires of the troops, accompanied by the dimming of lights in the auditorium.

Following this, we had time to look at many of the descriptive exhibits and see many of the displays and artifacts of the battles.

Now, time for the tour. Our guide, John Fuss, in his working life ten years ago was an accountant. He was a fountain of information and drove our car throughout the battlefield with all its many sights and monuments commemorating those troops on both sides that fought in the battles. John, and it probably comes as no surprise, was dressed natively with blazer, tie, and fedora.

John Fuss may not be tired, but Evalie and I were ready for a refreshing lemonade in our room at the Battlefield B and B. The last name of our in-house Civil War expert is Illingsworth.

Tuesday, September 24, 2002

This morning, after a breakfast of apple cobbler, followed by French toast, linked sausage, and country potatoes, the staff talked about what, as I recall, he described as the South Cavalry Battle that occurred at and around the location of our B and B. He had uniforms simulating those of the soldiers who were in the various units engaged in this battle. Very little is written about this battle, because it occurred at about the same time as Pickett's Charge. Be-

continued on next page

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cause of the significance of Pickett's Charge, most of the writers overlooked the South Cavalry Battle, because it is clearly not as important an event. On the other hand, to those who participated, I have no doubt but that it was equally as important.

Evalie and I then drove to the New Confederate Museum in Harrisburg, the Pennsylvania state capital. The building is about one year old and cost fifty million dollars. The exhibit consists of the usual battlefield descriptions and text along with narrated videos describing the battles. There is an interesting diorama showing typical soldiers' life, descriptions of the military prison camps and medical treatment. Probably the highlight of the exhibition is a video presentation of six actors from different walks of life on each side of the battle, depicting their lives before the war began. After visiting a number of exhibits describing part of the war, the same six persons, on video, described their lives, feelings, and reactions. Then, when the war is nearing its close, their appearance is repeated. Following the war, they again appear and describe their life at that time. This is a very interesting presentation, and the acting done by each of the participants is excellent.

Back home to our B and B for the usual lemonade, homemade cookies, and preparation for dinner out tonight at the Cashtown Inn.

The drive out to Cashtown Inn is eight-plus miles from the center of Gettysburg, turn right when you reach the dead end in Cashtown. The inn was established in 1797, has seven B and B rooms, and a restaurant. In 1992, one of the cast of "Gettysburg," Sam Waterston, who played Buford, stayed at the inn. The movie "Gettysburg," one of the shots, about one-third of the way through the movie, shows General Lee coming down the road and the

Cashtown Inn is in the background. We had a fairly light dinner, and afterwards had a lively discussion with one of the owners, the wife, of the Cashtown Inn. We discussed the movie, the inn, and the challenges that she faces running the restaurant.

Back to our B and B, a pleasant good night to David and the couple from the San Fernando Valley, together with some helpful advice about our visit tomorrow to Lancaster. Their names are Steve and Barbara Rosselli.

Wednesday, September 25, 2002

Breakfast on Wednesday, September 25, started with thin-sliced fruit on a sweet sauce. The main course, after orange juice and homemade muffins, was two heart-shaped pancakes with a whole blueberry sweet sauce, and ham. The morning lecture was about artillery shells, their history, use, problems, and colorful incidents that occurred during the battle.

Evalie and I said goodbye and headed for the visitors center. The traffic was blocked so we circled through the location of the second and third day battles across the fields, up on to Cemetery Ridge, past the high-water mark, and to the visitors' center. We took a leisurely walk on the military cemetery, with all of the many marked and unmarked graves of Union soldiers, and to the monument that marks the place where Lincoln spoke to the audience giving his Gettysburg Address.

One does not come away from Gettysburg free of the image and heavy spiritual weight of all the thousands of young American casualties that occurred there.

Lunch was in the middle of Gettysburg, at the Gingerbread House, then off to Lancaster.

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