

SPONSOR: Mary Smith (Principal Sponsor), Danny Van Horn

PROPOSAL: Amends §3.1 to include individuals in good standing with federally recognized tribal courts, amends §3.3 to remove from membership any individual not in good standing in any jurisdiction.

Article 3. Membership

§3.1 Members. Any person of good moral character in good standing at the bar of a state, territory, possession, or tribal court of any federally recognized tribe of the United States is eligible to be a member of the Association in accordance with the Bylaws. The Bylaws may specify classes of members.

§3.3 Termination of Membership. (a) A member may resign from the Association at any time effective upon receipt of the member's resignation.

(b) A member who is in default in the payment of dues or other monetary obligation to the Association may be dropped from membership. A member who, by a final order or judgment, (1) is convicted of a felony or (2) is disbarred or suspended for a period longer than six months from the practice of law ~~in a state, territory, or possession of the United States in any jurisdiction~~, ceases to be a member of the Association. A member who, because of misconduct ceases to be ~~a member of the bar of a state, territory or possession of the United States authorized to practice law in any jurisdiction~~, also ceases to be a member of the Association. For other good cause, after a hearing at which the member is given reasonable opportunity to be present with counsel and be heard in his or her own defense, a member may be censured, suspended, or dropped from membership by the Board of Governors.

REPORT

The American Bar Association has long supported measures to promote diversity in the legal profession. In 1986, our Association adopted Goal IX. That goal supported "the full and equal participation in the legal profession by minorities, women, persons with disabilities, and persons of differing sexual orientations and gender identities." In 2008, the ABA revised its goals, and Goal IX became Goal III, to eliminate bias and enhance diversity. The objectives of Goal III are to promote full and equal participation in the Association, our profession, and the justice system by all persons and to eliminate bias in the legal profession and justice system.

While the Association has made significant strides towards inclusion, there is a glaring injustice that needs to be corrected to fully embrace Goal III – full membership for American citizens who happen to be licensed through a tribal court as opposed to a state, federal or territorial bar. Under the ABA Constitution and bylaws as currently drafted, anyone licensed in a state, federal or territorial jurisdiction within the United States may join the Association as a full member with all rights and responsibilities. That policy does not extend to those who are licensed through a tribal court of a federally recognized tribe. Thus, there is a class of American citizens, most of whom attended an ABA accredited law school, who are denied the opportunity for full membership in our Association because they practice solely in a tribal court. As a policy decision, the ABA extends the opportunity for full membership to lawyers who practice in Guam, American Samoa, Puerto Rico and the Virgin Islands. The same inclusive policy should apply to individuals practicing before tribal courts within the United States. These American citizens deserve an opportunity for full participation in our Association.

In recognition of the three sovereign court systems in the United States (federal, state and tribal) and the justice served by these court systems, this resolution seeks to permit tribal court practitioners – who are not currently eligible to be ABA members – to become full members of the ABA. This resolution will – at long last – put tribal court bar admissions on equal footing with the bars of states, territories and possessions of the United States.

I. THE THIRD SOVEREIGN IN THE AMERICAN SYSTEM OF JUSTICE: TRIBAL JUSTICE SYSTEMS

American Indian and Alaska Native Nations constitute a third sovereign within the American system of justice. The status of Indian tribes and tribal justice systems was articulated by Supreme Court Justice Sandra Day O'Connor when she stated the following:

Today, in the United States, we have three types of sovereign entities -- the Federal government, the States, and the Indian tribes. Each of the three

sovereigns has its own judicial system, and each plays an important role in the administration of justice in this country.¹

Most of the tribal courts that exist today date from the Indian Reorganization Act of 1934.² The Indian Reorganization Act recognized the inherent sovereignty of tribes to organize their governments, to draft their own constitutions, to adopt their own laws through tribal councils, and to set up their own court systems. By that time, however, previous U.S. policies directed at American Indians (such as forced migration, settlement on the reservations, and the allotment system) had wrecked havoc on customary Native American life. Consequently, in 1934, most tribes were not in a position to recreate historical forms of justice. Therefore, while a few tribes have "traditional courts" based on Indian custom, most modern reservation judicial systems do not trace their roots to traditional Indian fora for dispute resolution. Because the tribes were familiar with the regulations and procedures of the Bureau of Indian Affairs, under the provisions of the Code of Federal Regulations (CFR), that model provided the framework for many tribal courts at the time of the Indian Reorganization Act.³

Today, the vast majority of the more than 350 tribal justice systems function in isolated rural communities. These tribal justice systems face many of the same difficulties faced by other isolated rural communities, but these problems are greatly magnified by many other complex problems unique to Indian country. Tribal justice systems are faced with a lack of jurisdiction over non-Indians, complex jurisdictional relationships with federal and state criminal justice systems, inadequate law enforcement, lack of detention staff and facilities, lack of sentencing or disposition alternatives, lack of access to advanced technology, and lack of substance abuse testing and treatment options.⁴ Tribal courts must work to satisfy the sometimes-competing demands of those inside and outside the tribal communities. But while the challenges are enormous, "the effective operation of tribal courts is essential to promote the sovereignty and self-governance of the Indian tribes."⁵ As the Supreme Court has recognized, "Tribal courts play a vital role in tribal self-government, and the Federal Government has consistently encouraged their development."⁶

As one prominent commentator has observed: "Tribal courts constitute the frontline tribal institutions that most often confront issues of self-determination and

¹ Sandra Day O'Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 TULSA L.J. 1, 1 (1997).

² Indian Reorganization Act of 1934, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461-79 (1983)).

³ See Day O'Connor, *supra* note 6, at 1-2.

⁴ See generally *National American Indian Court Judges Association Testimony on Fiscal Year 2001 Interior Appropriations Before the H. Subcomm. on Interior and Related Agencies, H. Comm. on Appropriations*, (Apr. 6, 2000), available at http://www.naicja.org/legislation/house_testimony.asp [hereinafter *NAICJA Testimony*].

⁵ See Day O'Connor, *supra* note 6, at 2.

⁶ See *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 14-15 (1987).

sovereignty, while at the same time they are charged with providing reliable and equitable adjudication in the many and increasingly diverse matters that come before them”⁷ Tribal justice systems are the primary and most appropriate institutions for maintaining order in tribal communities.

Tribal courts preside over many of the same issues state and federal courts confront in the criminal context, such as, child sexual abuse, alcohol and substance abuse, gang violence and violence against women. These courts, however, while trying to address these complex issues with far fewer financial resources than their federal and state counterparts, must also “strive to respond competently and creatively to federal and state pressures coming from the outside, and to cultural values and imperatives from within.”⁸

Tribal courts must deal with a wide range of difficult criminal and civil justice problems on a daily basis. The scope, numbers, and complexity of tribal court civil caseloads have been rapidly expanding. But issues related to the tribal court criminal caseloads are even more problematic. It should be noted that in most tribal justice systems, 80-90% of the cases are criminal case and 90% of these cases involve the difficult problems of alcohol and/or substance abuse.⁹ While the crime rate, especially the violent crime rate, has been declining nationally, it has increased substantially in Indian Country. In fact, the rate of violent crime estimated from self-reported victimizations for American Indians is well above that of other U.S. racial or ethnic groups and is more than twice the national average.¹⁰ Tribal justice systems are grossly under-funded to deal with these criminal justice problems.¹¹

II. BACKGROUND ON TRIBAL COURT PRACTITIONERS

There are 566 federally-recognized tribes in the United States, and there are over 200 tribal court systems. The 2010 Census reports that there are 5.2 million Native

⁷ Frank Pommersheim, *Braid of Feathers: American Indian Law and Contemporary Tribal Law* 57 (1995).

⁸ See *NAICJA Testimony* (citing Pommersheim, *Tribal Courts: Providers of Justice and Protectors of Sovereignty*, 79 JUDICATURE No. 7, Nov.-Dec. 1995, at 111).

⁹ See *NAICJA Testimony*.

¹⁰ U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *A BJS Statistical Profile, 1992-2002, American Indians and Crime*, Dec. 2004, NCJ 203097, <http://www.ojp.usdoj.gov/bjs/abstract/aic02.htm>.

¹¹ The below section sets forth the consequences of this chronic underfunding. Some believe that the most stable funding for tribal justice systems would likely be through tribal percentage set asides in mainstream funding legislation such as the methodology that has been successfully utilized in the Violence Against Women Act (VAWA), which was recently reauthorized, including Title IX which specifically addresses Safety for Indian Women. See, e.g., COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 1410 (Neil Jessup Newton ed., LexisNexis 2005).

Americans in the United States, either alone or in combination with one or more races.¹² Out of this total, 2.9 million persons identify as American Indian and Alaska Native alone.¹³ Since 2000, the Native American population has experienced rapid growth, increasing by 39 percent.¹⁴ It is estimated that there are approximately 2500 Native American lawyers in the United States.

The ten largest reservations are located in four states – Arizona, South Dakota, Oklahoma and Montana.¹⁵ The Navajo Nation was the American Indian reservation with the largest total population of 174,000, and the largest Native American alone-or-in-combination population of 169,000.¹⁶

Although there is no comprehensive study of the requirements to be a member of a tribal bar association or to practice before a tribal court, in general, there are essentially four categories of requirements to practice before a tribal court: (1) admission to any state bar alone; (2) admission to a state bar with additional requirements of knowledge of tribal law or custom; (3) other admission requirements without any requirement of admission to a state bar; and (4) mere payment of a fee.

This particular resolution concerns only the latter two categories – those that do not require admission to a state bar to practice before a tribal court. With respect to the above first two categories, these persons are already eligible to be full ABA members.

While some tribes have had court systems for many decades, preliminary research indicates that there has been a proliferation of tribal court systems in the last decade. As such, tribal court systems can range from very sophisticated systems with multiple levels of courts and a very rigorous bar admission process to part-time courts with jurisdiction over very narrow and limited types of cases.

This section describes examples of tribal courts with admission requirements in each of the latter two categories (described above).

A. Tribal Courts That Have Admission Requirements But Do Not Require Admission to a State Bar

The Navajo Nation court system is the largest Indian court system in the United States and has been called the “flagship” of American tribal courts.¹⁷ The Navajo Nation

¹² U.S. Census Bureau, *The American Indian and Alaska Native Population: 2010* at 1 (Jan. 2012), available at <http://www.census.gov/prod/cen2010/briefs/c2010br-10.pdf>. (hereinafter “2010 Native American Census Brief”).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 14 (Table 7).

¹⁶ *Id.*

¹⁷ See www.navajocourts.org. The development of a court system in the Navajo Nation began with the Navajo Court of Indian Offenses established by the Bureau of Indian Affairs Court in 1892. The Navajo Nation court system was established in 1959 with trial courts and, in the 1970s,

operates a two-level court system: the trial courts and the Navajo Nation Supreme Court, which is the appellate court. The Navajo Nation courts have general civil jurisdiction and limited criminal jurisdiction. The civil jurisdiction covers all persons (Indian and non-Indian) who reside in the Navajo Reservation or have caused an action to occur in the Navajo Reservation. The criminal jurisdiction covers all crimes codified in the Navajo Nation Code along with its terms of punishment.

Navajo Nation Bar Association (NNBA) membership is required to practice law in the Navajo Nation courts. To become a member, an applicant must have proper moral character and fitness, and pass an examination. There are over 400 members of the NNBA. The membership consists of attorneys and lay advocates.¹⁸ Advocates—individuals not barred in Arizona, New Mexico, and Utah—must be enrolled members of a federally recognized tribes and (1) present proof of tribal membership; and (2) received legal training by completing law school, college, a course of study approved by NNBA, or an advocacy program certified by NNBA.

Tribal Courts That Merely Require Payment of a Fee or Have No Requirements

An example of some tribal courts that merely require the payment of a fee or have no other requirements are: the following five tribal courts in Arizona: Chemehuevi, Havasupai, Hualapai, and Yavapai-Apache.

IV. CONCLUSION

Tribal justice systems are the primary and most appropriate institutions for maintaining order in tribal communities. They are the keystone to tribal economic development and self-sufficiency. In recognition of their sovereignty and the justice they provide to tribal communities, members of tribal bars who are not otherwise eligible for full ABA membership should be permitted to become full members. Adherence to Goal III requires the Association to correct this historical injustice and extend eligibility for full ABA membership to these American citizen tribal court practitioners. Their inclusion will further the ABA's goals of improving the legal profession, eliminating bias and enhancing diversity, and advancing the rule of law throughout the United States and around the world.

Respectfully Submitted,

a Supreme Judicial Council was added. In 1985, the Navajo Nation Council passed the Judicial Reform Act to create the Navajo Nation Supreme Court, streamline court operations and, at the same time, abolish both the Navajo Nation Court of Appeals and the Supreme Judicial Council.
¹⁸ In order to take the Navajo Nation Bar Examination, a person who is not an enrolled member of any tribe must be a member of good standing of the bar of Arizona, Colorado, New Mexico, or Utah; reside in one of those states; and be a law school graduate.

April 2014