



## ABA Diversity Summit 2009: Achieving Diversity in the Profession

BY DEIDRIE BUCHANAN



Deidrie Buchanan

Ten years after the chief legal officers of approximately 500 major corporations signed the document entitled “Diversity in the Workplace—A Statement of Legal Principles” and five years after 110 general counsels signed the “Call to Action,” 200 members of the American Bar Association (ABA) gathered in National Harbor, Maryland, to discuss the importance of diversity in the legal profession and to identify pivotal steps and changes to be made in the legal community to further diversity efforts.

The attendees at the ABA’s Diversity Summit mirrored the diverse society in which we now live. The Summit included approximately 200 attorneys from different racial and ethnic groups as well as attorneys with diverse sexual orientations and various types of disabilities. A truly diverse group of attorneys gathered for two days

to identify the necessary steps that remain to be taken to achieve diversity in the legal profession. The purpose of the Summit was to gather recommendations to be implemented by a special committee designated by the ABA to work on increasing the number of diverse attorneys in the legal profession.

The Diversity Summit began with a reception on Thursday, June 18, 2009. Opening remarks were given by then ABA President H. Thomas Wells Jr., then ABA President-Elect Carolyn B. Lamm, and the Honorable James Wynn Jr. Former ABA president, Dennis Archer, the first African-American ABA president, kicked off the Summit by talking about the importance of diversity in the legal profession. In identifying why we need a diverse legal profession, Mr. Archer discussed the unprecedented results that can be obtained from having diverse perspectives at a conference table. Mr. Archer recapped some of the success that major corporations, such as PepsiCo and Wal-Mart, have seen as a result of

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## The Indian Child Welfare Act: The Obligations of Justice

BY C. STEVEN HAGER



C. Steven Hager

*Do the obligations of justice change with the color of the skin? Is it one of the prerogatives of the white man, that he may disregard the dictates of moral principles, when an Indian shall be concerned?*

— Sen. Theodore Frelinghuysen, April, 1830<sup>1</sup>

America has historically struggled with the rights of Native Americans, guaranteed through law and treaty. Those struggles continue into the modern era. One of the most important of modern Indian laws is the federal Indian Child Welfare Act (ICWA), passed in 1978, with individual states passing

complimentary statutes in the years following. Enforcement, however, remains contentious. Many cases to which the ICWA should be applied go unnoticed, and many more are reviewed and remanded on appeal. Even though the law is over 30 years old, application is problematic, especially among attorneys who have not experienced Indian law cases. What can practitioners do to avoid this problem? The simplest solution is for practicing attorneys to recognize when the ICWA applies to a case and to follow the law to the best of their ability. Recognizing the nature of the case, however, involves understanding the history of tribal families in the United States and the law that offers protection.

The historical removal of Indian children from their families was an attempt to destabilize tribal influence and tribal culture.<sup>2</sup> Motivated by mandated requirements to “integrate” Indians into a culture openly hostile to them, children were removed on the thinnest of pretext. This policy did not fade with time. A 1974 study by the Association of American Indian Affairs found that 25 to 35 percent of all Indian children had been removed from their families and placed in foster, adoptive, or institutionalized

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## CHAIRS' COLUMN

### Survey Says

BY JENNIFER BORUM BECHET, JULIE SNEED, AND RAYMOND B. KIM



Jennifer Borum Bechet



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Minority Trial Lawyer Committee members know what they want.

According to a recent survey of committee members, 87 percent of you joined the Minority Trial

Lawyer Committee to take advantage of opportunities to network. With previous committee Dutch Treat dinners held at the famed Kevin Rathbun Steakhouse in Atlanta and the opulent Alhambra Palace in Chicago, our committee has provided opportunities to interact and socialize with colleagues in an informal setting. Join us again for upcoming Dutch Treat dinners to be held on April 21, 2010, during the Section of Litigation's Annual Conference in New York City and on August 5, 2010, during the ABA Annual Meeting in San Francisco, California. For details on the locations and times once they become available, visit our committee webpage at [www.abanet.org/litigation/committees/minority](http://www.abanet.org/litigation/committees/minority).

Forty percent of our members surveyed want to speak at a CLE presentation. Several times during the year, the ABA and the Section of Litigation solicit proposals for programs to be presented during national or regional conferences. If you want to educate your colleagues and gain recognition as an authority in your practice area, we encourage you to submit a proposal to any of the committee cochaairs, or contact the Programming Subcommittee's chair,

D. Michael Lyles, whose contact information is available on our website.

Forty percent of you stated that you would be interested in writing an article to increase your involvement in the Minority Trial Lawyer Committee. The committee publishes its newsletter, *Minority Trial Lawyer*, on a quarterly basis. In this issue, Deidrie Buchanan provides a thorough synopsis of the presentations and discussions had during the ABA Diversity Summit, which was recently held in National Harbor, Maryland. C. Steven Hager, the author of "The Indian Child Welfare Act: The Obligations of Justice," educates our readers about the federal Indian Child Welfare Act. A litigator's knowledge and application of the Act's provisions can significantly affect a child custody proceeding. In "Serve Your Community and Benefit Your Career," Brian Josias, the Minority Trial Lawyer's Young Lawyer Liaison, not only argues the case for involvement in community service endeavors but also provides suggestions to turn thought into action. Also, Mary Vasaly enlightens us as to the results recent judicial appointments in all the federal circuits have had on changing the face of the judiciary. Finally, as you have come to expect, experienced practitioners and other knowledgeable resources offer valuable advice and insight to young lawyers via our Ask A Mentor column. In this issue, Delia K. Swan and Ron Jordan put a young lawyer on the right track following a recent layoff. To submit an article for our newsletter or to propose a topic for an article, contact editor-in-chief Anna Torres at [atorres@powersmcnalis.com](mailto:atorres@powersmcnalis.com).

Our committee continues to be a resource for information and portal for increased involvement in the Section of Litigation and ABA as a whole. Join us at the 2010 Corporate Counsel CLE Seminar, of which the Minority Trial Lawyer Committee serves as a cosponsor. The CLE Seminar will be held on February

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# Exercising Leadership: A Call to Diversify the Judiciary

BY MARY R. VASALY



Mary R. Vasaly

**B**arack Obama's election had a powerful impact on both African-Americans and other minority groups who have been traditionally excluded from the seats of political

power. His election meant that participation in government at the highest levels was no longer open only to those who fit traditional stereotypes. But this achievement does not mean that our work in promoting diversity in the halls of power is finished. Indeed, there is still a stunning lack of diversity in the federal judiciary, particularly when one considers the underlying demographics among those qualified to serve.

A group of law professors, lawyers, and academics are keenly interested in changing this situation, particularly as it relates to the absence of women on the federal bench. This group recently formed the Infinity Project. Its mission is to increase gender diversity on the Eighth Circuit bench. Although its efforts are concentrated on the Eighth Circuit, the Infinity Project hopes its initiative takes hold in other circuits for two primary reasons. First, the circuits are a pipeline to the U.S. Supreme Court, which sorely needs to experience an increase in the number of seated women. Second, in the last few years, the judiciary has increasingly come under attack: Judicial elections have become politicized, judges have been attacked and criticized for rendering unpopular decisions, and the other branches have sought to invade the courts' jurisdictions. All of this undermines public confidence in the judiciary and threatens the rule of law. Lack of gender diversity on the bench is another fundamental threat to the preservation of the rule of law. The court's job is to safeguard the constitutional rights of both women and men, as well as vulnerable and disadvantaged

minorities. How can the public have confidence and trust in such an institution if half of those who are qualified to serve are excluded from its ranks? The judgments of a diverse judiciary command greater acceptance in a diverse society and, of course, a deliberative process enhanced by collegiality and a broad range of perspectives necessarily results in opinions that are both true to the rule of law and over time allow for a fuller and richer evolution of the law. It is thus imperative that we increase gender diversity and thereby foster respect for the rule of law.

The Infinity Project focused on the Eighth Circuit because it boasts the worst record in terms of gender diversity despite the fact that efforts to increase diversity began decades ago. As women began to enter the legal profession in greater numbers, specifically in the seventies and eighties, leadership in the legal profession focused on exploring the impact of gender bias in the courts. The National Judicial Education Program pushed for state-specific information out of a growing concern that gender bias was having an impact on the administration of justice. Fifteen years ago, the problem was first recognized and the chief judge of the circuit appointed the Honorable Diana E. Murphy—the circuit's lone woman judge—to chair a gender task force that was charged with examining the effects of gender on "both processes and people in the Eighth Circuit judicial system." The task force issued a Final Report and Recommendations of the Eighth Circuit Gender Fairness Task Force.<sup>1</sup> The report concluded that the workforce in the Eighth Circuit was mostly female; however, these jobs were primarily staff positions. In contrast, most of management and, in particular, the judges, were men. The study recommended that the court "take identifiable steps to ensure equal opportunity for advancement by women into management and supervisory positions within the court units."

Despite the study's recommendations, 61 judges (three before Congress

officially established the court) have served on the Eighth Circuit bench in its history, but only one has been a woman. Eleven judges currently sit on the Eighth Circuit Court of Appeals. Only one woman—Judge Diana Murphy—currently serves. If we were to include the six senior judges in this calculation, the number is one out of 17, or 5.8 percent. Since 1995, nine people have been appointed to the Eighth Circuit Court of Appeals.<sup>2</sup> All nine appointments have been men.<sup>3</sup> (Although Bonnie Campbell was nominated by President Clinton, her appointment was never voted on.)

The founding committee of the Infinity Project met over the course of a year to develop the framework for the project and to identify at least two point people in each of the states comprising the Eighth Circuit to carry out its mission. The Court of Appeals for the Eighth Circuit includes seven states and 10 districts: Arkansas [eastern and western], Iowa [northern and southern], Minnesota, Missouri [eastern and western], Nebraska, North Dakota, and South Dakota. The founding committee members identified leaders in each state committed to forming an Infinity Subcommittee. During the year, the founding committee also developed a case statement and talking points document, identified key areas for further action within the entire circuit and within each state, and began planning for a circuit-wide meeting. That meeting was held on October 17, 2008.

As a result of its efforts, the Infinity Project hopes to increase diversity within the judicial appointment process and develop a sustainable mobilization mechanism by:

- creating public awareness of the importance of gender equity on the bench and the availability of qualified women candidates
- engaging senators and other politicians on the issues of gender equity and the need for the appointment of a female Eighth Circuit judge

## Circuit Appointments by Gender

1st Circuit	Female Appointments	Male Appointments
1995–2000	1	1
2001–2006	0	1
2007–Present	0	0
Total Appointments	1	2

2nd Circuit	Female Appointments	Male Appointments
1995–2000	2	3
2001–2006	2	3
2007–Present	0	0
Total Appointments	4	6

3rd Circuit	Female Appointments	Male Appointments
1995–2000	1	2
2001–2006	0	7
2007–Present	0	0
Total Appointments	1	9

4th Circuit	Female Appointments	Male Appointments
1995–2000	0	3
2001–2006	1	2
2007–Present	0	0
Total Appointments	1	5

5th Circuit	Female Appointments	Male Appointments
1995–2000	0	1
2001–2006	2	2
2007–Present	1	1
Total Appointments	3	4

6th Circuit	Female Appointments	Male Appointments
1995–2000	1	3
2001–2006	3	4
2007–Present	0	0
Total Appointments	4	7

7th Circuit	Female Appointments	Male Appointments
1995–2000	3	1
2001–2006	0	0
2007–Present	0	1
Total Appointments	3	2

8th Circuit	Female Appointments	Male Appointments
1995–2000	0	2
2001–2006	0	7
2007–Present	0	0
Total Appointments	0	9

9th Circuit	Female Appointments	Male Appointments
1995–2000	4	9
2001–2006	2	4
2007–Present	0	1
Total Appointments	6	14

10th Circuit	Female Appointments	Male Appointments
1995–2000	1	2
2001–2006	0	4
2007–Present	0	2
Total Appointments	1	8

11th Circuit	Female Appointments	Male Appointments
1995–2000	0	3
2001–2006	0	1
2007–Present	0	0
Total Appointments	0	4

District of Columbia Circuit	Female Appointments	Male Appointments
1995–2000	0	2
2001–2006	1	1
2007–Present	0	0
Total Appointments	1	3

- serving as a clearinghouse for candidates who have indicated an interest in serving on the Eighth Circuit bench

It is hoped that these efforts will result in the appointment of more women to the district court and Eighth Circuit bench in the near future and that lawyers in other circuits will take action to address this problem, which persists throughout the federal judiciary (see chart on page 4). At the present time, all federal circuits and over 40 states have impaneled groups of lawyers, judges, and academics to try to improve the experience of anyone who encounters or interacts with the justice system. One common theme permeates

all the findings to date: Improvement remains an opportunity.

As many implementation efforts are beginning to trail off or seem frozen in time, the Infinity Project recognizes the need for continued progress and self-reflection regarding judicial appointments in all the circuits. Anyone who participates in or impacts the federal judiciary should accept responsibility in addressing issues of gender differences and bringing continuous improvement to the judicial system. For more on the Infinity Project, please visit [www.theinfinityproject.org](http://www.theinfinityproject.org). ■

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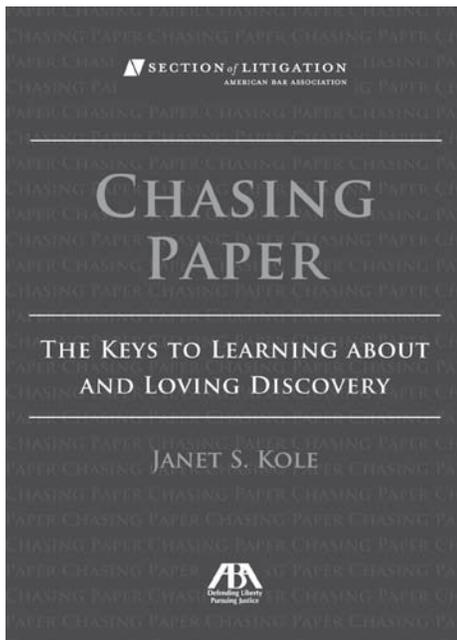
*“Exercising Leadership: A Call to Diversify the Judiciary,” by Mary R. Vasaly, 2009, The Woman Advocate, 14:3. © 2009 by the American Bar Association. Reprinted with permission. All rights reserved.*

#### Endnotes

1. Creighton Law Review in 1997, at 31 CREIGHTON L. REV. 9.
2. Federal Judicial Center, *U.S. Court of Appeals for the Eighth Circuit*, click on “Judges,” Jan. 13, 2008, available at [www.fjc.gov/public/home.nsf/hisc](http://www.fjc.gov/public/home.nsf/hisc).
3. *Id.*

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# Serve Your Community and Benefit Your Career

BY BRIAN JOSIAS



Brian Josias

**F**or a young or not-so-young lawyer, the benefits of community service involvement are enormous. As any person who has spent substantial time volunteering in public service would

quickly say, volunteers always get more out of volunteering than they put in. Moreover, investing time in community service is an even better idea in difficult economic circumstances, such as those currently affecting the legal community, when the opportunities for younger lawyers in general practice to truly grow their career and skill sets have been curtailed.

Although there may be pressure to work only on billable projects during tight economic times, the need for volunteers is greater than ever and the potential benefits to volunteers have also grown. Even if the current financial dynamic has altered the costs and benefits of community involvement, public service is always worthwhile. During even the best of times, there are countless organizations that can benefit from the specialized skills and knowledge lawyers possess, and lawyers of all ages can play a variety of roles in assisting community service organizations. This article will explore some of those benefits, the roles lawyers can play in community organizations, and some organizations with which lawyers can work.

## How Community Service Can Benefit You

The benefits of community service to lawyers includes satisfying the obligation as citizens and members of the bar to serve the less privileged among us. Moreover, since most community service opportunities available to the younger lawyer are local in nature, any steps the younger lawyer takes to serve his or her community will have the ancillary benefit of making the local area a more pleasant place to live and work.

In addition to these altruistic benefits

and motivations, serving the community has many additional paybacks for the young lawyer. In the modern practice of law, many younger lawyers spend their first several years in practice reviewing documents, performing legal research, and serving as a fourth or fifth chair on any given matter. The opportunities to gain the necessary experience to become a truly effective lawyer can be few and far between. Community service offers young lawyers an opportunity to gain the much-needed experience engaging in real “lawyerly” activities, such as hearings, depositions, and closings; direct interaction with clients; and the ability to learn the ins and outs of operating a business, albeit one that has a non-profit motive.

Operating hand-in-glove with the experience gained from volunteering is the added responsibility gained from many aspects of public service. Young lawyers, especially those from generation X, quite naturally crave responsibility and a feeling that what they are doing means something. Yet, during their first few years of practice, today’s younger lawyers often feel as though they have less real responsibility than college or high school students. Community service organizations, with their small staffs, tight budgets, and large client and service loads, typically have no choice but to give large amounts of responsibility to their volunteers, especially those such as highly trained, energetic, and intelligent young lawyers. Within a few months of joining an organization as a volunteer, young lawyers can find themselves heading committees, directing programs, or being the sole lawyer handling a client’s important piece of litigation or the formation of a new legal entity. Many lawyers who do not perform public service can practice for years before they experience that level of responsibility and satisfaction at a job well done.

Community service organizations also provide a young lawyer with enormous networking and business development opportunities. Public service organizations, especially non-

legal services-based charities, often have numerous local business owners and operators involved at all levels of the enterprise. There truly is no better way to make contacts with those individuals and to build a reputation than to get involved with the community. Additionally, public service can frequently offer a young lawyer the chance to develop expertise in a specific area of practice and a reputation for that expertise. For example, if a young attorney volunteers with an Internet-free speech organization, his or her work with that group could provide an opportunity to build knowledge in a cutting-edge area of the law and/or help shape the development of the law through research and lobbying activities. These benefits are not limited to volunteering with large organizations; even the smallest organizations offer career-related benefits, as they frequently interact with other organizations in the community and give their volunteers an opportunity to play a larger role in the direction and growth of the entity.

## Your Role in a Local Community Organization

The average young lawyer has many skills that community service organizations can put to work in a range of roles across their organizations. The fuel that makes most organizations work is the on-the-ground volunteers who help provide basic services. Most public service organization leaders would say there is no such thing as too many volunteers. As a result, the best place to get started is on the ground floor, working as a direct volunteer assisting the organization’s day-to-day operations and services. An example of an excellent direct volunteer opportunity is serving as a mentor to children with an organization like Big Brothers Big Sisters or volunteering as pro bono counsel to indigent clients through a local Legal Aid group. Many organizations offer opportunities to volunteer a few hours a month or less. Getting involved at this level with

an organization presents a great window into its mission and the way the organization works. It also allows volunteers the opportunity to decide if this is the type of organization with which they would like to get more involved.

Young lawyers are also well-suited for taking leadership roles in public service organizations. Most organizations offer opportunities to serve on committees, on boards of directors, and as officers. Volunteering for a leadership role provides young lawyers with the opportunity to gain experience with all aspects of running a business, from finance to employee and policy decisions. Moreover, most community service groups have to navigate a thicket of legal, regulatory, and corporate governance obstacles, and the legal advice and expertise that a young lawyer brings to the table is invaluable in helping to lead and direct the organizations and avoid running afoul of the law.

### Choosing an Organization

Clearly, there are many benefits that can be had from serving the community. Although there are always demands on a young lawyer's time, giving up a few hours a month to serve the community will generate an enormous return on the young lawyer's investment. Once a young lawyer has made the decision to volunteer, there are dozens of public service organizations where he or she can volunteer time.

One of the best ways for lawyers to get involved with the community is to volunteer with a legal service organization performing pro bono services for the indigent. These organizations are always looking for additional volunteers and will work to pair a lawyer with a practice area that matches his or her interests and skills. Legal Aid organizations also offer a variety of programs that can accommodate the amount of time a volunteer has to offer. These opportunities can be as varied as assisting with initial case screenings, preparing written materials for distribution, helping form a new charitable organization, litigating a case on behalf of a wrongfully terminated employee, or preparing an appeal for a wrongfully convicted prisoner. Pro bono service to

Legal Aid organizations does not have to be overly time intensive. Although some tasks, such as directly representing a client, can be time-consuming, most Legal Aid organizations also offer volunteer opportunities that are limited to specific windows of time, such as case intake and helping out in forms clinics. Legal Aid organizations typically offer training for their volunteers, and prior experience is often unnecessary. The National Legal Aid and Defender Association offers a wealth of information about volunteer opportunities and also provides resources to assist attorneys in serving both civil and criminal clients. There are also local Legal Aid organizations where it may be easier to start volunteering immediately.

## Political and social organizations may have dedicated legal advocacy arms that welcome attorney volunteers.

Another excellent source of community service for lawyers is volunteering with a bar organization. Bar organizations operate on the local, state, and national level and include voluntary bar associations, bar associations devoted to specific practice areas, and minority bar associations. Many bar organizations have young lawyers groups or divisions with numerous committees and subcommittees. There are opportunities for involvement at many levels, including leadership roles, and they can lead to great professional relationships, career opportunities, and personal friendships. Many bar organizations also produce legal publications, such as this one, and frequently seek editors and authors to assist in creating the publication. For a younger lawyer, or any lawyer looking to get involved with a bar organization, a great place to get started is the organization's webpage.

Lawyers are not limited to bar associations, legal services organizations, and other law-centric organizations

when looking to get involved with their community. Many other public service organizations welcome lawyers as volunteers of all types, such as religious organizations, children's charities, homeless assistance groups, and community associations. Mentoring is a great volunteer activity, and there are many opportunities for young lawyers to assist not only children but also adults through adult literacy programs, job training organizations, law student mentor groups, and others. Although it may sound mundane to some, many community and homeowners associations are also great opportunities for young lawyers to use their legal and leadership skills to help improve their community.

Another excellent avenue for involvement in the community is to volunteer with political and social organizations. These organizations often have both local and national branches or chapters and may have dedicated legal advocacy arms that welcome attorney volunteers. During the political campaign season, young lawyers can also volunteer with local political candidates or even run for office themselves. It is important to note, however, that young lawyers in private practice or working for a government agency should check with their supervisors to make sure that their participation is compliant with any policies regarding outside activities.

Finally, it is important for the young lawyer to remember to approach volunteering with the same commitment and sense of responsibility that he or she would bring to the workplace. A volunteer who commits to serve and then forgets to show up or cancels because something else comes up damages the reputation of the charity and may deprive the clients of the services they rely upon. As stated above, volunteers almost always get more out of volunteering than they put in—but if they do not put anything into volunteering, then they are sure to get nothing out of it. ■

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## ABA Diversity Summit 2009

*Continued from page 1*

implementing diversity measures. Aside from discussing the benefits of having a diverse legal profession, Mr. Archer also addressed the need to focus diversity efforts on the pipelines. He emphasized the need to start encouraging children in elementary school to consider a career in the legal profession.

The Summit continued on Friday morning with addressing the important, yet often unanswered, question of why we need diversity in the legal profession. A panel discussion was held with Irene Recio, Linda Crump, and John Brittain. Arin Reeves, president and founder of the Athens Group, served as the moderator. The panelists offered their own unique perspectives on the importance of diversity in the legal profession. The panel discussions were designed to identify the full range of reasons why we want to promote diversity in the private sector, law schools, and judiciary. Ms. Reeves described the current climate of diversity as being one of fatigue, wherein society has developed a “push mentality” towards diversity. People are pushed towards engaging in diversity efforts rather than freely engaging in diversity measures. According to Ms. Reeves, to break down this “push mentality,” the legal community needs to understand why diversity is important. Without having an understanding of the why, the “push mentality” towards diversity will continue and the fatigue will persist. Mr. Brittain, a professor of law at the University of the District of Columbia School of Law and former chief counsel and deputy director of the Lawyers’ Committee for Civil Rights under Law, discussed the need for diversity in the judiciary. According to Mr. Brittain, “a diverse judiciary delivers equal justice and restores the public’s faith in the legal profession.”

In addressing the issue of why diversity is desirable, Irene Recio of Reed Smith LLP pointed out that we need to stop going through “phases of diversity,” wherein a particular minority group is the focus of diversity initiatives for a particular period of time. Rather,

we need to have diversity measures that are inclusive of all groups. Increasing diversity should not be limited to racial, ethnic, or gender diversity; instead, the legal community needs to see generational diversity, religious diversity, and diverse sexual orientations.

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### **To keep diverse attorneys within the profession, good mentoring relationships must be in place.**

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The idea of inclusion was a theme that resonated throughout the Summit as attendees emphasized the need to have participants from all facets of society represented in making decisions regarding diversity initiatives. It became evident that diversity initiatives should not be limited to solely increasing the number of attorneys from any particular racial, ethnic, or gender group. Rather, the future of diversity should be centered on initiatives that call for the inclusion of individuals representing the vast demographics of our society.

After addressing why diversity is important in the legal profession and the meaning of diversity, Summit attendees engaged in break-out sessions wherein they discussed specific measures that can be taken to achieve diversity in the legal profession. In identifying key changes to be made in the legal community, a primary focus was on the pipelines. A consensus was reached that to achieve diversity in the legal profession, efforts need to be directed to the pipelines. Efforts to increase pipeline initiatives, however, should not solely be limited to students at the law-school level; rather, attendees agreed that pipeline strategies need to start as early as elementary school. Specific recommendations regarding pipeline initiatives included developing an ABA database of best pipeline strategies from second grade upwards, creating a crash course for third-year law students on how to survive in the legal profession after law school, and increasing funding to elementary schools so that they can

initiate debate programs for students.

In discussing the need to fix the current leaks in the pipelines, Summit attendees did not ignore the obvious financial obstacle that students face in attending law school. Summit attendees discussed the idea of a new call to action with the focus on making law schools more affordable. A recommendation was made to develop new partnerships between law schools and law firms to fund the education of a diverse attorney, not only through scholarship opportunities but also by having a guaranteed job waiting for that attorney upon completion of law school. A “3 + 3 + 1” program was discussed, wherein a diverse student would spend three years in college followed by three years in law school and have a job guaranteed upon the completion of law school.

Aside from discussing pipeline initiatives, attendees in the break-out sessions also discussed measures that could be implemented in holding corporate America accountable for diversity initiatives. Specific strategies that were discussed included the ABA publishing a “Best for Diversity” list, firms giving billable hour credit for hours spent on work to attain diversity goals, and corporations withholding a percentage of a firm’s compensation until diversity performance is established.

After identifying the key areas that need to be targeted in creating diversity initiatives, Summit attendees met Friday afternoon to discuss the problem of retention of diverse attorneys in the legal profession. The afternoon session began with a panel discussion. The panelists included Jose Roberto Juarez Jr., John Lewis, Holly Fujie, and the moderator for the panel, Juanita C. Hernandez. Panelists discussed the responsibility that law firms need to share in encouraging retention of diverse attorneys. During the discussion, the panelists emphasized the importance of law firms creating an environment that meets the needs of their associates. Aside from providing the requisite training, panelists discussed the need for a nurturing work environment that encourages mentoring.

Following the panel discussion, the attendees broke out into group sessions to identify key steps that can be taken to

improve the retention of diverse attorneys in the legal profession. The general consensus seemed to be that to keep diverse attorneys within the profession, good mentoring relationships must be in place. Attendees suggested that mentoring efforts should not be limited to the traditional matching of individuals from similar ethnic or racial groups. Rather, mentoring should be an inclusive effort that is focused on building inter-diversity coalitions.

On Saturday morning, the Honorable Cruz Reynoso kicked off the morning by discussing the obstacles students face in getting into law schools and getting admitted to the bar. Judge Reynoso pointed out that law schools are neither admitting nor graduating a diverse population; thus, efforts at increasing diversity in the legal profession need to be focused on (1) getting diverse students into law schools, and (2) getting diverse attorneys admitted to their respective state bar associations. In addressing possible solutions to these two problems, Judge Reynoso suggested that law schools should be more affordable for students and that there should be more public law schools.

Aside from the economic obstacle to getting into law school, Judge Reynoso recommended a reevaluation of the criteria used in admitting students to law schools. In regards to the problem

that minorities have a low bar passage rate, Judge Reynoso suggested that funding be provided to diverse graduating law students to enroll in bar exam preparatory courses. In addition, Judge Reynoso proposed an apprenticeship for lawyers, wherein a graduating law student would be able to practice for two or three years under the supervision of a licensed attorney and then become automatically admitted to the bar.

### The final panel of the Summit focused on the legal profession's responsibility to society to promote a diverse legal system.

The Summit culminated with a final panel discussion on the legal profession's responsibility to society to promote a diverse legal system. Panelists for this discussion included the Honorable Ming W. Chin, Simone Wu, and Michele Coleman Mayes. Scott LaBarre served as moderator.

During the course of the Summit, speakers and attendees remained mindful

of the achievements that have been made in developing diversity in the legal profession. However, they also openly acknowledged that a lot still remains to be done. The three next pivotal steps identified at the Summit are to (1) *lead it*—the ABA and leaders in all sectors need to be able to answer the question “why diversity?” In addition, the ABA will appoint a special committee to ensure the actions discussed at the Summit will be put in place; (2) *teach it*—diverse law students must be taught skills for success; and (3) *afford it*—new partnerships need to be forged to “stock the pipeline” and make law school more affordable.

This new call to action focuses well beyond efforts to achieve and maintain diversity in our profession. It reaches deeply into pipeline issues and focuses on making the profession more attractive to a diverse population by encouraging students at a young age to join the legal profession and by making legal education more attractive, attainable, and affordable. ■

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## Indian Child Welfare Act

*Continued from page 1*

care at some point in their lives.<sup>3</sup> The national adoption rate for Indian children was eight times higher than for other children, with 90 percent of those placements in non-Indian homes.<sup>4</sup> It was against this backdrop that the ICWA was formulated, passed by Congress, and signed into law by President Carter.

### Statistical Background of Tribes

About 4.1 million people listed themselves as American Indian in the 2000 census (about 1.5 percent of the population).<sup>5</sup> More than one in four Indians (25.7 percent) live below the poverty line, a ratio twice as high as the general population (12.4 percent); the number below poverty increases to 35 percent on reservations.<sup>6</sup> More than 32 percent of Indian children live below the poverty line.<sup>7</sup>

Off-reservation Indian children are involved in 5.7 child abuse and neglect cases per 1,000, compared to 4.2 percent per 1,000 of the general population.<sup>8</sup> According to the 2000 census, “[a]lthough the percentage of children under 18 who were American Indian and Alaska Native is small, a higher percentage of adopted children were American Indian or Alaska Native (1.6 percent) than the percentage of biological (1.0 percent) or stepchildren (1.2 percent) who are American Indian or Alaska Native.”<sup>9</sup>

In April 2005, the Government Accountability Office (GAO) completed a 14-month survey of the implementation of the ICWA. Indian children are 1.8 percent of children in the United States but are 3 percent of the children in foster care.<sup>10</sup> The statistics reviewed by the GAO were limited—just five states

had information on ICWA compliance that was available for examination. However, the agency was able to produce some interesting statistics. In 2003, 62 percent of the children in foster care in Alaska were Indian. In South Dakota, 61 percent of foster children were Indian; in Montana, 35 percent; in North Dakota, 30 percent; and in Oklahoma, 25 percent.<sup>11</sup> Clearly, significant problems remain in the Indian population.

The ICWA attempts to address these concerns by balancing the interests of the child, the parents, and the tribe against the interests of the state. While there are many areas of protections and issues, three significant areas are threshold to an ICWA case: (1) whether or not the child can be considered a member of a tribe; (2) whether notice fulfills the requirements of the Act; and (3) the proper jurisdiction of the case.

### Definitions of the ICWA

Under the definitions found at 25 U.S.C. § 1903, “child custody proceedings” include adoptive placements, preadoptive placements, terminations, and foster care placements.<sup>12</sup> If an Indian child is in one of these proceedings, the ICWA must be applied to the case. It is important to note that it does not matter if it is a state agency or a private actor who brings the matter to court; if the action is in state court, the ICWA applies.<sup>13</sup> However, the ICWA does have specific exceptions for custody orders to parents in divorce proceedings and juvenile delinquency proceedings in cases involving non-status offenses.<sup>14</sup>

A crucial set of definitions includes “Indian,” “Indian child,” “Indian child’s tribe,” “Indian tribe,” and “parent.”<sup>15</sup> An “Indian Tribe” must be eligible for services from the Secretary of the Interior, i.e., they

must be a federally recognized tribe. This excludes tribes from Canada, Mexico, Hawaiian natives, unrecognized or disenfranchised tribes, and state-recognized tribes.<sup>16</sup> Simply put, the status of being “Indian” in the United States is a political one; while heritage, culture, or racial background all play a part, it is the quasi-sovereign nature of tribes that grant tribal members their status.<sup>17</sup> If the tribe doesn’t receive Bureau of Indian Affairs (BIA) funding, or if they claim to be a “treaty tribe” or an “unrecognized band,” they are not likely to fall within the ICWA.

An “Indian” is a member of a recognized Indian Tribe; an “Indian Child” is an unmarried person under 18 years of age who is a member of, or eligible for, membership in an Indian tribe. It is important to note that neither of these terms requires enrollment per se, and that the tribe is the ultimate arbiter of membership.<sup>18</sup> If a tribe determines that a person is a member of the tribe, the trial court cannot disturb that determination.<sup>19</sup>

However, the lack of a tribal determination of membership is not conclusive proof of nonmembership.<sup>20</sup> Courts have found that “membership” may include children outside of the definition of “Native” in the Alaska Native Claims Act;<sup>21</sup> children whose Indian ancestry is uncertain;<sup>22</sup> and children whose tribes fail to make conclusive determinations of eligibility for membership.<sup>23</sup> Other courts have ruled that without proof of “membership,” people cannot be considered Indians under the ICWA.<sup>24</sup>

An Indian child’s tribe may actually include multiple tribes, depending on the membership and potential membership of the parents. For example, the child’s father may be enrolled Comanche through his father but have a mother of Choctaw membership. The child’s

## Tribal Membership

Most tribes limit membership to a single tribe; as a result, it is entirely possible that a parent will be enrolled in one tribe with a child enrolled in another for financial or cultural reasons. If enrollment has occurred, it is generally dispositive on the notice issue. If enrollment has not been done, the best practice is to provide notice to all tribes who could be the child’s tribe.

While ultimately the court must determine the tribe with the most significant contacts, notice requirements require that all possible tribes be notified so that the court can gain sufficient information to make that determination.

## Failure to Notify

In *Doe v. Hughes, Thorsness, Gantz, Powell & Brundin*, a private law firm correctly determined that the ICWA would not apply to an adoption and did not mention the potential Indian status to the court. When the biological mother sought to overturn the adoption based on the ICWA, the adoptive parents successfully defended against the action by arguing that the child was not an “Indian child” as defined by the act. They then successfully sued Hughes, Thorsness, Gantz, Powell & Brundin for failing in their obligation to bring the matter before the court, so that the court could make the determination that would have prevented the mother’s lawsuit.<sup>i</sup>

i. See *Hughes, Thorsness, Gantz, Powell & Brundin*, 838 P.2d 804 (Alaska 1992).

mother may be enrolled Pawnee, with Tonkawa and Ponca heritage. The child then could be a member of the Comanche, Choctaw, Pawnee, Tonkawa, or Ponca tribes, depending upon tribal enrollment criteria. In determining the child’s tribe, the issue devolves into selecting the tribe with the closest ties to the child or giving notice to all possible tribes and letting the tribes sort it out.

The definition of a parent is important to understand. Any biological parent or parents of an Indian child are included in this term. The parent does not have to be Indian in order to invoke the ICWA protections. A non-Indian parent of an Indian child is protected to the same degree as an Indian parent of the same child.<sup>25</sup> In addition to the biological mother and father, the definition of parent includes an Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. This definition does not include a non-Indian who has adopted an Indian child. This is the only difference between Indian and non-Indian parents for the purposes of the act. The term “parent” specifically excludes unwed fathers if their paternity has not been acknowledged or established.<sup>26</sup> This is the third exception to the ICWA, following divorce custody and juvenile delinquency.

Once a practitioner determines that a child may be Indian, there is an ethical obligation to notify the court even if the client may not wish the ICWA to be applied.<sup>27</sup> The Bureau of Indian Affairs’ *Guidelines for State Courts; Indian Child Custody Proceedings* lists five possible (but not exclusive) scenarios that should trigger inquiry into a child’s possible

membership: (1) a party to the case, a tribe or Indian organization, or a public or a private group tells the court that the child is an Indian child; (2) a licensed agency discovers information that suggests the child is Indian; (3) the child gives the court reason to believe he or she is Indian; (4) the residence of the child, the parents, or Indian custodian is an area known to be a predominantly Indian community; and (5) an officer of the court has knowledge that the child may be Indian.<sup>28</sup> The child’s membership does not have to be confirmed for the ethical duty to arise; simply put, it is the court’s obligation, not the attorney’s, to make the determination of membership. A failure of an attorney to notify the court of even suspected Indian status could conceivably result in malpractice charges, ethical sanctions, or contempt proceeding. The Oklahoma Court of Appeals has made it clear that a failure to follow these requirements, even when acting as an advocate for adoptive parents, is sanctionable. The court stated that “every attorney involved in matters concerning Indian children subject to the ICWA is under an affirmative duty to insure full and complete compliance with these Acts.”<sup>29</sup>

### The Notice Requirements of the ICWA

Under 25 U.S.C. § 1912 (a), notice must be given to the parents, the Indian child’s tribe, and the Indian custodian if applicable. If the Indian child’s tribe is not known, then the Bureau of Indian Affairs must be given notice so that they can discover the child’s tribe and pass the notice along. The notice must be given 10 days before the hearing and must

be sent by registered mail. Under the BIA’s guidelines, it must contain specific elements that are designed to provide sufficient information to identify the child and inform the parties of their rights.<sup>30</sup>

The notice requirement does not hinge on parental participation or information. Tribal notice is not dependent on any parental action. As one California court has observed, “The ICWA . . . is designed to protect Indian children and tribes notwithstanding the parents’ inaction.”<sup>31</sup> The onus of notice is on the court, not the parents. Notice sent to the wrong address or wrong tribe is similarly found to be invalid, requiring remand.<sup>32</sup>

Problems occur when parties are not sure if a child is Indian and the tribe is unresponsive, or if the only evidence submitted has been vague allegations of heritage.<sup>33</sup> Another problem is when a parent does not raise the possibility of tribal membership or Indian heritage until late in the process, and then asserts it to try to defeat the previous court decisions. Some courts have tried to determine what is sufficient notice to require investigation.

For instance, California’s Fourth District Appellate Court has held that the mere statement of Indian heritage is sufficient to trigger further investigation, but once a tribe has indicated the child is not a member, there is no need for further notice.<sup>34</sup> The court has held that notice must contain enough information for the tribe to determine if the child is a member. This information required far exceeds the recommendations of the BIA (Board of Immigration Appeals) Guidelines, but the courts feel that it is necessary to sufficiently determine tribal membership.

The need for proper notice, and the pain a child suffers by that failure to comply with the law, is well stated in the case of *In Re Elizabeth W.*, from California's Second District Appeals court. In *Elizabeth W.*, permanency placement for a child had to be delayed until the trial court corrected its years of malfeasance and reviewed the allegations of tribal membership. The appeals court eloquently stated the cost of that delay:

After years of bouncing from foster home to foster home, eight-year-old Elizabeth W. has a chance at a normal life as the adopted child of her present caregivers. The only thing standing between Elizabeth and the pot of gold at the end of her rainbow is her father's challenge to the Department of Children and Family Services' failure to comply with the notice requirements of the Indian Child Welfare Act. Because we must, we hold that Elizabeth's chance at stability will be delayed—but we publish this opinion with the hope that other children will fare better in the future, and that the Department and its lawyers will at some point learn to give the proper notices at the proper times, and to file the required documents with the dependency court, keeping in mind that childhood is brief and fleeting, as is a foster child's hope of finding and keeping a stable home.<sup>35</sup>

### The Jurisdiction of the Court

Understanding Indian land can be daunting. It consists of reservations, dependent Indian communities, and allotment lands, which include trust and restricted lands.<sup>36</sup> Reservations, perhaps the easiest to understand, are tracts of land reserved for the exclusive use of a specific tribe. These are often traditionally held lands. Perhaps the most well-known example of this is the Navajo Nation, which incorporates parts of four states within its boundaries. Inside reservation boundaries, tribal law applies, even to land owned by non-Indians, although this is growing less clear.<sup>37</sup>

Dependent Indian communities are places outside of a reservation that are set aside for the use and benefits of Indians under federal supervision.

"Indian" schools throughout the country, and tribal buildings on federal trust land, are also included in this definition. The key is that the land must be set aside for Indians and maintained for Indian purposes, and is regulated and maintained by Indian sources.<sup>38</sup>

The title to allotted trust land is held by the United States for the benefit of the individual Indian owner; the BIA must approve any action on the land, and it cannot be taxed, sold, or adversely possessed unless it is removed from trust status.<sup>39</sup> Restricted land is land held to an individual Indian member of the Five Civilized Tribes but with restrictions against alienation.<sup>40</sup> This means that leases, sales, probates, or other actions must be approved by state district court, as authorized by federal statute.<sup>41</sup> This land can be adversely possessed, sold with approval, and taxed in some situations.

Under Section 1911 (a), any Indian child domiciled in these areas is subject only to tribal court jurisdiction.<sup>42</sup> Even if the child is subject to an event off reservation, the ICWA requires that the child be returned to reservation custody as soon as practicable.<sup>43</sup>

There is, however, an exception to this jurisdiction: If other laws grant the jurisdiction to the state, then the tribe must seek retrocession from the Department of Interior to exercise that jurisdiction.<sup>44</sup> This is a direct reference to the so-called PL-280 states, which hold jurisdiction over some or all of tribal reservations within their boundaries.<sup>45</sup> In these states, the effect of PL-280 is not to erase jurisdiction over tribal children, but rather to grant the state concurrent jurisdiction over them.

If this is not confusing enough, Indian children living in a non-Indian country are subject to concurrent jurisdiction under 25 U.S.C. § 1912 (b). However, there is a judicial presumption that the proceeding should be heard in tribal court.<sup>46</sup> The preference for tribal court requires that, upon a proper petition to transfer made by either parent, the Indian custodian, or the tribe, the state court must transfer to the tribal court unless either parent objects or good cause exists not to transfer. Objection by either parent, Indian or non-Indian, is an absolute bar to transfer. The absence

of parental objection to a transfer cannot be found unless a parent is given a meaningful opportunity to object, meaning that the parent must be fully informed and represented by counsel before the motion to transfer is heard.<sup>47</sup>

Good cause to oppose transfer, outside of parental objection, is more difficult to quantify. Oklahoma, in the case of *Adoption of S.W. and C.S.*,<sup>48</sup> provides a well-reasoned analysis of transfer and what is good cause to void it. Other states have found that good cause to deny transfer is largely determined by the individual facts of the case, with the party opposing the transfer carrying the burden of proof to demonstrate the contrarian facts. The absence of a tribal court may constitute good cause, although the tribe may have a counsel or other tribal method to determine custody proceedings. When a tribal court system does exist, the adequacy of such a system, as perceived by the state court, should not be considered.<sup>49</sup>

Courts have found good cause not to transfer a proceeding if the petition to transfer is untimely and the proceeding has already reached an advanced stage; if the child involved is over the age of 12 and objects to a transfer; if the child involved is over the age of five, the parents are unavailable, and the child has had little or no contact with the tribe or its members; or if the evidence necessary to decide the case cannot be presented in tribal court without undue hardship to the parties or witnesses. The Washington Appellate Court and the Texas Court of Appeals have held that the determination to transfer is subjective and requires a balancing of the state's, tribe's, and child's rights.<sup>50</sup> Transfer can be declined by the tribal court; it should be noted that this does not mean that a tribal employee or government official can stop transfer.<sup>51</sup> Only the tribal court can issue the proper order. If the court does so, then the matter returns to the state court for further action.

### Conclusion

The ICWA makes significant changes to a child custody proceeding. Practitioners should carefully determine if the act is applicable to every case they litigate. If tribal membership, notice,

and jurisdiction are determined at the beginning of the case, the conclusion of the matter is likely to be successful. ■

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### Endnotes

1. Jon Meacham, *American Lion: Andrew Jackson in the White House*, at 96, (Random House) 2008.
2. Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 109 S.Ct. 1597 104 L.Ed.2d 29 (1989).
3. *Id.*, 490 U.S. 30, 109 S.Ct. 1597 104 L.Ed.2d 29 (1989).
4. *Id.*
5. Stella U. Ogunwole, 2002, *The American Indian and Alaska Native Population: 2000*, U.S. Census Bureau, Census 2000 Brief at 3, C2KBR/01–15.
6. Stella U. Ogunwole, 2006, *We the People: American Indians and Alaska Natives in the United States*, U.S. Census Bureau, Census 2000 Brief at 12, CENSR-28.
7. *American Indian, Alaska Native Tables from the Statistical Abstract of the United States: 2004–2005*, U.S. Census Bureau, Census 2000 Statistical Abstract of the United States at 451, 124th Edition.
8. *Urban Indian America: The Status of American Indian and Alaska Native Children and Families Today*, citing 2004 Urban Indian Health Institute statistics, A report to the Annie E. Casey Foundation, at 11, National Urban Indian Family Coalition, 2008 available at [www.nuife.org/NUIFE\\_PUBLICATION\\_FINAL.pdf](http://www.nuife.org/NUIFE_PUBLICATION_FINAL.pdf).
9. Rose M. Kreidler, 2003, *Adopted Children and Stepchildren*, U.S. Census Bureau, Census 2000 Brief at 9, CENSR-6RV.
10. *Indian Child Welfare Act: Existing Information on Implementation Issues Could Be Used to Target Guidance and Assistance to States*, GAO-05-290 at 1, United States Government Accountability Office, April, 2005.
11. *Id.* at 13. It should be noted that Oklahoma had more Indian children in foster care (3,689) than California (3,646), a state with 10 times the population. Oklahoma numbers are also greater than Minnesota (2,292), Washington (1,690), and Oregon (1,219)—all states with greater general populations. However, Oklahoma statistics, to some extent, include children in tribal custody and in tribal courts.
12. 25 U.S.C. §1903.
13. *Starr v. George*, 175 P.3d 50 (Alaska 2008); *Matter of the Guardianship of J.C.D.*, 2004 SD 96, 686 N.W. 2d 647 (South Dakota 2004); *Jordan v. Jordan*, 938 P.2d 1258 (Alaska 1999); *Matter of Adoption of Baade*, 462 N.W.2d 485 (S.D. 1990).
14. *In re Alejandro A.*, 160 Cal. App. 4th 1343 (Cal. App. 4th 2008); *In re Enrique O.*, 40 Cal. Rptr. 3d 570 (Cal. App. 5th 2006).
15. 25 U.S.C. § 1903.
16. However, there may be some flexibility with transnational tribes, such as the signatory Canadian-American tribes of the Jay Treaty of 1794; and tribes like the Kickapoo Tribes of Texas, Oklahoma, and Kansas who have traditional grounds in Mexico; or the Tohono O’odham of Arizona.
17. *Fisher v. District Court*, 424 U.S. 382 (1976); *Morton v. Mancari*, 417 U.S. 535 (1974). See also *In re A.J.*, 733 A.2d 36 (Vermont, 1999); *Interest of P.A.M.*, 961 P.2d 588 (Colo. App. 1998); *Adoption of Christopher*, 173 Misc. 851, 662 N.Y.S.2d 366 (New York Family Court 1997); *Matter of T.I.S.*, 586 N.E.2d 690 (Ill. App. 1991).
18. *In re Miracle M.*, 73 Cal. Rptr. 3d 24 (Cal. App. 2d 2008); *Phillips A.C. II v. Central Council of the Tlingit and Haida Tribes of Alaska*, 149 P.3d 51 (Nev. 2006); *Interest of X.H.*, 138 P.3d 299 (Colo. 2006); *Matter of S.M.H. and L.M.H.*, 103 P.3d 976 (Kan. App. 2005). The reverse is also true. When a tribe says that a person is not a member, the court will not apply the ICWA. *Matter of Welfare of C.B., C.R.B., and T.A.B.*, 143 P.3d 846 (Wash. App. 2006).
19. *Phillips A.C. II v. Central Council of the Tlingit and Haida Tribes of Alaska*, 149 P.3d 51 (Nev. 2006); *Welfare of S.N.R.*, 617 N.W. 2d 674 (Minn. App. 2000), *Application of Angus*, 655 P.2d 208 (Or. App. 1982), *pet. denied* 660 P.2d 683; *cert. denied* 418 U.S. 830.
20. *Interest of D.T. Jr.*, 667 N.W.2d 694 (S.D. 2003); *Matter of T.J.H., J.H., J.L., and A.L.*, 2003 MT 352, 81 P.3d 504 (Montana 2003); *Matter of A.P.*, 962 P.2d 1186 (Montana 1998); *Matter of Baby Boy Doe*, 849 P.2d 925 (*Id.* 1993); *Matter of Adoption of a Child of Indian Heritage*, 543 A.2d 925 (N.J. 1988). *But see Arizona Dept. of Economic Security v. Bernini*, 48 P.3d 512 (Ariz. App. 2002), in which the court found that the ICWA was not to be applied in a case until the child’s tribe is determined. In *interest of D.T. Jr.*, the tribe had responded that the child was not eligible for enrollment, which the court found to be insufficient; membership, not enrollment, was the issue that the tribe needed to address.
21. *Juvenile Dept. of Lane County v. Tucker*, 710 P.2d 793 (Or. App. 1985).
22. *In re J.T. and C.T.*, 693 A.2d 283 (Vt. 1997); *Matter of Adoption of a Child of Indian Heritage*, 543 A.2d 925 (N.J. 1988).
23. *Matter of Baby Boy Doe*, 849 P.2d 925 (*Id.* 1993).
24. *Matter of the Children of M.L.A. and J.J.K.*, 730 N.W.2d 54 (Minn. App. 2007); *Interest of R.M.W., J.M.W., and C.A.W.*, 188 S.W. 3d 831 (Tex. App. 2006); *In re E.H.*, 46 Cal. Rptr. 3d 787 (Cal. App. 4th 2006); *In re Aaron R.*, 29 Cal. Rptr. 3d 921 (Cal. App. 1st 2005).
25. *In re Jonathan S.*, 28 Cal. Rptr. 3d 495 (Cal. App. 4th 2005); *Interest of J.J.G.*, 83 P.3d 1264 (Kan. App. 2004); *K.N. v. State*, 856 P.2d 468 (Alaska 1993).
26. *In re Daniel M.*, 1 Cal. Rptr. 3d 897 (Cal. App. 4th Dist. 2003); *Adoption of Christopher*, 173 Misc. 851, 662 N.Y.S.2d 366 (New York Family Court 1997); *State ex. rel. Dept. of Human Services v. Jojola*, 660 P.2d 590 (N.M. 1983), *cert. denied* 464 U.S. 803 (1983); *Matter of Adoption of Baby Boy D.*, 742 P.2d 1059 (Okla. 1985), *cert. denied* 484 U.S. 1072. *But see In re Michael J.*, 325 Ariz. Adv. Rep. 40 at 42–43 (Ariz. App. 1st 2000), in which the court finds that an Indian father who appears before the court and acknowledges paternity and then takes a paternity test established his paternity within the provisions of the ICWA.
27. *Adoption of Baby Girl B.*, 2003 OK CIV APP 24 at para. 81, 67 P.3d 359 (Okla. App. 2003); *Doe v. Hughes, Thorsness, Gantz, Powell & Brundin*, 838 P.2d 804 (Alaska 1992).
28. Bureau of Indian Affairs, *Guidelines for State Courts, Indian Child Custody Proceedings*, Section B.1., Federal Register, November 26, 1979.
29. *Adoption of Baby Girl B.*, 2003 OK CIV APP 24 at para. 81, 67 P.3d 359 (Okla. App. 2003). Emphasis in original.
30. Bureau of Indian Affairs, *Guidelines for State Courts, Indian Child Custody Proceedings*, Section B.1., Federal Register, November 26, 1979.

31. *Dwayne P. v. Superior Court*, 103 Cal. App. 4th 247, 126 Cal. Rptr. 2d 639 (Cal. App. 4th Dist. 2002). However, there must be some basis to believe that a child is Indian; if not, there is no duty on the court to continue to investigate, or to search, for that information. *In re Aaliyah G.*, 135 Cal. Rptr. 2d 680 (Cal. App. 2d Dist. 2003).

32. *In re Mary G.*, 59 Cal. Rptr. 3d 703 (Cal. App. 4th 2007); *Nicole K. v. Superior Court*, 53 Cal. Rptr. 3d 251 (Cal. App. 3d 2006); *Matter of R.E.K.F.*, 698 N.W.2d 147 (Iowa 2005).

33. *In Interest of D.M.*, 2007 ND 62, 730 N.W.2d 604 (N.D. 2007), the court found that when a tribe does not respond to “repeated efforts to engage and contact” that the ICWA would not be applied absent definitive information of tribal membership. *See also In re C.P.N.C.*, 641 S.E. 2d 13 (N.C. App. 2007); *In re Arianna R.G.*, 2003 WI 11, 657 N.W.2d 363 (Wis. 2003).

34. *In re Christopher I.*, 106 Cal. App. 4th 533, 131 Cal.Rptr.2d 122 (Cal. App. 4th Dist. 2003).

35. *In re Elizabeth W.*, 16 Cal. Rptr. 3d 514 at 525 (Cal. App. 2d Dist. 2004). *See also In re Gerardo A. Jr.* 14 Cal. Rptr. 3d 798 (Cal. App. 5th Dist. 2004), and *In re Miguel E.*, 15 Cal. Rptr. 3d 530 (Cal. App. 4th Dist. 2004), which hold that the failure to provide full information to all tribes in which the child may be eligible

for membership is reversible error.

36. 18 U.S.C. § 1151 defines Indian country.  
37. *U.S. v. John*, 437 U.S. 634, 98 S.Ct. 2541, 57 L.Ed.2d 489 (1978); however, there are exceptions to this rule, as held in *Atkinson Trading Company v. Shirley*, 121 S.Ct. 1825, 121 S.Ct. 1825, 149 L.Ed. 2d 889 (2001).

38. *C.M.G. v. Oklahoma*, 594 P.2d 798 (Okla. Ct. App. 1979).

39. *U.S. v. Ramsey*, 271 U.S. 467, 46 S.Ct. 559, 70 L.Ed. 1039 (1926).

40. Act of August 4, 1947; *see also* *Semple, W.F. Oklahoma Indian Land Titles Annotated*, Sections 79–80, Thomas Law Books, St. Louis, Missouri, 1952.

41. Act of August 4, 1947.

42. *Mississippi Band of Choctaw Indians*, 490 U.S. 30, 109 S.Ct. 1597 at 1601–1602, 104 L.Ed.2d 29 (1989).

43. 25 U.S.C. § 1922 permits the emergency removal of an Indian child located on non-reservations lands but domiciled on Indian land. It requires prompt return to tribal jurisdiction.

44. 25 U.S.C. § 1918 (a).

45. P.L. 280 established state jurisdiction over criminal activities of Indian and non-Indian alike in Indian country in six states, called the “mandatory states.” The law also offered other states the ability to opt in for jurisdiction; 10 did so and were referred to as

“option states.” Mandatory PL-280 states are California, Minnesota, Nebraska, Oregon, and Wisconsin. Alaska, the sixth mandatory state, was added in 1958 in P.L. 85-614. Minnesota, Wisconsin, Oregon, and Alaska have some exceptions to their jurisdiction.

The 10 optional states are Arizona, Florida, Idaho, Iowa, Montana, Nevada, North Dakota, South Dakota, Utah, and Washington. However, the options expressed in most of the states are more confusing than clarifying. For example, in a case involving a child fatality, only Florida, Montana, Washington, and Nevada could exercise jurisdiction. The rest would not.

46. *Mississippi Band of Choctaw Indians*, 490 U.S. 30, 109 S.Ct. 1597 at 1601–1602, 104 L.Ed.2d 29 (1989).

47. *Matter of GLOC and TJM*, 668 P.2d 235 (Mont. 1983); *Matter of SZ*, 325 N.W.2d 53 (S.D. 1982).

48. *Adoption of S.W. and C.S.*, 2002 OK CIV APP 26, 41 P.3d 1003 (Okla. App. 2002).

49. Dept. of the Interior ICWA Guidelines, 44 Fed. Reg. 67584–67595 (1979), 44 Fed Reg 67587.

50. *Dependency of E.S. and C.S.*, 964 P.2d 404 (Wash. App. 1st 1998); *Yavapai-Apache Tribe v. Mejia*, 906 S.W.2d 152 (Tex. Ct. App. 1995).

51. *Interest of C.Y.*, 925 P.2d 941 (Kan. App. 1996).

## Chairs' Column

*Continued from page 2*

11–14, 2010, at the Westin Mission Hills Resort in Rancho Mirage, California. Check our webpage for details about our annual business meeting, which will be held during the conference.

While you are visiting our webpage, participate in our discussion boards. Our members can benefit from the involvement of the 29 percent of you who expressed a desire to moderate a discussion on our webpage. The opportunity to do so presents itself. Visit our committee discussion board and post a topic today.

In short, the survey says committee members want a lot, including networking, speaking at CLEs, publishing articles, and moderating discussions. Minority Trial Lawyer is committed to delivering all of this and more. ■

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**ASK A MENTOR***Dear Ask a Mentor,*

I am a junior, mid-level associate recently laid off from a midsize firm due to the economy. I am using every resource at my disposal to search for another position but with the legal market flooded with résumés from out-of-work attorneys all around the country, I would appreciate any advice on how I can obtain employment in such a competitive market.

*L.K., New Haven, Connecticut*

*Dear L.K.,*

Be certain you are engaging every possible avenue to secure a new position. You should work with your law school career services office, check craigslist job listings, scan the local legal newspaper ads, and check online job posting sites. In addition, you need to be proactive and spread the word that you are actively seeking a legal position. Most folks want to be helpful, and even if they are unaware of any current opportunities or leads, ask them if they know of anyone who might be able to help. Networking is key during these times. I've found that there is a great sense of camaraderie in these tough times and an empathetic understanding that "we're all in this together." You might consider visiting chapters of various networking organizations in your city and mingling with other lawyers at chamber of commerce mixers, local and state bar events, and the like.

You should also embark on a targeted mail campaign, which includes a brief introductory letter, résumé, and law school transcript. Focus on smaller firms and consider geographic areas that are less desirable to live in or are otherwise off the beaten path. A key element in mail campaigns and networking is to be organized. Develop a system to keep track of who you communicate with, the dates of the communications, and the upshot if any.

It is critical to follow up with all leads. There is often a thin line between being diligent and annoying, so tread carefully. Don't leave multiple voicemail messages and instead continue to call until you reach a live person. You can follow up by email as well. It is best to alternate between the two methods and follow up no less than two or three times over

the course of several weeks. Always be grateful for whatever time and energy someone offers you and be willing to give back in any way you can. In the meantime, stay involved in the law through volunteer work. Finally, stay optimistic and continue to believe that through your persistent efforts, you will eventually land the job you want.

*Delia K. Swan*

*Dear L.K.,*

I will assume that you are between your third and sixth year of practicing law. You did not indicate your practice area, so I will offer advice equally applicable to both corporate and litigation.

One way to remedy your situation is to think about relocating to a more distant and remote city—a location that is open to your skill set but where the deals and contracts on which you would be working are not as complex as you experienced at BigLaw. Cities such as Buffalo, New York, or Hartford, Connecticut, come to mind. I mention these two cities because Buffalo is close to the Canadian border and there are companies in Canada that utilize Buffalo law firms for their U.S. corporate work. On the other hand, Hartford is where most insurance companies are located, and they are likely to utilize local counsel. Consider also Colorado, Utah, and Idaho.

For litigators, because you are seeking to further your learning curve within the litigation and trial attorney space, you might seek advice and counsel from a local judge where you reside. A judge can point you to counterparts within his or her circle of friends and family. Also, when speaking to a judge, you can ask about available clerkships within the court in which he or she is presiding. I have found that judges are the most helpful counsel on the planet. They have been where you are and, believe it or not, they were more pressed to get a job in the eighties and nineties than you are today. Why? Because there was not as great a push for diversity then as there is now. Therefore, they understand your plight with much more intimacy and personal knowledge than they may care to show. Don't be hesitant in being personal and

honest with them about your situation.

The social networking avenues that are popular, such as Twitter, Facebook, LinkedIn, Plaxo, and Ning, are good places to reconnect with friends from college and law school. Many of your undergraduate friends opted to go to business school, and some of them went to work for a UK or an European company. Reconnect with them. Your local bar association of color—the Hispanic National Bar Association, the National Bar Association, the National Asian Pacific American Bar Association, the Lavender Bar, and the Native American Bar—are all resources you should use to your advantage.

Before you start your search, you should sit down and write out a goals and aspirations plan (i.e., a business plan). This plan is truly a short-term and long-term life map, starting with a deep analysis of your awareness and heart. If you indeed want to be a lawyer, really question yourself about whether you are willing to work in the type of environment that you just left. You must write down what your long-term goals are and what aspirations you would like to accomplish with your law degree. Goals must be written down if they are to be attained. Aspirations must also be written down, but they must come from your heart, not your head. Aspirations also allow you to bring your goals into better focus. The goals and aspirations plan is a written document that is meant to help you get a job, but not just *any* job.

Diverse attorneys of color are a force to be reckoned with. This small setback in your career is really a blessing in disguise. There are opportunities outside of the box that the traditional law firm model may not have availed to you had you not been put in this circumstance. Resiliency, perseverance, and focus are all traits of a great and resourceful attorney. My bias is that diverse attorneys of color have those traits in abundance. ■

*Ron Jordan*

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*Delia K. Swan is president of Swan Legal Search. Ron Jordan is senior principal director at Carter-White & Shaw LLC.*



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