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**FINAL EXAM**

Instructions

1. Be certain that this exam consists of 5 pages, including this cover sheet and an attachment for Part One.
2. **Time Allowed on this Exam: Three Hours**
3. **SKIP LINES. WRITE ON ONE SIDE OF THE PAGE.**
4. This is a limited open-book exam. You may consult your casebook, class handouts, Canby (the book not the Judge), and your own work product, such as class notes or outlines prepared by you or by a group in which you were an active participant.
5. Place your exam number in the designated space on each Blue Book (and page if you're typing). Do not identify yourself in any other way.
6. **THINK AND PLAN BEFORE YOU WRITE.** **Outline or prepare a checklist for each answer.** If you include it in your bluebook, it could improve your grade if it shows specific knowledge of the problem's issues that you did not get to draft in your answer.
7. **Use the law studied in this class.** While you may have knowledge and information from other courses and experiences, your primary analysis and discussion should be based on the law studied in this course.

**Part One** (50% of the grade)

You were recently hired as staff attorney for the newly established Pecos Pueblo Gaming Commission. Pecos just opened its small casino and tribal resources are quite limited. Apart from the tribal government, the BIA school, and the small health clinic run by the Catholic Church (serving Pecos and two other Indian communities), Pecos is pretty quiet. Thinking that he should take advantage of the only staff attorney working for the tribe, the Governor of the Pueblo stopped by your office this morning and gave you a copy of the attached article (next page) which was sent to most of the physicians in New Mexico.

After checking with your immediate supervisor and finding that you weren't busy for the next 90 minutes, he asked you to do three things. First, write a memo giving him your legal evaluation of what the article says. Second, draft a letter that he can send to physicians in the area responding to the article. Third, draft some recommendations for him to take to the Tribal Council (a typical IRA-style council) to deal with the fallout from the article. He understands that you don't have time to do any research and must rely only on what you learned in law school. He wants you to address only the issues you were supposed to consider in your Indian Law class.

## Tribal Courts – The New Forum For Malpractice Cases

We recently received an opinion from attorneys Greg Chase and Robin Goble of the law firm of Miller, Stratvert & Torgerson, P.A. regarding the rendering of medical treatment to Native Americans.

As you probably know, many issues have been raised recently by Native American tribes concerning tribal rights and jurisdiction, i.e. tribal gaming, DWI citations on reservation land, etc.

"In a case filed several years ago, one Acoma Pueblo member used a telephonic contact ... as the basis for placing an Albuquerque physician 'on reservation' to support tribal court jurisdiction over the tribal member's medical malpractice claim."

"...you must presently assume that you expose yourself to the possibility of tribal court jurisdiction over any claim arising from telephonic, e-mail, regular or facsimile correspondence, tele-communications, or any other conceivable communication delivered or transmitted to a reservation in which you are providing assistance or consultative services for care being rendered to the Indian patient on the reservation even if your communication originates from outside the reservation."

Tribal court differs markedly from state or federal court. Tribal court judges may not be required to be lawyers or persons trained in the law. A civil defendant (you!) may not be entitled to a jury; if a jury is permitted, it will likely consist only of tribal members. No written law regarding medical malpractice or procedural rules may exist. There may not be a written statute of limitations. Governing law may be the custom and tradition of the pueblo. A tribal medicine man/woman could make the determination of whether you met the standard of care.

Worse, the tribal court may not recognize the New Mexico Medical Malpractice Act; hence, you, personally, would have no statutory damages cap and would be exposed to liability that exceeds your insurance coverage. "A multi-million dollar judgement in tribal court could leave you financially ruined."

There are 3 situations you should keep in mind if you wish to reduce or avoid exposure to tribal court. "On-reservation conduct will clearly expose you to possible litigation in tribal court for any alleged negligent medical treatment.... The only way to avoid exposure of this nature is to simply never travel to a reservation to provide care to Indian patients. If you wish, nonetheless, to volunteer your services and provide on-

reservation care...as a non-Service physician, then tribal court jurisdiction...is a risk you assume."

Second, consultative communications with someone on the reservation, with a healthcare provider, the Indian patient, or even the patient's family, in making care decisions could subject you to tribal jurisdiction. "The best way to protect yourself against exposure... is to decline to provide consultations regarding IHS (Indian Health Services) beneficiaries receiving services at IHS facilities located on reservations." You can see, consult, and/or treat such patients at your office located off-reservation.

Third, you could obtain status of a federal employee by using a "Personal Service Contract." Such contracts with the federal government would mean you would be covered by the Federal Tort Claims Act wherein you could not be individually named in a lawsuit. The U.S. would take your place as a defendant, and suit could not be filed in tribal court but rather federal court. The federal government should be responsible for paying any damages or settlements because it is liable for the conduct of its employees. A multi-million dollar judgement would fall on the shoulders of the federal government – not you.

"...you are strongly encouraged to have an attorney experienced in Indian Law, Indian Healthcare Law, and physician contracting represent you in your contacts with any particular IHS facility." "Sign nothing without the benefit of ...counsel – this is a complex and developing area of the law and the federal government will likely not be looking out for your best interests."

We are not intending to discourage physicians from humanitarian efforts to ease the health care need of the Native American population. Those who lose are those who are most in need of improved health care – the American Indian population. However, from a legal perspective, you need to understand recent developments in the law so that you make an informed decision.

"If an IHS facility refuses to enter into a Personal Services Contract with you, then you must consider whether you are willing to accept being subject to tribal court jurisdiction and individual liability..."

For the complete, 13-page opinion by attorneys Chase and Goble, please call us at 821-9485 or 1-800-880-9485; or write us at P O Box 92890, Albuquerque, NM 87199.



Providing "more than just a policy."

Part Two (50% of the grade)

Joe John is an enrolled member of Tanoan Pueblo in the state of East Amnesia. East Amnesia is a non-Public Law 280 state, located within the 14<sup>th</sup> Circuit Court of Appeals. The 14<sup>th</sup> Circuit has no controlling precedents of its own, guided only by decisions of the U.S. Supreme Court on Indian law issues.

Joe is married to Susie John, an enrolled member of San Miguel Pueblo. They both live and work in Sun City, about thirty miles from both pueblos, but they frequently travel to their homes to visit friends and relatives, for feast days, and to comply with religious obligations.

Last weekend, Joe drove his motorcycle to San Miguel to visit his mother-in-law, who is also an enrolled member of the tribe. Susie rode on the back of his motorcycle. As they entered the pueblo, Joe decided to stop at a convenience store, operated by a non-Indian corporation on land leased from the tribe (a 10-year lease, negotiated by the tribe and approved by the BIA).

Joe took State Highway 58 which runs right through the eastern part of the Pueblo. The road is on a right of way acquired by the state (and approved by the BIA) in 1948 for fifty years, with an option to renew “on mutually agreed upon terms.” An agreement has not yet been reached.

As Joe pulled off the state road into the convenience store parking lot, his motorcycle struck two young boys, Floyd and Freddy Miera, walking toward the store. The two boys were cousins; Floyd is enrolled and lives at Tanoan, Frank at San Miguel.

Both children were severely injured in the collision, though Joe and Susie were not. A San Miguel cop, Nellie Moore, arrived at the scene in her patrol car. Officer Moore, a non-Indian, resides at San Miguel with her husband, Edward, an enrolled member of the pueblo. When Office Moore began questioning Joe and said she was going to arrest him (though for what wasn't clear), Joe got scared, grabbed Moore's revolver, shot her in the

stomach and jumped into an idling car parked nearby. As he drove out of the parking lot, his wife Susie tried to wave him down. She ran onto the highway waving her arms, but since Joe was looking back at the Officer he had just shot, he didn't see Susie and hit her at fairly high speed. She was killed instantly.

In utter despair, Joe then headed down the road in the patrol car, chased by two other San Miguel police cars. They soon hit 120 miles per hour, slowing slightly around the tight curves that characterized the road through the pueblo. Since it was near rush hour (the highway was heavily used by commuters from Espanola to Los Alamos), traffic was heavy. Still for about five miles, they avoided an accident.

Then, just before leaving the pueblo boundaries, Joe turned onto County Road 19 (which the county maintained, subject to a state right of way obtained thirty years ago and approved by the BIA). Just after turning, Joe crashed head-on into a tractor trailer truck owned by the Albuquerque corporation which owned the convenience store, that was on its way to make a delivery. The driver of the truck, a non-Indian named Francisco Alvarez, was severely injured, as was Joe, who is in traction in Sun City, under armed FBI, State Police, and San Miguel Police guard.

Joe has come to you (or rather summoned you to his bed-side) for legal advice, specifically his criminal and civil liability in any tribal, state, or federal court proceeding.

Write a memo discussing his situation. Do not be overly concerned with defining precisely the exact torts, felonies, or misdemeanors that Joe may have committed. Your memo will be evaluated based on your discussion of the jurisdictional issues raised in the fact pattern. For example, if Joe's running down his wife was manslaughter or stealing the car robbery, who has jurisdiction over such felonies and why. If he has committed a tort, who has jurisdiction to adjudicate the tort and why. Make sure you discuss any possible challenges Joe could raise to assertions of criminal jurisdiction by tribal, state, or federal courts and the jurisdiction over tort claims that could be filed against him in any or all courts.

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