FEDERAL BAR ASSOCIATION, D.C. INDIAN LAW CONFERENCE
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LITIGATING INDIAN LAW ISSUES IN STATE AND FEDERAL APPELLATE COURTS

"Unique Considerations At Play"

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I. Before Appealing: Accounting for the Development of the Law

Appellate decisions in the field of federal Indian law have the potential to affect important sovereignty interests of all Indian tribes in a host of unsettled areas. Here are just a few examples of such areas:

- Is tribal authority over non-members anywhere within Indian country determined under the so-called *Montana* "exceptions" or is the application of those exceptions limited to tribal authority over non-member activity on non-member fee lands?[1]

[1] In *U.S. v. Montana*, 450 U.S. 544 (1981), the Supreme Court addressed the authority of the Crow Tribe to regulate hunting and fishing *on fee lands* owned by non-members within the exterior boundaries of the Crow reservation. Notwithstanding these narrow facts, the Court said there is a "general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe," *id.* at 565, and then continued:

> To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

Montana v. United States, 450 U.S. 544, 565–66 (1981). In the same decision, the Court was quick to recognize that the Crow Tribe possessed inherent sovereign authority to regulate hunting and fishing by non-members on the Tribe's reservation. *See id*. at 557 ("The Court of Appeals held that the Tribe may prohibit nonmembers from hunting or fishing on land belonging to the Tribe or held by the United States in trust for the Tribe, . . . and with this holding we can readily agree."). Thus, were the above-quoted language read to suggest that Indian tribes' civil regulatory authority over non-members on reservation lands is subject to the "general proposition" and can only survive if one of the two exceptions is met, it would render the decision self-contradictory.

Compare, e.g., Water Wheel Camp Recreational Area v. LaRance, 642 F.3d 802, 814 (9th Cir. 2011) ("tribe's status as landowner is enough to support regulatory jurisdiction without considering Montana," where non-members' activity "occurred on tribal land, the activity interfered directly with the tribe's inherent powers to exclude and manage its own lands, and there are no competing state interests [of the sort at issue in *Hicks*] at play") *with Stifel, Nicholaus & Co. v. Godfrey & Kahn,* 807 F.3d 184, 207 n.60 (7th Cir. 2015) ("We do not believe that [*Water Wheel*'s] conclusions can be reconciled with the language that the Court employed in *Hicks*"); *Attorney's Process & Investigation Servs., Inc. v. Sac & Fox Tribe of the Miss. in Iowa,* 609 F.3d 927, 936 (8th Cir. 2010) (applying *Montana* to "both Indian and non-Indian land"); *MacArthur v. San Juan County,* 497 F.3d 1057, 1069-1070 (10th Cir. 2007) (same).

- Is a general federal law applicable to persons and entities (a) presumed to apply to Indian tribes and their enterprises unless application of the law would abrogate an express treaty right or interfere with a "purely intramural matter," or (b) absent a clear statement by Congress, presumed not to apply if it would interfere with inherent tribal sovereignty (e.g., the right to govern economic activity with reservation or trust lands)?[2] The Second, Ninth, and Sixth Circuits apply the former while the Eighth and Tenth Circuits apply the latter. *See Soaring Eagle Casino & Resort v. NLRB,* 791 F.3d 648, 673 (6th Cir. 2015) (discussing split).

Further, subsequent Supreme Court decisions in the 1980s clearly confirmed that tribes possess inherent sovereign authority to regulate the economic/resource extracting activities of non-members within tribal reservations and trust lands. *See New Mexico v. Mescalero Apache Tribe,* 462 U.S. 324, 333 (1983); *Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130, 141-142 (1982).

Nevertheless, in *Strate v. A-1 Contractors,* 520 U.S. 438 (1997), Justice Ginsburg announced that *Montana* "is the pathmarking case concerning tribal civil authority over nonmembers." *Id.* at 445. *See also Nevada v. Hicks,* 533 U.S. 353, 387 (2001) (O'Connor, J., concurring) (suggesting that the Court's decision establishes that *Montana*, "governs a tribe's civil jurisdiction over nonmembers regardless of land ownership."). *Contra id.* at 386 (Ginsburg, J., concurring) ("The holding in this case is limited to the question of tribal-court jurisdiction over state officers enforcing state law," [and] leaves open the question of tribal-court jurisdiction over nonmember defendants in general.").

[2] Examples of areas where this is unsettled include the application of the Bankruptcy Code, the Fair Labor Standards Act, the Family Medical Leave Act, and the Age Discrimination in Employment Act to tribes and their enterprises. *See generally* KAIGHN SMITH JR., LABOR AND EMPLOYMENT LAW IN INDIAN COUNTRY at 132-172 (2011) (discussing application of federal labor and employment laws to tribes).

- Can Indian tribes consent to state court jurisdiction over contract actions arising in Indian country without Congressional approval?[3] *Compare Navajo Nation v. Dalley,* 896 F.3d 1196, 1205 (10th Cir. 2018) ("[C]ongressional approval is necessary—i.e., it is a threshold requirement that must be met—before states and tribes can arrive at an agreement altering the scope of a state court's jurisdiction over matters that occur on Indian land.") (citing *Kennerly v. Dist. Court of Ninth Judicial Dist. of Mont.,* 400 U.S. 423, 427, (1971) and *Fisher v. Dist. Court of Sixteenth Judicial Dist. of Mont.*, 424 U.S. 382, 388 (1976)) with *Outsource Servs. Mgmt., LLC v. Nooksack Bus. Corp.,* 333 P.3d 380, 381-384 (Wash. 2014) (en banc) (holding that clear consent by tribe for contract enforcement in state court subjects tribe to state court adjudication of action on the contract).

Myopic advocacy for "tribal sovereignty" without consideration of the risks of a precedent for Indian country can spell disaster. The adage that "bad facts make bad law" is ever-present in this field. Here are some examples of cases presenting bad facts (i.e., risk factors for a loss with impacts for all tribes).

- *Nevada v. Hicks,* 533 U.S. 353 (2001). Floyd Hicks, a member of the Fallon Paiute-Shoshone Tribes, allegedly killed a California bighorn sheep, off of the reservation, in violation of Nevada criminal law. On a tip from tribal police officers that Hicks had two mounted sheep heads at his residence on the reservation, Nevada game wardens obtained a search warrant, approved by both the state court and the tribal court, to search Hicks's residence, and they executed that warrant with the cooperation of tribal police. In doing so, the tribal and state officers found heads of different sheep, but not of the California bighorn protected by Nevada law. Claiming that the officers acted beyond the scope of their warrant and damaged his sheep heads, Hicks sued the state wardens, the tribal police officers, and the tribal court judge who had approved the warrant in tribal court. Eventually all of his claims were dismissed by the tribal court, with the exception of certain torts and civil rights claims against individual state officers. After the tribal court ruled that it had jurisdiction to proceed with those claims, the state officers sued Hicks in federal court, seeking a declaration that the tribal court lacked jurisdiction. Hicks prevailed in the Ninth Circuit, but the Supreme Court reversed, holding that the tribal court lacked jurisdiction over Hicks's claims, but using broad language that can be read to diminish tribal authority over non-members within Indian country. *See supra* at 2, n.1 (quotations and citations from *Hicks*).

[3] Because banks and other institutions that Indian nations deal with for economic development may not want contract disputes adjudicated in tribal forums, and federal courts likely lack subject matter jurisdiction over contract disputes between tribes and non-Indian entities arising in Indian country, Indian nations may not be able to enter into contracts with such institutions if they cannot consent to state court jurisdiction for the enforcement of lending or other transactions.

- *People v. Miami Nation Enterprises,* 386 P.3d 357 (Cal. 2016). State brought action against payday lenders affiliated with Indian nations to enforce laws limiting the size of the loans and the fees that can be charged for them.

  > The practice of . . . "payday" or "cash advance" lending—generally involves small sums that become due on the borrower's next payday. In return for the loan, the borrower provides the lender with a personal check for the amount of the loan plus fees or with direct access to his or her checking account. The lender then waits a specified amount of time to deposit the borrower's check or debit his or her account—hence the deferred deposit. Because of the short-term nature of these loans and the relatively high fees involved, effective annual percentage rates of 700 percent or higher are not unusual.

  Id. at 361. The defendants, tribal corporations formed by the Miami Tribe of Oklahoma and by the Santee Sioux Nation, claimed sovereign immunity from suit, raising the question of whether they were "arms of the tribes" and, therefore, imbued with tribal sovereign immunity. Two brothers, Scott and Blaine Tucker, nontribal members, managed the lending activities, and a federal investigation found that funds from the checking account of one of the corporations appeared related to personal expenses for "a private residence in Aspen, Colorado, chartered flights to auto racing events, and several luxury automobiles." *Id.* at 378. The only evidence of the Tribes' financial share of the profits showed they received one percent of the gross revenues. *Id.* at 362.

  A unanimous California Supreme Court reversed a Court of Appeal decision that the tribal entities had sovereign immunity. *See id.* at 368-379. In so doing, it determined that the burden of proof to establish whether or not a tribal entity has sovereign immunity rests with the entity as defendant, not the plaintiff. *See id.* at 368-371.

- *Narragansett Indian Tribe v. Rhode Island,* 449 F.3d 16 (1st Cir. 2006)

  Pursuant to a land claims settlement in the 1980s, the Narragansett Indian Tribe agreed that "the settlement lands shall be subject to the civil and criminal laws and jurisdiction of the State of Rhode Island." In 2003, the Tribe set up a smoke shop on the settlement lands and refused to abide by state laws governing cigarette sales including state tax requirements. State police raided the smoke shop, sparking a violent altercation with members of the Tribe and leading to the arrest of eight individuals, including the Tribe's Chief. The Tribe then sued the State in federal court, seeking a declaratory judgment that Rhode Island could not enforce its cigarette sales and excise tax laws against the Tribe. The State, in turn, brought a state court action to enforce its laws. Both actions were consolidated in the federal

> court, where the Tribe claimed, inter alia, that sovereign immunity shielded it from the enforcement of state laws in question. Notwithstanding the Supreme Court's decision in *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma,* 498 U.S. 505 (1991), holding that there is a difference between the application of state law to an Indian tribe and ability enforce the law in the face of tribal sovereign immunity from suit, a majority of First Circuit judges held, en banc, that the Tribe could be sued by the State of Rhode Island.

In the wake of *Hicks* and other Supreme Court decisions in the early 2000s watering down what were previously viewed as bedrock principles of federal Indian law fully supportive of tribal sovereignty and self-government, NARF and NCAI launched the Tribal Supreme Court Project.

> The TSCP monitors and helps coordinate tribal cases that are likely to reach the U.S. Supreme Court and assists tribes, their attorneys, and their advocates and supporters with expertise regarding case presentation, strategy, and Supreme Court practice. The TSCP is dedicated to providing better and more valuable tools to enhance the overall quality of tribal advocacy before the Supreme Court. The TSCP is staffed by NARF and NCAI attorneys.

https://www.narf.org/our-work/development-indian-law-educating-public-indian-rights-laws-issues/ (last accessed 10/26/18).

Nearly 20 years later, advocates of tribal sovereignty might ask if this is enough. For tribes now face the likes of well-healed organizations like the Goldwater Institute, which has brought strategic litigation to destroy the Indian Child Welfare Act, including *Brackeen v. Zinke*. *See* https://goldwaterinstitute.org/indian-child-welfare-act/ (last accessed 10/26/2018).

II. State Courts and Indian Tribes

History shows that the most significant battles over access to tribal resources occur at the local level. The colonization of this country had to be centralized in the federal government. Hence, in one of its first enactments in 1790, Congress passed the Indian Non-Intercourse Act, which rendered null and void any land cessions by tribes to states or private entities without federal approval. The federal trust responsibility includes, in part, the protection of tribes and their resources from state intrusions. *See generally* WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW at 154 (6th Ed. West 2015) ("One of the basic premises underlying the constitutional allocation of Indian affairs to the federal government was that the states could not be relied upon to deal fairly with the Indians.") Given this setting, it should come as no surprise that state courts are generally inhospitable forums for the adjudication of the rights and authorities of Indian nations.

The Supreme Court itself recognizes this reality. *See, e.g., Arizona v. San Carlos Apache Tribe,* 463 U.S. 545, 566–67 (1983) (there is "a good deal of force" to the view that "[s]tate courts may be inhospitable to Indian rights"); *Oneida Indian Nation v. County of Oneida,* 414 U.S. 661, 678 (1974) ("[S]tate authorities have not easily accepted the notion that federal law and federal courts must be deemed the controlling considerations in dealing with the Indians"); *see also Idaho v. Coeur d'Alene Tribe,* 521 U.S. 261, 313 n.11 (1997) ("[T]he readiness of the state courts to vindicate the federal right[s of Indian tribes] has been less than perfect") (Souter, J., with Stevens, Ginsburg, and Breyer, JJ., dissenting); *New Mexico v. Mescalero Apache Tribe,* 462 U.S. 324, 339 (1983) (state and local decision making may be "based on considerations not necessarily relevant to, and possibly hostile to, the needs of the reservation"); *United States v. Kagama,* 118 U.S. 375, 384 (1886) (recognizing that "[b]ecause of the local ill feeling, the people of the States where [the Indians] are found are often their deadliest enemies").

In certain circumstances, it may be in an Indian tribe's best interest to proceed with a case in state court or to consent to the adjudication of a contract in state court – for instance, to ensure that a non-Indian bank or other institution will do business with it. *See supra*. at 3 & n3. *See also Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, P.C.,* 467 U.S. 138 (1984) (tribe suing contractor in state court and fighting to proceed in the state court). Such cases will not likely serve up novel questions of federal Indian law to a state court for decision.

From a law development viewpoint, however, when state court actions present federal Indian law questions, it may be advisable to remove the case to federal court, if possible, or to challenge the state court's jurisdiction. Understanding the nuances of federal court jurisdiction over claims involving tribes and their enterprises is critical for avoiding state forums that may be hostile to tribal authority or interests.[4]

For a recent decision addressing federal court jurisdiction to challenge the jurisdiction of a state court to decide a question of federal Indian law, *see Ute Indian Tribe v. Lawrence,* 875 F.3d 539, 543 (10th Cir. 2017). For a discussion of the law governing federal and state court jurisdiction over questions of federal Indian law in general, *see* Kaighn Smith, Jr., *Federal Courts, State Power, and Indian Tribes: Confronting the Well–Pleaded Complaint Rule,* 35 N.M. L. REV. 1 (2005).

[4] This is not to say that state courts are always inhospitable to the interests of Indian tribes or that federal court judges are always more sympathetic to principles of tribal sovereignty. *Compare, e.g., Brackeen v. Zinke,* 2018 WL 4927908 (N.D. Tex. Oct. 4, 2018) *with Teague v. Bad River Band of Lake Superior Tribe of Chippewa Indians,* 665 N.W.2d 899 (2003) (construing state statute and holding that state court should transfer jurisdiction over case to tribal court).

III. Educating the Court

Federal Indian law is novel to most judges. And it is "anomalous." *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 142 (1980); *see also United States v. Lara,* 541 U.S. 193, 219 (2004) ("Federal Indian policy is, to say the least, schizophrenic.") Thus, in most Indian law cases on appeal, it is critical to educate the court about the fundamental principles of federal Indian law that are at play and the rationale for those rules. That may require setting out the particular history of a given tribe and/or a description of the "era" of federal Indian policy that may be relevant to the controversy.

- Attached is a brief recently filed on behalf of the Penobscot Nation in the U.S. District Court for the District of Maine, which seeks to lay out a significant amount of history and context in limited pages to frame the important federal Indian law issues at stake. (The discussion derives from an earlier appellate brief, but is even more crystallized down.)

IV. Practical Resources

- Attached are the cover pages and contents of two books written by the late Frank M. Coffin of the U.S. Court of Appeals for the First Circuit that contain excellent guidance for appellate practice in general.

- Attached are my notes on "10 tips" that Judge Kermit Lipez of the U.S. Court of Appeals gave to a group of First Circuit practitioners.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

STATE OF MAINE, *et al.*

Plaintiffs,

v.

ANDREW WHEELER, Acting Administrator, United States Environmental Protection Agency, *et al*.

Defendants and

PENOBSCOT NATION, *et al.*

Defendants-Intervenors.

Civil Action No. 1:14-cv-264 JDL

MOTION OF THE PENOBSCOT NATION TO FILE COUNTERCLAIM

Intervenor, the Penobscot Nation (the "Tribe" or the "Nation"), hereby moves to amend its Answer to add a counterclaim against the Plaintiffs (collectively "Maine"). This counterclaim for declaratory and injunctive relief is the mirror image of Count II of Maine's Second Amended Complaint ("Maine's Count II"). It involves the establishment of a matter of critical importance to the Penobscot Nation: that the right of the Tribe to take fish for sustenance within its historic treaty reservation, as enshrined in the Maine Act to Implement the Indian Land Claims Settlement, 30 M.R.S.A. §§ 6201 *et. seq.* ("MIA"), ratified and rendered effective by the Maine Indian Claims Settlement Act of 1980, 25 U.S.C. §§ 1721 *et. seq.* ("MICSA"), is an expressly retained sovereign right, protected under principles of federal Indian law as a treaty right. The Nation's counterclaim would establish that the Settlement Acts require Maine to recognize and protect this unique Penobscot sustenance fishing right within its reservation waters of the Main

Stem of the Penobscot River in any official action Maine takes to set water quality standards there. The Tribe's proposed Amended Answer with Counterclaim is attached hereto as Exh. A.

As set forth more fully below, the Penobscot Nation meets the liberal standard of FED. R. CIV. P. 15(a)(2) for the amendment of pleadings. The Nation must assert this counterclaim to protect its critical interests as a unique riverine Indian tribe that has relied upon the Penobscot River for sustenance fishing since time immemorial, a practice that is essential to its cultural survival. Circumstances have only recently unfolded that necessitate the bringing of this claim: (a) the prospect of Maine and EPA settling the issue without substantive involvement by the Tribe and (b) more recently, the prospect of EPA, under the Trump Administration, tacitly agreeing with Maine and reversing a course protective of these critical Penobscot interests.

MEMORANDUM OF LAW

BACKGROUND

I. The Penobscot Nation And Its Aboriginal Homeland On The Penobscot River

In settling the Tribe's historic land claims against the State of Maine pursuant to MICSA, Congress explained that "[t]he aboriginal territory of the Penobscot Nation is centered on the Penobscot River" and that is "riverine in [its] land-ownership orientation." S. REP. NO. 96-957 at 11 (1980) ("S. REP."); H.R. REP. NO. 96-1353 at 11 (1980) ("H.R. REP."), *reprinted in* 1980 U.S.C.C.A.N. 3786, 3787. Congress further confirmed the right of Penobscot tribal members take fish "for their individual sustenance," within the Tribe's reservation. 30 M.R.S.A. § 6207(4), *ratified by* 25 U.S.C. § 1721(b).

The Penobscots have relied upon the resources of the Penobscot River for their physical and cultural survival from time immemorial; their sustenance practices in the River are their cultural practices. *See* Declaration of Harald E. Prins, Exh. B ("Prins Decl."); Declaration of Lorraine Dana, Exh. C ("L. Dana Decl.") at 1-3; Declaration of Christopher B. Francis, Exh. D

("C. Francis Decl.") at 1-2; Declaration of Barry Dana, Exh. E ("B. Dana Decl.") at 1. The fish that Penobscots eat are in the waters of the Penobscot River. L. Dana Decl. at 1; C. Francis Decl. at 1-2; B. Dana Decl. at 1. There are no waters on the surfaces of the islands to support fish, eel, and other Penobscot sustenance resources. B. Dana Decl. at 2 ¶12.

The Tribe's river-based subsistence fishing practices are imbedded in the Tribe's language, culture, traditions, and belief-systems, including its creation legends. Exhibit 2 to Prins Decl. at 3. Penobscot family names, *ntútem* (or "totems" in English), reflect the fish in the River: for example, *Neptune* (eel); *Sockalexis* (sturgeon), *Penewit* (yellow perch). Prins Decl. ¶4. *See also id.* (referring to Penobscot place names and fishing sites). These practices are not mere romantic notions of the distant past; they remain fundamental to who the Penobscots are. *See* C. Francis Decl. at 1-2; B. Dana Decl. ¶11. *See also* S.REP., 17; H.R.REP., 17 (the Settlement Act will not "lead to acculturation" but will protect the Nation's "cultural integrity"). Well into the 1990s, when understandings of contaminants suppressed their consumption, Penobscot families relied upon fish, eel, and other food sources from the River for up to four meals per week to the tune of two to three pounds per meal. C. Francis Decl. at ¶¶ 5-9; B. Dana Decl. ¶¶ 6-9.

II. Penobscot Treaties Ceding Upland Lands On Either Side of The River

On the eve of the Revolutionary War in 1775, the Provincial Congress in Boston resolved to protect the Tribe's aboriginal territory "beginning at the head of the tide of the Penobscot river and extending six miles on each side of said river" in exchange for the Tribe's pledge to support the Americans' war effort. WATERTOWN RESOLVE (1775), Exh. F. Nevertheless, "[t]he Penobscot Nation lost the bulk of its aboriginal territory in treaties [with Massachusetts] consummated in 1796 and 1818." H.R. REP., 12. In the 1796 treaty, the Penobscot Nation ceded its lands "on both sides of the River Penobscot" from the head of the tides "at Nichol's rock, so

called, and extending up the said River thirty miles." TREATY (1796), Exh. G. *See also* Prins Decl. ¶4(d) (describing Nichol's rock). In the 1818 treaty, the Nation ceded essentially the rest of its lands "on both sides of the River" from above the thirty mile stretch ceded in the 1796 treaty. TREATY (1818), Exh. H. In 1820, at the advent of Maine's statehood, Maine entered into a treaty with the Tribe to accede to its 1818 treaty cessions. TREATY (1820), Exh. I. The Penobscots' treaties ceded only uplands; they retained their use and occupation of the River to survive and they never intended otherwise. Prins Decl. ¶4(b); Exhibit 2 to Prins Decl. at 5-9.

III. The Nation's Land Claims, The Land Claims Settlement, And Fishing Rights

In *Joint Tribal Council v. Morton,* 388 F. Supp. 649 (D. Me. 1975), Judge Gignoux ordered the United States, as trustee for the Penobscot Nation and the Passamaquoddy Tribe, to commence a lawsuit challenging the validity of the Tribe's treaty cessions under the Indian Nonintercourse Act because the 1796 and 1818 treaties with Massachusetts and 1820 treaty with Maine were not approved by the federal government. *See* S.REP., 12-13.

Court decisions in 1979 confirming the application of federal Indian law to the Penobscot Nation and the Passamaquoddy Tribe and their treaty reservations drove Maine to "reevaluate the desirability of settlement." Jt. Legal Supp. Exh. 15 at 413-418. Congress explained that these decisions, one of which was *Bottomly v. Passamaquoddy Tribe,* 599 F.2d 1061 (1st Cir. 1979) (Coffin, C. J.), established that the Tribe is "entitled to protection under federal Indian common law doctrines," and "possesses inherent sovereignty to the same extent as other tribes in the United States." S. REP., 13-14 (describing decisions); H.R. REP., 12 (same).

The resulting settlement was a tripartite agreement between the Penobscot Nation, Maine, and the United States. The Nation and the State agreed to jurisdictional terms. *See* MIA § 6202. Congress then ratified MIA and rendered it effective and extinguished the land claims. *See* MICSA §§1721-32. Maine provided no monetary consideration for the settlement, but

characterized as worthy consideration a concession that the Tribe would retain authority to exercise sustenance fishing under principles of federal Indian law. *See, e.g.,* Jt. Legal Supp. Exh. 15 at 417-418, 425, 436; Jt. Legal Supp. Exh. 39 at 1110; Exh. 15 at 417-418.

Addressing concerns about the settlement's impact on tribal fishing rights, Congress explained that those rights were "examples of expressly retained sovereign activities," protected under federal Indian common law doctrines in accord with *Bottomly.* S. REP., 13-17; H.R. REP., 13-17. Congress also addressed fears that the settlement "will lead to acculturation of the Maine Indians," promising that "[n]othing in the settlement provides for acculturation"; rather it "offer[ed] protection against" any disturbance of the Tribe's "cultural integrity" by confirming tribal self-governance. S. REP., 17; H.R. REP., 17. Congress then ratified the sustenance fishing provision quoted above. MIA §6207(4). *See* MICSA §1725 (b)(1) (ratifying MIA).

A LEXICON OF ORAL ADVOCACY

Frank M. Coffin

NITA

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A remark, having nothing to do with the law or facts of a case but most often with the niceness or naughtiness of a party or a counsel, calculated to make points with the judge.

ARROGANCE 20
An inescapable odor permeating the argument of the lawyer who senses the superiority of his own mind to the more modest attainments of the judges.

BACKBENCHER 22
An advocate whose remarks at the lectern are the least important part of his argument. His preferred locus is at the counsel table; his preferred time is when his adversary is addressing the court; and his preferred languages are body English and pantomimicry.

BORE (monumental) 24
To be distinguished from "small bore," an advocate who is merely dull and tedious.

CANDOR 26
One of the most prized attributes of a good advocate, this virtue is usually described in absolute terms, i.e., either a lawyer is candid or he is not; or, candor requires one to level completely with the court.

So to describe this word is vastly to underestimate its complexity. Complexity is inherent, since candor describes a spokesman who always labors in a tension between duty to client and duty to court.

CHESHIRE CAT 31
The lawyer who so completely shares with the judges their vast knowledge of the law that he feels no compulsion to explain either the facts or the law, preferring to smile instead.

CHUTZPAH 32
The quality of testing judges' willingness to suspend their disbelief. It is gall carried to a point of magnificent supererogation. (But, like almost any other vice, it has its place.)

CLIENT IN COURT 33
A device which, when calculated to generate sympathy, more often than not backfires.

CONFIDENCE 35
A quality which, however manifested by counsel, if it stems from hard analysis, stands a good chance of spreading its benign influence to the court.

CONTROL (and its loss) 39
The ability to give some direction to the discussion of issues. This could be subtitled control of time, of self, of court, or of argument.

CREDIBILITY (a misplaced argument) 48
This is an argument that the testimony of a key witness is so unbelievable that the verdict or judgment below must be reversed. While an obviously proper argument to make to the finder of fact, it is almost never justified at the appellate level.

DANCER 50
An advocate who believes that he can infuse strength into an otherwise flaccid case by substituting body dynamics for the spoken word.

DEMONSTRATIVE EVIDENCE 51
Visual aids to argument; devices suitable for a salesmen's meeting, but seldom for an appellate argument.

DILETTANTE 54
An advocate who, solely because of his family's position in a firm, inherited or married wealth, or past political prominence, has sufficient clientele to thrust him into an appellate court.

DISHRAG 55
An advocate whose smart texture of crisp linen, upon being dampened by bench inquiries, loses all stiffening and form.

EARNESTNESS (emotional over-involvement) 55
The characteristics of conduct reflecting an advocate's personal belief in the merits of his client's cause, emotional over-involvement being an exaggerated degree of earnestness.

EMPHASIS 59
The differentiation given words by one's voice and bearing, which is one of the justifications for oral presentations.

EXCELLENCE 60
Not a single quality but the impression resulting from the mix of qualities – all good – of an advocate.

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An advocate with far-flung reputation, perhaps deserved, in his field, but with no discernible aptitude for dealing effectively with an appellate court.

FADING FOLIAGE 64
The senior partner who has lingered too long.

THE GASCON 65
An advocate who, from overweening confidence in his case or from a

chronic suicidal complex, throws caution and diplomacy to the winds, draws his sword and takes on all judges at once.

HARE 67
An advocate who is well prepared and assumes that the court is as thoroughly conversant with all of the facts and law as he is. He therefore tries to cover as much ground as possible by (a) talking very rapidly, (b) making great leaps from issue to issue, or (c) doing both.

HOUSE COUNSEL (away from home) 68
A lawyer who serves as the permanent "inside" legal adviser to a corporation. Because of the high fees charged by the major law firms, many corporations are said to be utilizing house counsel more and more. But it is a rare "inside" adviser who is also a good "outside" advocate.

JUDGES 69
Lawyers who were once advocates, whose job now is to decide among advocates, and who, in the process of deciding, will advocate their positions to their colleagues. Judges have the power to make oral presentations a shambles or a stimulating aid to expeditious and sound decisions.

JURY LAWYER (without a jury) 74
A lawyer who makes the mistake of thinking that three or more appellate judges sitting behind a bench respond to the same approaches as do six to twelve jurors sitting in a jury box.

LISTENING 76
A rare quality in an advocate that, when a judge asks him a question, causes him to suspend his own thinking, concentrate on what the judge is saying, and try to see what bothers him.

MARSHALLING 79
The finale and capstone of an effective oral presentation in which the advocate brings together in succinct, highlighted form all of the facts

on all of the legal issues, showing what may previously have been hidden or understressed.

MASTERY OF THE FIELD 80
The advocate whose knowledge of the relevant law is so broad and deep that he knows how it developed, how the authorities differ and which ones seem sounder and why, and where in the overall legal landscape this case belongs.

FREE FLOATING MINE 81
An advocate who has enough presence, position or connections to attract clients but who lacks the most essential qualifications of one who would charge a fee for his service.

MOOT COURT HALLMARKS 83
Those slight but discernible signs of an advocate that indicate that his only prior exposure to appellate advocacy has been in the hot-house atmosphere of a law school moot court experience.

MYOPIA 84
In appellate advocacy the condition in which counsel is placed because he has never taken the trouble to see beyond his nose, i.e., how his case might appear to those further removed from it than he.

SENSE OF PRIORITY 87
The quality of an advocate who adapts Darwin to appellate presentations by operating on the principle that the processes of artificial selection govern the survival of one's theses.

PRO SE 90
A vestigial survival of the Jacksonian principle that any man can perform any public function; the individual who represents himself and does without professional counsel.

RAVELING 92
The process that even the well-prepared advocate fears most: when

in the course of an unhindered and efficient weaving of the fabric of argument a single question leads to an answer that gives the court some difficulty, that leads . . . to the utter entanglement of all the strands of what had been a well-ordered argument.

REPUTATION 95
An advocate's invisible garment, stitched together in his numerous prior appearances before the court, which proclaims him to be either something of a slicker or a straight shooter.

SCRIBBLER 97
An advocate who, while sitting at counsel table listening to his adversary's presentation, furiously covers long sheets of yellow foolscap with emphatic jottings.

TORTOISE 98
The advocate who makes an unimpressive start but plods along and finishes first.

TRIBUNE (impatient) 99
The advocate, often but not always young, who, representing people with an excellent cause, has his eye on the goal and not on the ball. He therefore is likely to drop the latter.

UNCTUOUSNESS 102
The habit of some advocates, who have a sufficiently low opinion of judges to think that they welcome expressions of extreme servility, deference, and laudation.

WORDS (banal and bizarre) 103
The major means by which the advocate conveys his thoughts during oral presentation. Notwithstanding their obvious essentiality to the work of an appellate advocate, they are misused in all sorts of ways, from the prosaic to the strange and wonderful, to the lasting delight of the professional listeners, the judges.

X: The Unknown Quantity 105

ON APPEAL

Courts, Lawyering, and Judging

FRANK M. COFFIN
Illustrations by Douglas M. Coffin

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FIRST CIRCUIT TIPS

1. Never forgo a reply brief. (Odd that anyone would, but apparently it happens all the time.)

2. Never forgo reserving time for rebuttal at oral argument. (Again, odd that anyone would.) You may not need it, but if all you do is stand up and say "Unless the Court has further questions, I see no need to spend any further time..." you've done your client a service by not leaving the last word to your adversary.

3. When the oral argument list comes out, if you think the time allotted for oral argument is insufficient, you can always request more time. You may not get it, but don't hesitate to ask.

4. When the red light goes on, never interrupt your flow. Always finish your sentence, even up to 2 more. Never stop in the middle of a thought and say "Well, I can see my time is up." That leaves the impression you're relieved to be done.

5. Never posture at counsel table. You're on display and the Judges can't stand rolling eyes, shaking heads or other gestures of exasperation.

6. If you don't understand a question, don't answer it until you do. Take the blame for being dense and ask the Judge if she would kindly ask it again.

7. If a Judge tells you that the argument you think is your strongest is of no importance and to move on, respectfully stand your ground and argue your point. Other Judges on the panel may strongly disagree with that Judge's view on the issue and (although Lipez didn't come out and say this) consider it to be unwarranted bullying.

8. If a point came up at oral argument that was not adequately briefed, don't hesitate to ask for supplemental briefing.

9. If you are arguing a point on rebuttal, and you feel like you need a bit more time, don't hesitate to ask right there in the moment. Some presiding Judges may not give you additional time, but others will.

10. Never ask a question of the Court! One of the attendees asked if it might be appropriate to ask the panel what issue is most bothersome. Duh...