THE COURT
Legacy

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Indian Tribal Courts Today: Cautious Opportunity

By Bill Ibelle

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When California movie producer Debra Bassett agreed to make a documentary for the Mashantucket Pequot tribe in Connecticut, it never occurred to her that she was dealing with a sovereign nation.

But when the deal went sour and she sued the tribe for allegedly stealing her script, she got a heavy dose of reality... a motion to dismiss the case based on sovereign immunity.

The Pequots raised the immunity issue to bolster their motion to move Bassett's suit into their own tribal court. And if recent federal court decisions are any indication, that may be where the case is finally heard.

Making History

Indian law – once confined primarily to internal conflicts, fishing rights and treaty disputes – has emerged as a high-stakes practice area that affects Indians and non-Indians alike, thousands of miles beyond the reservation.

"There is greater economic activity, so these tribal courts are no longer located at the ends of the earth," says Seth Lesser, a New York City lawyer with several high-stakes injury suits pending in Navajo court in New Mexico.

In the last 20 years, the number of tribal courts has increased fourfold, now over 350 nationwide. This growth coincides with a new assertiveness on the part of tribal courts and a host of federal court decisions to back up their jurisdictional claims.

The new activism has been fueled, in part, by a sudden flood of money into tribes across the nation following a 1988 law that legalized gambling on reservations. This sudden wealth has made it possible for tribes to become a lobbying force in Washington and major players in the world of campaign finance. But most importantly for lawyers, it has enabled them to afford top-notch legal talent.

In addition, individual tribal members have become more aware of their legal rights.

"For the first time, we're seeing Native Americans recognize that the law can be used to obtain redress," says Lesser. "Native Americans are waking up and not just taking what's thrown at them."

The trend presents a host of opportunities for lawyers to extend their practices into Indian affairs. Whether you handle contracts, estate planning, real estate development, personal injury – from routine workers' compensation cases to high-stakes toxic torts – there may be work for you in Indian Country.

Casinos Bring New Wealth

There are currently more than 550 federally recognized Indian tribes in the United States. About a third of them run gambling operations which, taken together, comprise a $6 billion industry.

Yet in spite of the staggering numbers, gambling profits are spread unequally among the nation's tribes. In fact, 40 percent of all gambling profits go to just eight of the approximately 200 tribes with gambling operations, according to the federal General Accounting Office. Another 100 or so tribes turn a healthy profit, and the rest barely break even. About 10 percent of the Indian gambling operations actually lose money.

As a result, poverty still dominates much Indian Country, which still maintains a 30-percent unemployment rate where a third of those who do have jobs earn less than $10,000, according to the Bureau of Indian Affairs.

But for more than a hundred tribes, gambling has brought new wealth to the reservation – and for a few, like the Mashantucket Pequots in Connecticut, the influx of new money has been spectacular. As the second largest casino in the world (the largest is in Malaysia), the tribe's Foxwoods casino makes more than $1 billion a year and pulls in more than 55,000 people a day.

The Pequots, who were a poverty-stricken tribe just 10 years ago, are now the state's largest single taxpayer, and, with 11,000 employees, have become the region's largest employer. The tribe recently made the biggest single donation in the history of the Smithsonian Institution.

And it's not just the few fabulously wealthy tribes that are having an impact. In 1971, the Potawatomi tribe in Shawnee, Oklahoma, had $550 in the bank. Today they own that bank – along with a golf course, a bowling alley, a restaurant and a gaming center. The tribe, which now grosses $15 million annually, has plans to build a second golf course and possibly a theme park.

"I don't think there's any doubt that this is a growing practice area," says R. Brown Wallace, the Oklahoma City attorney who recently won the landmark Kiowa case in the U.S. Supreme Court (see below). "It's a growing practice area because tribes are going out and actively getting involved in a range of business ventures."

As tribes acquire wealth and assert their sovereignty, there is a parallel growth in opportunity for lawyers to deal with Indian-related issues in a myriad of practice areas:

Doing Business With the Tribes

As owners of a billion-dollar casino – which includes three hotels, 24 restaurants, 23 stores and a theater that has hosted the likes of Frank Sinatra and Luciano Pavarotti – the Pequots do business with vendors the length and breadth of the United States. The tribe also owns two hotels in nearby cities, several office buildings and a shipyard.

If Bassett's $500,000 movie contract is any indication, anyone who contemplates doing business with tribes would be well-advised to have a contract lawyer who is familiar with Indian law.

"When she negotiated that contract, she had a lawyer who was very knowledgeable about movie production and contract law – but he didn't know squat about sovereign immunity," says Bassett's new lawyer, Richard Goren of Framingham, Massachusetts "People who enter into contracts with the tribe aren't aware of the quirks of Indian law and often don't include language to protect themselves."

Although the opportunity is there, the tribe does not intend to use sovereign immunity to get the case thrown out altogether, according to the tribe's attorney, Elizabeth Conway. She says she raised immunity only to support a motion to transfer the case to tribal court under the principle of "exhaustion of tribal remedies."

"All we're saying is that they sued in the wrong court," says Conway.

Goren is fighting that motion, saying that the principal U.S. Supreme Court decision – Montana v. United States, 450 U.S. 544 (1981) – limits the jurisdiction of tribal courts to issues that threaten the political integrity, economic security or political independence of the tribe. Goren's motion is pending in federal court in Hartford, Connecticut.

If you think Bassett is an isolated case, you need look no further than last month's U.S. Supreme Court decision in Kiowa v. Manufacturing Industries (No. 96-1037; May 26, 1998).

In an attempt to create jobs and foster economic development, the Kiowa tribe of Oklahoma signed promissory notes to buy a struggling aircraft-repair company for more than $1.3 million. But when it came time to pay for the stock, the tribe reneged. The stockholders sued and the state court found for the plaintiffs. The Kiowas appealed and the case went all the way to the U.S. Supreme Court.

On May 26, the high court reversed, saying that sovereign immunity protects tribes from suit in commercial transactions with non-Indians both on and off the reservation.

"What this means is that tribes are, in fact, immune from suit unless the tribe specifically waives immunity," says Kiowa attorney R. Brown Wallace. "When you're dealing with a tribe, you have to make arrangements for remedy."

Wallace says Kiowa lends clarity to business dealings with tribes which, until now, had no clear precedent in the case law.

"This puts the business community on notice that they will need specialists in Indian law to help them negotiate their contracts," says Wallace.

This negotiation is rarely as simple as including a blanket waiver of sovereign immunity, says Wallace. Negotiations usually involve language that specifies the amount for which tribes can be held liable, how judgments can be collected, the types of disputes the waiver applies to and whether disputes will be heard in state, federal or tribal court.

"It can be complicated, but it is certainly possible to put together a transaction with an Indian tribe that's safe," says Wallace.

Needless to say, that requires lawyers who are conversant in Indian law. For example, many lawyers don't realize that any agreement that involves the use of tribal land must be approved by the Department of the Interior. Absent that approval, the contract is unenforceable.

"I would assume that when developers negotiate construction contracts involving millions of dollars, they hire lawyers who know Indian law," says Goren, the attorney in Bassett. "But what about the architects or small developers who are hired to handle some small project on the reservation? Or what about a convenience store operator who enters into a lease and builds a store with his life savings, then discovers that his lease is not enforceable because it was not approved by the Department of the Interior? These people might find themselves in big trouble if they don't get advice from someone familiar with the issues."

Brown says the vagaries of Indian law have convinced many businesses that dealing with tribes isn't worth the trouble. For example, many tribes are finding it difficult to get home mortgages because banks are fearful they will not be able to foreclose on the property if payments are not made. From 1992 to 1996, only 91 mortgages were issued nationwide to Indians living on a reservation, according to the General Accounting Office.

Recognizing that the threat of sovereign immunity could scare off businesses and patrons alike, the Pequot tribe passed two rules that waive immunity. The first, passed in 1992, waives immunity for all tort claims against the casino. The second, adopted in February 1997, waives immunity for all torts and contracts against the tribe itself

The waivers do, however, stipulate that these cases must be tried in the Pequot court.

To increase consumer confidence, the tribe has also incorporated all its off-reservation holdings – including two hotels, the shipyard and office buildings – as Connecticut corporations. This ensures that any disputes arising on those properties will be heard in state court.

But not all tribes have adopted these business-friendly provisions, and anyone doing business with them is well-advised to know the lay of the land before they sign on the dotted line.

THE COURT LEGACY

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"Sovereign immunity is alive and well here in Oklahoma," says Henry Ware, founder of Indian Country Lawyers, a husband-and-wife firm in Shawnee, Oklahoma.

"At least there's some kind of waiver in Connecticut," he says. "But there are no waivers here and no one prevails around here for any kind of tort damages. Nor have we been successful in any wrongful termination cases."

Suing Large Companies In Tribal Courts

Some lawyers have recognized the growing acceptance of tribal courts as an opportunity to bring large corporations to task in a friendly setting. As a result, a growing number of highstakes personal injury suits have been filed in Indian courts.

In 1996, John Hoyt won a $250 million verdict in Crow tribal court against the Burlington Northern Railroad. (Red Wolf v. Burlington Northern; 97 LWUSA 33; *Search words for LWUSA Archives: Red Wolf and Hoyt).* The case involved the death of two Crow women when a train speared their car, which had stalled at a rural railroad crossing on the tribe's Montana reservation. The case was tried before an all-Crow jury. Hoyt voluntarily reduced the verdict to $25 million, realizing the $250 million verdict could hurt his chances on appeal in federal court. But the verdict underscores that not all tribal courts are nightmares for plaintiffs' attorneys.

It appears that Red Wolf was at the beginning of a national trend.

In Oklahoma, Mark Hutton of Wichita, Kan., has sued the tobacco companies in tribal court on behalf of the Muscogee Creek Nation. He says nearly two dozen other tribes – including the Lower Brule and Crow Creek Sioux in South Dakota and the Crow of Montana – are considering similar suits in their own tribal courts.

In a similar vein, Seth Lesser of New York City has filed three uranium mining suits in the Navajo court in New Mexico. All three cases involve Navajo tribal members who allegedly were injured because the defendants abandoned the mines without proper clean-up. In two of the cases, the victims died of cancer, and in the third a baby was born with severe neurological defects after her mother drank water and bathed in the pools that formed in the abandoned mines.

Federal courts have affirmed the jurisdiction of the Navajo court in all three cases, and the Supreme Court has denied a writ of certiorari in one.

Although tribal laws generally mirror those of the state and federal systems, unique issues do arise from time to time. For example, Lesser is embroiled in a battle over whether communication with a medicine man is privileged. The debate centers on whether the plaintiff has to disclose how much money was paid to a medicine man to treat the victim's cancer. In Navajo culture, talking about a medicine man's magic can neutralize its power or even turn it against you, according to Lesser.

In spite of the exotic quality of this legal side show, Lesser says it's really no big deal.

"Obviously, I've never had to deal with a medicine man before, but it's not unlike physician confidentiality," he says. "The question is where does the privilege start and where does it stop?"

P.I. Cases Against the Tribe

More than 50,000 people visit the Foxwoods casino every day. That's 18 million people a year – more than visit all the major league baseball parks across the country each year.

With that many people visiting the reservation, there's bound to be a hefty number of personal injury cases. In fact, there were 864 injury claims and 942 property damage claims last year, according to tribal treasurer Pedro Johnson.

But Foxwoods is not the P.I. bonanza those numbers might imply. The reason is the tribe's toughest-in-the-nation damages cap. Pequot tribal law allows no punitive damages or loss of consortium claims, and it limits pain and suffering to 50 percent of the person's actual damages (medical bills and lost wages).

This policy is not popular with plaintiffs' lawyers.

"Our office is five minutes from the casino, so we get a lot of calls from injured patrons and employees," says Dennis Ferdon, partner in an eight-lawyer firm in Norwich, Conn. "I'd say we've had 200 calls from injured patrons since 1992, and we've accepted seven."

In contrast, Ferdon accepts about 40 percent of the personal injury cases outside the tribal court.

"In my opinion, it's pointless for a lawyer to do personal injury work in the tribal court," he says. Others agree.

"This cap has nothing to do with Indian culture," says John Strafaci, a general practitioner and former mayor of New London, Connecticut. "The system was established at the recommendation of their insurance carrier, and it's intended to dissuade claims."

The Connecticut Trial Lawyers Association has saved its most virulent criticism for the Pequot law that prohibits jury trials in civil cases. The association recently passed a resolution criticizing the policy for denying plaintiffs a basic right guaranteed by both the state and federal judicial systems, says association president John Reardon Jr. of New London.

"I refuse to go into that court because I don't believe the system is fair," says Reardon.

Although he's no fan of the damage caps, Strafaci supports the rule that requires all civil trials to be decided by a judge.

"The alternative is to have a jury trial with a jury that's likely to consist mainly of tribal members," he says. "I think that jury is a lot less likely to award damages than a tribal judge."

Pequot treasurer Pedro Johnson argues that the only reason plaintiffs' lawyers don't like the system is that it prevents them from winning "runaway verdicts" and collecting huge contingency fees. He maintains that the system provides fair and swift compensation to those injured on the reservation.

"The incentive of all parties is to settle rather than prolong and complicate the proceedings which, in our opinion, often works to the advantage of the attorney and the detriment of the injured party," he said during a recent Congressional hearing.

"The point of the system is to make the person whole – to restore them to where they were before the injury occurred," explains Pequot Chief Justice Jill Shibles. "We want to create certainty as to what the outcome will be so people won't go judge-shopping and lawyers won't be reaching for that pot of gold."

The Pequots believe their system may prove to be a prototype for tort reform throughout Indian Country and in courts around the nation.

Although the tribe believes their system is a positive evolution in the world of tort law, they acknowledge that the trial lawyers have raised a few valid concerns.

First, the cap makes it impossible to fairly compensate someone such as a person who lost a limb – who has lifelong pain and suffering but did not incur large medical bills.

"We clearly have to address that," admits tribal lawyer Patrice Kunesh, herself a Lakota Sioux. "Our judges would like the leeway to address catastrophic cases. The beauty of our system is we're always trying to improve it."

Second, linking compensation for suffering to lost wages "discriminates against wage earners," according to Goren, the attorney in the Bassett case.

To make his point, Goren describes a hypothetical situation in which a $20,000-a-year laborer and a $300,000-a-year lawyer receive identical injuries. Both have $100,000 in medical bills and are out of work for six months. Both receive the maximum compensation allowed for their injuries under the cap.

But the laborer gets $55,000 for his pain and suffering, while the lawyer gets $125,000. Same injures, same pain – but the lawyer's award is more than double that of the laborer.

"This cap says that if you're a $300,000-a-year lawyer, your pain is worth more. I don't get that," says Goren.

Kunesh says it would be inappropriate to respond to Goren since he is engaged in active litigation with the tribe.

A Surge in Bread-and-Butter Cases

Although personal injury law is a bust for lawyers in Pequot tribal court, other routine practice areas have proved fruitful:

Employment and Workers' Comp

With 11,000 employees at the tribe's around-the-clock casino operation, there has been a proportional surge in workers' comp and employment disputes. Since July 1, 1997, those disputes have been handled in the tribal system.

While Ferdon won't touch a tribal P.I. case, he has handled more than 50 workers' comp cases.

"We get more people calling from Foxwoods than any other company," he says. "After all, they are the biggest employer in

the region. And my experience in the tribal system has been fine. They basically adopted Connecticut workers' comp law as their own."

Family Law

"You have to be familiar with tribal court and how it works if you're going to have a family practice around here," says Robert Cary Jr., partner in a seven-lawyer firm that practices family law in New London, Connecticut.

In areas where tribes have come into new wealth, divorces have suddenly become high-stakes affairs. For example, Pequot tribal law deals with the casino proceeds allotted to each tribal member as an inheritance rather than as income.

"The money that comes into the marriage with the tribal member, goes out of the marriage with the tribal member," says Cary. "It's treated as an inheritance as if you were a member of the Rockefeller family."

Because there is suddenly much more money on the line, family law has become one of the most hotly contested areas of tribal law, with jurisdiction being the primary issue.

Indians in mixed-race marriages typically argue that their case should be heard in tribal court, while their spouses want the state to retain jurisdiction.

As a result of both the money and jurisdictional issues, prenuptial agreements are likely to become more important for Indians – especially those marrying non-Indians.

"I haven't had anyone approach me for a prenuptial but I would think that it would be a wise move," says Strafaci. "And to give solid advice, you will have to know how both state and tribal courts work."

With a high rate of custody and other family issues stemming from years of abject poverty, family law is a very active component of tribal courts throughout the country.

Criminal

Criminal law in tribal court is limited to petty crime, since the state retains jurisdictions over all felonies. For attorneys, the big advantage over state courts is speed.

"You don't waste a lot of time waiting for a judge," says Low, the Norwich general practitioner. "They get you in whenever you're assigned."

Neighboring Towns vs. Tribal Expansion

A handful of lawyers are also receiving a steady flow of work from towns that are battling tribal attempts to expand their reservations.

"This is definitely starting to become a bigger issue, especially in areas where tribes have successful gaming operations," says Don Baur, a partner at Perkins Coie in Washington, D.C.

For the last five years, Baur has spent a large chunk of his time working for four Connecticut towns in their battle to prevent the Pequot tribe from adding land to its reservation.

When the tribe received federal recognition in 1983, 2,200 acres were designated as potential reservation land, with about 800 acres of that parcel already owned by the tribe. Any land the tribe bought within those 2,200-acre boundaries would become tribal land, free of federal and state taxes as well as local zoning laws.

The arrangement worked well until the tribe hit the mother lode a with the opening of the Foxwoods casino in 1992. Suddenly the tribe was buying up land around the reservation and applying to the Department of the Interior to have that land added to the reservation. The tribe planned to use 247 acres across from the casino to enlarge the resort and another a 1,200-acre parcel that includes a lake to build a golf course.

The towns objected, not to the purchases, but to the "tribal lands" designation that would take the land off the tax rolls and exempt any development from local zoning and environmental review.

In June 1995, the firm obtained an injunction preventing the tribe from developing the land, and the case has remained in limbo ever since.

"This has been a huge project for us," says Baur. "We've donated about $500,000 of our time pro bono – that amounts to about half our time – because there was a limit to what the towns could afford."

But Baur doesn't regret a minute of the time he's spent on the case.

"This is a very interesting case for me," he says.

Working for the Tribe

Certainly the big money and the most reliable flow of business comes from the tribe itself There are several opportunities in this regard:

Defending

Although the tribe has a staff of in-house attorneys to handle its transactional work, litigation is handled by outside counsel.

"They're the biggest single client I have," says Edward Gasser, partner in a 14-lawyer insurance defense firm based in West Hartford, Conn. "I handle anywhere from 80 to 100 cases a year for the tribe."

At the tribe's principal law firm – Brown, Jacobson, Tillinghast, Lahan & King of Norwich, Conn. – Elizabeth Conway devotes 100 percent of her time to Indian law, while several other lawyers bill large chunks of their time to the tribe.

"The tribe is our firm's largest single client," says Jeffrey Godley, who estimates that 60 percent of his time is spent on Pequot cases. "It's a lot more lucrative for us and other firms that represent the tribe. But there aren't that many openings to do that."

Individual Members

Opportunity abounds for lawyers wherever there is new wealth – and you're not likely to find a group that went from poverty to fabulous wealth faster than the Mashantucket Pequots.

Although two law firms have a virtual lock on the tribe's legal work, individual tribal members have their own legal needs.

"You're not going to make a lot of money in tribal court, but if you can use that to draw the business of tribal members, that could be profitable," says Jeffrey Low, a member of a six-lawyer general practice firm in Norwich, Connecticut.

Whether your specialty is taxes, investment, estate planning, land acquisition and development or start-up businesses, the Pequots are leading the charge in southeastern Connecticut.

Through his routine work for the tribe, Strafaci has landed more lucrative work handling the estate planning and business development needs for about a dozen tribal members.

"I think this can be a profitable niche when you have tribal members that have enough money to require fairly sophisticated estate planing," he says.

Godley of Brown Jacobson says about 10 percent of his practice is devoted to representing tribal members.

"We do a lot of tax work for them and a lot of property acquisitions," he says. "There are only 500 members of the tribe, but they all need legal work."

Drzislav "Dado" Coric, an attorney with the region's largest law firm, landed work for several tribal members through his social contacts.

"I've known a lot of these people for years because I play basketball here on the reservation," he says. "Because of those contacts, I've represented several members in their outside business dealings.

"But this is not a particularly large tribe, so the opportunity is limited. It can be good work for the individual attorney, but the numbers are so small, it's never going to be a big practice area."

Working for the Court

Although opportunity is limited, Indian courts need judges and prosecutors. Timothy Cummings, a partner in a two-lawyer Norwich firm, spent four years as a part-time prosecutor for the Pequot tribe.

"I never did any prosecuting in my life," says Cummings. "I got a call one day from the tribal attorney, and he asked me if I was interested."

It proved to be a lucrative gig, paying $125 an hour and accounting for 25 percent of his practice. Cummings lost the position a year ago when the tribe decided to hire a full-time Native American prosecutor.

Thrill of A New Legal System

Some of the attraction of tribal court can't be measured in dollars and cents.

"I find it fascinating from an intellectual standpoint," says Strafaci, a former mayor of New London, Conn. "In a general practice like mine, things tend to get routine. Tribal work is exciting because it's an entirely new body of law that's still developing. There's an opportunity for every case to become a landmark. That makes life a lot more interesting."

One of Strafaci's routine employment cases resulted in a radical change in Pequot employment law and he's currently preparing a brief in another case that will challenge tribal jurisdiction in divorce cases.

Norwich general practitioner Deborah Benson recently cited Strafaci's employment in her own client's employment appeal. Like Strafaci, she enjoys the freshness of Indian law.

"When you do an employment appeal, the body of law is still small enough that you can read it all from start to finish," she says. "I find it intellectually interesting. It can get boring doing the same thing all the time. Tribal court presents different issues to think about."

On the opposite side of the issues, tribal defense counsel Edward Gasser also revels in the opportunity to be in on the formation of an entirely new legal system.

"This is a brand new legal system so I've been involved from day one in establishing the common law," says Gasser. "In the state courts the law is firmly established, and you spend most of your time researching and citing old cases. Here, we're doing it from the ground up."

Tribal Courts to Stay

"There has been a definite trend to broaden tribal jurisdiction," says Indian Law scholar Charles Wilkinson of the University of Colorado Law School. "We live in a nation with three sources of sovereignty – federal, state and tribal."

Although tribes won a huge victory in the Supreme Court's Kiowa decision, the success rate of tribes has slipped in recent years.

"In the 1990s, court decisions have been running heavily against tribes," says Wilkinson. "Prior to that the tribes had prevailed in most cases."

Even Kiowa, while clearly establishing tribal immunity from contract suits, was a mixed blessing for Native Americans. While ruling in favor of the tribe, the high court made it clear that it had serious doubts about the current scope of immunity — and virtually invited Congress to reexamine the issue.

"Nevertheless, the tribal immunity doctrine [was] developed almost by accident in early cases that assumed immunity without extensive reasoning," Justice Kennedy wrote for the majority. "The wisdom of perpetuating the doctrine may be doubted, but the Court chooses to adhere to its earlier decisions in deference to Congress."

These comments came at a time when the political climate in Congress had already shifted towards a more skeptical view of tribal sovereignty.

Led by Senator Slade Gorton (R-Washington), Congress has given serious consideration to a bill known as "The American Equal Justice Act," which would gut the principle of sovereign

immunity and move all contract and tort cases to the state and federal courts.

In spite of the shifting sentiments in both the legislative and judicial branches, Wilkinson does not see any significant erosion in tribal sovereignty or tribal court jurisdiction. Although the success rate of tribes in federal court has slipped numerically, the courts "continue to recognize expansive notions of tribal sovereignty," he says.

The same is true in Congress. Although Senator Gorton's bill received serious consideration, it was ultimately withdrawn due to insurmountable opposition in the Senate Indian Affairs Committee. Wilkinson credits the bill's failure to the increased political muscle of Native Americans.

"Congress hasn't been this hostile to Indian tribes since the early 1960s," he says. "Yet there have been no significant laws passed, even though this hostile attitude has existed for at least four years now. There has been a great amount of effort levied to limit the rights of Indians, and it hasn't happened."

Wilkinson says that he doesn't expect Congress to make any broad-scale changes to tribal autonomy in the foreseeable future.

"I believe that in a thousand years, tribal sovereignty will still be alive in this land," he says.

For lawyers, the continued prosperity of tribal courts may well prove to be good news.

"This is like a whole new practice area that has all the variety of a small-town situation," says Sam Deloria, director of the American Indian Law Center in Albuquerque, New Mexico. "It's a practice area that involves more than a million people and it's just being discovered."

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D. Submit a sound, progressive idea for the mutual community-lawyer-government good.

Making Legal History – The Execution of Anthony Chebatoris

By Aaron J. Veselenak

In 1846 Michigan outlawed capital punishment for murder, becoming the first jurisdiction in the English-speaking world to do so. Why then did a hanging take place in Milan on July 8, 1938?

Reprinted with permission: Michigan History Magazine

The scene that unfolded that fateful Wednesday morning, September 29, 1937, in the Chemical State Savings Bank in Midland, Michigan, had all the intensity, action and drama of a Hollywood gangster flick. The players, however, were not silver-screen bad-boys Jimmy Cagney, Humphrey Bogart or Edward G. Robinson.

At approximately 11:30 A.M. two gunmen entered through the front doors of Chemical State Bank. Twenty-eight-year-old Jack Gracy and thirty-seven-year-old Tony Chebatoris, both from Detroit, had extensive criminal records. They were intent on looting the weekly Dow Chemical Corporation payroll then being processed. Gracy wore a hat and overcoat, concealing a sawed-off shotgun. Chebatoris, wearing a hat and a short, blue denim jacket, was armed with a .38-caliber Smith & Wesson revolver.

Weeks before the planned heist, Gracy cased the bank. The job would be a cinch.

The two men, who had met in the state prison in Jackson serving sentences for previous crimes, drove north from Hamtramck in separate cars. One car was stolen; the other belonged to an acquaintance of both men. Gracy and Chebatoris met near Corunna. They abandoned the second car and drove together to Midland.

Entering Chemical State Bank, Gracy approached sixty-five-year-old bank president Clarence H. Macomber, who was standing up front talking to his twenty-two-year-old daughter Clair, a bank employee. He jabbed the gun barrel into the president's ribs. Instinctively, Macomber grabbed the gun. As the two men struggled, Chebatoris shot Macomber. Forty-five-year-old cashier Paul D. Bywater rushed to aid his boss. Chebatoris shot Bywater, a bullet tearing into his intestines. Realizing their plan had gone awry, the would-be robbers fled the bank.

Dentist Frank L. Hardy, whose second-floor office was in the mattress store next to the bank, heard the commotion. Grabbing a .35-caliber deer rifle kept oiled and loaded in his office for just such an event (bank robberies and holdups occurred regularly in America during the 1930s), Hardy thrust his rifle through the window screen and opened fire on Gracy and Chebatoris, who by then were racing down Benson Street in their getaway car. Chebatoris was at the wheel.

Hardy's first shot struck the car's fender; another went through a door; the third passed through the rear window, hitting Chebatoris in the left arm, causing him to lose control. The car

careened into a parked car on the other side of the street. The collision knocked Gracy out the passenger's-side door. A wounded Chebatoris, with rifle in hand, helped his fallen buddy up. Frantically, the men's eyes searched wildly for the source of the bullets. Spotting a uniformed man standing at the corner, Chebatoris shot from the hip, severely wounding fifty-five-year-old truck driver Henry J. Porter of Bay City. The bandits then intercepted a car driven by a woman with a baby. The woman fled in terror, carrying the child. Hardy shot again, trying to hit the gas tank. Gracy and Chebatoris fled from the car and continued on foot to a bridge spanning the Tittabawassee River. They attempted to hijack a Nehil Lumber Company truck, but as Gracy stood on the running board, Hardy, nearly 150 yards away, aimed and squeezed off another round. It was a direct hit. Sensational accounts of the day claimed the back of Gracy's head was blown off. He died instantly.

Chebatoris ran west along the Pere Marquette Railroad tracks attempting to pirate two more vehicles. He was apprehended a few blocks away by several townsmen and road construction workers as he sat exhausted in the second car. Midland County sheriff Ira M. Smith arrived on the scene and placed Chebatoris under arrest.

Federal Bureau of Investigation officers arrived at the scene shortly after. It was clear from the beginning that Chebatoris would be charged with a federal, not a state, offense. Chebatoris had violated the National Bank Robbery Act, passed in 1934 in response to the rash of bank robberies during the Great Depression. The feds had jurisdiction in any holdup of a bank that was a member of the Federal Deposit Insurance Corporation or Federal Reserve System. Chemical Bank belonged to both. The law also provided for the death penalty in the event an innocent person was killed. Immediately after the bungled heist, speculation arose that Chebatoris might be hanged should one of his victims die.

Upon learning of her son's death, Gracy's mother collapsed. She claimed he was a "good boy" and would never be involved in such an act. His record, though, suggested otherwise. As a juvenile Gracy was arrested for bicycle and auto thefts and escaped from the Boys' Industrial School in Lansing. In 1923 he was sent to the state prison for armed robbery. He was paroled in 1926 but returned after a second armed robbery. He also spent time at a branch prison in Marquette for planning an escape.

Chebatoris, a native of Poland and its own jail system, had spent fifteen of the previous seventeen years in prison. His troubles began in 1920. As a driver for the Packard Motor Car Company, he robbed a cashier on their way to the bank. He was sent to prison and then paroled in 1926. He returned to prison after a second robbery and remained there for repeated offenses that marked most of his life. At the time of his arrest in Midland, Chebatoris was wanted in Pennsylvania for bank robbery and felonious assault. He was also suspected of crimes in Kentucky.

Forty-eight-year-old Hardy attained hero status among townsfolk, law enforcement officials and the press for his quick action. It was a role he did not relish. "Don't make a hero out of me in this thing," he stated. "I like to hunt, and I like to play bridge. Today, I'd say I liked bridge better." The small-town dentist thought for a moment, then added with a twist of irony, "You know it's a funny thing, but that parked car the bandits ran into is owned by Violet Venner. Her father was the sheriff who got me to taking my gun to work."

Clarence Macomber was the most fortunate of the three gunshot victims. He suffered a mere flesh wound. Bywater and Porter were seriously hurt. Bywater recovered; Porter succumbed to his wounds on October 11 at Mercy Hospital in Bay City. With his death the charges of bark robbery and assault were changed to murder, setting the stage for an unusual string of events in Michigan history

U.S. District Attorney John C. Lehr planned to seek the death penalty. Porter's widow opposed the action and she appeared in U.S. District Court on October 19, while a grand jury deliberated whether to indict Chebatoris for murder. Wearing black, she was accompanied by her sister, Mrs. John Rosentreter. Rosentreter claimed her brother-in-law once wanted Chebatoris spared death in the event he died. Dr. H. B. McCrory, who had treated Porter, disagreed. He claimed that one of the last things Porter had said to him was, "It's too bad one of us [including Bywater] can't kick off so they can hang the dirty rat."

On Tuesday, October 26, Chebatoris was brought to trial in U.S. District Court in Bay City. Judge Arthur J. Tuttle presided. Tuttle, a distinguished-looking man of sixty-five, had twenty years' experience on the federal bench. A former U.S. congressman, prosecutor Lehr had been on the congressional committee that drafted the law under which the defendant was being tried. He was assisted by John W. Babcock. Dell H. Thompson, president of the Bay County Bar Association, and James K. Brooker were appointed to defend Chebatoris.

During the three-day trial the prosecution called thirty-four witnesses. The defense called none. The case against Tony Chebatoris was solid. The swarthy, brooding man never took the stand. If there was a gentle, remorseful side to Chebatoris, the jury of seven women and five men never saw it. He was even reluctant to discuss the case with his attorneys, maintaining a defiant attitude toward them as well. During the trial he told one of them, "I haven't a friend in the world. My wife has divorced me. I'd rather die than go back to prison."

While seeking the death penalty, Lehr made an impassioned statement to the jury, calling Chebatoris a "brutal, ruthless killer – a sly, sneaking human beast...This is no time for foolish sympathy. You have the responsibility of protecting innocent American citizens against bandits, gangsters and ruthless beasts." The defense countered that capital punishment was a relic of the Middle Ages and "fast losing favor.

On Thursday, October 28, the jury returned a guilty verdict and imposed the death penalty. The guilty vote was reached unanimously on the first ballot. It took until the seventh ballot to decide on the death penalty. According to Judge Tuttle, "It was absolutely just, as well as encouraging to the cause of justice and also a deterrent to the underworld. The verdict for a man who takes the life of another man could not have been just with any other penalty than death."

Chebatoris became the first person in the nation to be sentenced to death under the Bank Robbery Act. He was the first to face death for a crime committed in Michigan in nearly a hundred years and the first ever to be sentenced to death by a Michigan jury.

During the trial Chebatoris was held in the Saginaw County Jail. In the early morning hours of Friday, the condemned man, alone in his cell, attempted suicide, slashing his wrists and throat with a rusty razor blade. When guards rushed in to stop him, he fought for the blade. Finally disarmed, Chebatoris was taken to a Saginaw hospital for stitches. How he obtained the weapon is not known.

On November 30 Chebatoris was formally sentenced to death by Judge Tuttle. The execution date was set for July 8, 1938, allowing seven months for an appeal. Chebatoris was told by his lawyers at sentencing that he had neither the money nor grounds for an appeal, so one was never made. Tuttle also determined that the sentence be carried out within the walls of the Federal Detention Farm in Milan, Michigan, where Chebatoris was being held. This caused a stir. In 1846, during a lengthy revision of the state's entire penal code, Michigan became the first English-speaking government in the world to abolish capital punishment for murder.

The law convicting Chebatoris specified that states with death penalty statutes were to carry out the federal sentence within their boundaries. Technically, Michigan was a death-penalty state. The same revision of codes in 1846 that struck the death penalty for murder left death intact for treason. The death penalty for treason was later appealed but reenacted in 1931, during another revision of the state penal code. The obscure law had never been used, but Lehr made sure Tuttle was aware of the provision.

U.S. Marshal John J. Barc, in charge of the execution, obtained G. Phil Hanna, a sixty-four-year-old farmer from Epworth, Illinois, with seventy-one hangings to his credit, to conduct the hanging. Sheriff Chester A. Pyle of White County, Illinois, would assist.

Forty years earlier Hanna launched a personal crusade to make hangings painless after witnessing a botched one that subjected the condemned to a slow, tortuous strangling. Hanna professed, "It is not a nice thing to see a man die – or to have a part in executing him. My point is that if men are to be put to death, it should be done mercifully. I would rather supervise a hanging and have it done correctly than to attend to my farm chores and read that another hanging has been bungled by an inexperienced sheriff." Years earlier, he tested weights and distances to determine the proper distance a man should fall. He also commissioned a Missouri firm to make a special rope.

As the execution date neared, the Chebatoris case once again became big news. Midland County Sheriff Ira M. Smith was asked to spring the gallows' trap door. He agreed to the job, in part influenced by the 1935 murder of Midland County sheriff's deputy Earl Martindale. The murderer was "serving a life sentence," Smith said. "That amounts to about 12 years in Michigan. Then he'll be out again. I am glad the public will be assured that Chebatoris will never be freed again." He later added, "I think it is the wish of most of the people of Midland County that Chebatoris be out of the way permanently, and since they elected me sheriff of the county, I feel it is only a part of my duty to see that the death sentence is carried out."

On June 22, 1938, barely two weeks before the scheduled hanging, Michigan governor Frank Murphy asked President Franklin D. Roosevelt to move the execution to another state. Michigan's chief executive noted, "There hasn't been a hanging in Michigan for 108 years. If this one is carried out in Michigan, it will be like turning back the clock of civilization." Although sympathetic to the request, Roosevelt claimed the law was fairly clear and little could be done to prevent the hanging in Michigan. He referred the matter to U.S. Attorney General Homer Cummings.

The last execution in Michigan had taken place in Detroit on September 24, 1830, seven years before Michigan became a state. The hanging, just outside the local jail, was quite a spectacle. The condemned was innkeeper Stephen Simmons, a large man found guilty of beating his wife to death in a drunken rage. Bleachers were built to accommodate the large, festive group of spectators gathered around the gallows. A band played. However, before the trap was sprung, Simmons gave a rousing speech before a hushed crowd. He pleaded for mercy and condemned alcohol. The repentant man ended by singing a hymn. The crowd's emotions were considerably stirred and after the hanging they tore down the gallows. The event had a lasting impact on Michigan.

Cummings requested that Judge Tuttle rule on Murphy's request. On Thursday, July 7, the day before the execution, Tuttle declared:

An able and fearless United States attorney fairly presented this case to a qualified jury of five men and seven women, all good citizens of the state of Michigan. On October 28, 1937, that jury had the courage and wisdom to return the just verdict which directed that Chebatoris be punished by death. That just verdict having been returned, the law was mandatory in three respects, namely that the penalty should be death, that it should be by hanging, and that it should be within the state of Michigan. These last two requirements resulted from the fact that Michigan has one statute providing the death penalty by hanging. If the sentence had been different in any one of those three respects, it would have been unlawful.

I have neither the power nor the inclination to change the sentence. If I did have the power to do so, I think it would be unfair to suggest that the people of a neighboring state are

less humane than are the people of our own state of Michigan. This federal court is enforcing a federal law in Michigan for an offense against the United States, committed in Michigan.

Governor Murphy was outraged and declared:

I deplore the fact that this execution is taking place within our state, where for more than a century there hasn't been a legal execution. It has always seemed to me that Michigan could take pride in being the first commonwealth on this earth to abolish capital punishment. I don't think it against the interests of the people of this state to oppose its revival by having the federal government come in here, erect a scaffold and hang a man by else neck until he is dead…I think the federal government should have arranged for the execution elsewhere – if it was to take place anywhere."

Murphy's comments led a reporter to ask if this wasn't like asking a neighbor to chloroform Murphy's sick dog in the neighbor's back yard. Murphy retorted, "If the neighbor was in the habit of chloroforming dogs in his backyard, one more or less probably wouldn't disturb him."

Murphy was correct in that regard. The state of Illinois had offered one of its electric chairs to carry out the execution. Frank Sain, warden of Chicago's notorious Cook County Jail, claimed, "Our chair is ready for your use any time. We'll make no charge of course. Always glad to oblige a neighbor."

Michigan's rebellious chief executive ended the interview with a prophecy, "I always have been, and always will be, against capital punishment. I think the time is not far distant when it will be prohibited in every state in the union." A few years earlier, as governor general of the Philippines, Murphy commuted the death sentences of three men to life imprisonment.

Chebatoris was oblivious to the political maneuverings before his scheduled execution and remained indifferent and hostile. An atheist, he turned away the prison chaplain the day before his execution, declaring, "You can't do anything for me." During his last night, Chebatoris was visited by his former wife, daughter and her baby, son-in-law, sister and two brothers. He ate his last meal heartily after rejecting the customary special one. Conscientious of socialist doctrine from his extensive readings in prison, Chebatoris declared, "I'll eat what the other fellows eat."

Shortly after 5:00 A.M. on Friday, July 8, 1938, Anthony Chebatoris arrived at the gallows, accompanied by guards and priest Leo Laige of Ypsilanti. Twenty-three people were present, including police commissioner Henrich A. Pickert of Detroit, Wayne County sheriff Thomas C. Wilcox, U.S. Marshal John J. Barc, warden John J. Ryan, five deputy marshals, three physicians and three reporters. Dr. Hardy declined an offer to attend. Chebatoris ascended the thirteen steps to the eighteen-foot-tall gallows' platform ten feet above the ground. He smiled – some said it was a sneer – at Phil Hanna and asked, "Are you Mr. Hanna?"

"I am."

"Then I know it will be a good job."

Guards strapped Chebatoris's legs and arms as he stood over the trap. At 5:07 A.M. a black hood was placed over his head and the noose fastened in place. At 5:08 A.M. Hanna gave the command. At 5:21 A.M. Chebatoris was officially pronounced dead. "It was a dignified execution, properly carried out," proclaimed Hanna. Governor Murphy disagreed, calling it "a blot on Michigan's civilized record."

The press never learned that three hours before the execution, warden John Ryan made a frantic phone call to the home of James V. Bennet, director of the United States Bureau of Prisons. Hanna and three friends had arrived drunk, hardly able to walk. He then threatened to abandon his duty and pack up his equipment if his friends were not allowed to witness the execution. Bennet reminded Ryan that no one but official witnesses were allowed to view the execution. Ryan tried to reason with the bellicose man but to no avail. Bennet warned Ryan that if the matter could not be resolved, he personally would have to conduct the hanging according to regulations. Ryan objected: "No, sir, I'm against the whole business anyway. We haven't had a hanging here in the state in a hundred years, and the whole institution's on edge. You and the attorney general can have this job right now."

The distressed warden, however, came up with a plan. Believing the hangman was too inebriated to know if his friends would be in the darkened execution chamber, Ryan told Hanna they would be allowed to witness from the back of the room. Satisfied, Hanna agreed to carry out the execution. Afterward, when he asked his pals what they thought of his job, the men complained they had been prevented from watching. Irate, Hanna berated the warden. Ryan promptly threw the men out the prison doors.

Anthony Chebatoris was one of thirty-two men and two women executed in the twentieth century by the U.S. government. Fifteen were electrocuted, twelve were hanged and seven were gassed.The most famous were Julius and Ethel Rosenberg who were electrocuted at New York's Sing Sing Prison, on June 19, 1953, for conspiring to commit espionage. James Dalhover, also imprisoned in Milan with Chebatoris, was electrocuted in Indiana on November 18, 1938. The last federal execution was at Iowa State Penitentiary on March 3, 1963, when Victor Feguer was hanged for kidnapping.

Currently, there are eighteen men under sentence of death by the federal government. All are there for murder, most in connection with the drug trade. Oklahoma City bomber Timothy McVeigh is the best known. Over four hundred fifty inmates have been executed by state governments since the U.S. Supreme Court's 1976 *Gregg v. Georgia* decision reinstated capital punishment.

Michigan is one of only twelve states without the death penalty.

Aaron Voselenak, who lives in Rogers City, is a part-time political science and history instructor at Alpena Community College.

Hugh Munce – Editorial Manager

U.S. Court History Group Picks Editorial Manager

The Historical Society of the U.S. District Court has retained Hugh Munce as editor of the group's newsletter and administrator for other expanded functions planned.

History of the federal court trials, functions and personnel are enhanced by the Society, which works closely with the prestigious Federal Bar Association.

The former editor of the Detroit Legal News, retired the past six years, still writes a popular local column and is active in legal areas.

He served over five years in the U.S. Marine Corps, some in the military government in Japan. After four major combat operations, he emerged as captain. He worked in major advertising agencies on General Motors and Ford programs, much in television/radio production and was an officer in the National Academy of Television Arts & Sciences.

A contributor to Cranbrook's St. Dunstan Players, Detroit's Players and the Fine Arts Society, he worked in area theatres often.

He contributed heavily to the Supreme Court's rules of court and attorney videotaping, holding many honors in mediation/arbitration, law firm and personnel support.

New Federal Court Affiliation of FBA Historical Society

The Federal Bar Association's Eastern District of Michigan Chapter and the Historical Society For The United States District Court For The Eastern District Of Michigan are now working together to advance common interests. Missions of both organizations: added interest in the federal district court; presenting events relating to U.S. courts, with overlap of both memberships.

The Historical Society, founded in 1992, preserves the history of the federal district court and personnel associated with it. Activities include: an oral history program that collects and preserves the reminiscences of retired or senior judges and court officials; its newsletter, published three times each year, with articles on interesting historical topics; and its annual meeting, which has featured distinguished speakers such as Gerald Gunther and John Hope Franklin.

As part of this new affiliation, the FBA and the Historical Society will hold a joint luncheon meeting each year featuring a speaker on a historical topic of interest to respective members. In addition, you can now join the Historical Society when you renew your membership in the FBA. Other joint activities are planned.

The FBA and the Historical Society believe the new affiliation will complement each other's goals and activities and will enhance advantages of membership in each organization.

YOU are the future
of the USDC-EDM
HISTORICAL SOCIETY

Membership Application

Annual membership fees:

☐ Student *(Must be registered at an educational institution)*	$ 15.00
☐ Associate	$ 25.00
☐ Member	$ 50.00
☐ Contributing Member	$100.00
☐ Sustaining Member	$250.00
☐ Patron	$500.00 *or more*

Please make checks payable to:

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Membership contributions to the Society are tax deductible within the limits of the law.

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DAY EVENING

This is a gift membership from:

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Questionnaire

We would like to know about your interests and skills. Please fill in this questionnaire and mail it with your membership fee.

Name: _____

Special interests in the field of legal history:

_____

_____

Suggestions for programs or projects:

_____

_____

_____

Indicate interest in Society's activities:

- ☐ Writing articles for the Society newsletter
- ☐ Layout and production of the newsletter
- ☐ Conference planning
- ☐ Oral history
- ☐ Research in special topics in legal history
- ☐ Fund development for the Society
- ☐ Membership recruitment
- ☐ Archival preservation
- ☐ Exhibit preparation
- ☐ Educational programs
- ☐ Other *(please describe)*: _____

_____

This Form May Be Duplicated And Submitted With Your Membership Fee

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