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Tribal Courts and State Courts:

From Conflicts to Common Ground

H. Ted Rubin

Last summer, nearly 250 people gathered in Seattle, Wash., for a national conference, "Civil Jurisdiction of Tribal and State Courts: From Conflict to Common Ground." The participants represented 22 states and Canada and included state chief justices; state court justices; tribal court justices; state, tribal, and federal government officials; and members of other organizations interested in improving intergovernmental relationships. The conference capped a 30-month project to improve state-tribal court relations, which was conducted by the National Center for State Courts and funded by the State Justice Institute. The goal of the conference was to share

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information on the nature of state-tribal conflicts, provide solutions that have worked in other states, and let participants draft plans to improve state-tribal court relations in their states. This article presents the content, process, and results of that conference.

The nature of state court-tribal court relationships

Several speakers emphasized the need for state courts and tribal courts to find common ground as they begin to improve their relationships, including Chief Justice Tom Tso, of the Navajo Nation Judiciary; Chief Justice Ralph J. Erickstad, of the Supreme Court of North Dakota; and Judge Roger Wollman, of the U.S. Circuit Court of Appeal for the Eighth Circuit. They cited the critical importance of the jurisdictional issue and the need to select the correct forum before initiating suit. Other speakers described how cooperation, communication, and comity, which became known at the conference as "the three C's," can forstall the need for suit or simplify jurisdictional issues when suit is necessary. One state appellate judge added a fourth "C," common sense, advising practical solutions to what could become very complicated problems.

Tribal/state relationships often lack harmony. Some of this may be because people who are not Native Americans don't understand the precept of tribal sovereignty, the independence of tribal governments, and their lawful ability to make and enforce their own laws. Tribal assertion of treaty rights may trigger hostility, as was the case in Wisconsin several years ago, when non-Indians were blocked from fishing in certain waters protected for the tribe by treaty. Others may be critical of reservation life or aspects of it that often are associated with a culture of poverty. Some think that Indians should give up the reservation, move into cities, and assimilate more or less like everyone else—a defunct 1950s federal policy that did not earn high marks.

The conference's keynote speaker, Judge Monroe Gunn McKay, of the U.S. Court of Appeals for the Tenth Circuit, described "cultural chauvinism" as the worst obstacle to tribal-state relations. He indicated that state courts and judges fall short by many standards, while tribal courts, despite their lack of resources, are capable of very farsighted decisions. Indian tribes today, he said, have four primary assets: water, minerals, land, and territorial government. He urged that the federal government honor its

treaties with Indians as part of its own self-interest and that Indian tribes adhere to their own self-interest based on these assets.

U.S. Senator Daniel Inouye, of Hawaii, another featured speaker, focused on U.S. Senate acceptance of tribal sovereignty in the form of an amendment to the crime bill that would permit tribes to vote and determine whether the proposed expanded capital crime provisions should apply in Indian country. Inouye, who chairs the Senate Select Committee on Indian Affairs, also claimed that legislation introduced by his committee would improve the resources of the tribal courts. He urged a partnership between the tribal courts, the National Center for State Courts, and the U.S. Administrative Office of the Courts. Finally, Inouye noted also that approximately 800 treaties with Indians had been signed by a president, but 430 of these had never been ratified by the U.S. Senate. "Ratified or not," he said, "we've proceeded to violate every single treaty."

Professor Ralph W. Johnson, a legal scholar and consultant to the project, traced the history of tribal courts. In the 1880s Courts of Indian Offenses were instituted and controlled by the Bureau of Indian Affairs. Tribal courts that operated on the principle of inherent sovereignty were created following the Indian Reorganization Act of 1934. However, these courts declined when federal funding was withdrawn after the enactment of Public Law 280 in 1953, which authorized state court jurisdiction over reservations, part of a revised policy directed toward terminating tribes as self-governing entities.

The so-called self-determination era that began in 1960, and still continues, renewed and expanded tribal court activities and jurisdiction. This development was fueled by congressional legislation such as the Indian Civil Rights Act of 1968, which applied nearly all of the Bill of Rights to tribal courts and governments; the Indian Self Determination Act of 1978; the Indian Child Welfare Act of 1978; and the American Indian

Religious Freedom Act of 1978. Indian-directed training programs for tribal court judges and officials became available; university law schools began teaching Indian law courses; and tribal codes were vastly expanded to cover civil and traffic codes, health, custody and adoption, building codes, and other areas.

As tribal court civil jurisdiction has broadened, according to Johnson, new conflicts with state courts have arisen. Depending on the subject matter, either the tribal or state court may have exclusive jurisdiction or they may have concurrent jurisdiction. While the U.S. Supreme Court has ruled that questions of jurisdiction shall first be resolved in a tribal court, subject to federal court review, a standard jurisprudence is used to determine which court system has authority.

Forums work to resolve disputes

In this new era of increased jurisdiction and increased conflict, the National Center for State Courts began a program in 1989 aimed at reducing conflicts in civil jurisdiction. Statewide forums emerged as the most effective way to reduce these conflicts within states. The National Center helped three states—Arizona, Oklahoma, and Washington—hold statewide forums in 1990 to resolve jurisdictional disputes. The project is now in its second year, and many of the solutions worked out at the forums are in place and working well.

Leaders of the conference reported on their activities and urged other states to adopt similar methods of resolving jurisdictional and other disputes between state and tribal courts. They emphasized that tribal and state jurists could work effectively together to define and set up a range of projects to resolve disputes. They identified an important component of their forums: the mutual trust that arises when committed people work together toward common objectives. Tribal court officials need to have the respect of their own and other tribes.

State court officials need to understand the values inherent in justice in Indian country and to be familiar with the federal government's recognition of the sovereignty of the tribes.

Members of the Arizona, Oklahoma, and Washington forums described how their four meetings in 1990 had led them to a series of recommendations that were already being followed. The Arizona forum's call for an annual tribal-state jurisdictional conference began last year at the Arizona State University Law School. The Indian law section of the Arizona Bar Association has accepted the forum's recommendation to open their membership to nonattorney Indians who have been certified by their tribes to perform certain legal tasks.

The Oklahoma forum had recommend extensive use of the rule-making authority of its supreme court to clarify jurisdictional boundaries and concerns. Its members described one such rule that requires state court judges to enter findings consistent with the mandates of the federal Indian Child Welfare Act in all such cases. The Indian law section of the Washington Bar Association has followed the forum's recommendation that it update and reprint the tribal court directory that was initially prepared by the forum. The directory describes the characteristics of the state's 26 tribal courts, their requirements for attorney practice, provisions regarding codes and constitutions, appellate procedures, agreements the tribal court has entered into, and other information on the appropriate scope of the jurisdiction of these courts. Treatises on important federal court decisions, the sources of tribal law, and the history of Washington's tribal courts are included as well.

Another way to reduce disputes that was used by the Arizona and Washington forums was the collection and distribution of intergovernmental agreements. Both states distributed examples of agreements between tribes and state or local courts that covered such areas as cross-deputization of law enforcement

personnel, courtesy probation supervision, tribal purchase of beds in a local juvenile detention facility, joint hunting and fishing regulations, a tribal-county regional land-use and environmental quality maintenance program, and child welfare services. Other states were urged to initiate or expand similar intergovernmental agreements. However, Jeanne Whiteing, a legal scholar and consultant to the project, warned that a tribe may have to initiate a suit to encourage state or local governments to negotiate such agreements.

Too often, state court judges and tribal judges whose jurisdictions border each other do not even know each other's names. One of the most important lessons from the state forums in Arizona, Oklahoma, and Washington is that tribal and state court judges whose jurisdictions border each other should be on a first-name basis, should visit each other's courts, should be familiar with each other's court procedures, and should pick up the telephone when questions arise to determine if issues could be worked out this simply.

In many instances, the conference marked the first time that state, tribal, and federal officials had sat down together. An Alaskan tribal official commented that people in that state had never thought of tribal-state collaboration and that the opportunity to share information between tribal and state officials was the most valuable component of the conference.

A North Carolina state court judge stood up near the end of the conference to announce that he had just met his neighboring Cherokee court judge for the first time, that they had exchanged phone numbers, would visit each other, and had already planned a conference for state and tribal court officials and attorneys. (This conference took place last August.)

States plan action to reduce conflicts

As the North Carolina example demonstrates, meetings between state and tribal officials from each of the 22 states represented were integral to the conference design. The meetings allowed the representatives from state and tribal courts to meet each other and discuss common concerns, and, more importantly, to draft concrete steps to resolve conflicts. State groups met separately at the conference to discuss particular problems that affected jurisdiction between tribal and state courts in their states, rank these concerns, and devise an agenda to address one or several of these problems.

Washington, with more than 40 officials at the conference, determined to implement some of the earlier work of its forum. Arizona's 32 tribal and state representatives added five additional tasks to the original 15-item agenda of its forum report. They wanted to continue their forum with more involvement and help from additional tribal leaders and to develop something similar to the Washington Centennial Accord, in which the governor of Washington and the state's 26 tribes signed an agreement for a government-to-government relationship, with protocols set forth to implement the accord. Further, Arizona plans to work much more through supreme court rule than by legislation to cover such areas as subpoena of Indians into state courts, service of process, extradition, and recognition of civil judgments.

New Mexico's Commission on Indian Affairs staff and the state chief justice announced a conference and also began planning for a Washington-style accord.

Idaho, one of three state where there was tribal but no state court representation, expressed concern about the state officials' failure to attend the conference. Idaho Indian representatives aimed their plan at improving communication between tribal and state courts and also

between the tribal courts themselves. They also expressed interest in furthering recognition of judgments between the two court systems by full faith and credit or comity.

Kansas officials laid the foundation for an agreement to resolve a conflict relating to the state's plan to require a tax on cigarettes sold on reservation land to non-Indians. This and issues surrounding divorce, child custody, and transfer of cases between tribal and state courts received further consideration at an August meeting.

Maine representatives isolated Indian Child Welfare Act concerns as their priority for an educational project. The chief justice of the Supreme Judicial Court of Maine, who attended the Seattle conference, offered to use his influence to place this matter on the annual judicial conference educational program.

The 22 representatives from North Dakota, who included the state chief justice, announced a conference held in late October to take up highway safety concerns.

Many states were interested in a model developed in Washington—the supreme court invites all tribal court judges in that state to the annual state judicial conference, where topics pertinent to the tribal-state court issues are now on the schedule. Wyoming and Utah plan to follow suit. The example of then-Chief Justice Frank X. Gordon, of Arizona, who visited the judicial center of the Navajo Nation at Window Rock, encouraged several state court officials to visit tribal courts in their states.

A number of state plans began with the goal of improving communication between tribal and state court officials. States sought either to arrange an early, informal meeting or to seek the initiation of a forum much like those in Arizona, Oklahoma, and Washington, invoking the involvement of the state chief justice to select forum members. Many states were also interested in statewide conferences on civil jurisdiction or multi-state, regional conferences that would

address a number of the issues raised in Seattle.

In addition to communication, common themes included the information gap, the human relations gap, the need for familiarity, and the importance of "crossovers" into knowing each other and each other's court system and laws. Specific steps developed by the states included:

- cross-deputizing tribal and state law enforcement officers;
- listing and describing tribal courts in state bar directories;
- encouraging state court administrators to become more involved in tribal-state concerns;
- holding conferences on domestic relations law concerns, such as paternity, child support enforcement, and custody;
- educating state bar association members about tribal court authority and procedures;
- developing supreme court rules or state legislation on full faith and credit or comity;
- inviting tribal probation officers to state probation-training institutes;
- inviting tribal court administrators and clerks to educational programs for state trial-court administrators and clerks;
- arranging dialogues between state legislative leaders and Indian tribal representatives; and
- helping tribal governments maintain codes and appellate court decisions in an accessible location, such as a state supreme court or law school library.

Some states will fulfill the agendas they prepared and announced in Seattle. Others will take some steps, and perhaps some will not go beyond their good intentions. Several may formalize their efforts into a forum similar to those in Arizona, Oklahoma, and Washington. For those that choose forums, the Arizona forum's "dos and don'ts" list in Figure 1, should help.

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Figure 1

Tribal/State Court Forum Dos and Don'ts
(based on the experience of the members of the Arizona forum)

Membership

DO select forum members from diverse perspectives who have demonstrated interest, expertise, or experience in addressing Indian law issues.

DON'T select forum members based only on their position within the judiciary or elsewhere.

Mutual Respect

DO acknowledge differences between tribal and state court systems and seek ways of cooperating consistent with those differences.

DON'T characterize either system as better or worse or more or less sophisticated than the other.

Scope

DO proceed in phases with predetermined time frames, including a study phase in which issues are identified, before implementing recommendations.

DON'T devote resources to implementation until a consensus is reached concerning priority issues and recommendations.

Persistence

DO design a process that invites broad-based participation in identifying issues and making recommendations.

DON'T be discouraged by lack of participation or lack of progress.

Performance

DO assign manageable tasks to forum members or subcommittees to be accomplished within established time frames.

DON'T delay too long before dividing the work of the forum into tasks that can be accomplished within the time frames established.

Solutions

DO emphasize creative solutions to jurisdictional issues that avoid litigation and are consistent with the rights of the parties, sovereignty, and judicial independence.

DON'T emphasize jurisdictional limitations.

Communication

DO emphasize person-to-person communication and education to address jurisdictional issues.

DON'T seek to address jurisdictional issues solely through large-scale change in the law or legal systems.

The civil terms of the New York City Supreme Court have been forced to close parts and suspend programs. In October, the civil term in New York County suspended its transfer program, which included eight "dual-track" trial parts presided over by eight judges from outside of New York City. During the suspension of the program, no upstate judges were assigned to New York City, and the operations of the eight transfer program dual-track trial parts ceased. The court also suspended its judicial hearing officer status program and closed seven court parts, with the judges assigned to those parts working on motions and conferences in chambers. By October, a total of 15 of the court's 50 trial parts were unable to function normally during any term. In addition, two general individual assignment parts were converted to trial assignment parts.

The civil terms of the New York City Supreme Court in other boroughs have been similarly affected. Civil operations in supreme, surrogate's, city, and district courts across the state have also been adversely affected because, in upstate areas, staffs were small to begin with.

Backlogs and delays

The litany of suspensions and curtailments does not take place in a vacuum. Such reductions in court services mean unconscionable delays to citizens seeking justice. As fewer resources are available to the supreme courts, the rate of disposition will increas-

ingly fall below the volume of filings. Cases will take longer. In 1990 the average tort case in a New York City Supreme Court took 11.8 months from filing of note of issue to disposition. This will rise to nearly 16 months and is projected to increase to more than 30 months by the end of 1992. In 1993 it is anticipated that civil cases will take nearly three years from filing of the note of issue to disposition.

This alarming state of civil justice, as grim as it is, may be in fact a best-case scenario, providing we can maintain the current level of resources in the civil courts. The fiscal problems facing the courts now and in the future, if not addressed, can only result in more justice delayed or, ultimately, justice denied. sjn

Tribal Courts, continued

Since the National Center for State Courts began its project in January 1989, it has been guided by a 13-member coordinating council that includes Indians, non-Indians, justices, judges, non-jurists, and two legal scholars as consultants. Former Chief Justice Vernon R. Pearson, of Washington, chair of the coordinating council and the fulcrum of the many improvements in tribal-state relation-

Projects in Brief, continued

ships in that state, summed up the project and the conference pointedly:

We have pinpointed the conflicts, demonstrated that many disputes can be reduced or prevented, and found that goodwill and mutual respect are our allies. There is much to overcome, but the task is a promising one, and this is a moment for us to initiate or expand our collaboration.

Chief Justice Tso, of the

administrative branch officials, supreme court justices, superior court judges, clerks and other court employees, and the probation and recorder's offices. The team also reviewed constitutional and statutory provisions, court cases, rules, regulations, reports, and other material. (WRO-131, 139 pp., \$8.50 plus postage and handling.)

The Fulton County Law Library Observations and Recommendations. The National Center for State Courts' Southeastern Regional Office was asked by the court administrator and the law librarian of the Fulton County Superior Court to assess the county law library's operations and management. The court is planning to move the office to larger facilities in the new superior court complex, which is under construction. The final report emphasizes relocation of the collection and planning for future development in the expanded facility. The report also considers space management in the library's current setting. (SERO, T/A-509, 82 pp., \$5 plus postage and handling.) scj