

The Value of Tribal-State Court Consortia

Honorable BJ Jones
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Tribal Law and Policy Institute



- Since 1996, Providing TTA and Resources to Indian Country Programs www.home.tlpi.org
- Tribal-State Collaboration Project
 - Provide On-Site Training and Technical Assistance to Courts and Law Enforcement
 - Develop Resources on Collaboration
 - Developed “Tribal-State Court Forums Annotated Directory” and Promising Strategies Publication Series
 - Hosts and Maintains www.WalkingOnCommonGround.org: Only site of it’s kind to provide tribal-state collaboration resources including interactive map and MOU analysis
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Who Am I to tell you about Tribal-State Judicial Relations?



Topics We Will Discuss

- Why should we meet?
- Methods by which State and Tribal (and sometimes federal) Judges engage to discuss issues of common concern and the relative merits of each method
- Discuss what potential objectives may exist and what can realistically be achieved
- Discuss potential pitfalls that may befall consortia of tribal and state courts
- Look at some subject matter areas where we all have an interest in reaching consensus (recognizing each other's judgments, ICWA, protection of victims of violence, prohibiting flight across jurisdiction to avoid judgments, criminal and civil, consoling each other when we try to figure out how PL 280 applies in Washington)
- Discuss issues in Washington of concern

Why? Mutual benefits

- There are centuries of historical distrust between States and Tribes, oftentimes precipitated by irrational variations in federal law, and we need to have some reconciliation (or conciliation if we never got along)
- Many Native people distrust justice systems and many non-natives distrust tribal systems- We all have a responsibility to ensure confidence in these systems
- We serve the same people- constituents of justice - who are oftentimes indigent and persons of color and we can learn from each other because neither of our systems have a monopoly on justice
- Drugs and Despair know no jurisdictional boundaries
- Tribal-State (also Tribal-Tribal) judicial disputes hurt real people- Different ways of looking at dispute resolution- Maybe the Tribal Court does something the State Court can utilize or vice versa, e.g. Drug Courts or Peacemaking Courts

Benefits to Tribal Systems

- Tribes by and large have placed an emphasis on pressing the federal-tribal relationship because of the trust responsibility, but this has not always benefitted native interests- We need to focus on the Tribal-State relationship in a time of federal insecurity
- We get judged, unfortunately sometimes, on how well our systems emulate state systems, so we can learn from those systems in order to get funding, recognition for our orders, etc.
- Reaching out to state courts help better facilitate transfers of jurisdiction under ICWA, recognition of child custody orders, etc.

Benefits to State Systems

- Many tribal courts have mastered the art of serving pro se litigants so State courts can learn from this
- Many of the innovations in alternative tribal justice models (peacemaking, wellness courts, sentencing circles) could assist state courts and litigants who are becoming disenchanted with the adversarial system
- State and tribal courts are becoming overwhelmed with drug cases, both criminal and child welfare, and through tribal-state collaborative courts perhaps tribal/state approaches to addiction can aid courts in relieving the burdens of these cases and lowering recidivism rates

Under What Umbrella Should We Meet?

- Take a gander at <http://www.courts.oregon.gov/programs/jcip/EducationMaterials/Documents/Tribal-Statecourtforumdocument.pdf>
- A Committee or Sub-Committee of a State Or Tribal Supreme Court? North Dakota, New Mexico, model- Benefits include a funding mechanism, right to promulgate rules, and some administrative help plus possibly more credibility in the State judiciary- Detriments include limitations on taking stand on issues
- Independent consortium- Tribal and State elected leaders or judicial leaders designate persons to be reps from each entity- Minnesota model
- Bar Association organization- Rosebud Sioux Tribe for example in South Dakota has a Bar that sponsors Tribal-State Judicial Meetings

Washington Model- Come as you are

- The Tribal State Court Consortium (TSCC) is a joint effort between state and tribal court judicial officers and other judicial branch members in an effort to expand communication and collaboration. Additionally, the TSCC provides an open, transparent forum where state and tribal court judicial officers can come together and discuss jurisdictional issues, gaps in services, and ways to develop lasting partnerships. The TSCC is focusing its efforts on domestic violence and sexual assault issues, dependency cases involving Indian children, and the disproportionate number of Indian youth in the juvenile justice system.

What realistically can we achieve?

- We have to remember that we operate in an area where federal law controls in certain contexts, but we need to develop processes to enforce federal law
 - 25 USC §1911(d) of ICWA- full faith and credit for tribal court child custody orders
 - 18 USC §2265- domestic violence protection orders, including child custody provisions therein
 - 28 USC §1738B- Child Support orders, but this does not mean that Tribes or States must honor withholding orders without registration
 - 28 U.S.C. §1738- Are Tribal Courts territorial Courts under this statute? Probably not
 - PKPA? Does it apply to tribal-state custody disputes
 - UCCJEA- Many States have enacted latest version of UCCJEA(including Washington see RCW 26.27.041) that requires State Courts to treat tribal court orders similarly for UCCJEA purposes as other state court orders, but what impact does this have on tribal law and jurisdiction to honor or modify state orders when Tribe has not adopted UCCJEA?

Other areas where federal law may muddy the waters?

- PL 280 and how it applies in Washington- Watch out this will bring tears to your eyes- Confusion reigns about how Washington, an optional 280 state, which passed legislation in 1957 requiring consent of Tribe and 1963, no consent but only piecemeal jurisdiction, applies in Indian country in Washington and the lands acquired by Tribes after 1968 when ICRA amended PL 280 to mandate consent for further assertions of state jurisdiction- Look at 47 Gonz. L. Rev 663 (2012)
- There is also a provision in PL 280 that a state court in the exercise of civil jurisdiction shall enforce tribal customary law
- Tribal treaty rights that exist outside Indian country- how do state courts accommodate those rights?

Some potential obstacles

- We sometimes approach things in a different way My Jim Comey story
- Aunt Bea's Pickle Syndrome- We don't like the taste so we think we can change it when we can't
- Overarching Political disputes, which the judiciary cannot resolve, get in our way- North Dakota DAPL protest for example, Extradition, Gaming, Tax disputes, Treaty rights disputes
- Ethical concerns with whether we are violating our duty of impartiality by discussing individual cases involving litigants with cases pending in two courts
- Centuries of historical distrust

What can we talk about

- The sacred ones- Children- Child Welfare, Private Custody and Delinquency cases
 - The Department of Interior recently released federal regulations governing ICWA and changed some of the old guidelines on transfer of jurisdiction from State to tribal courts, qualified expert witnesses, viability of existing Indian family exception, whether state ICWA law supersedes federal law, impact of ASFA deadlines etc.- Some have voiced concern- We need to talk about those concerns
 - Custody disputes- Enforcing protection orders that contain custody provisions without stepping all over each other
 - UCCJEA and Tribal Court Orders
 - Juvenile Delinquency cases- How can we work together to get services for native children under tribal and state jurisdiction

More potential priorities

- Protecting victims of violence
 - How do we ensure that our orders are being recognized and enforced by law enforcement and our courts without a formal registration process?
 - Can we criminally prosecute violators of foreign protection orders within our jurisdictions? Impact of VAWA and need to share information on levels of due process provided prior to issuance of such orders and ensuring our prosecutors can obtain and submit records from each other's jurisdictions
 - Firearms disqualification issues- Brady requirements and registration issues
 - Developing a process of cover orders

Comity and Full Faith and Credit

- Comity is a common law doctrine where the judiciary out of respect for another foreign jurisdiction may recognize that court's orders
- Full Faith and credit is usually regulated by statute but can it be enforced by Court rule??

Washington Superior Court

Rule 82.5

(c) Enforcement of Indian Tribal Court Orders, Judgments or Decrees. The superior courts of the State of Washington shall recognize, implement and enforce the orders, judgments and decrees of Indian tribal courts in matters in which either the exclusive or concurrent jurisdiction has been granted or reserved to an Indian tribal court of a federally recognized tribe under the Laws of the United States, unless the superior court finds the tribal court that rendered the order, judgment or decree (1) lacked jurisdiction over a party or the subject matter, (2) denied due process as provided by the Indian Civil Rights Act of 1968, or (3) does not reciprocally provide for recognition and implementation of orders, judgments and decrees of the superior courts of the State of Washington.

- Washington also has an abstention rule that allows a state court to abstain from the exercise of jurisdiction, even when it has jurisdiction, in favor of tribal court, which is pretty rare

And Finally!!!!

- My one and only Norwegian joke