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Swinomish Indian Tribal Community

A Federally Recognized Indian Tribe Organized Pursuant to 25 U.S.C. § 476
* 11404 Moorage Way * La Conner, Washington 98257 *

April 24, 2019

Cynthia Delostrinos, J.D.
Manager, Supreme Court Commissions
Cynthia.Delostrinos@Courts.wa.gov

Sent via electronic mail

RE: Comments on Proposed Changes to Rule 82.5

Dear Ms. Delostrinos:

The Swinomish Indian Tribal Community ("Swinomish Tribe") is an active participant in the Washington Tribal State Court Consortium and strongly supports adoption of court rules that encourage communication and cooperation between tribal and state courts.

There is growing recognition that state courts and tribal courts have common goals and interests in serving their particular community and, where our jurisdictional boundaries often overlap, we have many shared clients and concerns. In many of these cases, local tribal courts have unique competencies and interests to address issues that may be raised.

While there is growing mutual respect between tribal and state justice systems, there can be impediments to cooperation and coordination of efforts between the courts. Although the existing Rule 82.5 addresses the ability to transfer matters to tribal courts and/or to recognize tribal court orders, the proposed amendments to Rule 82.5 open a channel for courts to communicate directly about cases and shared litigants or matters.

It is not unusual for parties to have matters in both state and tribal court, and it is often in everyone's best interest to know what decisions have been made and what orders are in place in each of the adjudicating courts. While state and tribal courts will not always agree as to how a matter should be addressed, just as all judges within a jurisdiction may not always agree, courts will often seek to coordinate actions and enter orders that are consistent with orders of other jurisdictions.

It is understandable that state court judges have expressed a desire to open dialogue with their tribal court counterparts, but may also feel constrained by ethical and due process concerns about how to engage in communications with tribal justice systems. While the Swinomish Tribe would not purport to speak for state court judges, it appears the proposed rule addresses those concerns while still respecting the sovereignty of tribal courts. The proposed rule does not require reciprocal procedures in tribal courts, but that should not be of concern. The Swinomish Court, like most tribal courts, is already aware of and protects the due process rights of all parties and will implement procedures to protect those rights when communicating with state courts.

People unfamiliar with tribal court proceedings might be hesitant to allow matters to transfer to that forum, or may not understand the value of state courts communicating and cooperating with tribal justice systems. Tribal courts have evolved well beyond their early iterations and many are now implementing new and exciting programs to address the root causes that bring matters to court. In fact, many state courts throughout the country have praised and emulated programs that started in tribal court. Tribal courts are often best suited to address issues involving tribal members, or issues arising within tribal boundaries, whether that is because of an understanding of tribal history and culture, or simply because of the physical proximity and greater amount of time tribal courts may be able to apply to a given case.

We are long past the time when tribal courts might have been considered by some to be somehow inferior to state or federal courts. While tribal justice systems may not duplicate state and federal courts, they are equal partners in the total justice system, serving their own sovereign government and their own community. The proposed amendments to Rule 82.5 recognize that open cooperation and coordination between state and tribal justice systems can serve all citizens of the state of Washington and all citizens of the many tribal communities in our state.

While we strongly support the spirit of the revised rule 82.5, we would like to offer the following drafting revisions that may clarify some issues and better convey the intent of the new rules.

Subsection (c)(2): Communication with the Court.

In two instances, Subsection (c)(2) directs superior courts to communicate specifically with an Indian tribal court judge rather than the tribal court itself. For the benefit of consistent procedures and mutual respect for the court systems, we recommend that communications between the two jurisdictions occur by directing communication to the court rather than an individual judge. This minor change is procedurally consistent with all other subsections in this section.

Subsection (d)(2): Clarify application of second sentence to Superior Court.

Subsection (d)(2) begins with guidance to the superior court regarding a party's participation in communication with the tribal court. That guidance continues in the second sentence, and the rule instructs the superior court to allow a party to present facts prior to a decision regarding communication. A minor amendment will clarify that this rule applies to the superior court. The final sentence concerns communication in tribal court and consistently acknowledges that tribal court procedures will govern tribal court communications.

Subsections (d)(3-4): Switch subsections to convey general rule and then limited exception.

As written, subsection (d)(3) authorizes a limited exception to the general rule in subsection (d)(4) that communications must be recorded and the parties notified of the communication. Subsection (d)(3)'s exception applies only to non-substantive communications such as scheduling, calendaring, or court records. A rule of general applicability is ordinarily stated first and followed by a limited exception to the rule. This guides the reader's understanding of the broad application of a rule and the narrow applicability of an exception. We therefore recommend that the order of subsections (3) and (4) be switched in order to follow the "rule followed by exception" format. Similarly, we recommend that the sentences in new subsection 3 be reordered so that provisions relating to the superior court are adjacent.

For clarity, though the subsections switch places, the initial amendment language visually remains in black and new/deleted language in blue/red to distinguish the initial language and our recommendations.

Subsections (d)(3-4): Insert consistent language about Indian tribal court proceedings.

We recommend a minor stylistic amendment in subsections (d)(3-4) to harmonize the subsections. Earlier subsections clarify that Indian tribal court determines the procedures for tribal court proceedings. In subsection (d)(3), this language changes to "their court". For clarity, we recommend adopting the "tribal court proceeding" language.

Subsection (d)(6): Two possible interpretations.

Subsection (d)(6) either operates to prohibit all communication in adult criminal matters or operates to exempt adult criminal matters from the procedural requirements of subsections (1-5). These two possible interpretations result in dramatically different outcomes. In the first instance, superior courts will be forbidden from communicating with tribal courts about adult criminal matters; in the second instance, each superior court can communicate with tribal courts in any procedural manner that they choose without recording constraints.

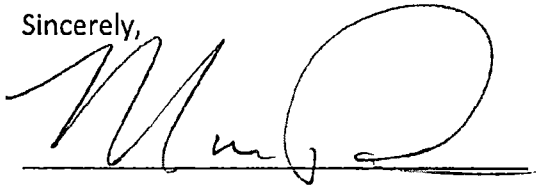
April 24, 2019

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The Swinomish Tribal Court and Office of the Tribal Attorney recommend authorizing communication between jurisdictions in all co-occurring proceedings. In practice, we note that information sharing is vital for extradition proceedings and rehabilitative courts such as drug courts. Subsection (d)(6) rightly recognizes that adult criminal matters are unique, as due process requirements afforded to criminal defendants are more prescriptive than in other court matters. To uphold these due process requirements, we recommend requiring that communications regarding adult criminal cases follow the requirements of subsection (d)(4). If, however, the intent of the rule was to prohibit communications between superior court and Indian tribal court for adult criminal matters, that prohibition should be conveyed clearly to avoid inconsistent application by superior courts.

We appreciate the opportunity to comment on proposed rule 82.5 and trust that these recommendations will prove useful to the Washington State Courts in its thoughtful review of this important provision. Please let us know if there is additional information that we can provide that might be of assistance.

Sincerely,



Honorable Mark Pouley
Tribal Judge
Swinomish Tribal Court



Stephen T. LeCuyer
Director, Office of Tribal Attorney
Swinomish Indian Tribal Community

Proposed Rule 82.5(c) and (d) TRIBAL COURT JURISDICTION

(a) Indian Tribal Court; Exclusive Jurisdiction. Where an action is brought in the superior court of any county of this state, and where, under the Laws of the United States, exclusive jurisdiction over the matter in controversy has been granted or reserved to an Indian tribal court of a federally recognized Indian tribe, the superior court shall, upon motion of a party or upon its own motion, dismiss such action pursuant to CR 12(b)(1), unless transfer is required under federal law.

(b) Indian Tribal Court; Concurrent Jurisdiction. Where an action is brought in the superior court of any county of this state, and where, under the Laws of the United States, concurrent jurisdiction over the matter in controversy has been granted or reserved to an Indian tribal court of a federally recognized Indian tribe, the superior court may, if the interests of justice require, cause such action to be transferred to the appropriate Indian tribal court. In making such determination, the superior court shall consider, among other things, the nature of the action, the interests and identities of the parties, the convenience of the parties and witnesses, whether state or tribal law will apply to the matter in controversy, and the remedy available in such Indian tribal court.

(c) Enforcement of Indian Tribal Court Orders, Judgments or Decrees.

(1) 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.

(2) The superior court may attempt to resolve any issues raised regarding an Indian tribal court money judgment by contacting the Indian tribal court that judge who issued the judgment. The superior court shall follow the procedure for communicating with the Indian tribal court judge outlined in subsection (d) of this rule.

(d) Communication Between Superior Court of Any County of this State and Indian Tribal Court.

(1) A superior court of any county of this state may communicate with any Indian tribal court concerning co-occurring proceedings before the respective courts to address issues identified by the superior court, the Indian tribal court, or the parties to the co-occurring proceedings. The parties shall provide to the respective courts the identity, contact information, and a case or docket number of the other court's proceedings to facilitate this communication.

(2) The superior court may allow the parties to participate in the communication. If the parties are not able to participate in the communication, they must be given an opportunity to present facts and legal arguments before a decision is made regarding the communication, or the subject of the communication, by either the superior court. The Indian tribal court's procedures and customs shall determine the parties' participation in the Indian tribal court proceedings.

(3) The superior court must make a record of ~~the~~ a communication made pursuant to ~~under~~ this section. The parties must be informed promptly of the communication by the superior court and granted access to the record. The Indian tribal court's procedures shall determine whether and how a record is made in ~~their court~~ Indian tribal court proceedings, and whether and how parties may be informed of the communication or granted access to a record of the communication.

(4) Except as otherwise provided in subsection (3) of this ~~rule~~ section, communication between the superior court and the Indian tribal court ~~on~~ regarding schedules, calendars, court records, and similar matters may occur without informing the parties. The superior court need not make a record of the communication. The Indian tribal court's procedures shall determine whether and how a record is made in Indian tribal court proceedings of such communication.

(5) For the purposes of this section, "record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(6) The superior court shall follow the procedures set forth in subsection (3) of this section when communicating regarding adult criminal matters, except as otherwise authorized by law. ~~This rule does not apply to adult criminal matters except when a superior court or Indian trial court have issued orders prohibiting contact between parties that have co-occurring proceedings.~~ The Indian tribal court's procedures shall determine the requirements for communication regarding adult criminal matters in Indian tribal court proceedings. Superior courts and Indian tribal courts may communicate about the orders prohibiting contact as set forth in subsections (1)-(5) above.

✓
Tracy, Mary

From: Hinchcliffe, Shannon
Sent: Thursday, April 25, 2019 1:02 PM
To: Tracy, Mary
Cc: Delostrinos, Cynthia
Subject: FW: Swinomish Tribe's Comments on Proposed Changes to Rule 82.5
Attachments: 20190424_LrePropChanges82.5 v2_0.pdf

Mary,

Could you please process this comment to CR 82.5? Thank you!

Shannon Hinchcliffe | Office of Legal Services and Appellate Court Support Administrative Office of the Courts | P.O. Box 41174 | Olympia, WA 98504-1170
☎ (360) 357-2124 | shannon.hinchcliffe@courts.wa.gov | 🌐 www.courts.wa.gov

-----Original Message-----

From: Delostrinos, Cynthia
Sent: Thursday, April 25, 2019 11:13 AM
To: Hinchcliffe, Shannon <Shannon.Hinchcliffe@courts.wa.gov>
Subject: FW: Swinomish Tribe's Comments on Proposed Changes to Rule 82.5

Hi Shannon,

Please see attached for additional comments to proposed rule 82.5.

Thanks,

Cynthia Delostrinos, J.D.
Manager, Washington State Supreme Court Commissions Administrative Office of the Courts
(206) 683-1585 | cynthia.delostrinos@courts.wa.gov

From: Melissa Simonsen [msimonsen@swinomish.nsn.us]
Sent: Thursday, April 25, 2019 10:58 AM
To: Delostrinos, Cynthia; Elizabeth Miller
Cc: Stephen LeCuyer; Mark Pouley; Lauren Henry
Subject: RE: Swinomish Tribe's Comments on Proposed Changes to Rule 82.5

Thank you Ms. Delostrinos for your quick response.

As promised, I have included the text of the Proposed Rule 82.5 with red/blue comments on pages 5 and 6 to assist the Rules Committee.

Sincerely,

Melissa V. Simonsen
Tribal Prosecutor

Swinomish Indian Tribal Community
11404 Moorage Way
LaConner, WA 98257
Tel. (360) 466-7371 / Cell. (360) 854-8952

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-----Original Message-----

From: Delostrinos, Cynthia [mailto:Cynthia.Delostrinos@courts.wa.gov]
Sent: Thursday, April 25, 2019 9:55 AM
To: Elizabeth Miller
Cc: Stephen LeCuyer; Melissa Simonsen; Mark Pouley; Lauren Henry
Subject: Re: Swinomish Tribe's Comments on Proposed Changes to Rule 82.5

Thank you! I will make sure this gets to the rules committee for consideration.

Cynthia Delostrinos, J.D.
Manager, Washington State Supreme Court Commissions Administrative Office of the Courts
(206) 683-1585 | cynthia.delostrinos@courts.wa.gov<<mailto:cynthia.delostrinos@courts.wa.gov>>

On Apr 25, 2019, at 8:34 AM, Elizabeth Miller <emiller@swinomish.nsn.us<<mailto:emiller@swinomish.nsn.us>>> wrote:

Dear Ms. Delostrinos,

Please find the Swinomish Indian Tribal Community's comments on the proposed changes to Rule 82.5 attached above. Thank you for your time.

Sincerely,
Liz Miller, Paralegal
Swinomish Indian Tribal Community
emiller@swinomish.nsn.us<<mailto:emiller@swinomish.nsn.us>>
11404 Moorage Way
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<20190424_LrePropChanges82.5 v1_0.pdf>