

ARIZONA STATE, TRIBAL & FEDERAL COURT FORUM
Gila River Indian Community Tribal Court
721 W. Seed Farm Rd.
Sacaton, Arizona 85247

Minutes of the
October 19, 2007 Meeting

Court Forum Members Present:

Hon. Victor Antone
Gila River Community Court

Hon. Ted Armbruster
Fountain Hills Municipal Court

Hon. William Canby, Jr.
U.S. Court of Appeals, Ninth Circuit

Hon. Victor J. Clyde
Chinle Justice Court

Amy Courson
State Bar of Arizona

Ms. Pat Henson
Public Member

Diane Humetewa
U.S. Attorney's Office

Hon. Patrick Irvine
Arizona Court of Appeals, Division One

Mary O'Grady
Arizona Office of the Attorney General

Hon. William O'Neil
Superior Court, Pinal County

Hon. Delbert Ray
Salt River Pima-Maricopa Indian Community Court

Kathlene Rosier
Public Member

Hon. Claudette White
Quechan Tribal Court

Hon. Ida Wilber
Ak-Chin Indian Community Court

Administrative Office of the Courts (AOC) Staff Present:

Lisa Bruner
David Withey

Participants/Visitors Present:

Patty Ferguson Bohnee
Helen Burtis
Jamie Heller

Judge Kay Lewis
Edd Welsh
Reagan Armstrong

II. Call to Order

Judge Irvine called the meeting to order at 10:21a.m. Judge Irvine welcomed the attendees and invited everyone to introduce themselves.

III. Approval of Minutes

Judge Irvine called for the approval of minutes as the first order of business. David Withey noted to change Mary O'Grady's title to Solicitor General. Diane Humetewa stated she was

present at the meeting. Judge Irvine motioned to approve the minutes with changes. Motion was seconded. Minutes were approved.

IV. Ongoing Matters

A. Service of Process Rule

Judge Irvine suggested creating a subcommittee to look at this rule and to report back at the next meeting. David Withey reviewed the outline of the Red Rover article which can be provided to the subcommittee members. He described the second handout as an overview of the service of process requirements and practices for various Indian nations and tribes in Arizona. The information is incomplete but useful, as it relates to other issues such as orders of protection. David Withey noted that this document needs to be expanded with those jurisdictions not listed. Judge Irvine suggested that the subcommittee could do that and also could find and share information on standard information adopted uniformly by all tribes. Judge Irvine asked for volunteers for the subcommittee and noted that he and David Withey would assist. Judge Ray and Judge Wilber volunteered. Mary O'Grady will volunteer a person from the child support enforcement area of the Attorney General's Office. Judge Irvine noted that he will conduct a conference call within the next month.

Judge O'Neil initiated discussion on how the subcommittee will come up with the rule. Judge Ray indicated that there is enough in the tribal codes and the key is reciprocity. Judge Irvine clarified that the proposal has been to codify case law into a state rule to direct practitioners. Is a rule a good idea is the ultimate question.

David Withey suggested to the subcommittee members to supplement the chart as much as possible. Kathlene Rosier said she would provide assistance in compiling the information for the subcommittee.

B. Tribal Court Involuntary Commitment Process

David Withey led this discussion. This effort began with a protocol for Coconino County that was focused on how a tribal court order can be used efficiently to place a resident of the Navajo Nation in a hospital who needs in-hospital care. David Withey revised the protocol with assistance of Steve Boos, a private attorney who represents a tribal health care entity on the reservation. The protocol involves use of fax/electronic means to expedite the paper exchange between the tribal court, the proponent of the order and the state court. It includes agreement on how the clerk and probate judge would handle the paper transfer. Judge O'Neil clarified that a probate case is usually assigned to one judge in each county.

David Withey, working with the Intertribal Counsel of Arizona, started with Coconino County and then rewrote the protocol to work in any county in the state and, as suggested by Mr. Boos, to allow any entity to process the tribal court order efficiently using the latest technology, because these cases are urgent when they occur.

One issue that needs to be addressed is the requirement for local evaluation and treatment. This is typically a two step process. First, a person goes for evaluation and treatment locally. If that doesn't work, then there is a commitment to a state hospital. The problem with the reservation is there are no local facilities, so placement is always off the reservation. The issue is how a tribal

court makes the placement. The option for local evaluation and treatment has not been resolved as an absolute requirement. How absolute does the Attorney General's Office consider that requirement for this process and how does the tribe implement it requires additional discussion.

Judge O'Neil recommended to include the clerks in this process and to notify the mental health presiding judge (every county has one) to avoid delay.

A discussion ensued regarding the complexities of state and federal funding of mental health care for the tribal nations. Judge Irvine suggested that the protocol take the payment issue into account.

Judge Armbruster noted that court liaisons were a great resource for mental health issues dealt with by the court. The Maricopa county jail and correctional health services were other good resources.

David Withey addressed the need for internet information where anyone could go to get the rule, statute, forms, and protocol. The Forum needs to continue working with the Intertribal Council on how to do this and how to get the word out on what resources are available.

C. Recognition of Tribal Judgments

David Withey led the discussion on whether there is a need for a procedure where the clerk of the superior court is to issue a certification document when a tribal court judgment is filed and there is no objection and response from anyone. Under current rules, notice is required to go to the subject of the order in this situation. Before the tribal judgment is enforceable, the clerk does a certification that no response is received. Under the Foreign Judgments Act, there is no such process and the clerks are questioning why this certification process is needed since it is not required for a regular foreign judgment. Section 12-1704.C. of the Arizona Enforcement of Foreign Judgments Act contains the provision for proof of mailing/certification that is under discussion. Under this provision, there is a 20-day waiting period; there is no need for the clerk to provide a certification and the judgment is enforceable like any other order. Rule 5B of the Rules of Procedure for the Recognition of Tribal Court Civil Judgments departs from the way foreign judgments are handled.

There was discussion on whether tribal judgments should be treated differently and that this creates a problem for the clerks as they are not familiar with the process. Pat Henson suggested to keep the process simple. Judge O'Neil volunteered to take the steps to get the rule amended. Judge Irvine explained that the rationale for the rule was to formalize and codify the case law.

The issue that domestic violence court orders are not being enforced in state and county courts nationally is one that Diane Humetewa hears routinely from tribal judges. Ms. Humetewa noted that there might be a category of practitioners that still have questions about the enforcement of tribal court orders. David Withey clarified that orders given full faith and credit under federal law are not covered by this rule (e.g., orders of protection, child support, child welfare act orders).

Judge O'Neil explained the key is that a non-tribal order may or may not be enforceable on a nation's soil, but an Indian nation's orders are fully enforceable in the state of Arizona. Project Passport was then discussed by Judge O'Neil. Project Passport was an effort to get everyone, including Indian nations, to have the front page of orders of protection to be substantially similar and completely unique. Every state has adopted Project Passport and over half of the Indian nations have adopted it, but there has not been as much progress in Arizona. Chief Justice McGregor is aggressive in efforts to have orders of protection enforced. Judge Armbruster noted the front page references that the order is enforceable on any jurisdiction, including tribal jurisdictions. Judge O'Neil confirmed that the order is enforceable across the nation.

Judge O'Neil suggested placing a reference to the tribal judgments rule in the civil rules and Judge Irvine concurred, further suggesting moving them in their entirety into the rules of civil procedure. Judge Irvine will assist Judge O'Neil in this effort and called for individuals to assist in looking at the rule. He asked Amy Courson to think of someone in the Indian Law section who could assist. Judge Irvine would like the subcommittee to put something together by the next meeting.

D. Revocation of State Probation of Reservation Resident

David Withey is working on compiling the extradition procedures and requested copies from the tribal judges. Judge Wilber provided her procedures. Kate Rosier will assist in compiling the information. Judge Irvine clarified that this would be true for almost any information such as rules, statutes, and ordinances, as ASU is the reasonable and logical place to store this information. Ms. Rosier confirmed that they are always looking for updates.

Judge O'Neil returned to the tribal judgment rule issue and wanted to know if there was any objection to eliminating the clerk certification from it. Judge Irvine wanted to do a rule petition by the January 2008 filing deadline and suggested circulating a draft by the next Court Forum meeting. Judge Canby noted that there was no need for the certification provision and he had trouble seeing why it is required by the rule.

E. Indian Law on Bar Exam

Amy Courson, the current Chair of the Indian Law Section of the Arizona State Bar and new member of the Court Forum, provided an update. The approach is not to be too specific, but to make people aware it's out there. They raised the issue by writing a letter to the Committee on Examinations. The committee's response was that Indian law is too specialized and should not be included. A second response was requested by 9/15/07 and nothing came back from the committee. The work group is now ready to have a meeting on 11/1/07 (consisting of University of Arizona and Arizona State University professors and practitioners) to determine the best way to proceed. A poll conducted at the Bar Conference this past summer to determine who supported this idea indicated a lot of support for this. The desire is to work cooperatively rather than politically at the outset.

The purpose of adding an Indian law section to the bar exam was discussed. Judge O'Neil asked if an individual passed the bar, could they practice on Indian nations. Amy explained that there are two types of practitioners: 1) licensed practitioners and 2) tribal advocates who don't have a Juris Doctorate or college degree, but have received training and are eligible to practice before a

tribal court. The idea of placing an Indian law question on the exam was questioned since one can't practice on a nation by passing the state bar exam. A certification program was suggested. Amy explained that practitioners will encounter Indian law issues at some point and they want to make them aware that there is another type of government. The concern is about practice outside of the reservation boundaries.

Judge O'Neil commented that it is a good idea to do this nationally, but absent that, there is a disadvantage to those who go to law school out of state. Kate Rosier discussed the research on this and noted that Indian law is taught at almost one half of all law schools. Ms. Rosier clarified that it is not mandatory.

David Withey cited service of process as an example. If someone does not know how to serve on an Indian reservation, then how does one practice. Patty Ferguson Bohnie discussed malpractice as another issue. This is seen by not filing in the right court and with out-of-state individuals who come to practice in Arizona.

Judge Wilber commented that Indian law on the bar exam is significant and she supports it. Judge Wilber suggested that there should be a question on ICWA as it is a federal law and it applies in state court to protect tribal rights. Judge White supports Judge Wilber on ICWA and further noted that many state judges are not familiar with this law. Judge White continued that it is also important to be familiar with common issues that affect residents and families. It's a disadvantage for citizens and bar licensed practitioners if they are not familiar with tribal jurisdiction and laws.

Alan Hawkins suggested looking at traditional court cases that involve Indian law.

Judge Irvine decided to take the agenda out of order since Judge O'Neil had to leave after lunch. Judge O'Neil will address the role of the state superior court in state criminal jurisdiction.

Criminal Jurisdiction – Role of State Superior Court

Judge O'Neil discussed that there are always issues with someone on probation, such as an individual moving back onto an Indian nation. There are issues about supervision and warrants. There have been no cases that were really jurisdictionally problematic other than a case involving an issue on where a weapon was fired. Gila River has a pretty good dialogue with the superior court and other courts. There has not been a non-Indian on non-Indian crime on the reservation. The tribal police department does not cite people into superior court.

Diane Humetewa noted that, in Maricopa County, there has been an increase in the number of Arizona post certified tribal officers citing non-Indians into Maricopa County Superior Court and that there is bound to be an increase in other courts as well.

Judge Irvine thanked Judge O'Neil for his attendance.

F. Arizona DV Database Access

David Withey clarified that tribal police can access the Arizona DV Database. An order issued by a state court can be accessed by the tribal police through this database. This database contains

orders that have been served and are in effect, so law enforcement can rely on the order to arrest an individual who is violating the order. The issue is we do not have a database for entering tribal orders. Diane Humetewa indicated that the NCIC is not set up for tribes to submit orders.

The process of how tribal orders of protection are recorded and enforced was discussed. A tribal police officer contacts the court to determine if a valid order is in place. Judge Wilber explained that the tribal officer serves the order once it is issued. There is a record of the orders with the tribal police and the Clerk of the Court also keeps a log of orders. Mr. Withey indicated that in the state, the sheriff is the holder of records. Judge O'Neil explained the process as follows: the clerk enters the data; the data is sent to the sheriff electronically; the original order of protection stays with Clerk's Office; and a paper copy is sent to the sheriff. An officer can access the order electronically, usually via a laptop.

One proposal is, for any automated tribal court system, to input tribal orders into the state database. But there still needs to be a local law enforcement agency that can be contacted to verify the order, which would be the tribal police. The tribal police would be the holder of tribal court orders.

Judge O'Neil noted that the old computer language is a problem with the system. Mr. Withey explained that the IT Department can load any standard data format into the system.

Judge Irvine noted that David is the source of information for this subject and requested the tribal judges to find out what is happening at their respective courts by the next meeting. Items to research are the efforts to coordinate the system and whether any issues have been encountered. Information will be shared at the next meeting on what is happening at the tribal courts.

Judge O'Neil stated that if anyone is interested in serving on the committee on the Impact of Domestic Violence in the Courts to contact him as soon as possible. There are judge and non-judge positions available on the committee. Judge Irvine commented that is a great opportunity to find out about the nuts and bolts of the system. Mr. Withey clarified that tribal law enforcement would need access to ACJIS to get to the database.

Lunch

The meeting adjourned for lunch at 12:06pm. Judge Clyde began lunch with a Navajo journey song, *Dzil biyiin*.

VI. New Matters

The meeting reconvened at 1:12pm by Judge Irvine. Pat Henson made a motion to thank the Gila Indian Community Tribal Court, on behalf of everyone, for the excellent food. The motion was seconded and unanimously approved.

A. Tribal Court Tour and Programs

The tour of the Gila Indian Community Tribal Court was conducted by Judge Antone, Chief Judge, and Irene Patino, Assistant Court Administrator, **after** Agenda Item VI.B. Criminal Jurisdiction In and Around Indian Country.

B. Exercise of Criminal Jurisdiction In and Around Indian Country

Role of Gila River Indian Community Justice System

Manuel (Max) Aguiar, Chief Prosecutor, and Carlton (Charlie) Giff handed out a Jurisdiction Chart and discussed how the tribal court and prosecutor's office works. Judge Irvine asked about the number of prosecutors in the office and the types of prosecutions they do. Mr. Aguiar indicated they handle misdemeanor cases ranging from marijuana possession cases to assaults. He also stated there is a high incidence of violent crimes and domestic violence. They have nine prosecutors and will be getting a domestic violence prosecutor in January 2008. There is a high emphasis on domestic violence, both prosecution and education.

Mr. Aguiar explained that the line between prosecution by the tribe and prosecution by the federal government is major crimes. They are a misdemeanor jurisdiction. They can pursue any crime with a penalty of less than 365 days or \$5,000. The majority of cases are serious assault, car theft, battery, gang issues and domestic violence.

Judge Armbruster inquired about a victims services program, separate from the domestic violence prosecution. Mr. Giff discussed the proposed victims rights ordinance.

Mr. Giff explained that at the time a felony is investigated by criminal investigators, a report is provided simultaneously to the tribal prosecutor's office and the U.S. Attorney's Office. The tribal prosecutor's office may have already filed or filed lesser charges. In very rare cases, the tribal prosecutor's office has had to file criminal homicide charges. Mr. Giff noted that present code is being looked at for additional ordinances for gang traffic which involves not only drugs but immigrant smuggling.

David Withey inquired about problems with non-Indians committing crimes on the reservation. Mr. Giff indicated they have a few and discussed the option of exclusion. The issue of how a non-Indian violation of an exclusion order would be prosecuted (i.e., on the state side or as a federal charge) was discussed. Mr. Aguiar explained that their officers are deputized at the tribal, state and federal levels. They can make the determination in which venue the charge will be brought.

Mary O'Grady inquired about methamphetamine (meth)-related crime. Mr. Aguiar said they have been fortunate, but it does show up. Mr. Giff indicated that they are seeing the majority of meth-related cases through probation violations. The problem is getting the second drug test done.

Mr. Aguiar noted that another problem is the cost of forensics and that they do not have the technology for it. Pat Henson inquired about assistance from the U.S. Attorney's Office with major crime or if they get FBI forensics involvement. Mr. Aguiar responded that it is usually the other way around. The federal case is developed first, then the tribal court case is developed. Mr. Giff added that for the same offense, the federal court will give credit for time already served at the tribal level.

Diane Humetewa presented two issues. One is that when a tribal prosecution is taken federally on a related, separate charge, the Bureau of Prisons (BOP) requires a person to go back to tribal

jail to serve out the remainder of the sentence before being transferring to the BOP. This avoids prolonging a sentence due to expense and reduces the time served at the federal level. The other issue has been seen in recent oral arguments at the ninth circuit court where questions have arisen about the tribal police and the federal government in collusion to overstep particular processes, either tribally or federally. There is a recent oral argument about three weeks ago where this is the focal point of an appellate court judge. Ms. Humetewa noted that they need to monitor this.

Edd Welsh inquired about 638 contracts and if the prosecutor's office has enough money. Mr. Aguiar responded that they are a tribal government, and like any other government, there's never enough money. Mr. Giff then used the criminal justice facility at the Gila Indian Community as an example where \$18 million was approved but the Indian community ended up funding the project themselves.

Judge Irvine inquired about the size of the police department. Max stated that they have 68 officers, 30 of which are actually in the community. Mr. Giff noted that they have the largest detention facility in Indian country. They have a 240-bed adult detention facility with twelve beds designated for juveniles transferred to adult court. They also have a 120-bed juvenile detention facility.

Judge Wilber inquired if their prosecutors participate in the APAC training. Mr. Aguiar responded they do not now. Mr. Giff discussed the Arizona Tribal Prosecutor's Association and noted that their next meeting is November 16, 2007. Diane Humetewa explained the goal of the association is to facilitate communication between not just the U.S. Attorneys Office and tribal prosecutors but amongst each other. Through the association, they permit sharing of resources, sample codes and processes.

Mr. Aguiar then discussed the issue of violence against women. Getting witnesses is a problem and they need a mechanism to assist victims. They recently received a federal grant to implement victim services. Pat Henson offered a hot line as a suggestion.

Diane Humetewa handed out the 2006 Indian Country Report by the U.S. Attorney's Office. Ms. Humetewa noted that this publication from now on will go to the tribal judges in addition to the tribal leadership. Ms. Humetewa discussed a ninth circuit case, *US v. Lesman Mitchell* which deals with the major crimes act. The issue in the case is whether or not the opt-in clause of the death penalty was preempted by generally applicable federal crimes. The ninth circuit ruled in *Mitchell* that because it was a generally applicable federal offense, the death penalty did apply. The case is also probative of the level of violent crimes increasing. The Westlaw cite for this case is 2482077 and the opinion was filed on 9/5/07.

Judge Antone discussed criminal prosecution from the tribal court's point of view. There was only one time the court needed assistance from Pinal County. It was a situation where an individual left a jurisdiction to hide in another jurisdiction. Other than that, there have been no other cross-jurisdictional issues. Judge Irvine inquired about the number of judges on the bench and the percentage of time the judges spend on criminal issues as opposed to civil issues and family court issues. Judge Antone responded that it is approximately 80 to 85 percent criminal

and 15 percent civil. There are six court rooms and one court room is for civil issues. Seven of the eight judges deal with the criminal issues. Ninety-five percent of crimes are related to domestic violence. The adult recidivism rate is 75% as of 7/29/07. Judge Antone then discussed the meth problem and that it has not reached the reservation, but that it has the potential to destroy the reservation if they do not get a handle on it.

Role of Pinal County Attorney

Susan Crawford, Bureau Chief of Juvenile Crimes Unit and Bureau Chief of the Domestic Violence Unit with the Pinal County Attorney's Office discussed their role in criminal jurisdiction. They enforce state laws where non-Indian persons are suspects or victims. They handle any crime that occurs on tribal territory committed by a non-Indian against a non-Indian victim. They also handle a lot of local youth or young adults who run onto the tribal area to escape the local law enforcement officers or offenders who think they can finish the crime on the reservation because they won't be prosecuted.

The county prosecutor's office handles everything from misdemeanors to felonies. They want to ensure that state juvenile probation officers are working with tribal probation officers, and that there is open communication between governments.

David Withey inquired about issues with revocation of probation. Ms. Crawford responded that they can't enforce a probation search without tribal authority. They can do a probation search in cooperation with tribal authorities and the tribal authorities work closely with their probation department.

Judge Irvine inquired about any resource issues, such as who pays for what services. Ms. Crawford responded that they had not had any. Tribal members get better services for their juveniles and in some cases, adult services as well than the county can provide for other county residents.

Pat Henson asked about their method for service of process of non-Indians on Indian reservations. Ms. Crawford explained that a new policy came out about six weeks ago. The process is they go to local tribal law enforcement officer and serve it locally together. For court orders, they go to the court.

Role of State JP and Municipal Courts

Judge Armbruster discussed the role of the municipal courts. Judge Armbruster met with Ft. McDowell municipal court colleagues last week. The biggest challenge is coordinating shared defendants on probation issues dealing with program participation. They have made big strides in coordinating efforts including meeting with program providers at Ft. McDowell and meeting with tribal probation officers. Since they do not have a probation department, the cooperative effort by Ft. McDowell is a great resource.

One issue is to avoid complicating the process. The court has licensed program providers through the Department of Health Services. Ft. McDowell has some program providers licensed through the Department of Health Services but counselors are licensed through the State of

Arizona. They are trying to forego the unnecessary extra monitoring step through the license agency to make it less complicated and expensive.

Judge Armbruster discussed the teen court in Fountain Hills, which is in its fourth year. They have a partnership with Maricopa County Probation and Juvenile Court. Generally, they have minor offense, first offenders. They partner with the county to train lawyers who advocate for the state and they also partner with the high school. They recently spoke to Ft. McDowell representatives, who hopefully will participate in the teen court as well.

Judge Clyde discussed justice court jurisdiction in the Chinle Justice Court. Most officers who file in his court are from the Arizona Department of Public Safety, Navajo Nation law enforcement, the sheriff offices from Apache and Navajo counties, and the Motor Vehicle Department. The Navajo Nation does not have a specific code for trucking offenses, so they are filed in justice court. They have jurisdiction only of non- Indian dependents and non-Indian victims. Judge Clyde discussed the peace making courts which are analogous to alternative dispute resolution.

Judge Antone conducted a tour of the court.

C. Open Forum

Not conducted.

D. Future Meetings

Not discussed.

VII. Adjournment

The meeting adjourned at 2:55pm at the conclusion of the court tour.