

ARIZONA STATE, TRIBAL & FEDERAL COURT FORUM REPORT

Friday, April 27, 2007 Meeting Minutes
State Courts Building
Phoenix, AZ

Members and Staff Present

Hon. Ted Armbruster, Fountain Hills Municipal Court
Hon. Victor Antone, Gila River Community
Hon. William Canby, Jr., U.S. Court of Appeals, Ninth Circuit
Hon. Earl Carroll, U. S. District Court
Hon. Victor Clyde, Chinle Justice Court
Hon. Jesse Filkins, Yavapai-Apache Nation
Hon. Donna Grimsley, Superior Court, Apache County
Sue Hall, Clerk of Court, Apache County
Diane Humetewa, U.S. Attorney
Hon. Patrick Irvine, Court of Appeals – Division One
Mary O’Grady, Solicitor General
Hon. Delbert Ray, Salt River Pima-Maricopa Indian Community
Kathleen Rosier, Associate Director-ILP, College of Law, ASU
Hon. Claudette White, Quechan Tribe
Hon. Ida Wilbur, Ak-Chin Indian Community
David Withey, Chief Counsel, Arizona Supreme Court, AOC

Participants

Hon. Ben Zvenia
Charleen Greer
Hon. Bonnie Makil
Kerry Patterson
Kelly Hammer
Robert Roll

Call To Order

Judge Irvine called the meeting to order and invited members and participants to introduce themselves.

Approval of Minutes

Judge Carroll suggested that it would be helpful to identify the position of each member. Judge Irvine moved approval of the minutes from the last meeting. The minutes were approved unanimously.

Judicial Education Opportunities

Paul Julien and Marna Murray provided information to the Forum regarding state judicial education programs open to tribal judges. A calendar is published annually and is on the Education Services Division website at <http://www.supreme.state.az.us/ed/>. Program subjects include civil traffic, small claims, jury trials, evidence, civil practice, general jurisdiction court judging, dependency, and many others. With the exception of the probation officer academy, all classes listed are typically available to tribal judges and court staff. The judicial conference held in June each year is also open to tribal judges. The Education Services Division welcomes a diverse group of participants in programs to enhance the education experience.

Judge Filkins became aware of the probation officer academy and unsuccessfully attempted to have a couple of tribal probation officers attend. Marna explained that only four academies are offered each year, and only 50 can attend at a time for the intensive two week course. State probation officers must attend the academy and successfully complete an assessment within their first year on the job. Space and cost are the limiting factors.

Judge Clyde commented that the computer-based training CDs developed by the Education Services Division are very helpful and recommended they be made available to tribal court judges. Paul Julien stated CDs have been developed on subjects including evidence, victims' rights, restitution, and conducting initial appearance and plea proceedings. Tribal court judges are welcome to use these CDs.

Judge Clyde questioned whether the judicial education office could arrange with the State Bar for tribal judges who are members of the State Bar to receive CLE credit hours for COJET classes. Marna thought they typically were accepted by the State Bar. She will find out and make the request if it is not already done.

David Withey questioned whether a tribal judge who is a member of the Arizona bar can satisfy MCLE requirements by satisfying COJET requirements as can state judges. Marna said she believed so. Charleen Jackson stated a State Bar staff person informed her that because she is a judge, though on a reservation, the State Bar does not require her to complete CLE, and COJET doesn't apply to her either. David Withey explained that, as an employee of the state courts, he satisfies MCLE requirements by meeting COJET requirements.

Judge Filkins raised an issue regarding national judicial college scholarships. In applying for a scholarship an applicant must state there are no state scholarships available. Who would one call to find out this information? Marna said inquiries could be directed to her. The Education Services Division staff work very closely with the national judicial college. The State Justice Institute also has scholarship money.

Judge Clyde asked whether the tribal judges who go through new judge orientation will then be eligible to be state judges pro tem. In Apache County, there are only four judges who sometimes need pro tem judges to handle some cases. Paul Julien responded that if tribal court judges attend new judge orientation, they will be better prepared than many pro tem judges that sit in this state as pro tems are not required to attend the training.

Service of Process Rule

The service of process rule was assigned to a subcommittee at the last meeting. The chair of the committee, Jonodev Chaudhuri, was unable to attend the meeting. We still don't really have a consensus of where to take this issue. We will postpone this issue until the next meeting so the subcommittee can meet. According to the minutes from the last meeting, Charleen Greer volunteered to be on the subcommittee. She will be included in any further meetings.

Tribal Court Involuntary Commitment Process

Steve Boos participated in this portion of the meeting via conference call. He is a partner with a firm in Durango, Colorado that represents Tuba City Regional Health Care Corporation, which

operates the hospital in Tuba City, Arizona.

David Withey provided background regarding the memorandum from the Intertribal Council of Arizona Inc that went to tribal leaders, tribal attorneys and tribal health directors. The purpose of this was to describe a process that was developed in cooperation with the Superior Court in Coconino County and also the Attorney General's office. The goal was to use the rules that are in place for recognition of tribal court involuntary commitment orders more effectively and efficiently. The protocol describes how that is to be done in the Superior Court in Coconino County. The focus was on the Navajo Nation, because Navajo behavioral health officials indicated they had problems with the existing system partly because of the size of the reservation. The protocol did what could be done to expedite the judicial process. It includes faxing documents from the tribal court to the superior court and to and from the Attorney General's office.

One issue presented is whether the protocol should be expanded to the rest of the counties and how that should be done. A rather surprising development surfaced in the midst of working on the protocol. Legally, it appears that the recognition process is essential. However, there is an alternative route for involuntary commitment of people who are mentally ill on reservations. Unfortunately, there are no mental health facilities on Arizona reservations. Therefore, a tribe must send the individual to an off-reservation facility for evaluation. It isn't clear if this is typically done through a tribal court order. The person may initially voluntarily go to the facility. If the facility determines the person needs involuntary commitment to the state hospital, the facility files an original petition in the state court.

Consequently, there is an issue as to how frequently involuntary commitment to the state hospital through superior court recognition of a tribal court order is needed. Tribal judges present indicated they have seen the superior court recognition procedure occasionally. Diane Humetewa advised that a prosecutors' association meeting was held shortly after the presentation on this issue at the last court forum meeting. Material from the presentation was given to the tribal prosecutors and there were a number of tribal prosecutors who were familiar with the procedure and thought it was working well. Judge Grimsley and Sue Hall mentioned that expedited procedures had been used in Apache County though no written protocol is in place.

Steve Boos echoed a couple of things mentioned by others. The problem in Navajo County is there are no mental health facilities. They don't even have enough jail space for prisoners right now. One of the things that has become a particular problem for his client, the Tuba City Regional Health Corporation, which operates the Tuba City Hospital under a federal contract, is that the Navajo Nation Council approved a civil commitment code that creates a legal duty on the part of his client to take action concerning a patient who needs to be committed. The only option currently available is to hold the person in the emergency services department which they can only do for a limited amount of time. The Navajo civil commitment code provides expedited access to tribal court which, in practice, has worked well with judges hearing cases rapidly (within hours if not minutes) after a petition is filed. The question is, once a tribal court involuntary commitment order is issued, what can be done to expedite admission to the state hospital? The Coconino County protocol requires the matter be processed through the Navajo Nation Department of Justice. This step has become an enormous bottle neck because there is

only one tribal court advocate in the Navajo Nation Department of Justice who works on these cases.

Mr. Boos maintained entities not represented by the tribal attorney need the ability to use the protocol to secure recognition of tribal court judgments and commitment to the state hospital. For example, they had a Hopi patient who was running through the hospital, naked, trying very diligently to cut his wrists to kill himself. He was held in the emergency department of the hospital for a period of time while a petition was filed with the Tuba City Court and an order was obtained. One of the psychiatrists involved contacted a facility in Prescott which had initially indicated a willingness to take the patient. They would not rely on the tribal court order alone to authorize treatment. Instead, they evaluated the patient and initiated a separate proceeding in the superior court under state law. It was an unnecessarily cumbersome process. Mr. Boos contacted the clerk of the Superior Court in Yavapai County to see whether the clerk would consider following the protocol currently being used in Coconino County. He redrafted the protocol to allow its general use. A copy of this amended protocol is included in the handout materials. David Withey noted that with the agreement of local court officials this protocol may be usable in any county, by any tribe or tribal entity.

Judge Grimsley asked if there was any limitation on who the petitioner can be for an involuntary commitment. Mr. Boos said there was not.

The proposal is that the Forum distribute this expanded protocol to the superior court of each county, including Coconino County, so officials are aware of the expansion of the current protocol, with the request that they consider it and implement it to the extent they are able. We may want to check periodically to see how the protocol is working. A question was asked regarding how the protocol would be authorized. David Withey responded that any official authorization of the protocol would probably be by local rule or administrative order. The Forum discussed the potential value of memoranda of understanding and a statewide administrative order but recognize the variety of circumstances around the state. Each tribe must establish involuntary commitment procedures based on the tribal law. Then the tribal order issued in appropriate cases would be handled by the superior court in the county where that tribe is located according to the protocol or some variation of it adopted by the superior court. There really isn't anything for the tribes to agree to. If they choose to, tribes can set up a process to have tribal court orders filed in the superior court to have them recognized.

Mary O'Grady offered to provide the redrafted protocol to Katherine Plumb, attorney for the state hospital, at the AG's office first. David Withey stated the protocol was tweaked to make it fit more circumstances. Steve Boos mentioned that none of the provisions were changed. He only added provisions.

Charleen Greer stated they haven't had problems getting things to the court. Rather, they've had problems with Ms. Plumb telling them that their court order will not be honored because the state hospital won't take people without local evaluation and treatment efforts as required by state law. It was mentioned that commitment to the state hospital occurs only after all local options such as counseling and treatment have been exhausted. Mary O'Grady will check with Catherine Plumb regarding whether treatment and evaluation at a local facility is mandatory

before commitment to the state hospital from a tribal court.

Recognition of Tribal Judgments

At the last meeting, a question was raised by Sue Hall regarding whether the process for tribal court judgments really needs to be different from the process for foreign judgments. David Withey suggested the procedure could be the same. Under the Foreign Judgments Act, a judgment is filed in the Office of the Clerk of the Superior Court. The clerk is required to treat the foreign judgment in the same manner as a judgment of the superior court. Foreign judgments have the same effect and are subject to the same procedures as Arizona judgments. Likewise, the tribal court rule states a tribal court judgment shall be enforceable in the same manner as if issued by the superior court. However, the tribal judgments rules require the clerk to certify that no objections were timely filed. For foreign judgments failure to object is just recognized as a default. Sue Hall stated there probably are very few clerks of court who actually issue a certificate. If the Forum wants to streamline this process based upon the process regularly used with foreign judgments, she feels that a poll of clerks who think this requirement ought to be removed would result in 100% endorsement. David Withey asked for comment regarding a rule amendment removing the requirement to issue a certificate. Judge Irvine and David Withey will look at that and discuss it.

Revocation of State Probation of Reservation Resident

David Withey reported that research is needed concerning tribal extradition procedures for use in state probation notification. The overall issue is how state probationers are supervised on reservations. It seems to be different in every part of the state. There are even differences with the same tribe having one set of rules for one probation department and other rules for another probation department. The state probation chiefs and directors concluded they really need to deal with this issue locally as best as they can through local relationships. These relationships change over time depending on the people involved. One common issue for departments around the state is the ability to arrest someone on a reservation for a state probation violation. David Withey asked that tribal judge members forward their tribe's extradition process to him, if it isn't too lengthy, or refer him to where it can be accessed.

State Bar Exam Indian Law Question

Kerri Patterson chairperson of Indian Law Section of the State Bar reported the Section is proposing that Indian law issues be included on the Arizona Bar exam. This proposal has been pending for several years. Since 2005 an Indian Law Section Bar exam committee has been working on this issue. The executive council of the Section passed a resolution supporting including Indian law on the bar exam. This resolution is on the STFCF website. The resolution was then presented to the Supreme Court Committee on Examinations by members of the executive council. The Supreme Court Committee on Examinations responded with a letter indicating that they were not required to include Indian law as a topic on the Bar exam. Their primary objections were that the Bar exam already includes too many subjects, Indian law is a specialty and a difficult area of law and other subjects of similar significance are not included on the exam. The national trend is to decrease, not increase, the topics tested. Before responding to the Examinations Committee's letter, the executive committee sent a questionnaire to Section members requesting input regarding support and received unanimous support. Since then, they've been seeking letters of support. The State Bar Board of governors provided a resolution

of support and several tribes have given verbal commitments to submit letters of support. Ms. Patterson asked the Court Forum to support this initiative through a letter or resolution in support of adding Indian law question to the bar exam.

Judge Carroll questioned why all persons wishing to practice law in Arizona should be required to be tested on Indian law when a limited group of Arizona attorneys actually work on Indian law issues or practice in tribal court. He noted tribal Bar examinations are required in order to be admitted to practice in tribal courts. Judge Canby noted that of all of the states identified that have adopted some Indian Law component on the State Bar exam, Arizona has the most sovereign Indian country. Requiring basic knowledge regarding the multiple sovereigns in the state seems reasonable. Other members commented that law schools have an important role in assuring this basic knowledge is incorporated in the law school curriculum.

Judge Irvine asked when the response to the Examination Committee's letter is expected to be submitted. Kerri Patterson responded that they hope to submit a response by the end of May.

Chief Judge Claudette White questioned including the broad Indian law topics suggested since Indian Law is such a complex body of law that it seems unfair to have someone preparing for the bar concentrate on those broad topics as a way to get people to think about Indian law. She asked whether proponents had tried to narrow it down and prioritize. Even a topic such as sovereign immunity or jurisdiction is extremely broad and difficult and puts the person at a disadvantage. Maybe we can get potential Bar members thinking about Indian law, even if it's something specific, that generally affects us. Ms. Patterson responded that the Section would probably propose that, like most states, Arizona just follow the approach New Mexico has taken.

Judge Irvine made a motion that the Forum support efforts of Indian law section. The motion was seconded. Judge Carroll inquired about the content of the motion. Judge Irvine responded that the motion was to support efforts of Indian law section in proposing Indian law as a topic on the State Bar exam. Judge Carroll noted that there were only about five people at the meeting who are state bar members. Everyone else present represented the interests of the Indian tribes. He suggested it is inappropriate for the Forum to take a position on this issue. Chief Judge Claudette White responded that all are participating as equals, that the vote should be limited to members, but to halt the vote altogether would be inappropriate. Judge Irvine stated that each member of the forum represents a certain position under the administrative order that creates the forum.

The motion was seconded and approved on a vote of 12-1.

Enforcement of Domestic Violence Orders of Tribal and State Courts

Judge Ben Zvenia gave a presentation (including PowerPoint available on the Court Forum web site) regarding domestic violence orders. Robert Roll, Data Warehouse Integration Manager, gave a brief presentation regarding the potential inclusion of tribal orders in state domestic violence order database. Federal funding may be available for tribal courts to participate in systems such as this that facilitate enforcement of domestic violence orders. Robert offered to assist tribal officials to contact federal funding sources as well as provide technical consultation regarding the Arizona database. Judge Irvine questioned whether tribal police can access this

database and whether they may be able to input tribal court orders.

Court Forum Code of Judicial Administration Section

The recently adopted ACJA § 1-801 that authorizes the Forum was provided for the information of members. The Forum was formed by adoption of an administrative order by the Chief Justice and continues under the administrative code. The ACJA section was simply a codification of the existing administrative order. No changes were made in the organization of the Forum, otherwise it would have been presented to the Forum for review and comment. Members did not have any questions about the code section.

Next Meeting

We have an offer from Gila River to host the next court forum meeting in October. Judge Wilber stated that she heard the national tribal court judges conference is in October, but is not sure of the date. Judge Irvine would like to schedule dates out one year in advance. If any other tribes are willing to host meetings, preferably someone located in the middle sector of the state, please contact David.

Open Forum

Judge Carroll encouraged members to become familiar with the Assimilative Crimes Act that allows the US government to prosecute a non-Indian on an Indian reservation, where there is no identical federal statute.

Mary O'Grady mentioned that the Conference of Western Attorneys General published a book called the Indian Law Desk Book. They are in the process of updating it. Recently, they met with the Intertribal Council of Arizona to receive feedback and are particularly seeking feedback concerning any perceived bias.

David Withey provided excerpts from a report by Amnesty International regarding sexual assault of Native American women. An NPR audio clip was played for the Forum. (NPR link to the story <http://www.npr.org/templates/story/story.php?storyId=9803207>) Diane Humetewa said their office is quite aware of this issue and has been inundated with requests for response to the report. The report is not based upon a national sample and consequently overgeneralizes. Prosecutors are considering whether reporting is inadequate regarding domestic violence crimes on reservations and systems for gathering evidence are insufficient. She suggested there may be gaps between federal, state, and tribal prosecution of domestic violence crimes. Sexual assault cases are extremely hard to prosecute and depend on victim reporting and availability of evidence that is often lacking.

Adjournment

Agenda items should be forwarded to David Withey to be included in the next meeting's agenda.

The meeting adjourned at approximately 2:00 p.m.