

ARTICLES

Michigan's Story: State and Tribal Courts Try to Do the Right Thing

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This symposium issue treats important substantive questions of federal Indian law, and offers a wide survey of recent developments in this fascinating field. To open the conversation, though, let me begin by taking the reader along a somewhat different path.

The relationship among the federal government, the state governments, and the tribal governments is governed by many factors. No one can doubt that history plays a substantial role and that both native peoples and immigrant peoples remain aware of the struggles that have taken place over so many decades and centuries. Further, this history is not confined to the distant past. Even in areas where tribes are enjoying the recent fruits of economic development and the respect that often accompanies prosperity, it takes only a short memory to recall a time when tribal communities were treated quite differently.

Obviously, the relationship among the federal, state, and tribal authorities is also governed by constitutional and statutory sources of law.¹ These provisions variously require, allow, or prohibit one

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1. FELIX S. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 3 (1982 ed.). Historically, the federal government has determined that certain groups of Indians will be recognized as tribes for various purposes. Such determinations are incident to the Indian Commerce Clause of the Constitution, which expressly grants Congress power "[t]o regulate Commerce . . . with the Indian Tribes." *Id.* (quoting U.S. CONST. art. I, § 8, cl. 3). "Indians are expressly mentioned three times in the Constitution . . . The only grant of power that specifically mentions Indians is the Commerce Clause, which includes the Indian Commerce Clause. Congress is authorized to 'regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes.'" COHEN, *supra*, at 207. Federal authority over Indian Tribes is quite broad and is evidenced by laws that, for example, prohibit the sale of liquor on property that is attached to tribal land. *Id.* at 213.

group's exercise of influence over the activities of another.²

Finally, there is the important element of active modern-day cooperation among governmental authorities. Obviously, considerations of law and of history play a role, but good relations among governments are also based largely on specific efforts. In this short article, I will attempt to outline what has been done in one state – Michigan – to bring together federal, state, and tribal authorities in cooperative efforts to achieve optimal results for all citizens.

Like a human family working to maintain sound relations in good times and bad, the nations of the world have experienced mixed success. Certainly, divisions between racial and ethnic groups have taxed humankind since the beginning of history. On these shores, the relationship between native peoples and those of immigrant ancestry were mixed, at best. Although many early explorers and missionaries treated native peoples with respect and kindness, the cruel record of history tells us that many natives, including entire tribes, bitterly experienced the westward migration of European peoples.³

This great tragedy is embodied in the remarks that have come down to us from some of the great chiefs. We read the remarks of Chief Joseph of the Nez Perce, who came to Washington in 1879 and delivered to an assembly of Congressmen, diplomats, and dignitaries a moving account of the suffering of his people at the hands of the military.⁴ In the course of doing so, he offered a reminder that we can use today:

I have heard talk and talk, but nothing is done. Good

2. For example, Indian Tribes may tax non-tribal members who do business on their land. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 140-41 (1982). Though the exact extent of tribal powers is not definable, Indian Tribes do have the power to determine the ways in which the following matters will be handled: their form of tribal government, including membership and legislation; the administration of justice; and the exclusion of non-tribal members and non-Indians from tribal territory. COHEN, *supra* note 1, at 246-57.

3. With regard to the European migration to and exploration of North America, the native inhabitants of the area were treated with hostility and were often made to take subservient roles where once they had governed this land and themselves. WILCOMB E. WASHBURN, *RED MAN'S LAND, WHITE MAN'S LAW* 28-29 (1995).

The Indians functioned in most of the accounts of voyages merely as the objects of European desires: whether for labor, for portable wealth, or for land The natives were part of the new landscape. Depending upon their power and their relationship to other Europeans, they might be alternatively allies to be cultivated, opponents to be crushed, or inhabitants whose land would be shared by the English. The principle conclusion to be drawn from English thinking of the sixteenth century is that the English refused to be excluded from the new lands.

Id.

4. THE WISDOM OF THE GREAT CHIEFS: THE CLASSIC SPEECHES OF RED JACKET, CHIEF JOSEPH AND CHIEF SEATTLE 58-59, 61 (Kent Nerburn ed., 1994).

words do not last long unless they amount to something.

I am tired of talk that comes to nothing.

It makes my heart sick when I remember all the good words and broken promises.

There has been too much talking by men who had no right to talk. Too many misrepresentations have been made; too many misunderstandings have come up

When the white man treats an Indian as they treat each other, then we will have no more wars. We shall all be alike – brothers of one father and one mother, with one sky above us and one government for all.⁵

I am sure that Chief Joseph's vision of "one government for all" did not mean that there would be only one civil authority governing throughout the land. Rather, he hoped that with honest communication and with promises that led directly to action, all the peoples of North America could share a land in which the rule of law offered dignity and protection to each community.

We certainly have not completed that journey. Native peoples continue to experience too many unpleasant jolts along the road. Although individuals and government agencies have often accomplished much for and with native peoples, the cruelties of poverty and disrespect have been the way of too many native lives for too many years. Further, it is clear that, to this day, native peoples continue to experience profound estrangement from civil authority and from the economic mainstream in some areas of this country.

In these few pages, an attempt will be made to outline some of the factors that have allowed one jurisdiction to claim, modestly and carefully, a degree of success in maintaining good relations between native and non-native peoples.

Like every state, Michigan has its own history of state and federal relations with native peoples. With a way of life defined by the Great Lakes, Michigan and its native peoples first encountered French mis-

5. *Id.* Chief Joseph is considered one of the greatest Indian Chiefs in all of history. His tribe, the Nez Perce, inhabited what is now Oregon. In his speech, Chief Joseph recounted the history of his people and his land since the time that white people arrived in their territory. The speech expressed Chief Joseph's confusion and disappointment over the way in which the European settlers took the land for themselves, assuming that it was theirs for the taking. Chief Joseph maintained that the land was there not for any one person or group of people and could never be claimed to the exclusion of certain groups. He explained that the Europeans decided that the land could be bought and sold, and manipulated the Indians, lied to them, and tried to bribe them in attempts to claim the North American land for their own. *Id.* at 13-18.

sionaries and voyagers. Later came the British military. Again, that history is fully recounted elsewhere, and has no place in this short article. As we claim a degree of harmony in the modern era, however, we must be mindful of those who came before us.

Like every jurisdiction, Michigan saw unfortunate statements and actions by some civil officials. Yet Michigan was blessed by persons, many long forgotten, whose caution and wisdom was greater. Thus, Michigan was blessedly free of the military campaigns that took place in many western states. Indeed, in the face of an 1850 order from President Zachary Taylor for the removal of some of the Chippewa people from the Upper Peninsula, the Michigan Legislature petitioned that the order be set aside, and that the Chippewa be allowed to remain in Michigan.⁶

We thus find ourselves, in the current era, free of a portion of the harsh history that has poisoned relations in some other jurisdictions.⁷ Still, we remember the bitter experiences of native peoples, and know that even in the modern era, too many have faced appalling treatment in our communities. Thus, it is not enough that we avoid further harm. Our state authorities must take positive steps to demonstrate a commitment to a sound relationship based on respect and friendship.

In the relationship between Michigan's state judicial officials and those of the tribes, an essential beginning was the Indian Tribal Court/State Trial Court Forum.⁸ Comprised of state court judges

6. EDMUND JEFFERSON DANZIGER, JR., *THE CHIPPEWAS OF LAKE SUPERIOR* 88 (1978). President Taylor's order was made in response to a treaty that had been signed by the area's Indian Tribes. The Indian Tribes were under the impression that when they signed the treaty, settlers would only be allowed to remove newly discovered natural resources, specifically copper, from their land. They were mistaken. The treaty actually took the land in which the copper was located away from the Indians altogether. In 1853, the Michigan Legislature signed a joint resolution that urged the government to leave certain Indians, those who were "acculturated, voting citizens of the state," on their lands and not relocate them to Minnesota. As an example of the strength and determination of the Indian Tribes to stay on the land that was their home, one who was close to the dispute noted that "the Indians 'will sooner submit to extermination than comply' with the removal order." *Id.* at 88-89.

7. During the mid-1800s, the "agents of civilization" caused the Indians' way of life to change dramatically. For example, "white Indian agents, missionaries, copper miners, farmers, lumbermen, and townbuilders . . . waged war on Chippewa culture and seized nearly all of [another Tribe's] land for white exploitation." *Id.* at 89.

8. Other states have held similar forums. For example, North Dakota held its forum close to the same time as Michigan.

The [North Dakota] Forum, throughout its five meetings, identified and discussed issues and concerns, and made recommendations, in four major areas: the Indian Child Welfare Act (ICWA), including awareness of and effective enforcement of the Act's requirements; recognition of tribal and state court judgments and orders; criminal jurisdiction matters, with primary emphasis on methods of enforcement and prosecution; and educa-

and tribal judges, this group met during 1992 to identify problems in the relationship between state and tribal systems, and to identify means to resolve those problems.⁹ Fulfilling the terms of a grant from the State Justice Institute to the National Center for State Courts, the Forum presented a 1992 report to the Chief Justice of the Michigan Supreme Court. In its report, the Forum identified several concrete steps that could be taken to enhance the burgeoning relationship.

As its first priority, the Forum indicated the need for a measure to ensure mutual recognition of state and tribal judgments. The Forum proposed a court rule, in the report, that would require full faith and credit between state and tribal courts. Also, the Forum discussed other means, such as a statutory enactment, and other models, including a rule based on the principle of comity.

In due course, the bar association's American Indian Law Committee, itself formed as a result of the Forum's efforts, persuaded the State Bar of Michigan of the need for such a court rule. The State Bar submitted the proposal to the Michigan Supreme Court and, in keeping with the normal procedures of the court, the proposal was then published for comment. This procedure allowed Michigan's lawyers and judges, and any other interested persons, to offer their thoughts. Based on the court's own research, it published an alternative version of the court rule, encompassing the principle of comity.¹⁰ The alternative version was loosely based on a rule that had been adopted in North Dakota. These proposals were published for comment in March 1995.¹¹

tion, broadly directed at increasing the knowledge base of state and tribal court judges and personnel about how the respective systems operate.

Ralph J. Erickstad & James Ganje, *Tribal and State Courts – A New Beginning*, 71 N.D. L. REV. 569, 575 (1995).

9. The forum was an enriching, mind-expanding experience for those of us, myself included, who had no prior experience with Michigan's tribes and who were embarrassingly unfamiliar with Michigan's rich Native American history, traditions, and cultures.

10. The term "comity" means

courtesy; complaisance; respect; a willingness to grant a privilege, not as a matter of right, but out of deference and good will [C]ourts of one state or jurisdiction will give effect to laws and judicial decisions of another state or jurisdiction, not as a matter of obligation but out of deference and mutual respect."

BLACK'S LAW DICTIONARY 183 (6th ed. 1991). Comity has also been defined as "the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws." *Hilton v. Guyot*, 159 U.S. 113, 164 (1895).

11. Rule 2.112, Pleading Special Matters, 448 Mich. 1210 (1995) (proposing to accept judgments of federally recognized Indian tribes as proven by sufficiently particular pleadings).

At about the same time, the Michigan Indian Judicial Association was assembling the Model Code of Tribal Court Rules and Procedures. Approved in November 1994 by the judges of the eight tribal courts then exercising jurisdiction in Michigan, the code included a detailed model for enforcement of foreign judgments, including those from state courts. The Michigan Indian Judicial Association model rule was also based on principles of comity.

In May 1996, the Michigan Supreme Court adopted Michigan Court Rule 2.615, *Enforcement of Tribal Judgments*. The rule is a synthesis of the proposals from the Forum and from the Michigan Indian Judicial Association. The rule provides:

(A) The judgments, decrees, orders, warrants, subpoenas, records, and other judicial acts of a tribal court of a federally recognized Indian tribe are recognized, and have the same effect and are subject to the same procedures, defenses, and proceedings as judgments, decrees, orders, warrants, subpoenas, records, and other judicial acts of any court of record in this state; subject to the provisions of this rule.

(B) The recognition described in subrule (A) applies only if the tribe or tribal court

(1) enacts an ordinance, court rule, or other binding measure that obligates the tribal court to enforce the judgments, decrees, orders, warrants, subpoenas, records, and judicial acts of the courts of this state, and

(2) transmits the ordinance, court rule or other measure to the State Court Administrative Office. The State Court Administrative Office shall make available to state courts the material received pursuant to paragraph (B)(1).

(C) A judgment, decree, order, warrant, subpoena, record, or other judicial act of a tribal court of a federally recognized Indian tribe that has taken the actions described in subrule (B) is presumed to be valid. To overcome that presumption, an objecting party must demonstrate that

(1) the tribal court lacked personal or subject-matter jurisdiction, or

(2) the judgment, decree, order, warrant, subpoena, record, or other judicial act of the tribal court

(a) was obtained by fraud, duress, or coercion,

(b) was obtained without fair notice or a fair hearing,

(c) is repugnant to the public policy of the State of Michigan, or

(d) is not final under the laws and procedures of the tribal court.

(D) This rule does not apply to judgments or orders that federal law requires be given full faith and credit.”¹²

Another of the initiatives proposed by the Forum was the formation of an American Indian Law Section within the State Bar of Michigan.¹³ In the wake of the Forum's report, the State Bar did take the step of forming an American Indian Law Section. It also formed a Committee on American Indian Law. In State Bar parlance, a “committee” is a smaller group than a “section,” and in the early days after the Forum, the committee was able to begin work somewhat more expeditiously. Working within the organizational structure of the State Bar, the Committee succeeded, as noted above, in persuading the State Bar to endorse the proposal for a court rule on full faith and credit.

The Forum also recommended that there be continuing support for legislative efforts, including those related to family issues and law enforcement. A recent example of such cooperation came in 1998 when the legislature enacted the final version of its sentencing guidelines, for criminal offenses prosecuted in state court. In a complex system for scoring prior offenses, the guidelines address prior convictions from federal courts and other state courts. Nevertheless, the legislature chose to omit tribal convictions. Upon noticing this, the Michigan Supreme Court promptly notified the Michigan Indian Judicial Association, noting the problem and offering a discussion of the analogous provision in the federal sentencing guidelines.¹⁴ It remains for the Michigan Indian Judicial Association and the tribes to decide whether to approach the legislature for a revision in this regard, but the key element at this stage was the prompt recognition of the omission.

Put another way, it is essential that state court officials, when they encounter a statute or a statutory proposal that is intended to

12. MICH. CT. R. 2.615.

13. Michigan has an integrated bar, and an attorney cannot practice law in state courts unless that attorney is a member of the State Bar of Michigan. The Bar's sections and committees are an important element of its organizational structure, and provide two-way communication on important legal issues.

14. The Michigan sentencing guidelines provision is codified at MICH. COMP. LAWS ANN. § 769.34 (West 1998). The court rule currently states: “When a federal court or state appellate court considers a question that Michigan law may resolve and that is not controlled by Michigan Supreme Court precedent, the court may on its own initiative or that of an interested party certify the question to the Michigan Supreme Court.” MICH. CT. R. 7.305(B)(1).

include the federal government and other state governments, habitually ask the question, "What about the tribal governments?" The Supreme Court is currently looking at just such a proposal, as it considers adding tribal courts to Rule 7.305(B)(1) of the Michigan Court Rules, a provision dealing with certified questions of law from federal and state courts.

This consciousness is well summarized in the "government-to-government" approach taken by the United States Department of Justice under the leadership of the current Attorney General. With the full concurrence of the President, the federal government has made every effort to confirm that its relationship with the tribes is that of one sovereign and another. Here, for instance, is the opening paragraph of an April 1994 memorandum from President Clinton to the heads of executive departments and agencies:

The United States Government has a unique legal relationship with Native American tribal governments as set forth in the Constitution of the United States, treatise, statutes, and court decisions. As executive departments and agencies undertake activities affecting Native American tribal rights or trust resources, such activities should be implemented in a knowledgeable, sensitive manner respectful of tribal sovereignty. Today, as part of an historic meeting, I am outlining principles that executive departments and agencies, including every component, bureau and office, are to follow in their interactions with Native American tribal governments. The purpose of these principles is to clarify our responsibility to ensure that the Federal Government operates within a government-to-government relationship with federally recognized Native American tribes. I am strongly committed to building a more effective day-to-day working relationship reflecting respect for the rights of self government due the sovereign tribal governments.¹⁵

This attitude on the part of the federal government has contributed significantly to the relationship among the federal, state, and tribal governments in Michigan. In 1994 and 1995, efforts were underway to establish a federal "Partnership Project," to facilitate inter-governmental cooperation and, it was hoped, expedite the consideration of future grant applications. The Michigan Supreme Court strongly supported this initiative. On behalf of the court, I met with federal and tribal officials at the offices of the Grand Traverse Band of Ottawa and Chippewa Indians. Later, the court submitted a letter of support for the project, and I participated in a March 1995 telephone conference with United States Attorney General Janet Reno.

15. Government to Government Relations, 59 Fed. Reg. 22,951 (1994).

The Partnership Project was discussed further, and the Attorney General expressed, on behalf of herself and the United States government, an appreciation for the cooperative efforts that had taken place in Michigan among the tribes, the state, and the federal government. In time, the Grand Traverse Band and the Saginaw Chippewa Indian Tribe were selected to participate in this project.

Among the steps that followed from the Forum's initiatives were several that flowed from a recommendation regarding the use of court agencies. The Forum was looking for ways to ensure continuing contacts and interaction. These excellent recommendations have all been implemented.

In this regard, the Forum first recommended that Michigan's State Court Administrative Office and the Michigan Judicial Institute offer appropriate support to the tribal courts.¹⁶ This step has been very well received, and its benefits are apparent. Tribal courts have taken advantage of available technical assistance, and state judges and tribal judges are finding more frequent opportunities to interact. The Michigan Judicial Institute routinely sends invitations to tribal judges and staff, and tribal participation has been significant. Recently, a number of tribal judges participated in the biennial "New Judges Seminar," a lengthy gathering of those new to the bench.

Implementation of that proposal has also served to effect another Forum recommendation — that state judges and tribal judges meet regularly, and share invitations to professional conferences.

The Forum proposed that the State Bar's annual directory issue contain material regarding tribal courts. This has proven to be a singularly helpful step. Each year, the directory, which is sent to each of Michigan's more than 32,000 lawyers, contains detailed information regarding each of Michigan's tribal courts. In addition to basic data such as addresses and phone numbers, the directory provides a summary of the nature of each tribal government, the constitutions or other documents that formed the tribal community, the organization of the council, and the tribal population. The manner in which each tribal court is organized is discussed, and caseload statistics and a full directory of court personnel is provided. The territorial jurisdiction of the tribe is summarized, along with requirements to practice before the tribal court. A list of the tribe's inter-governmental agreements is provided, as well as a list of the sources of substantive tribal law. This is a wealth of information, and provides a ready primer for anyone who is going to be involved at any level with the tribal court.

The Forum also suggested that tribal materials be centrally available at the State Law Library, located near the Capitol in downtown

16. This section is the Institute's training arm for judges and court staff in Michigan.

Lansing. That step has been taken, and lawyers now can find the full body of substantive tribal law for each tribe.

As indicated above, the Forum also recommended the formation of an American Indian Law section in the State Bar of Michigan. That section, as well as the committee on American Indian Law, now meet regularly and report their activities annually to the full bar.

Cordial relations between any two groups are inevitably based on solid face-to-face relationships. This is an equally important component of the relationship between the tribal courts and the state courts. Along with court staff, I have had the opportunity to participate in several formal interactions. In September 1993, a "listening conference" in Santa Fe, New Mexico, entitled "Building on Common Ground: A Leadership Conference to Develop a National Agenda to Reduce Jurisdictional Disputes Between Tribal, State, and Federal Courts" was an important introduction for many persons to this area of the law. In June 1994, I had the honor of addressing the National Tribal Assembly of the Sault Ste. Marie Tribe of Chippewa Indians. Around that time, the Michigan Supreme Court hosted the Michigan Indian Judicial Association at the court's facilities in Lansing.

Representatives of the court were present for an important gathering in Michigan's Upper Peninsula in October 1995. Entitled "Jurisdiction in Indian Country," this conference of federal, state, and tribal personnel from courts and law enforcement agencies addressed the practical problems of enforcing the law in areas where territorial jurisdiction is uncertain or resources are limited.

December 1995 provided an opportunity to address the Tribal Courts Symposium at the Harvard Law School. After delivering my remarks, I had a chance to interact with state and tribal officials from eastern states, who wished to compare their experiences with those of persons from Michigan.

During 1997, I addressed the Great Lakes Native American Conference in Traverse City, speaking on full faith and credit. A month earlier, I attended the Federal Bar Association's Twenty-Second Annual Indian Law Conference in Albuquerque, New Mexico.

Supreme Court staff have also been present on other such occasions, including a November 1997 Indian Law Symposium in Lansing and an October 1998 conference entitled "The Welfare of Indian Children in Tribal Systems." The latter was sponsored by the University of Detroit Mercy School of Law's Indian Law Center and the Michigan Indian Judicial Association, and took place on the reservation lands of the Saginaw Chippewa Indian Tribe.

As in any relationship, cooperative efforts are an ongoing process, not a series of unrelated events. During the mid-1990s, Michigan's state court system undertook a substantial strategic planning effort. This project led first to a May 1995 report called "Charting the

Course for Michigan Justice,” and a September 1995 address to the Michigan Legislature by the Chief Justice. Later, this planning initiative combined with legislative efforts to accomplish significant changes in the structure of Michigan’s state courts. Along the way, the Michigan Supreme Court carefully assured that the underlying planning effort included representatives of tribal courts. Further, the accompanying planning at the local level – as in Mt. Pleasant, home of the Saginaw Chippewa tribe – has included tribal judges and state court judges as equal participants.

A good test of whether an appropriate relationship exists is whether each side understands the potential for learning from the other. There are those whose initial reaction to interaction between state and tribal courts is that this will be an opportunity for the state courts to “improve” the tribal courts through the application of methods and structures that have grown familiar to those who work in the state court system. In fact, the state can learn much from the tribal system. For example, the Grand Traverse Band and other Michigan tribes have begun working extensively with the “Peacemaker” model that has reached its fullest development in the Navajo tradition.¹⁷ Mindful that our tribes have their own history and tradition, tribal officials in Michigan have begun using similar methods to resolve situations in the community, before recourse to the court system is required. The state system has much to learn in this regard, and the Michigan Supreme Court has been careful to place native representatives of the peacemaker process on committees formed within the state system to explore alternatives to litigation.

Our goal is a healthy, vibrant, continuing relationship that will allow cordial and frank discussion of any issues that may arise. As indicated, a currently pending proposal would allow tribal courts to petition the Michigan Supreme Court for a controlling statement of

17. The Navajo Peacemaker Court was created by the Judicial Conference of the Navajo Nation in 1982. The Peacemaker Court is a modern legal institution that incorporates traditional community dispute resolution, which is based on traditional Navajo legal values, into the general adjudication process. Traditional Navajo legal values are a community-based way of thinking and resolving conflicts in which individual feelings are considered. In addition, some Navajo legal traditions abandon the aspect of fault and compensation altogether and instead focus on well being for everyone.

The Navajo Peacemaker Court makes it possible for judges to avoid adjudication and avoid the discontent adjudication causes by referring cases to local communities to be resolved by talking things out. Once a decision is reached, it may (if necessary) be capped with a formal court judgment for future use A peacemaker is a person who thinks well, who speaks well, who shows a strong reverence for the basic teachings of life and who has respect for himself or herself and others in personal conduct.

Robert Yazzie, “*Life Comes From It: Navajo Justice Concepts*,” 24 N.M. L. REV. 175, 185-86 (1994).

state law where it may be needed to resolve a matter arising in tribal court. Some have already foreseen the next step – a mechanism by which local state courts and local tribal courts can obtain rulings from each other on the substantive law of each jurisdiction.

Perfection is not to be found in Michigan or anywhere. We have, however, experienced a degree of success in building solid relationships among the different sovereigns. We intend to continue this important work, and to continue learning from one another. Perhaps other jurisdictions that have enjoyed more limited success may wish to consider some of the steps that appear to have worked in Michigan.