

Trailblazer: Kathryn Tierney Argued Landmark Tribal Cases

Kathryn Tierney has practiced tribal law for 50 years. Along the way, she's argued two landmark federal cases and mentored many female tribal attorneys.

BY JEFF M. BROWN

Kathryn Tierney's first brush with tribal law came during one of the biggest criminal cases of the 1970s: the federal government's prosecution of American Indian Movement members Russell Means and Dennis Banks for their role in an armed takeover of Wounded Knee, South Dakota, in 1973.

Means and Banks were part of a group that seized the town to protest corrupt tribal governments and treaty violations. Tierney and several of her classmates from the University of Minnesota Law School worked on the defense team for Means and Banks

The law students, who worked on the case without pay, pressured the law school to offer a class in tribal law.

"People wanted course credit for doing the work on that trial," Tierney said. "It was fascinating and very impactful."

The school agreed and hired a prominent tribal law expert who'd argued cases before the U.S. Supreme Court.

Means and Banks were tried in a federal court in Iowa in 1975 and acquitted. By that time, Tierney had graduated and was working as in-house counsel for the Bay Mills Indian Community in Michigan's Upper Peninsula. She was the tribe's first in-house attorney.

"They had never had an attorney before, but there was grant money for it," Tierney said. "The first attorney they offered the position to had come up with his wife, who took one look and said, 'No,' because it was so rural."

Says 'No' to Women's Page

For many new attorneys – especially those who, like Tierney, are not American Indian or Alaska Native – accepting the position with the Bay Mills Indian Community would have been daunting.

Not for Tierney. She was accustomed to big moves into new territory, having lived in the

United Kingdom and Israel when she was a child, thanks to her father's service in the U.S. Air Force.

Tierney graduated from St. Catherine's University in St. Paul, Minn., with a degree in English and journalism. But the prospect of working on a newspaper's "women's page," writing recipe reviews and advice columns, didn't appeal to her. So, when she heard a friend talking about law school, she decided to go too.

After her stint with the Bay Mills Indian Community, Tierney worked in the Office of the Solicitor of the U.S. Department of the Interior. By the early 1980s, Tierney was working with what is now Judicare Legal Aid. It was there that she made her mark on tribal law in Wisconsin.



Landmark Cases

In 1983, police officers arrested two Lac Courte Oreilles tribal members in northern Wisconsin for spearfishing beyond the boundaries of the Tribe's reservation.

The Tribe challenged the arrests, suing state officials in the U.S. District Court for the Western District of Wisconsin. They argued that treaties between the Tribe and the federal government reserved for tribal members off-reservation hunting, fishing, and gathering rights, known as usufructuary rights, on public lands in northern Wisconsin.

The district court ruled for the state officials. But on appeal, in *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*, 700 F.2d 341 (7th Cir. 1983), the U.S. Court of Appeals for the Seventh Circuit held that the Tribe retained its usufructuary rights under the treaties.

In a companion case, *State v. Baker*, 698 F.2d 1323 (7th Cir. 1983), the Seventh Circuit held that an 1854 treaty did not grant the Lac Courte Oreilles the right to restrict public hunting or fishing on navigable waters inside its reservation boundaries.

Tierney was part of the team that argued both cases before the Seventh Circuit. The results came as a surprise to Tierney and the other attorneys. They figured they'd lose *Voigt* and win *Baker*.

"Nobody was prepared for that," Tierney said. "There were six tribes in Wisconsin who'd signed the same treaties of cession in 1837 and 1842, and there were two tribes in Michigan and one in Minnesota. Nobody had any clue as to how to deal with that."

The Lac Courte Oreilles Band soon realized that the *Baker* decision meant they'd have to hire game wardens, wildlife biologists, and judges. That was a big ask at a time when, 10 years before the advent of tribal gaming in Wisconsin, most tribes in the state didn't even have the money for in-house counsel.

"If there was money, it was for a school lunch program or training unemployed people," Tierney said.

Shortly after the *Voigt* and *Baker* decisions came down, Tierney became

in-house counsel for the Lac Courte Oreilles Band.

Impelled largely by the *Voigt* and *Baker* cases, the federal Bureau of Indian Affairs stepped in and gave the Lac Courte Oreilles Band the money it needed to hire the new staff.

"We spent a lot of time finding people to be wardens, finding people to be trained to be judges," Tierney said. "One tribe had to amend its constitution so it could regulate the conduct of its members off the reservation."

Tierney said the holding in the *Voigt* decision was worth the administrative costs indirectly imposed by the *Baker* decision.

"It was a massive victory for the tribes," Tierney said. "Anything you could find in nature they could harvest if they chose, and they could use any methods, both traditional and modern. They could sell what they harvest and there weren't any other restrictions."

Precious Mentoring

The *Voigt* and *Baker* cases did more than give Tierney the opportunity to help make new law. They also allowed her to mentor other tribal lawyers – young women cutting their teeth on the *Voigt* and *Baker* cases the way Tierney had done on Means and Banks' case 10 years earlier.

Along with dispensing how-to advice, Tierney often assigned her young charges trial tasks, like first-chairing depositions while she second-chaired.

"Those kinds of things are helpful to do in places where they know that if they mess up, you'll ask for a halt," Tierney said. "But you really want to have them try, to show them that doing it won't have people crack up because you said something wrong. The issue is having the confidence to try."

Tierney also made sure the lawyers she was mentoring knew the value of cultural humility.

"I tried to make sure that the attorneys knew that whether they were tribal members or not, that you'll do best for your clients if they know that you like them," Tierney said.

Do What You Love

Today, Tierney is back where she began, working as in-house counsel for the Bay Mills Indian Community. She advises new attorneys to choose their practice areas carefully.

"Practice the kind of law that you find interesting," Tierney said. "The most ideal job is to be paid for something that you enjoy doing."

She advises law students to participate in legal clinics whenever possible, to get a taste of real-world lawyering.

"People graduate and they don't have a clue what a lawyer does," Tierney said. "If you have no practical experience to go with your book learning, you're not going to be able to figure out how to put the two together, and that's what clinics are for. It's an opportunity to see if you even like doing what lawyers do."

The Tough Get Going

According to Tierney, the future has never looked brighter for women attorneys.

"Their gender is a positive rather than some status that they have to overcome," Tierney said. "You want to have the compassion and the empathy and the interest so that people and their worlds are inherently interesting and something that needs to be explored and protected, not something that's ugly and that you shouldn't know about."

For Tierney, no trial is too tough for the attorney who knows her worth.

"Women do not need to be protected from reality," Tierney said. "Anybody who's up all night with a baby is not being protected from reality." **WL**



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Judge Jo Deen Lowe: From a Long Line of Strong Women

Jo Deen Lowe, chief judge of the Ho-Chunk Nation Trial Court, was first in her family to graduate from law school. She shares in the legacy of colleagues in Indian law while working to leave a better justice system for those to come.

BY SHANNON GREEN

The foundations of Ho-Chunk society are compassion, respect, generosity, humility, bravery, and courage. “They should be the guiding principles of humanity,” says Judge Jo Deen Lowe, chief judge of the Ho-Chunk Nation Trial Court.

Raised with those foundations, Lowe decided at a young age that she would become a lawyer. She had, in her youth, aided others too timid or unable to speak in their own defense or advocate for themselves. “I was influenced by my elders who were not shy about sharing their opinions. They cared about the well-being of the community and its members and instilled in me a clear moral and ethical guide,” she said.

She also decided to pursue law and leadership positions because, she said, “of my desire to help individuals, families and my own Nation to identify the resources and tools that will be most beneficial to them.” Her work helps to preserve a way of life and provides access to justice, on top of “providing me with a way to care for my family and my pets.”

Opening Pathways

Judge Lowe is the first in her family to graduate from law school. She earned a bachelor’s degree in paralegal studies at Winona State University in 1981, then a law degree from the U.W. Law School in 1985.

Starting in 1986, she served as in-house counsel for several of Wisconsin’s tribes and worked at the Great Lakes Intertribal Council. “I provided legal

advice to the Menominee Tribe, where I did a brief stint as a prosecutor,” she said. She also worked in the Indian Law Unit of what was then known as Wisconsin Judicare and provided professional legal services for individuals and tribes.

When she became Jackson County district attorney (DA) (1987-89), she was the youngest person to serve as a DA in Wisconsin. She admits to “a bit of a learning curve” as a young DA. “I was fortunate in the mentors that I found. My law school professors and

the attorneys I clerked for in law school remained a reliable resource.”

“I took on some difficult issues within the community involving racism, sexism, and government corruption. I was not returned to that office by the electoral process,” Judge Lowe said.

In 1995, after working as the state-tribal liaison for the Great Lakes Inter-Tribal Council (1989-93) and then as staff attorney for the Ho-Chunk Nation (1993-94), she became the Ho-Chunk Nation’s first attorney general. “The Nation had just adopted



a new constitution with four branches (executive, legislative, judiciary, and General Council) to reflect a change from the previous Indian Reorganization Act government headed by the Wisconsin Winnebago Business Committee,” she said.

After serving as staff attorney for the Oneida Tribe in Wisconsin (1998-2000), she became an associate supreme court justice in the Ho Chunk Nation’s appellate court. “I was elected to fill out the remainder of the term of my predecessor and sat on the appellate bench from October 2002 to 2005.”

She then served for 11 years as deputy attorney general for the Forest County Potawatomi Community in Crandon.

On Jan. 9, 2012, she was sworn in as chief judge of the Ho-Chunk Nation Trial Court. She was the Nation’s first female chief judge and the fourth chief judge in the trial court’s history.

“During my first term, the Nation’s membership revised the constitution to require that the trial court judges be elected. Since that time, I have had the privilege to be returned to the chief judge’s post twice, most recently in July 2023.”

Many Bridges

Lowe noticed some differences, although not large ones, when practicing in Wisconsin courts and in tribal courts. The Ho-Chunk Nation’s court has different divisions, and the trial and supreme courts are based on a western European model. “The main difference that I observed was that tribal law and federal law were binding on the Menominee tribal folks. For criminal law, the existence of P.L. 280 left the other sovereign



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nations to determine what laws they would enact,” she said.

The Nation’s traditional court provides dispute resolution from traditional clan leaders – male elders from the 12 remaining clans and a representative from the Native American Church.

The Nation also has a treatment court – the Healing to Wellness Court – that focuses on tribal members after conviction to reduce recidivism. Participants are offered the opportunity for reduced incarceration time in favor of treatment for substance use.

Lowe served as the court’s presiding judge from 2013 to 2019. “It was my honor to facilitate the sobriety and path to wellness chosen by successful participants,” she said.

“This is a good example of how state and tribal courts can collaborate. The Nation’s cultural component is acknowledged as an important element of the individual treatment plans.”

Lowe found opportunities to bridge the practice areas and share knowledge with others about working with tribes. She was part of the State Bar of Wisconsin’s Bridging the Gap effort.

“I found that practitioners in Wisconsin had regular contact with tribes and their businesses, but yet had little knowledge of the concepts and principles of Indian law. I tried to provide a way to share that information with them,” she said.

Increasing Access to Justice

An ongoing statewide challenge in Wisconsin is access to justice, says Lowe. She serves on the board of the Wisconsin Access to Justice Commission, representing the Wisconsin Tribal Judges Association.

“The access to justice issues are so apparent in the rural areas,” Judge Lowe said. “Tribal people are further hindered in securing legal counsel because lawyers in general are unfamiliar with tribal law and tribal courts. Attorneys remain hesitant to invest their time and resources in expanding their practice to tribal courts.”

‘There is Room Enough for All of Us’

Lowe’s inspirations in the legal profession include the Hon. Susan Steingass, “one of my professors who was creative, professional, and concerned for others,” along with Hill and Jo Swamp, who “lead by example and showed that hard work, dedication, and scholarly effort combined with a touch of humor is important. It is good to have the spirit and tenacity to set boundaries and zealously pursue legal representation in an honest and forthright manner.” Others include Diane Diel, Michelle Behnke, Sharon House, and Cheryl Fairbanks.

“So many of my colleagues in the field of Indian law were inspiring to Indigenous women. It has been my privilege to share in this legacy while working to leave a better justice system for those to come,” Lowe said.

With ongoing gender inequalities in the legal field, it is important, she says, that women in the legal profession support each other and push for equal pay, promotions, case assignments, and access to resources. “There is enough room for all of us here,” she said. Also, “Don’t be afraid to ask questions. Don’t let fear get the best of you. Don’t let a job, a mentor, or a colleague convince you to compromise your own internal ethics or morals.”

Like other people contacted for this series of women leaders in the law, Lowe is considered a “history maker.” “I’m humbled, a little intimidated, and motivated to continue to dedicate my future work to the service of my people and by extension all other Nations we come in contact with,” Lowe said.

Among Lowe’s varied and many accomplishments, she finds particularly rewarding her work with the Nation’s Healing to Wellness Court, helping individuals and families to overcome their challenges, including substance use, and achieve stability. “Witnessing the healing and recovery of familial units gives me hope for future generations. Being a small part of that has made my career worthwhile,” she said.

Making History: Four Ways to Celebrate 150 Years of Women in the Law

Join Wisconsin's legal community in celebrating 150 years of women in the law. Here are four ways that you, your law firm, or the local legal community can recognize the significant contributions women have made to Wisconsin's legal history.

Governor Proclaims June 17 as Wisconsin Women Lawyers Day

To commemorate the 150th anniversary of Lavinia Goodell becoming Wisconsin's first woman lawyer, Gov. Tony Evers has proclaimed June 17, 2024, as Wisconsin Women Lawyers Day. The proclamation praises Goodell for pioneering a path for women in the legal profession across the state and for facing with unwavering resilience the many obstacles thrown in her path.

Commemorating Goodell's Admission: June 17 in Janesville

To celebrate this historical milestone, a consortium of women lawyers is hosting a commemoration of Lavinia Goodell's admission on Monday, June 17, 2024, which is the anniversary of Goodell's admission in Rock County.

Everyone is invited to attend the program at 5 p.m. in the Rock County Courthouse, 51 S. Main St., Janesville. A reception will follow at the nearby Genisa Wine Bar, 11 N. Main St., Janesville (cash bar). There is no cost for the program or reception, but RSVPs are requested for planning purposes. Send replies to wiswomenlaw150@gmail.com.

Exploring Legal Developments Affecting Women: June 20 in Green Bay

The State Bar of Wisconsin's Annual Meeting & Conference in Green Bay will include a special continuing legal education program exploring some important Wisconsin legal developments affecting women and the women lawyers who advanced them. The program, at 3:15 p.m. on Thursday, June 20, will begin with a welcome by Wisconsin Supreme Court Justice Ann Walsh Bradley. Topics covered will include:

- Lavinia Goodell and the right to practice law;
- Equal pay for equal work;
- Married women's right to own property and have credit;
- Indigenous women's legal identity, jurisdiction, and missing and murdered Indigenous women; and
- Women as legal peacemakers: collaborative divorce, mediation, and restorative justice.

Reenacting Goodell's Admission: Aug. 8 at Old World Wisconsin

Old World Foundation will host a program celebrating the 150th anniversary of Lavinia Goodell's admission to practice law in Wisconsin. This program will take place at Old World Wisconsin in Eagle at 11 a.m. and 1:30 p.m. on Thursday, Aug. 8, during "Kids Get in Free" week.



"Old World Wisconsin is Wisconsin's premier living history attraction that shares the stories of the past through hands-on activities," says Gwen Griffin, executive director of Old World Foundation. "Thus, this reenactment is the perfect program to bring to the site."

This year, Old World Foundation is also celebrating the 40-year fundraising partnership with Old World Wisconsin.

To Learn More

- **Celebration of 150 Years of Women in the Law**, contact Mary E. Burke at WisWomenLaw150@gmail.com.
- **Governor's Proclamation** and information about Lavinia Goodell, visit lavinia-goodell.com.
- **State Bar of Wisconsin Annual Meeting & Conference**, visit <https://www.wisbar.org/AMC/2024/Pages/Home.aspx>.
- **Old World Wisconsin** program and tickets for the Aug. 8 event, visit oldworldwisconsin.org.
- **Old World Foundation** and how it supports Old World Wisconsin, visit oldworldfoundation.org. **WL**

In Her Words: My Family's History Makers Made It Possible for Me to Be

"I am a member of the Hawk (Warrior) Clan. I come from a long line of strong women.

"The Ho-Chunk people are indigenous to this area now known as Wisconsin. Through the course of the westward expansion of immigrants and U.S. government policies on how

Indigenous people were viewed and treated, the Ho-Chunk People have survived and remained a part of the fabric of today's world. Removal-era tactics of the U.S. military gained thousands of acres of land from the Ho-Chunk people for access by miners, timber companies, the military, farmers, and others.

"Removal took the form of forced marches of elderly, children, women,

and men to the west, with families broken up and forced to survive with what they could carry and the substandard rations provided by the government. Other removals included relatives loaded into cattle cars in the winter, again with little food, no shelter from the winds as they blew through the open slatted sides of the car for several days. Sickness, death, and certainly tears were parts of these efforts. Many

WOMEN HISTORY MAKERS

did not complete the journey.

“Upon arrival in the west, in the lands of the Omaha people, my relatives were sheltered in an open horse corral that had been designated as a processing center and encampment. It was guarded by a unit of African American soldiers. Our family tells of the kindness of the Omaha people who shared what they had, and of the humanity and dignity that their captors showed them while there.


“My great-great grandmother and her sisters determined, like so many Ho-Chunks, to return to their homeland in the east. When the opportunity arose, the three women and their children made their way back

by escaping, traveling by night in the fall and early winter of the year. They followed the Missouri River down to its confluence with the Mississippi and were able to continue their passage, always fearful of being caught. Up the Mississippi to the confluence with the La Crosse and Black Rivers, eventually to return home.

“Ours is an oral history, and regrettably much of the detail has been lost through time, but it is that willful struggle to maintain our family, our tribe, and the society that had existed for thousands of years. These strong women, with little food, small children, and few resources, returned to this place and this tribe.

“It is in honor of them and all those who did not survive misguided government policies, racism, and the infliction of harm on this earth that I continue to seek justice. My career has been guided by this and other family history.


“I hope this helps in understanding that my family’s history makers made it possible for me to be.” **WL**



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Effective Legal Writing 2023	3.5 CLE
Administrative Law: Basics and Recent Developments	5 CLE /1 EPR
Real Estate Update 2023	7 CLE
33rd Annual Institute of Trial Practice	10 CLE
Keeping the Pooch Out of Probate	1 CLE
Your Guide to the Corporate Transparency Act	3 CLE
Figuring Out Governmental Immunity	1 CLE

See the full All-Star Seminars Series schedule and play ball at wisbar.org/allstars