

Litigation with Tribal Courts

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I. What type of judicial system will I be interacting with?

- A. Separating concerns related to “diversity” and concerns related to “home court” forums, from the unique aspects of tribal court adjudications.
1. Anxiety can be present when interacting with something that is “diverse” from the dominant society’s experience or point of view.

“It’s easy to accept diversity – when diversity looks a lot like you. But then again, that’s not really diversity, is it?” WSBA President Sal Mungia, Feb 2010 WSBA *Bar News*.
 2. Every experienced litigator attempts to drive litigation to a forum where he/she is known and the forum is familiar, and where the opposite situation applies to opposing counsel. Fears of “home cooking” may exist, but are not usually accurate in a tribal forum.
- B. Separating cultural concerns germane to society as a whole, from those unique to a tribal forum.

- Urban verses rural
- Big town verses small town
- West of the Cascades verses East of the Cascades
- Busy courthouse with high volume verses courthouse with lower volume and slower pace
- Law school graduate verses pro se

C. The various Oregon Tribal Courts.

- Warm Springs, Umatilla, Grand Ronde – all have a full time docket
- Other tribal courts engage judges on an as-needed basis, but with a full time court staff
- See Oregon Bar Directory for contact for each tribal court, also begin with contact with in-house counsel for the relevant tribe.
- Established appellate courts in existence for most tribes, others provide on an as needed basis.
- Some tribal forums attempt to separate a “Peace keeping court” from the more traditional practice and procedure of its tribal court, while others merely incorporate these concerns into general practice. [See, Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indians as an example of the separation.] When present, this separation of something analogous to a peace keeping court is dominated by an emphasis on native culture, pro se litigants, tribal elders, and adjudicators that do not have a primary law school training.
- Physical attributes of the courts: some in stand-alone buildings on the government campus, some in a room designated as a tribal court but housed in a general administration building, some courts take place in the empty chambers of the tribal council (executive/legislative body). Some buildings are elaborate, some are modular, portable structures.

D. Court staff and judiciary will likely have a broad range of subject matter to address each day, including criminal and juvenile matters. Do not expect to find a judge that specializes only in your particular subject of law, and craft your advocacy accordingly.

II. What are the cultural issues to be aware of when I practice in a tribal forum?

- A. Know your audience! This includes attempting to educate yourself and your relevant witnesses about history, including tribal perspectives on history.
1. Never refer to a tribe as if it “did not exist” or “did not exist for a certain period of time”. Termination of recognition from the federal government may have occurred in the history of certain tribes, but do not start by “shooting yourself in the foot” and advocating from a position that this is synonymous with the life of the tribe.
 2. Tribes and tribal individuals generally operate with a longer perspective on historical events. Many people you will interact with will know first or second hand about issues of termination, boarding schools, criminalization of tribal cultural events, and other painful parts of American history.
 3. A large majority of “failures” in American Indian policy could be interpreted as starting from what appeared to be benign intent. NAGRPA, ICWA, and

federal self-determination policy in general are all based on a foundation of 20/20 hindsight of the failures of the past. Current problems and legal framework should be analyzed with the appropriate tether to historical moorings.

4. States have had a significant history of hostility to tribal interests, and the federal government has often contributed to placing these two sovereign governments at odds. The history of this antagonism can be the unspoken presence in the room.
- B. Cultural differences arising in interactions with tribal individuals as part of the litigation process.
- eye contact
 - confrontation
 - speaking styles/talking circle
 - elders & deference
 - smudging the courtroom
 - oral traditions
 - interrupting a native speaker or speaking over the top of a native speaker
 - pace and timelines and starting times
 - communal ownership of property

III. Procedural issues in tribal court litigation.

- A. Tribal forums are forums of general jurisdiction, based on traditional notions of tribal conflict resolution, that emphasize a participatory element focused on facilitating the resolution of disputes. Rave v. Reynolds, 23 ILR 6150, 6158 (Winn. Sup. Ct. July 9, 1996); Bordeaux v. Wilkinson, 21 ILR 6131, 6132 (Ft. Bert. Tr. Ct., Oct. 1, 1993).

See attachments of Rave and Bordeaux that illuminate how traditional civil procedure concepts of standing, political question, etc. can apply in tribal court settings, but in a fashion that is appropriate for the tribal forum and slightly different than how they would be applied in a non-tribal forum.

- B. The source for the civil procedures that will apply in tribal court litigation can vary. Some tribes have detailed tribal civil procedures unique to the tribe, other tribes have adopted a hybrid of their own procedures and procedures from a non-tribal jurisdiction, other tribes adopt the FRCP, some tribes adopt state law civil procedures (but usually by case law and not codification).

A reference to FRCPs should not be initially interpreted to mean blind allegiance to all interpretive case law, or even interpretations that would conflict with tribal culture. FRCPs are drafted to fit with a judicial philosophy of guarding the

courthouse doors to the federal judicial system, tribal courts function in the exact opposite.

- C. Some tribal courts require summons to be issued by court and served by tribal police (such as Warm Springs).
- D. Default in a tribal setting usually occurs on a slower timeline than state court, and, due to cultural issues related to shame and avoiding confrontation, can often occur more frequently than in a non-tribal setting.
- E. Many tribes do not possess a large history of binding judicial precedent. Thus, be prepared for questions such as “what is the underlying policy behind the position you are advocating Mr. Shaw, and how does this policy support and conform to this tribe’s history and culture”. These questions are always relevant in litigation, but show up more often in a tribal forum.
- F. Evidence rules may be different, including a tip towards greater deference to oral statements and a different application of hearsay than you may expect in a non-native forum.
- G. Due in part to the participatory nature of tribal dispute resolution values, jury trials can occur more often than in state courts.
- H. Higher incident of pro se litigants.
- I. Tribal bar membership usually required, and can require a test on tribal law.

IV. Sovereign immunity, immunity waivers, forums to present claims and enforce judgments

- A. As a sovereign government, tribal governments, enterprises, agencies, and actors (subject to requirement that actor was within his/her authority) possess sovereign immunity in all courts (federal, tribal, state). Applies on or off reservation, whether the suit involves traditional governmental action or commercial activity. No immunity from suit by the United States.
- B. Tribal immunity may be waived in one of two manners: tribe itself may waive its own immunity or Congress may waive tribal sovereign immunity (acting through Congressional plenary power). All waivers must be explicit. Congressional waivers are strictly construed. Tribal waivers occur through one of three methods: express contractual provision, by tribal law or ordinance, or through tribe bringing suit in court. A tribal waiver may not be effective if the person purporting to waive immunity has no authority to do so under tribal law. Most tribes have tort claim ordinances, and other waivers of sovereign immunity within tribal code.

- C. Forums to present claims and enforce judgments. Not as difficult in light of PL 280 in Oregon, but still subject to pre-litigation analysis to initiate suit in best location to effectuate execution of judgment.

Judgments enforced through “full faith and credit” and comity. See ORS 24.220 and *Matter of Marriage of Red Fox*, 23 Or. App. 393 (1975).

For practical and legal reasons, always attempt to domesticate state judgment in tribal court prior to seeking execution. Note that right to garnishment may be conditioned at lower dollar amounts than state court.

Tribal per capita payments and other settlement funds usually unavailable for execution of judgment. Same for tribal trust assets (land, etc.). Per Capita Act provides that tribal per capita payments (from trust funds) are not liable “for the payment of previously contracted obligations” except as the relevant tribal government may authorize. 25 U.S.C. § 117b.

- D. Tribal claims and Federal Tort Claims Act (FTCA).

Indian Self Determination Act (and its subsequent amendments and counterparts including ISDEAA, here generally referred to as “ISDA”) enacted to authorize tribes to contract to provide services and programs provided by the Bureau of Indian Affairs (“BIA) and Indian Health Service (“IHS”). In 1990, ISDA amended to extend FTCA coverage to tribes and tribal organizations carrying out 638 contracts or compacts with either the BIA or IHS.

“With respect to claims...under a contract, authorized by the ISDA, an Indian tribe...is deemed...to be part of the Bureau of Indian Affairs...or the Indian Health Service...while carrying out any such contract and its employees are deemed employees with the Bureau or Service while acting within the scope of their employment..., any civil action or proceeding involving such claims brought hereafter against any tribe...or tribal employee, ... shall be deemed to be an action against the United States and will be defended by the Attorney General and be afforded the full protection and coverage of the Federal Tort Claims Act.”

What is covered:

Claim for “injury or loss of property or personal injury or death, caused by the negligent or wrongful act or omission of any employee of the Government”;

Liability exists under “circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.” 28 U.S.C. § 1346(b)(1);

FTCA remedies are the *exclusive* remedy available to any tort claim against the United States, *the tribe, or tribal employee*. 28 U.S.C. § 2679, 25 C.F.R. § 900.204;

Scope of FTCA coverage includes all activities within the scope of work under 638 contracts/compacts even if tribe receives non-638 funding or uses tribal funding to pay for such activities. 25 C.F.R. § 900.197.

What is NOT covered:

See 28 U.S.C. § 2680.

Law enforcement exclusion;

Claims for assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights, except that tribal law enforcement official deputized to enforce federal law, DO have FTCA coverage for the following excluded torts: assault, battery, false imprisonment, false arrest, malicious prosecution and abuse of process.

Questions about the “law of the place” (tribal or state) arise here. Do not assume one or the other would categorically apply, and attempt to address with summary judgment at outset if necessary.

Watch for typical FTCA issues such as no coverage for discretionary policy functions, etc.

V. Indian Civil Rights Act, 25 U.S.C. §1302

After *Santa Clara v. Martinez*, judicial remedies can be curtailed, with the exception of federal habeas corpus relief.

Most often involves due process claims.

The primary obstacle to successful monetary claims against a tribal government when the litigant cannot take advantage of a tribal tort claim process.