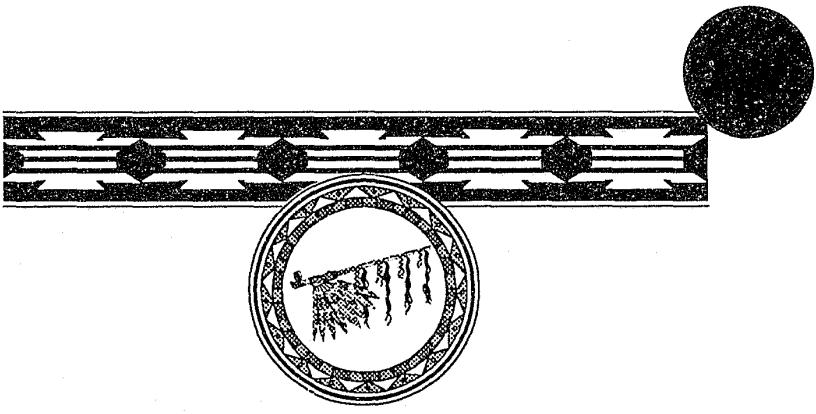
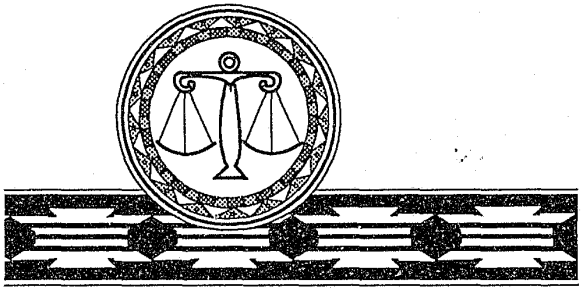


Tribal Court-State Court Forums

A How-To-Do-It-Guide to Prevent and Resolve Jurisdictional Disputes and Improve Cooperation Between Tribal and State Courts



Tribal Court-State Court Forums

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H. Clifton Grandy
Senior Staff Attorney

and

H. Ted Rubin
Senior Staff Attorney
National Center for State Courts

National Center for State Courts
State Justice Institute

National Center for State Courts
300 Newport Avenue
Williamsburg, Virginia 23187-8798
(804) 253-2000

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H. Ted Rubin
Senior Staff Attorney
National Center for State Courts

South Dakota's experience with the Tribal-State Forum has been most positive. It has allowed for the amplification of an existing dialogue with the State and Tribal Courts of South Dakota. This increased communication has resulted in an open and frank discussion of issues of mutual concern and has allowed us to work with great hope for continued growth and cooperation based on mutual respect and understanding.

While the work of the Forum has been completed under this grant, it will now become an ongoing process to continue to examine those issues of mutual concern, and to develop rational actions to respond to those concerns.

— Hon. Robert Miller, Chief Justice, South Dakota

There is a strong need in probably all states with Indian country to bring state and tribal officials together to address jurisdictional disputes between the two court systems.

— Hon. Jay A. Rabinowitz, Former Chief Justice, Alaska

As an attorney representing tribal governments and dealing with tribal courts on a regular basis, I know first hand the important progress this project has made in establishing ongoing relationships between tribal courts and state courts that have led to a reduction of conflicts between the courts. I have been involved in few projects during my professional life that have produced the kind of concrete results that are evident in this project.

—Jeanne S. Whiteing, Esq., Boulder, Colorado

Arizona was fortunate to have had good working relationships between individual state and tribal judges before conducting our state forum. The Arizona Court Forum and its report have served as a focal point for building upon these relationships and for concrete action to remove barriers to cooperation between state and tribal judges in Arizona.

—William L. McDonald
Administrative Director of the Courts, Arizona

Foreword

Notable advancements in reducing conflicts between tribal and state courts began in January 1989 when the Tribal Courts and State Courts: The Prevention and Resolution of Jurisdictional Disputes Project was initiated. The project has been sponsored by the Conference of Chief Justices, guided by a national coordinating council of 13 very active members, funded by the State Justice Institute, and administered by the National Center for State Courts.

The project has been addressing intersystem disputes that arise from the Indian Child Welfare Act, domestic relations matters, contracts, torts, taxation, economic development, hunting and fishing, highway traffic, criminal, and other substantive areas. We have found that great attention must also be applied to full-faith and credit or comity conflicts.

A main avenue for avoiding conflict has been the tribal court-state court forum. Chief justices of six state supreme courts have appointed these bodies. These forums chart and implement strategies to reduce jurisdictional conflicts and thereby make each court system more effective. Their main mode of action is getting tribal and state jurists and related officials to work together.

Jurisdictional conflicts are costly to court systems and particularly costly to the parties, and these conflicts delay the resolution of other pending matters. Many of these problems can be solved through informed agreements, informal intersystem working relationships, education, new or revised statutes or court rules, and other methods that a forum arranges or coordinates.

The more than 150 tribal courts in the United States share a common heritage with state and federal courts. There are close roots between these entities. Indeed, there are special qualities of tribal court jurisprudence that enrich us all.

A project goal is to stimulate chief justices in all states with tribal courts to appoint and support a forum. As chairman of the 1990 Washington forum, I can assure you that this is a most worthwhile and productive undertaking.

Justice Vernon R. Pearson (Ret.)
Supreme Court of Washington
Chair, Coordinating Council

What Is the Purpose of a Tribal/State Court Forum?

A tribal court-state court forum seeks workable solutions. A forum is a proven method of resolving civil and criminal jurisdictional conflicts between tribal and state courts and forestalling inappropriate litigation. State forums were initiated in three 1990 demonstration programs funded by the State Justice Institute (SJI) under the Tribal Courts and State Courts: The Prevention and Resolution of Jurisdictional Disputes Project administered by the National Center for State Courts.

Why Should a Forum Be Created?

A tribal/state court forum enables judiciaries to take the lead in problem solving. Judiciaries can fashion their own solutions while invoking assistance from the legislative and executive branches, rather than experiencing the unpredictability of legislative or executive branch actions. A forum unites tribal and state court interests and objectives to strengthen their common ground. A forum expands tribal and state court judges' knowledge of each other's jurisdictions, procedures, and practices, and furthers their mutual respect, cooperation, and appropriate case coordination.

What Is the History of Tribal/State Court Forums?

The Tribal Courts and State Courts Project came about because of the desire of the Conference of Chief Justices to address civil jurisdictional problems between state and tribal courts. The direction for the project comes from the 13-member coordinating council, whose members include a former and present chief justice, a tribal court chief justice and a former tribal court chief judge, two federal judges, two state court judges and a state court administrator, an Indian and a non-Indian lawyer, and an Indian and a non-Indian legal scholar/consultant. The coordinating council selected three states to implement demonstration state forums: Arizona, Oklahoma, and Washington. During the first three years, the project focused exclusively on civil jurisdictional

disputes. Beginning in 1992, the focus was expanded to include criminal and quasi-criminal disputes as well.

Have There Been Any State Forums Other than the Demonstration Projects?

In addition to the three demonstration projects, Michigan and South Dakota initiated state forums in 1992, with financial assistance from the project. North Dakota became the sixth forum state when it received a late-1992 direct grant from the SJI in-state education program. The Tribal Court-State Court Project sponsored a national conference, "Civil Jurisdiction of Tribal and State Courts: From Conflict to Common Ground," that was held in Seattle, Washington, in June 1991. Two hundred forty tribal, state, and federal officials participated. This conference focused on the state forum model of conflict resolution. This document draws on the learnings from the project-related state forums to provide states that have not yet implemented a forum with a "blueprint" for success.

A Brief Description of a Forum

A state forum is a body of state and tribal court representatives convened by the state chief justice to find mutually acceptable and practical solutions to conflicts between the two court systems. The forum meets a minimum of four times over one year to develop and complete an action agenda; some forum members have suggested that a fifth or a sixth meeting is desirable. An action agenda covers educational needs, proposals for legislation and both state and tribal court rules, suggestions for intergovernmental agreements, preparation of a tribal court handbook, approaches to improved communication and cooperation, encouragement of cross-visitations and information sharing, and indications of other actions that should reduce conflicts.

Appointing a forum to serve for two years is advantageous. A forum, during its first year, can concentrate on an action plan, and, during the second year, it can implement the action agenda. While much can be accomplished by a one-year action plan design effort, a second year is critical to achieving significant implementation.

What Are a Forum's Tasks?

An initial objective is to provide an opportunity to build relationships; that is, providing a place where the judges of tribal and state courts can become familiar with one another both professionally and personally. Another task is to develop basic information about each of the tribal courts in the state. With this information, the forum can educate state judges, attorneys, and others about the tribal courts. A brief treatise on Indian law, which can be made a part of a tribal court directory, can provide useful information, such as how the U. S. Indian Child Welfare Act affects state and tribal court jurisdiction and procedures. A forum designs a plan for distributing the tribal court handbook and seeks a group, such as the Indian law section of a state bar association, to update the directory on a permanent basis.

Among other tasks, a forum collects and evaluates intergovernmental agreements that take place between state or local government and tribal entities. A forum may use additional agreements to cover other substantive areas to build cooperation and reduce unnecessary litigation. Intercourt system agreements are of particular interest; for example, for sharing courthouse facilities or providing for cooperative probation supervision. The most important task of a forum is to develop an action agenda, which sets out well-defined courses of action for a number of concrete goals.

Who Convenes a Forum?

A forum is convened by the chief justice of the state supreme court. Leadership by the chief justice commands the respect of both state and tribal court systems. The chief justice's interest symbolizes that resolving conflicts between the two court systems is a priority of the state judicial system and that constructive, cooperative solutions will be sought. State chief justices have convened all six forums to date.

Who Should Chair a Forum?

The chair should be a current or retired member of the state appellate or supreme court, or an active state trial court judge. The chair should be a jurist who has prior experience

with tribal courts and their officials and is highly regarded by both tribal and state court judges.

The chair should have a clear idea of what needs to be accomplished by the forum, genuine commitment to the concept, and respect for the existence of the tribal courts as a parallel system. The chair should be skilled at running meetings. This includes the ability to keep the forum focused on common goals and away from political and divisive questions. The chair should champion cooperation between the two judicial systems and the fulfillment of the action plan.

All forums to date have appointed a tribal court judge as the forum vice-chair. This has worked extremely well. State chief justices have consulted with a tribal consortium or with tribal judiciaries in selecting this official, whose additional roles include substituting for the chair in the chair's absence; consulting with the chair regarding forum goals, procedures, and problems; and presiding over a committee that is appointed to focus on a particular task.

Who Should Be a Member of a Forum?

Forum memberships have consisted of four state court and three tribal court officials. While the great majority have been judges, several forums have appointed state court administrative staff, an assistant attorney general, or a solicitor for a tribal court system as members. A state that has four tribal courts may wish to increase membership to four tribal court representatives. A state should select the number of members that seems best for that state.

The balance between state court and tribal court members should be nearly equal. Tribal participation is essential for a forum. The appointed members should be interested in resolving conflict between the parallel judicial systems. Members should not be selected on the basis of their job title or office alone. Those who are selected should represent a diversity of views and experience and should be known for expressing these opinions. The appointed Indian officials should be known for the candor of their expressions. State and tribal officials need to inform each other of their opinions and beliefs. A forum may wish to appoint additional, ex officio members.

What Is the Role of the Consultant?

A law professor or practicing attorney with competence and experience in Indian law and in state-tribal issues should be a paid consultant to the forum. The consultant, appointed by the chief justice, will conduct pertinent legal research, draft potential legislation and court rules, help develop a tribal court handbook and review intergovernmental agreements, prepare the forum report and implementation plan, and conduct other activities that assist the forum. A small budget to support law student assistance to the consultant has proved beneficial.

The consultant should be independent of state and tribal institutions, such as the state administrative office of the courts, the chief justice's office, and tribal attorneys' offices. The consultant should be a person that both state court and tribal court members can trust and look to for informed advice. The consultant should make clear his or her biases, agree to the agenda that seeks to reduce disputes between the court systems, and support the effective performance of tribal and state court systems. Other important skills include organization, planning, timeliness, political acumen, and writing ability.

Is There a Need for Other Forum Staff?

Chief justices have appointed a staff member of the administrative office of the courts or supreme court to prepare or arrange forum mailings, agendas, meeting places, minutes, copying, and expense reimbursements. Affixing responsibility for such administrative support is essential.

What Have Been the Interpersonal Dynamics of Successful State Forums?

The members of successful state forums were honest with each other. Members treated all other members of their forum as equals. State officials recognized tribal courts as equal, legitimate, and permanent institutions. They were willing to consider mutual cooperation on numerous issues. They looked for commonsense solutions. They tried to seek a consensus (including agreeing to disagree), used the exper-

tise of the members, and integrated helpful public testimony into their work. Some forums established a committee structure and did certain specialized work in committees, using the general body to discuss and approve committee recommendations and products.

What Is the Agenda for the Forum's First Meeting?

The first meeting should be opened by the state chief justice. The chief justice must set the tone for the importance of the work the forum will be doing and express deep interest in the process and anticipated products. The chief justice should express confidence in the chair, vice-chair, membership, and consultant.

A knowledgeable person should give a history of the Committee on Jurisdiction in Indian Country of the Conference of Chief Justices, which sponsored the national project; the coordinating council, which guided the project; the National Center for State Courts, which administered the project; the state forums movement; and the expectations for the forum in your state. Before the first meeting, members should have received copies of forum reports from other states and project articles and publications. Members should be informed that these materials illustrate the scope of a forum's work and other states' action agendas, but their issues may well differ, and the direction of their recommendations and implementation plan will have unique qualities.

The initial identification of issues should take place at the first meeting. This can be done as members introduce themselves and are asked to comment on jurisdictional problems they have experienced or consider important.

In further identifying issues that this state forum should pursue, the findings of other state forums should be drawn upon. The consultant should compile or at least be aware of the state forum final reports, articles, compilations, tribal court handbooks, state action plans developed at the project's national conference, and other project materials that can be used to place other possible issues and directions on the table.

The issue identification process should not be closed at the first meeting but should remain open. The chair or the consultant should continue to solicit further views from the members, and prioritization of these concerns should be ongoing.

Some of the issues that forums have identified early on have been lack of access to tribal codes and appellate decisions, state court inattention to Indian Child Welfare Act requirements, lack of recognition of each other's judgments, uncertainty of state highway patrol jurisdiction through Indian country, problems enforcing state court judgments in Indian country, law enforcement cross-deputization needs, unfamiliarity with officials and procedures of the other court system, and concurrent jurisdictional problems, such as with divorce. As issues are identified, their possible solutions should begin to be identified as well.

The chair should inform the membership of the forum's goals of formulating an action plan and an implementation scheme to accompany this plan. Toward this end, one state forum appointed committees at its first meeting, another state forum at its second meeting, although other forums did not appoint committees.

There needs to be discussion and planning for the other meetings the forum will hold, including one or two meetings where public testimony will be taken and that are held, preferably, in or near Indian country.

Is There a Role for the Public?

A forum should hold at least one public hearing. A public hearing serves several functions. First, it allows the forum to gather information from informed citizens and from tribal, state, and federal officials who are not members of the forum. Second, it ensures that the forum process does not overlook the views of those persons who have personal experiences with the court systems. Third, the public hearing process gives the forum visibility and should increase the support for the forum in both the Indian and non-Indian communities. If possible, several public hearings should be held in different locations. One state forum conducted four public hearings at various locations, arranged for just several forum members to attend so that all

members would not experience burdens on their time, and recorded and transcribed the hearings so that all members could be fully informed as to the content.

A public hearing should be structured not to exclude input, but to ensure that specific input is gathered. One way is to first make sure that a public hearing has an agenda that shows what issues the forum is considering. Invite experts on specific issues to offer testimony. Likewise, the perspectives of affected agencies can also be solicited.

One state forum's public hearing was formatted as follows: The public hearing had two issues on its agenda, one issue was set for the morning and one issue for the afternoon. The testimony was presented in panels. An invited panel led the discussion of each issue. Subsequent panels were composed of interested citizens. A final panel was composed of persons who wanted to speak on other topics.

Each speaker should have a prescribed time limit. Speakers should be encouraged to submit a written copy of their testimony. A forum can take testimony for part of a day and hold its deliberative meeting later in the day.

What Takes Place at Other First-year Meetings?

The consultant describes ongoing research findings. Members report on discussions with colleagues or associates regarding conflicts and resolution strategies. Public hearings are held, and their content is assessed. Intergovernmental agreements are examined, and the need for additional agreements, for intercourt system agreements and for intertribal agreements, is set forth. The content of a tribal court directory is approved, and the materials are obtained. If appointed, committees report, and their recommendations are assessed. State or tribal legislation and court rules may be drafted and approved.

Priority areas for address emerge. Recommendations begin to be formulated together with supporting rationales. The consultant submits a draft report. Following deliberation, the report is approved for transmission to the chief justice and for publication. A dissemination plan is approved.

What Else Should One Know About the Forum's Action and Implementation Plan?

An action plan should address problem issues in order of their priority. The action plan should focus on those items that are manageable given the forum's budgetary and time restraints. The language should be detailed. The action plan should include short-term goals that can be accomplished fairly easily.

A good format is to have detailed recommendations followed by commentary and rationale. The more specific and detailed the action item is, the greater the likelihood of implementation. Interrelated components of an action plan should be structured so that they can be implemented in stages and so that support grows as each component is implemented.

A prime emphasis should concern what the judiciaries should do through rule, practice, education, communication, assistance, and other methods. Actions that may be taken by related organizations, such as bar associations, law schools, law libraries, and legal database entities, can be pertinent. Legislative and executive actions may be important, but these should have a connection to improving judicial system performance. Some forums' recommendations have extended to the need for certain intergovernmental agreements, and even intertribal agreements, that will affect courts.

A coordinated implementation plan is the final step in a forum's deliberation year. This plan calls for specific bodies to take specific actions to accomplish particular agenda items, and, as appropriate, by specific dates.

A second forum year for implementation is very important. Probably, fewer meetings are needed. A forum can meet formally and informally with appropriate officials to stimulate action plan fulfillment. Members can revise an implementation plan as experience indicates. Any implementation plan has a head start just because state and tribal officials have gotten to know each other and have worked together to address common concerns.

Are Forums Effective?

Forums have not achieved all of their objectives. Various forums have obtained pertinent legislation and court rules, annual law school symposia on Indian law topics, an institutional mechanism to update a tribal court directory, a growing state library of tribal codes and appellate court decisions, chief justice visitations to tribal courts, and invitations of tribal judges to state judicial conferences, among other accomplishments. Further, the informal working relationships that have developed have allowed numerous intercourt problems to be settled by what one forum chair refers to as a simple telephone call.

What Does a Forum Cost and Where Might Funding Be Available?

Forum costs are low. First-year direct costs should not exceed $6,000-$8,000. Consultants have been paid $2,000 and receive another $1,000 to employ law student assistants. There are in-state transportation and per diem costs related to meetings, but some courts have absorbed these costs into their own budgets. There are expenditures for report publication and dissemination and limited, miscellaneous long-distance telephone and copying costs. Second-year costs should be very modest.

Funding may be available through the in-state education program classification of the State Justice Institute in Alexandria, Virginia. Other possible sources of funding are a state court system budget or joint state-tribal funds, a law school or university budget, foundations, and businesses, including Indian corporations.

Where Do I Obtain More Information?

Contact the Director, Tribal Courts and State Courts: The Prevention and Resolution of Jurisdictional Disputes Project, National Center for State Courts, Court Services Office, 1331 Seventeenth Street, Suite 402, Denver, Colorado 80202, (303) 293-3063.