TRIBAL-STATE COLLABORATIONS

PRESENTED BY:
Lauren van Schilfgaarde
Tribal Law Specialist
Tribal Law and Policy Institute
www.Home.TLPI.org
Collaboration has long been impeded by

- Jurisdictional,
- administrative,
- bureaucratic,
- historical, and
- cultural conflicts

But, we have mutual interests and intertwined futures
Collaborative Benefits

- Expression and exercise of sovereignty – community and nation building
- Provide assistance in culturally-appropriate ways
- Increased participation in decision-making
- Maximize resources
- Cross sovereign education and understanding
Historical Perspective

- Understanding historical treatment of Indian Nations and sovereignty is critical to understanding current perspectives.
- Each Indian Nation has a unique history of contact with non-Indians, but there are common themes.
- Each Indian Nation has unique culture, norms and values.
- No “one size fits all”
PHASES OF INDIAN POLICY
Tribal Law vs. Federal Indian Law

- Tribal law is the law of each Indian Nation and pre-dates the Constitution

- U.S. law attempts to regulate Indian nations and Indian people
THE FOUNDATION OF FEDERAL INDIAN LAW

- Framework of Dominance - Johnson v. McIntosh, 8 Wheat. 543 (1823)
  - Discovery gave title to discovers, Indian people hold right to occupancy
- Cherokee Nation v. Georgia, 30 U.S. 1 (1831)
  - “Guardian-ward”; “Domestic dependent nations”
  - Tribal sovereignty subject to limitations - Plenary Power
PHASES OF FEDERAL INDIAN POLICY

- Objective: “How to deal with the Indians”
- Regardless of intent – result was a weakening of tribal sovereignty
  - Assimilation (“Kill the Indian, save the man” – Capt. Pratt)
  - Forced “make over” of Indian nations and societies into own image
- Loss of tribal land
PHASES OF FEDERAL INDIAN POLICY

• Colonial Period (1492 - 1774)
  • Sovereign-to-sovereign relationships

• Confederation Period (1774 – 1789)
  • Indian support for new government
  • High priority of good relations
  • Indians feared and hated

• Trade and Intercourse Era (1789 – 1825)
  • Federal relationship with the Indians
  • Department of War responsible for Indians
  • Trade and Intercourse Act
PHASES OF FEDERAL INDIAN POLICY

• Removal Era (1825 – 1850s)
  • US Military response to Indians
  • Forced removal to west of the Mississippi River
  • Removal Act of 1830
    • Tribes relocated to “Indian Territory” – now Oklahoma
  • Treaty of Guadalupe Hidalgo - 1848
PHASES OF FEDERAL INDIAN POLICY

• Reservation Era (1850 – 1887)
  • Gold discovered in California
  • Treaties, statutes and executive orders
  • Set aside tracts of land for Indian occupation and use – social experiment
  • Implemented by force, starvation, and disease
PHASES OF FEDERAL INDIAN POLICY

• Allotment (1887 – 1934)
  • Assimilate the Indian and destroy Indian way of life
  • General Allotment Act (Dawes Act)
    • Impose land ownership and farming/ranching
    • Tribal land converted to individual allotments
    • Allotments held in trust
    • Significant loss of tribal land
    • Land not allotted was “surplus” and sold to non-Indians
  • Boarding schools
PHASES OF FEDERAL INDIAN POLICY

• Indian Reorganization Era (1934 – 1940s)
  • 1928 Report – Assimilation attempt “total failure”
  • New Deal
    • Ended allotment
    • Revitalize and support tribal governments and tribal sovereignty
    • BIA drafted model constitutions

• Termination Era (1940s – 1961)
  • Attempts to protect tribal sovereignty abandoned
  • Sought end to federal/tribal relationship
  • 109 Indian nations were denied or terminated federal recognition
  • 1.3 million acres of tribal land lost
PHASES OF FEDERAL INDIAN POLICY

- Self-Determination Era (1961 – present)
  - President Kennedy’s administration refused to terminate more tribes
  - President Johnson’s Poverty Programs invested money into tribal programs and infrastructure (mid 1960s)
  - President Nixon declared policy of “Self-Determination”
  - Indian Self-Determination and Education Assistance Act of 1975
    - Tribes may contract with federal government for delivery of federal services and programs on the reservation
    - Protect and support tribal governments and courts
TRIBAL JUSTICE TODAY
Prior to European contact, Indigenous peoples practiced various forms of meaningful dispute resolution.

1883: First modern iteration of tribal courts: “Courts of Indian Offenses” (CFR)

1934: Indian Reorganization Act: permitting tribes to organize and adopt constitutions under federal law.

Today: tribal justice systems are diverse in concept and character. At various stages of development.
Criminal and Civil Jurisdiction is complex; often depends on the
- Indian status of the offender/defendant
- Indian status of the victim/plaintiff
- Location of the offense/act
- The nature of the offense/act

Additional factors include
- Federal prosecutorial discretion
- Development of the Tribal Court and/or Tribal Code
- Possible state jurisdiction (e.g. PL 280)
- Joint Powers Agreements and/or Memorandums of Understanding
Court Collaboration

- Diversion courts
- Recognition of tribal court judgments
- Family law
- Truancy and other juvenile matters
- Indian Child Welfare Act (ICWA) cases
- Motor vehicle licensing
- Child support enforcement
- Enforcement of protection orders
- Recognition of customary marriages
- Probation and reentry support
- Registration and management of sex offenders

Consider Tribal-State Court Forums
PROMISING PRACTICES GENERALLY

• State Police Officer Status and Cross Deputization Agreements
• Arizona Court Rule Providing State Recognition of Tribal Court Judgments
• Arizona Recognition and Enforcement of Tribal Court Involuntary Commitment Orders
• Washington Joint Executive-Legislative Workgroup on Tribal Retrocession
• New York Federal-State-Tribal Courts Forum
• Tribal Representatives in Maine Legislature
• Intertribal Court of Southern California
Healing to Wellness Courts are tribal drug courts.

Particular interest in addressing alcoholism, especially in a non-adversarial nature.

The term “Healing to Wellness Courts” was adopted to
(1) incorporate two important Indigenous concepts - Healing and Wellness; and
(2) promote wellness as an on-going journey.
HEALING TO WELLNESS COURTS
WWW.WELLNESSCOURTS.ORG
CULTURAL SENSITIVITY

- Cultural competency is one of the critical principals of care
- Not all tribal customs and traditions are the same
- Not all methods of seeking traditional healing are the same
- Not all Indian people will be open to participating in cultural orientated activities
- Must give careful consideration on the team’s approach to cultural teaching and customs in their programs
Opportunities for Collaboration in Wellness Court

- Transfer Agreement for eligible participants
- Provision of drug testing and other oversight services
- Sharing of database information
- Consultation for particular subject matter (e.g. cultural activity or treatment)
- Consultation for particular participants
- Joint team members (probation, behavioral health, treatment)
- Communication between Coordinators
- Observation of each other’s hearings
ST. REGIS MOHAWK TRIBE
JURISDICTION AND THE ST. REGIS MOHAWK TRIBE

• Concurrent Tribal, State, and Federal jurisdiction
• Most cases are handled at the local Town Court in Bombay, NY
• Felony cases are sent to County Court

• Federal cases are prosecuted by the AUSA of the Northern District of New York in either Albany or Syracuse
ST. REGIS MOHAWK TRIBAL HEALING TO WELLNESS DRUG COURT

• Works with
  • Local Town Court, County District Attorney, County Probation, Federal Prosecutor, and Federal Supervision;
  • St. Regis Mohawk Tribal programs;
  • Mohawk Council of Akwesasne programs
    • Also works with the Canadian Justice System in Ontario and Quebec
Leech Lake Band of Ojibwe
Joint Powers Agreement:

Tribal Court and State Courts agreed to work jointly on common goals of:

1. Improving access to justice
2. Administering justice for effective results
3. Fostering public trust, accountability, and impartiality
JOIN JURISDICTION WELLNESS COURT TEAMS

- Judges – State District Court Judge & Tribal Court Judge
- County Attorney
- Probation/Supervision – MN Dept. of Corrections and County Probation
- Law Enforcement – County Sheriff & Leech Lake Police
- Treatment Assessor/Provider – Leech Lake Outpatient & Private Treatment Providers
- Coordinator/MIS – 9th Judicial District
MOU LANGUAGE CONSIDERATIONS

Referral and Transfer Agreements
TRANSFER CONSIDERATIONS

• Pre- or Post-adjudication
  • Similarity to other similarly situated state case
  • Ability to prosecute
  • Carrot for participation
  • Coordination between prosecutors and defense counselors

• Will Tribe be informed for every tribal member arrested, or only for those the County decides to refer?
TRANSFER CONSIDERATIONS

• Screening and Assessment
  • How will the County identify tribal members?
  • How long between arrest/conviction and clinical assessment?
  • What tools will be used? By whom?
TRANSFER CONSIDERATIONS

• Extraneous Legal Requirements
  • Are there other state/county supervision requirements?
  • Can other cases be consolidated into Wellness Court?

• Services
  • Does participant reside in the community/otherwise have access to services?

• Incentives and Sanctions
  • Ability to use jail as a sanction
Transfer Considerations

• Discharge
  • Does the Wellness Court have the authority to determine discharge?
  • What are the benefits of a successful discharge?
    • Case dismissal
    • Sentence suspension
    • Expungement
  • Unsuccessful discharge?
  • Is the case transferred back to the County?
Transfer Considerations

- Data management and other information sharing expectations
- Agreement modification clause
  - Joint steering committee
  - Judges
- Specify agencies and departments
- Who needs to sign?
Stepping Forward

Collaboration begins with a first step.
Collaboration Considerations

- Personal connections
- Common ground on specific issue
- Share leadership and responsibility
- Find the low hanging fruit
- Better to start local
- Look for other partners
- Identify needed staff and resources
- Develop a communication plan
Barriers to Collaboration

• Collaboration is not telling or being told what to do
• Slippery Slope to becoming a State or Tribal Actor
  • Assume responsibilities without compensation
  • Assume liability
  • Appearance of surrendering sovereignty and/or independence
• When Historical Issues have not been addressed
  • Collaborators must understand the cultural trauma underlying each community
  • Simultaneously, we must move on: empathy over guilt
The Tribal Law and Policy Institute is a Native American non-profit organized to design and deliver education, research, training, and technical assistance programs which promote the enhancement of justice in Indian country and the health, well-being, and culture of Native peoples.

www.home.tlpi.org
www.WellnessCourts.org

