

# *LEGAL ISSUES IN INDIAN COUNTRY*

**Common Challenges & Conundrums for  
Tribal Healing to Wellness Courts**



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# OVERVIEW

- Indian Law Basics
- Jurisdictional Issues
- Common Issues in Healing to Wellness Court

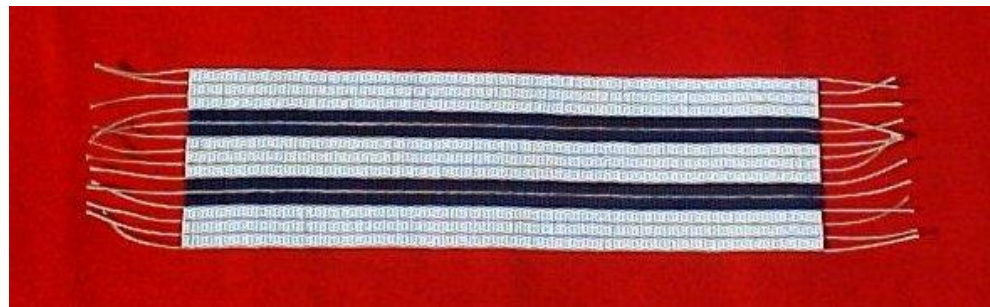


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# INDIAN LAW BASICS

# INDIAN LAW 101

- Indian Nations are sovereign nations outside U.S. Constitution
- Prior to colonization Indian Nations exercised full criminal jurisdiction
- Indian Nations are governed by tribal constitutions, codes, case law, customs and traditions
- U.S. interference in Indian nations' criminal jurisdiction
  - Federal jurisdiction
  - State jurisdiction
  - Non-Indians



# 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



Tom Tolino, Navajo  
Carlisle Indian School

# TRIBAL LAND OVER AMERICAN HISTORY

1492



1744  
Lancaster  
Treaty



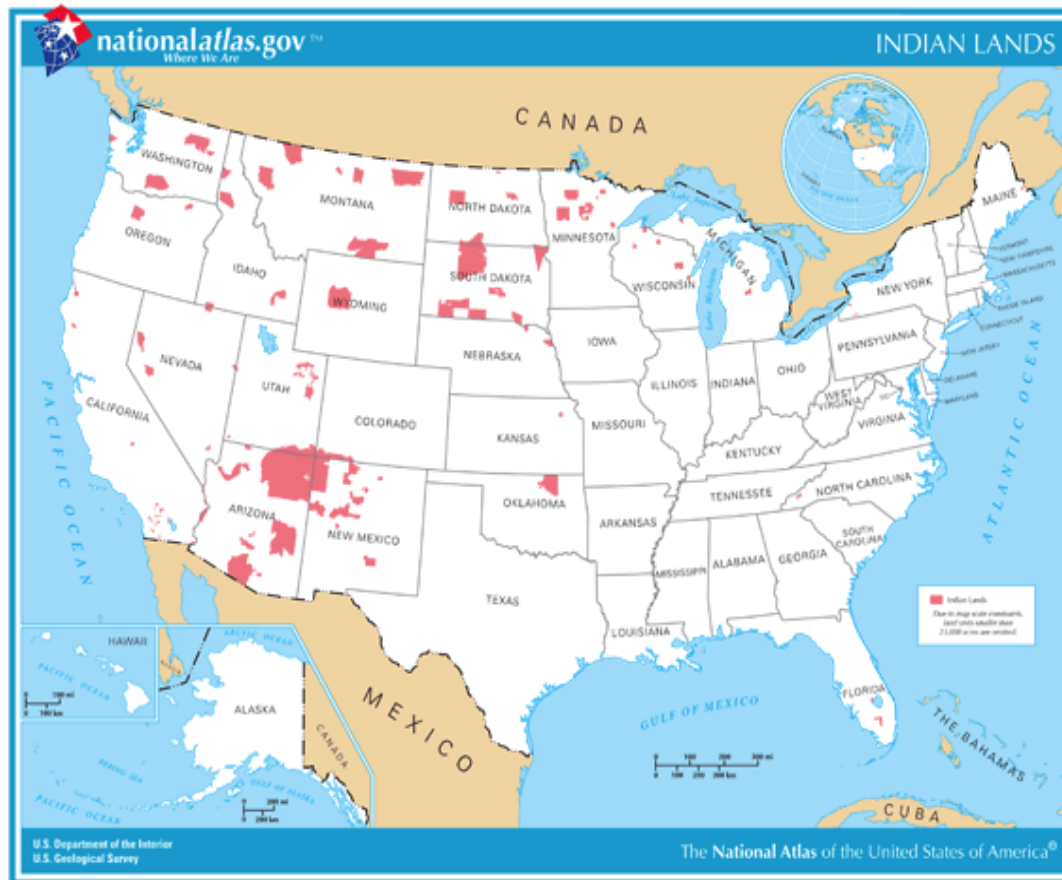
1830  
Indian  
Removal



1850



# TRIBAL LAND TODAY



U.S. Department of the Interior  
U.S. Geological Survey

The National Atlas of the United States of America®



# PHASES OF FEDERAL INDIAN POLICY

- Colonial Period (1492 - 1774)
  - Sovereign to sovereign relationships
- Trade and Intercourse Era (1789 – 1825)
  - Federal relationship with the Indians
  - Department of War responsible for Indians
  - Trade and Intercourse Act
- Removal Era (1825 – 1850s)
  - US Military superiority of Indians
  - Forced removal to west of the Mississippi River
  - Removal Act of 1830
    - Tribes relocated to “Indian Territory” – now Oklahoma
    - Trail of Tears





# Phases of Federal Indian Policy Cont.

- Reservation Era (1850 – 1887)
  - Gold discovered in California
  - Treaties, statutes and executive orders
  - Set aside tracts of land for Indian occupation and use
  - Implemented by force
  
- Allotment & Assimilation Era (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



# Phases of Federal Indian Policy Cont.

## ○ Indian Reorganization Era (1934 – 1940s)

- 1928 Report – Assimilation attempt “total failure”
- New Deal
  - Ended allotment
  - Revitalize and support tribal governments and tribal sovereignty

## ○ 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 Cont.

- Self-Determination Era (1961 – present)
  - President Kennedy's administration refused to terminate more tribes
  - President Nixon declared policy of "Self-Determination"
  - Indian Self-Determination and Education Assistance Act of 1975
    - Tribes play a major role in self-governance
    - Tribes may contract with federal government for delivery of federal services and programs on the reservation
    - Protect and support tribal governments and courts
  - Current policy



# TRIBAL COURTS

Prior to European contact → various forms of traditional dispute resolution



“Courts of Indian Offenses” (CFR),

- 1883
- Resolve disputes and enforce federal regulations, such as the criminalization of Indian dances.

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

Today, over 300 tribal courts

Many courts apply large bodies of written law, as well as custom and tradition to settle disputes and address crime.



# TRIBAL HEALING TO WELLNESS COURTS

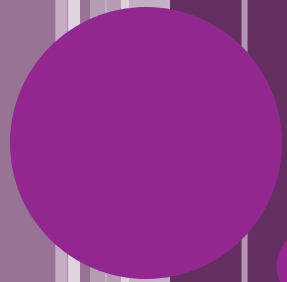


Tribal Healing to Wellness Courts are tribal adaptations of a drug court.

The term “Healing to Wellness Courts” was adopted to

- (1) incorporate two important Native concepts - Healing and Wellness; and
- (2) promote the program’s efforts to promote wellness as an on-going journey.





# JURISDICTION

# INDIAN CIVIL RIGHTS ACT

## ○ 25 USC § 1302

- Double jeopardy prohibited
- Prohibition against self-incrimination
- Speedy trial
- Sentencing limitations
- TLOA issues:
  - Required defense counsel – licensure requirements
  - Judges – training requirements



# TRIBAL LAW AND ORDER ACT: INCREASED SENTENCING AUTHORITY WITH CONDITIONS

## ○ Defense Counsel

- “equal to that guaranteed by the United States Constitution”
- “licensed to practice law in any jurisdiction in the United States that applies appropriate licensing standards and effectively ensure the competence and professional responsibility of its licensed attorneys”

## ○ Judges

- “sufficient legal training to preside over criminal proceedings”
- “licensed to practice law by any jurisdiction in the United States”





# VIOLENCE AGAINST WOMEN ACT

- Authorizes tribes to exercise special domestic violence criminal jurisdiction over all persons
- Jurisdiction concurrent with states and US
- Exceptions:
  - Victim and Defendant are non-Indian
  - Defendant's ties to Indian tribe
    - Residence
    - Employment
    - Spouse/Intimate Partner/Dating partner of tribal member or Indian resident




# VAWA: DEFENDANT RIGHTS

## ○ Impartial jury

- Cross section of the community AND
- Does not exclude any distinctive group, including non-Indians AND
- All other rights/necessary protections of the Constitution of the United States



# DOES YOUR HWC HAVE JURISDICTION?

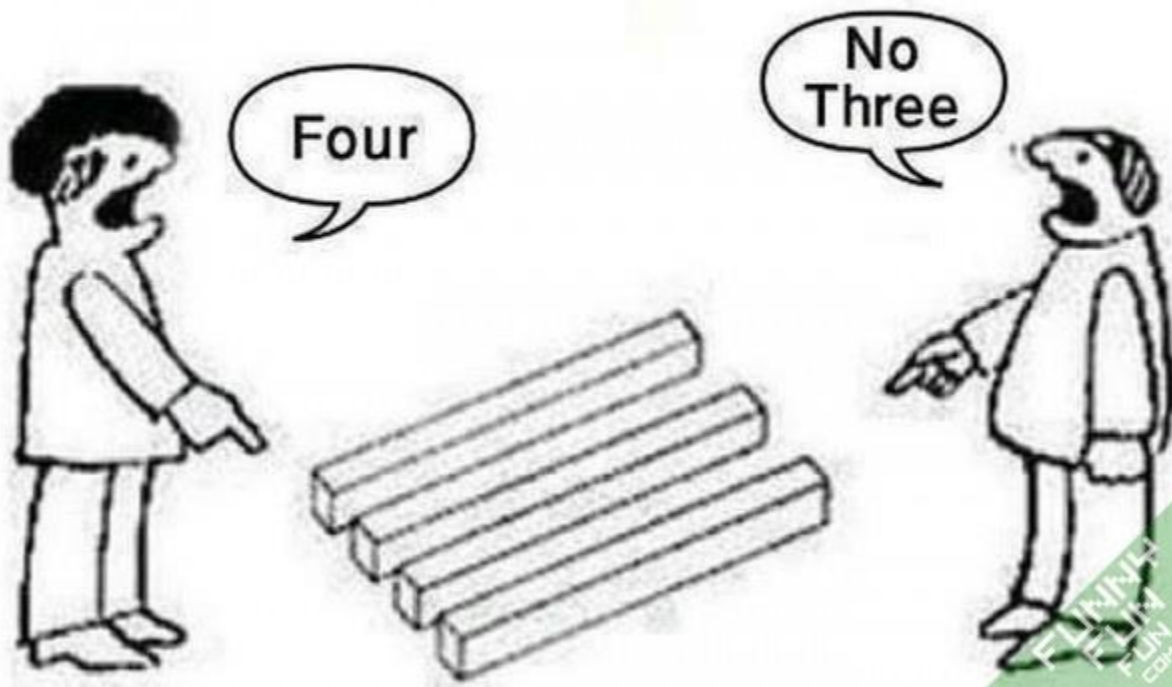
- Tribal Constitutions, Codes and Policies
  - Citizenship?
    - *Oliphant v. Squamish Indian Tribe*
    - Violence Against Women Act 2014 - Partial Oliphant Fix
      - Do you have necessary requirements in place?
  - Defendant's History: Violent Offender Issues
  - Type of Case: Civil/Family, Juvenile, or Criminal
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# COMMON WELLNESS COURT LEGAL ISSUES

# COMMON LEGAL ISSUES

**It is really confusing!!!**



# PROBATION ISSUES

## ○ Length of Probation

- There have been no challenges to length of probation under ICRA
- Length for federal and state criminal sentences defined by statute
- What does your tribal code say?

## ○ Consent to search ok for probation, maybe not for diversion/bond cases



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# DUE PROCESS

When do Protections Apply?

## GENERALLY ...

- If there is *potentially* a loss of liberty – due process rights attach.
  - Good Rule of Thumb: If sanction will amount to loss of liberty – due process rights attach.
  
- What process is owed?





# TERMINATION

- Termination  $\cong$  Probation Revocation – same rules apply. (People v. Anderson, Illinois, 2005, State v. Cassill-Skilton, Washington, 2004, Hagar v. State, Oklahoma, 1999, In re Miguel, Arizona, 2003, State v. Rogers, Idaho 2007)
  - What about right to counsel?
    - Not required for US Constitution, may be required by state law
    - Tribal? Not required by ICRA, may be required by tribal constitution or law



# WAIVER OF TERMINATION HEARING

- Cannot prospectively waive due process right. (State v. LaPlaca, New Hampshire 2011, Staley v. State, Florida, 2003)
- Failure to provide pre-termination hearing was a violation of due process when removal from Drug Court would result in imposition of suspended sentence. (Gross v. Maine, 2013).



# SANCTIONS

- Loss of Liberty – Due Process applies
- Sanctions resulting in jail time result raise due process concerns but there is also tension between the outcome and general guidelines for drug court operation. Drug Court recognizes that addicts will relapse even after periods of sustained abstinence. (State v. Steward, Tennessee, 2010)



## MORE ON JAIL

- Jail cannot be used as a sanction in a pre-plea contractual Drug Court program if not authorized by statute. (State v. Diaz, Florida, 2004)
- What about contempt?
  - Direct contempt - Conduct must occur in the “immediate view and presence of judge” and actually disrupt court for immediate sanction
  - Indirect contempt – Hearing required



## ASIDE FROM JAIL/DETENTION

- Intermediate sanctions do not implicate the same due process concerns but some type of hearing is necessary. (State v. Rogers, Idaho, 2007)
- Defendant who voluntarily agreed to drug court cannot opt-out to avoid jail based drug treatment. (Walker v. Lamberti, Florida, 2010)



# COMMON CHALLENGES: “TIME SERVED”

- Argument: Time served as a sanction should be credited towards un-imposed jail sentence in underlying criminal matter.
- Held: Mixed - No consensus
  - Denial – Waived credit when signed participation agreement – if it’s specific
  - Credit for time served waiting to be admitted and/or following termination but denied credit for time served as participant
  - Credit granted
  - Credit not granted when serving for contempt of court



# COMMON CHALLENGES: THE BASICS OF TERMINATION

- Generally – notice, hearing, a fair procedure
- Create an adequate record of drug court termination hearings
- Think – Due Process



# TERMINATION ISSUES: HEARING REQUIRED

- Jurisdictions split but emerging trend is to require a hearing – Think Due Process
- What does this mean for you?
  - Need a separate judge?
  - Not necessarily
  - Creating a record is good process





# COMMON CHALLENGES: EQUAL PROTECTION AND DUE PROCESS ISSUES

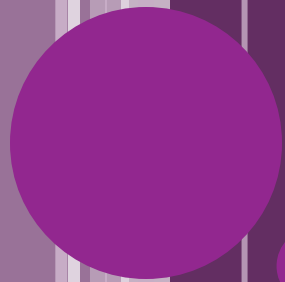
## ○ Arguments:

- It is a denial of equal protection if a defendant would have been eligible for drug court in another jurisdiction but is denied participation because the local jurisdiction doesn't offer drug court.
- Rejection from drug court participation violates due process

## ○ Held:

- No drug court in specific local is not a denial of equal protection
- Drug court is a privilege and not a right thus rejection from admission is not a violation of due process





# EX PARTE COMMUNICATIONS

# *EX PARTE* COMMUNICATION

- Direct or indirect communication on the substance of a pending case without the knowledge, presence, or consent of all parties involved in the matter.



# STAFFING AN EX PARTE COMMUNICATION?

- Does participant have knowledge?
- Does participant consent?
- Is presence required?
  - Participant
  - Defense counsel
    - Defense counsel generally as Team member
    - Participants individual defense counsel



## COMMON ISSUES: USE OF INFORMATION REVEALED IN DRUG COURT

- Held: In most instances use of the information was allowed because information was not precluded by federal confidentiality requirements
- Take away: have a rule in your policy – provides notice and process



## ABA MODEL CODE

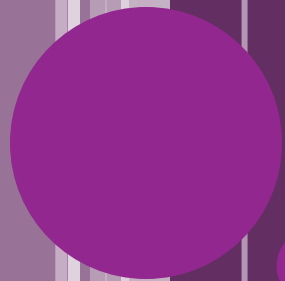
- Rule 2.9(A)(5): “A judge may initiate, permit, or consider any ex parte communication when expressly authorized by law to do so.”
- Comment (4): “A judge may initiate, permit, or consider ex parte communications expressly authorized by law, such as when serving on therapeutic or problem-solving courts, mental health courts, or drug courts. In this capacity, judges may assume a more interactive role with parties, treatment providers, probation officers, social workers and others.”



## TRIBAL CODE OF JUDICIAL CONDUCT

- Canon 3(B)(7)(e): “a judge may initiate or consider any ex parte communication when expressly authorized by law to do so.”
- Sample Tribal Code of Judicial Conduct - National Tribal Judicial Center at the National Judicial College





# REQUIRING TREATMENT



# AA/NA/RELIGIOUS 12-STEP PROGRAMS

- Requiring attendance at AA/NA or religious 12-step programs may violate Religious Freedom (Jackson v. Nixon - 8th Cir., 2014; Hazle v. Crofoot - 9th Cir., 2013)
- No violation if Defendant requests or never raises religious objection (Norton v. Kootenai County - D. Idaho, 2009)
- Sincerity of religious belief has no bearing (Alexander v. Schenk - N.D. NY - 2000)
- Loss of Immunity for forcing AA on Buddhist (Inouye v. Kemma - 9th Cir, 2007)



## MORAL OF THE STORY

- If NA/AA or other religious 12-step program is going to be mandatory - need to have non-religious options available
- Your knowledge is key
  - Know and require anyway - problem and potential liability issues with loss of immunity protections
  - If you don't know - no issues
- You aren't allowed to question sincerity of belief



## WHAT'S THE DEAL?

- Step 5: Confess to God our misdeeds.
- Step 7: Appeal to God to eliminate shortcomings.
- Step 11: Make contact with God to learn his will through prayer and meditation.
- Emphasis on God, spirituality and faith in a “higher power” supports the underlying basis as religious. (Warburton v. Underwood, NY 1998)



## ALSO CONSIDER ...

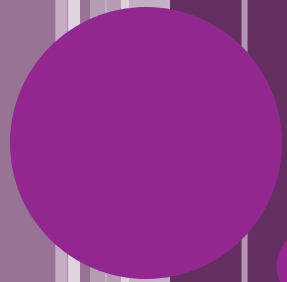
- Impact of Native American History
  - Christianity
  - Traditional Beliefs
  - Mixed beliefs
- High potential for manipulation based on circumstances.



## THE GRAY OR GREY AREA

- Cultural events and activities
- Cultural/Historical vs. Cultural/Religious





# CONFIDENTIALITY

# HIPAA

## ○ HIPAA

- Drug Court may not be a covered entity but providers are definitely covered by requirements.
- Rule/Order allows for transmission of information in court proceedings. (45 CFR 164.512 (a) and (e))
- Consent forms include notice of release of information as part of participation. (45 CFR 164.508(b)(4))
- Consent must be revocable.



# FEDERAL CONFIDENTIALITY

- General Rule: Patient Identifying Information cannot be disclosed
- Consent requirements must be met
- Right to revoke:
  - Criminal: No revocation
  - Juvenile & Family: May revoke





# CONFIDENTIALITY AND COURT

- Closed proceedings
  - 42 CFR 2.35 and the need for open courtrooms required denial of motion to close proceedings. (Florida v. Noelle Bush, Florida, 2002)
- Staffing
  - Based upon uniqueness of Drug Court, Adult Drug Court staff meetings are not subject to open courts provision of Washington Constitution. (State v. Sykes, Washington 2014)



# CONFIDENTIALITY AND PROVIDERS

- Reluctant to Share Information
- What do you need to know?
  - Appropriateness for Program
    - Moderate to Severe Substance Use Disorder
    - Co-Occurring Disorders
    - Treatment Recommendations
  - Progress in Treatment
  - Changes in Treatment recommendations
  - No need for details



# SOCIAL MEDIA

- Participant's availability or use of social media
- Admissibility issues
- Reliability issues
- Authentication issues
  - Messages should be authenticated on a case-by-case basis
    - State v. Fleck, 23 A.3d 818 (Conn. App. Ct. 2011)



# YOUR ISSUES?



# TRIBAL LAW AND POLICY INSTITUTE RESOURCES

- [www.WellnessCourts.org](http://www.WellnessCourts.org)
- Tribal Healing to Wellness Court Publication Series
  - Tribal 10 Key Components
  - Preliminary Overview
  - Judicial Bench Book
  - Program Development
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## FOR MORE INFORMATION

- [www.ndcrc.org/content/constitutional-and-other-legal-issues-drug-court](http://www.ndcrc.org/content/constitutional-and-other-legal-issues-drug-court).
- Excerpts from Selection Opinions of Federal, State and Tribal Courts Relevant to Drug Court Programs, Volume II: Decision Summaries by Issue and Jurisdiction, BJA Drug Court Clearinghouse and Technical Assistance
- [www.home.tlpi.org](http://www.home.tlpi.org)



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