

Tribal Courts: Practicing Law in Indian Country

BY MELISSA SIMONSEN

A quick test.

1. How many Indian¹ Reservations are there in Washington?
2. As a Washington licensed attorney, can you walk into a tribal courthouse and practice law there?
3. If you are not an Indian,² and commit a crime on the Reservation, where will you be booked into jail?
4. If you are an Indian and commit a crime on the Reservation, where will you be booked into jail?
5. If you are an Indian and criminal charges are filed against you at the tribal courthouse, do you have the right to an attorney?

Phew. For those of you who graduated with me and took the 2007 Washington State Bar Exam, you may remember the answers to some of these questions. We were the first group required to examine Indian law as a Bar Exam topic.

“Root Diggers” a cut-steel sculpture by Virgil “Smoker” March and depicting root gatherers’ relationship to the land. The site is part of the Coulee Corridor Scenic Byways tourism project which has the goal of educating travelers and providing a cultural experience along WA 155 through the Colville Indian Reservation. Photo by Spirit Peoples (spirit.peoples@colvilletribes.com).

These questions could certainly elicit a lengthy response and the answers will certainly differ depending on many follow-up questions. For those of us practicing law in Indian Country,³ we are acutely aware of the civil and criminal maze of jurisdictional issues that routinely arise as the Tribes exercise their sovereign rights. I hope that through this article you will be better informed and that your interest may be sparked in becoming licensed to practice in one of the courts of the 29 federally recognized Indian Tribes in Washington.

In civil matters, it is important to you and your community, not to mention your clients, to become members of a tribal bar. It is equally, if not more, important if your area of practice is in criminal law.

The Proper Forum

It is clear that as attorneys, whether practicing in the civil or criminal arenas, we review whether the matter before us is in the proper forum. Does the court have subject matter jurisdiction and personal jurisdiction? In a civil case, we want to make sure we are in the forum best suited to our clients' needs. Would we rather bring this matter in federal court or state court? Is there diversity jurisdiction? If there is, but the other party filed the matter in state court, do we even want it removed to federal court? Is there more than one county that the matter could be brought before? Would our clients' interests be best served by a particular court that may have more experience addressing a particular question of law? Have any of you considered whether your case may properly be heard in tribal court?

The Colville Confederated Tribe, where I practice as a prosecutor, has a land mass that spans over 1.4 million acres and has over 9,000 members. Could a civil action be most advantageously brought in Colville Tribal Court? Similarly, what if a client walked into your office after having been injured in a tribally owned casino? What if a client walked in who had entered into a contract with a tribal member to construct a home on trust land on the reservation and there was a breach of the contract? The proper forum to address these claims

undocumented or whose legal status in the United States has expired, and they are facing criminal charges, you must exercise extreme care in any plea negotiations and properly apprise them of all of the consequences of any entry of a plea of guilt. The same care should be given if you represent a tribal member or descendent.

As you will see from the analysis that follows, in many cases Washington state does not have criminal jurisdiction over offenses that occur within the reservation. If an Indian comes before a court in the state of Wash-



A Colville Tribal Court building in Nespelem is shown in November 2009. World file photo/K.C. Mehaffey, courtesy of *The Wenatchee World*.

would most likely be the tribal court. Are you licensed to practice in tribal court? If not, why not? Many of you are expected to be licensed to practice in both federal and state court, so why not also be expected to practice in those tribal courts that are within the jurisdictional area that your clients hail from?

In civil matters, it is important to you and your community, not to mention your clients, to become members of a tribal bar. It is equally, if not more important, if your area of practice is in criminal law. If you were unable to answer the above questions off the top of your head, then you may be representing clients in state court who should truly be in tribal court. As many of you know, if you represent a person who is

ington for a criminal offense, then an immediate question that should arise is whether the state court has subject matter jurisdiction.⁴ There may therefore be an appropriate motion to dismiss.⁵ If you are representing a client, do you ask about heritage? A member of a federally recognized tribe should be brought before a tribal court for most criminal offenses that occur within reservation boundaries.⁶ Navigating the jurisdictional maze can be challenging for me, as a law-school-trained attorney, so imagine how it may appear to an individual appearing in state court who may not have any understanding that the state of Washington does not have jurisdiction over them. It is your duty to recognize this issue.

Becoming In-Tune with Indian Country Law

You can see the importance of becoming more in-tune to issues of law in Indian Country. Recognition of these issues will benefit your practice both in the civil and criminal arena and benefit all members of this state, not to mention your clients. To demonstrate an example of the jurisdictional issues that arise for criminal defendants, let's examine what I know best, the Confederated Tribes of the Colville Reservation.

Picture this: You and your fam-

ily are relaxing on your couch in the quiet and beautiful town of Coulee Dam, where you own property that is held in trust nestled above the Columbia River on the southern edge of the Confederated Tribes of the Colville Reservation. It's Sunday, Dec. 30, and the last game of the Seahawks season is just starting; you excitedly turn on your new big-screen TV in anticipation of making it to the playoffs. Out of nowhere, your front door bursts open and a young woman enters your home, full of her Seahawks regalia

and equally eager to watch the game, she demands that you turn over your new big-screen TV. You look at her in disbelief and then ... this is where the story diverges.

In the first scenario, the intruder is not an Indian. In that case, you likely know the drill. A county, or cross-commissioned tribal officer, responds and the eager Seahawks fan is taken into custody to be brought before the Okanogan County court. But let me remind you, what if the person is in fact a tribal member but an officer books the individual into the county court without making the inquiry into their heritage? Will you be the attorney to recognize that Washington state does not have jurisdiction over this matter and that it should properly be handled in the appropriated tribal court?

In the second scenario, the intruder is a tribal member. In that case, she is taken into custody by a tribal officer and booked into tribal jail where she is brought before tribal court. In the Colville Tribal Court, the key players can take many unique faces. The prosecutor, defense counsel and judge could be non-tribal members who have both passed the Colville tribal bar exam and are licensed to practice in the state of Washington (like myself). Alternatively, they could be licensed to practice before the tribal court, but not in the state of Washington. In the majority of cases, the presiding criminal judge is Judge Sheila Cleveland, who has not been to law school but is licensed to practice before the Colville Tribal Court. She is an esteemed elder in the community who has practiced law before our tribal court for over 20 years.

Another unique element to the second scenario is this criminal defendant is provided rights under the Indian Civil Rights Act (ICRA) because the Tribes are not bound by the United States Constitution and Bill of Rights.⁷ For the most part the ICRA mirrors the Bill of Rights as you know them, but only provides for a right to counsel at the defendant's own expense.⁸ ICRA also outlines a tribal court's sentencing authority, providing that a criminal defendant may be sentenced to up to one year in prison and a \$5,000 fine.⁹

In 2010, a significant change occurred in tribal criminal jurisdiction with the signing of the Tribal Law and Order Act (TLOA) that allowed



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all federally recognized Tribes to increase the punishment for criminal offenses to up to three years in jail and a \$15,000 fine.¹⁰ To use this increased sentencing authority, the Tribes are required to provide the defendant additional rights, including the right to free effective assistance of counsel, as is guaranteed by the United States Constitution, and counsel that is bound by ethical rules for their licensure.¹¹ The Colville Tribes have not yet completed a revision of their laws to increase the punishment available, but it is certainly possible in the foreseeable future.¹² As it stands, the maximum punishment that this individual would receive would be a year in tribal jail.

Consider a third scenario. Again, she is a tribal member, but in this scenario, when she asks you for your supersized television, she pulls out a gun and shoots a hole in the floor near where you are sitting. Now we are looking at the type of serious offense that is properly prosecuted in federal court.¹³ Most commonly, she would be booked into tribal jail, arraigned in tribal court with a likely charge of burglary and weapon firing. Simultaneously, the FBI would investigate the matter and the United States Attorney's Office could file an indictment in federal court.

Your Knowledge Secures Justice

As WSBA members, your knowledge of these issues can both assist the Tribes in securing justice and can help make our communities and our state a better place to live. I encourage our WSBA members to become licensed to practice before at least one tribal court and complete their pro bono hours in this forum. This is an enriching experience where you learn more about your fellow Washingtonians, their culture, traditions, and philosophy of justice. As a practitioner in Indian Country, your understanding of justice will evolve and you may become an advocate for our tribes and its members. In fact, your area of practice most likely already includes the jurisdictional boundaries of at least one tribe in Washington. I encourage you and your colleagues to learn more about the tribal courts in your area and to keep a keen eye for whether your client can be better served by justice in the tribal courts. **NWL**



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She has worked for the Colville Tribes since 2010. Simonsen graduated *cum laude* from Gonzaga University School of Law in 2007. She worked for two years in the Office of the Public Defender for American Samoa, from 2008–10. She lives on Colville Reservation with her husband, Erick, and their three daughters, Siriana, Helen, and Maja. The opinions expressed in this article are the author's. This column is edited by the WSBA Committee for Diversity.

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NOTES

1. Indian is a legal term of art. The term “Native American” is, in my view, more culturally appropriate but in this article I have used the term “Indian” because it has a legal significance.
2. For the purposes of criminal jurisdiction, a person is an Indian if he has 1) a substantial percentage of Indian blood and 2) tribal or federal recognition as an Indian. See, e.g., *State v. Daniels*, 104 Wn. App. 271, 278, 16 P.3d 650 (2001); *Goforth v. State*, 644 P.2d 114, 116 (Okla. Ct. App. 1982).
3. 18 USC 1151 defines Indian Country as “(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.”
4. Congress delegated to the State authority to handle civil and criminal matters that occur in Indian Country through Public Law 280 whose criminal provisions are seen at 18 U.S.C. § 1162 and the majority of Washington Tribes have agreed to the State assuming jurisdiction in eight limited circumstances: 1) compulsory school attendance; 2) public assistance; 3) domestic relations; 4) mental illness; 5) juvenile delinquency; 6) adoption proceedings; 7) dependent children; and 8) operation of motor vehicles upon the public streets, alleys, roads and highways . . . RCW 37.12.010. Generally speaking, if a criminal act occurs in Indian Country and the act occurred on trust land, then the state does not have criminal jurisdiction. *State v. Flett*, 40 Wn. App. 277, 283, 699 P.2d 774 (1985).
5. An Indian criminal defendant can challenge state jurisdiction at any time: arraignment, plea, sentencing, or in a collateral attack on the conviction. *Arquette v. Schneckloth*, 56 Wn.2d 178, 179–80, 351 P.2d 921 (1960). A guilty plea will not bar a later challenge to jurisdiction. *Wesley v. Schneckloth*, 55 Wn.2d 90, 93, 346 P.2d 658 (1959); *Daniels*, 104 Wn. App. at 275.
6. A Tribe is able to exercise its inherent tribal authority to prosecute nonmember Indians. *United States v. Lara*, 541 U.S. 193, 210, 124 S. Ct. 1628, 1639, 158 L. Ed. 2d 420 (2004).
7. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, at 56 (1978) (citing *Talton v. Mayes*, 163 U.S. 376, 384 (1896)).
8. See 25 USC §1302(a)(1).
9. See 25 USC §1302(a)(7)(B).
10. See 25 USC §1302(a)(7)(D) (previously only one year and a \$5,000 fine maximum).
11. See 25 USC §1302(c) (which may not necessarily require a state bar).
12. To date, the only tribe that has so far adopted the TLOA in full is the Hopi in September 2012.
13. The General Crimes Act, the Major Crimes Act, and Public Law 280 are the three federal laws central to the exercise of criminal jurisdiction in Indian country. See 18 USC § 1152 (codifying the General Crimes Act, as amended, 1153 (codifying the Major Crimes Act, as amended), and 1162 (codifying Public Law 280, as amended).



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