



DARRELL DOWTY, ASSOCIATE JUSTICE,
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Darrell Dowty serves as Associate Justice of the Cherokee Nation Supreme Court and maintains a private practice in Tahlequah, Oklahoma. He also currently serves as Associate Justice of the Kaw Nation Supreme Court, as well as judge for the Prairie Band Potawatomi District Court and the Sac and Fox Tribal District Court. Judge Dowty spoke with the Center in May 2010 to discuss the Cherokee Nation's justice system and innovations in tribal court practice.

Interviewed by Kathryn Ford¹

I'd like to begin by discussing your professional experience as a tribal justice. What are the most rewarding aspects of being a tribal judge?

As you know, I have been privileged to serve several tribal courts both at the appellate level and the trial level. My most rewarding experiences have come through the trial courts and particularly my juvenile docket responsibilities. It is rewarding to see a juvenile deprived case achieve permanency, particularly with an Indian family placement or adoption. Even more rewarding is when an Indian parent truly turns his or her life around and reunifies with the children. I have even had a parent whose rights were terminated take the initiative after the case was closed to petition the Court to adopt her children, having done a complete turnaround in her life.

A good judge is somewhat invisible except when he or she is needed, but these are some of the most rewarding experiences for a trial judge, who has the opportunity to experience cases more directly and is more involved in the process. For this reason, I have found that my district court experience has been more fulfilling.

What advice or guidance would you give to a justice who's new to the bench?

For many tribes, especially smaller populations, justices are often not tribal members and work part-time. It is important to integrate culture and tradition into the judicial system of the tribe, and just as important, for those who sit on the tribal bench to have an understanding of how justice for a particular tribe is impacted by history, culture, and tradition. This can be done in a number of ways, including creating a requirement that the judge receive training prior to taking the bench; making knowledge of tribal history, tradition, and culture a part of bar membership requirements; maintaining an

¹ Kathryn Ford is Senior Associate of the Tribal Justice Exchange Program at the Center for Court Innovation.

advisory elders council or circle for judicial referrals; and requiring that there be one or more elder positions on the appellate or trial bench.

What supports or training do you think would be helpful for tribal judges and court staff to receive?

For tribal judges, jurisdictional issues are always arising. Tribal judges should have recurring training and annual updates in criminal and civil jurisdictional issues. My organization, the Institute for Native Justice, is developing on-line courses and offers on-site training in these areas, as well as courses in working with persons with disabilities, elder abuse, sexual assault and other topic areas.²

You are currently a justice on the Cherokee Nation Supreme Court, and have been Chief Justice of that court. How is the Cherokee justice system structured? What kinds of cases do you hear?

The Cherokee court system is very much based on a western, Anglo model. We are a constitutional court and, with the adoption of a new constitution in 2003, we are a true appellate court and exercise very little original jurisdiction. Our appeals cases run the gamut and we spend a lot of time resolving disputes between the other branches of government, hearing employment issues and claims for workmen's compensation, addressing tribal membership issues, such as the Freedmen case,³ and working on gaming cases, redistricting, election disputes, and a variety of other interesting issues.

What are the similarities and differences between the tribal courts where you've worked? How has your experience as a judge for several different tribes informed your view of tribal justice?

I find that most of my tribal courts have some structure based on the European court system. However, the level of influence of tribal history, culture, and tradition varies greatly. I have served in systems where certain ceremonies or the death of a tribal elder cancelled all court activity. Some tribal codes give tribal tradition the weight of substantive law and may give priority to tribal codes depending upon the issues being litigated.

Generally, tribal courts are less confrontational and less adversarial than Western courts. Many of the attorneys who come before me are non-Indian and struggle with the non-confrontational aspects of litigation. They also lack understanding of the role that tradition plays in tribal justice systems.

Also, some of our appellate courts are legislated rather than constitutional and can be effectively overridden by the governing body. The risk of tribal political influence is higher in these systems. Judges have difficulty maintaining independence and many good judges have unfortunately short tenure.

² <http://www.institutefornativejustice.org> (follow "Training &TA" hyperlink). The Institute is currently engaged in beta testing for its online courses, but the site should be up and running shortly.

³ See generally Treaty with the Cherokee art. 9, U.S.-Cherokee, July 19, 1866, 14 STATs 799; Circe Sturm, *Blood Politics, Racial Classification, and Cherokee National Identity: The Trials and Tribulations of the Cherokee Freedmen*, 22 AM. INDIAN Q. 230 (1998); *Morning Edition: Cherokee Tribe Faces Decision on Freedmen* (NPR radio broadcast Feb. 21, 2007) (available at <http://www.npr.org>); Evelyn Nieves, *Putting a Vote to the Question 'Who is Cherokee?'*, N.Y. TIMES, Mar. 3, 2007 (available at http://www.nytimes.com/2007/03/03/us/03cherokee.html?_r=1).

Finally, in the Cherokee system, judges must be law-trained. In other systems, lay tribal members may sit as judges.

What do you see as the biggest obstacles to the optimal functioning of tribal courts?

The lack of recognition of tribal sovereignty by the federal government and the states is the biggest obstacle. We have such a morass of jurisdictional issues created by Congress and federal and state court decisions. The restrictions on tribal jurisdiction, both civil and criminal, particularly as to non-members and non-Indians, are the biggest obstacles that I see to the functioning of tribal courts. Federal case decisions and legislation have impacted tribal jurisdiction to such an extent that the true exercise of sovereignty is impossible through the tribal courts.

For example, we have no criminal jurisdiction over non-Indians, who commit as many as 80% of sexual assaults in Indian Country.⁴ There is a current emphasis on improving the federal response to the problem, but until tribes can prosecute all crimes committed by all persons in Indian Country, a void will remain in the effective prosecution and in the exercise of true sovereignty.

Another obstacle is inadequate funding of tribal courts. Tribes need to give priority to their courts and some, especially smaller tribes, are struggling with limited resources.

What are the most common misconceptions that practitioners in state courts have about tribal courts?

Practitioners in state courts still view tribal courts as being inferior to state courts, and many believe that they cannot get a fair hearing in tribal court systems. In Oklahoma, state court decisions have done much to perpetuate this misconception. Many who practice before me also practice regularly in the state courts and are non-Indian, and when they have an opportunity to see the operations of a tribal court, they see that we are a fair forum and that they can receive justice in the tribal courts. Tribal courts are courts of competent jurisdiction capable of dispensing justice with fairness to all litigants. We need to get the state practitioners to join tribal bar associations and come and litigate in tribal courts. Hands-on experience is the best way to dispel the myths about tribal courts.

How important is it for state and tribal court systems to develop collaborative relationships? How can state and tribal court systems most effectively promote communication and collaboration?

These court systems must coexist side by side. The necessity of interaction will continue to grow, and it is essential that there be good lines of communication between the jurisdictions. This will also dispel the myths about the lack of fairness in tribal courts and promote mutual respect.

⁴ The U.S. Department of Justice estimates that 86% of reported sexual violence assaults against Native American women are perpetrated by non-Native men. Amnesty International, *Maze of Injustice: the Failure to Protect Indigenous Women from Sexual Violence in the USA* (Apr. 24, 2007), available at <http://www.amnesty.org/en/library/info/AMR51/035/2007>.

In Oklahoma, our State Supreme Court has taken the initiative to conduct an annual Sovereignty Symposium for tribal, state, and federal officials.⁵ All of the state's recognized tribes are represented. This effort has promoted an atmosphere of cooperation and an open line of communication among the jurisdictions, and allows development of relationships and collaborative projects like joint jurisdiction courts. Bringing our tribal, state, and federal court personnel together at a common site promotes networking and collaboration.

My organization had the opportunity at this year's Symposium to present a workshop on collaboration among the jurisdictions which was well-attended and received positive evaluations from the attendees. Also, some of our state and tribal courts have begun to develop programs of collaboration in Healing to Wellness Courts and in juvenile matters. Other tribes are sponsoring training conferences with state officials on an annual basis. The key, I think, is to continue to bring the parties together in meetings of this kind which spark discussion and innovative solutions to common problems.

What can state courts learn about the administration of justice from tribal courts?

State courts should be envious. Tribal courts, many fledgling, have the luxury of smaller dockets and do not experience the "cattle call" of frenzied caseloads that's imposed upon many state judges. Coupled with dwindling resources, this has put state courts in the posture of finding diversionary solutions by absolute necessity. It has been this motivation to reduce caseloads that has spawned many innovative programs such as mediation, drug and wellness courts, and community sentencing alternatives, many of which originated in traditional tribal systems.

On the other hand, the tribes have evolved from diversionary beginnings, such as circles of elders and peacemaker councils, to adoption of western-style court systems, and with the growth of those systems, have now begun to adopt the diversionary programs of the state courts in order to manage caseloads. We seem to be coming full circle. Innovation in our court systems should be a joint effort. Tribes should actively pursue court innovation and it should be in partnership with state courts.

Innovation is sometimes hard to foster in state court systems. How common is innovation in tribal systems?

I would like to say that innovation is flourishing in tribal court systems. However, my experience has been to the contrary. There are several barriers to innovation. First, tribes are not supporting their court systems financially. Resources are scarce and are being allocated to what are perceived as more pressing needs. While an independent judicial system is the bedrock of the exercise of tribal sovereignty, tribes tend to divert resources to other areas. Second, most tribal judges are contracted and part-time. They often have active private practices and limited time to devote to the tribe. They often do not reside on tribal land and may not be tribal members. They attend dockets and leave the administration to the court administrator or clerk. So the tendency is to maintain the status quo.

How do you mesh innovation with the desire to adhere to or return to traditional practices?

⁵ The Sovereignty Symposium, <http://thesovereigntysymposium.com> (last visited July 27, 2010).

Innovative alternatives to adversarial judicial systems are consistent with traditional tribal justice concepts. Traditional tribal justice has included healing and restoration as well as penal solutions. The codes of some of the tribes I represent place a priority on making the victim whole over the imposition of penal sanctions on the offender. Indian tribes are at the forefront when it comes to alternative justice solutions because of the impact of tradition on the development of their court systems.

What’s your assessment of the way the tribal, state, and federal justice systems respond to violence against Native women and children? What are the areas of challenge and strength?

Again, I would return to the jurisdictional mess under which tribes have to operate. As long as tribes have no criminal jurisdiction over non-Indians who assault Native women in Indian country, the problem will not be effectively addressed, in my opinion. There is no question that non-Indians constitute by far the majority who commit these assaults in Indian country.⁶ Federal prosecutions have been ineffective in reducing the escalating crime rate in Indian country. Even where the tribes have jurisdiction to prosecute Indian offenders, they are limited by the Indian Civil Rights Act⁷ to a maximum punishment of one year of incarceration. The proposed federal Tribal Law and Order Act⁸ will give tribes the authority to punish offenders with up to 3 years of incarceration, but that still is not enough and does not address the question of jurisdiction over non-Indians.

What improvements do you recommend?

Congress needs to recognize that tribal courts are fair courts of competent jurisdiction, and give them the authority to prosecute all offenders who commit crime in Indian country.

If you can, please provide one example of a case that you feel was handled safely and effectively, and another that was not.

One of my district court cases was logistically difficult because of the physical location, which was a small, cramped metal building wherein I had to conduct a bifurcated jury trial. There was no practical way to separate the families of the victim and the accused. The outcome was a just one but I had safety concerns. Since that time, the Tribe has found the resources to construct a new courthouse, and trials conducted there have been much more secure and safe because the construction was planned and completed with safety concerns at the forefront. I completed a case there recently involving alleged domestic violence, and it was gratifying to be able to provide a fair forum and still address safety concerns.

Tell me about your work with the Institute for Native Justice. What are the goals of the Institute, and what strategies do you utilize to reach those goals?

⁶ Amnesty International, *supra* note 3.

⁷ 25 U.S.C. § 1301-1303 (1968).

⁸ H.R. 725, 111th Cong. (2010).

The Institute was formed to address the issue of crimes against Native women in Indian Country, and seeks to confront and overcome barriers to justice in Indian Country for victims of interpersonal violence through training, technical assistance, and capacity-building support for tribes, non-profit organizations, and rural communities. It is a victim-centered organization, and provides training programs for those who work with victims in the criminal justice system, including judges, who can remain fair to all parties and still have an understanding of the dynamics of victimization.

What is your role there?

I am a consultant to the Institute on many projects. We conduct on-site training, online training, and video production of training products. We also conduct regional meetings, conferences and symposia and provide faculty for other regional events. Go to www.instituteformativejustice.org for more information.