

## INTERVIEW

### KOREY WAHWASSUCK, ASSOCIATE JUDGE, LEECH LAKE BAND OF OJIBWE TRIBAL COURT, CASS LAKE, MINNESOTA

*Korey Wahwassuck is Associate Judge of the Leech Lake Band of Ojibwe Tribal Court. The Leech Lake Reservation overlaps four counties in northern Minnesota—Cass, Itasca, Hubbard, and Beltrami. In 2006, Judge Wahwassuck teamed up with Cass County District Court Judge John Smith to create the first joint jurisdiction tribal-state court in the nation, the Leech Lake-Cass County Wellness Court. In 2007, Judge Wahwassuck and Itasca County District Court Judge John Hawkinson partnered to create a second joint jurisdiction court, the Leech Lake-Itasca County Wellness Court. Today, Judge Wahwassuck is working to establish a joint jurisdiction juvenile court with all four counties.*

*Interviewed by Aaron Arnold\**

**Could you tell me a little bit about your background, how you got involved in tribal justice and how you became a judge?**

I graduated from the University of Missouri Law School in 1991. After I graduated, I worked as a prosecuting attorney, both municipal and county, and also was in private practice. In 1995, I started working on prisoners' rights issues, both in the state and federal systems, and I became involved with helping Native American prisoners get access to their old ways and culture. It was very disheartening to see people denied the right to

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\* Aaron Arnold is director of the Tribal Justice Exchange at the Center for Court Innovation.

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be who they are. One of my clients was even denied a final request for a sweat lodge before he was executed in Missouri. Watching that man die without the benefit of “last rites” was a real turning point for me. After that, I began working with three of the four tribes in Kansas and concentrated my work on Indian law issues. In 2001, I took the bar in Kansas and was admitted there, so I did a lot of tribal law work prior to coming to Minnesota to work for the Leech Lake Band of Ojibwe as a tribal attorney. I first came up here in 2003 and spent 2<sup>1</sup>/<sub>2</sub> years doing the Band’s Indian Child Welfare Act<sup>1</sup> cases, both in the tribal court and state courts—in Minnesota and throughout the United States. I took the bench in March 2006 with the Leech Lake tribal court and have been a full-time judge since then.

**As a tribal court judge, how would you characterize the biggest differences between tribal courts and state courts?**

State courts are very limited in what they can do because they are bound by what statutes dictate. In tribal court systems, we have a lot more freedom to put culture and tradition into the mix and get to fundamental fairness—not that the state systems don’t, but their hands are tied in a lot of ways. We’re able to bring more people to the table in a more flexible way and to respond in a way that helps heal our tribal folks.

I’ll give you an example: recently there was a child protection case that was extremely contentious. There were multiple attorneys involved and motions were flying back and forth. In a state court system, it would have been a very adversarial hearing. It made a huge difference because we were able to just rearrange the furniture and put some coffee out and it changed the whole dynamic. In state court, it probably would have been at least a half day of oral arguments and people feeling very angry about things. Instead we were all able to sit down and help the family make some long-range plans that benefited the kids. Instead of everyone going away angry, the family mem-

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1. 25 U.S.C. § 1901-1963 (2006). The Indian Child Welfare Act, passed in 1978, imposes federal requirements on state child welfare proceedings involving Indian children. According to the statute, “it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture . . . .” *Id.* § 1902.

bers were able to sit across the table and take ownership in solving their own problems. I think that flexibility and being able to be responsive in that way is a huge difference between the state courts and the tribal courts.

**Do you see any misperceptions that practitioners in the state courts have about tribal courts?**

My experience has been that there are more misperceptions than knowledge out there. Those in the state court system here in Minnesota, even within the last five years, do not have a lot of knowledge about tribal court systems. When Judge Smith<sup>2</sup> and I first started our collaboration on the Wellness Court, we did a presentation for state judges. We had supreme court justices, appellate court judges, and district court judges and we gave them a pop quiz on Indian law and I don't think very many of them passed.

**How did they like that?**

It was an eye-opener. I think that it really started a lot of conversation and helped the dialogue open between the systems. It was a positive thing.

**You mention the flexibility that tribal courts have and how they are not bound by the statutes that bind state courts. How do you balance flexibility and the ability to get to the root of problems with consistency and fairness?**

It's rooted in common goals. Take, for instance, the child protection cases: we're looking out for the best interests of the children and a lot of the goals that we are trying to achieve are the same [as those of state courts]. The misperception that we have "no written laws" or that it's a "lawless place" can be corrected through communication and letting people see the process and educating people.

The state system can be boxed in by rigid rules and procedures, and that can be a limitation. My experience is that state court judges want things to be better and want to be able to respond in better ways, but there's only so much they can do with the laws that they have to follow. I think sometimes we're "overlawed" with statutes—if you can focus on the outcome,

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2. For a full discussion of the development of the Leech Lake joint jurisdiction courts, see Korey Wahwassuck, *The New Face of Justice: Joint Tribal-State Jurisdiction*, 47 WASHBURN L.J. 733 (2008).

then you can find ways to reach better results. Our juvenile code might not be as thick as a state code, but we're trying to get to the same place. Just like the state system, we're trying to do what's best for the children. We stay focused on that.

**With that in mind, what do you see as some of the biggest obstacles that are facing tribal courts today?**

Money. I think that's a huge problem. There are tribes everywhere that are building their justice systems and expanding their jurisdiction and the types of cases that they're handling. Leech Lake is a perfect example; they want to build a juvenile delinquency program and have more of a hand in these cases, but there is no infrastructure to provide supervision to these kids. The Band doesn't have the resources to start a program from scratch, and we've applied for grant after grant and things are very competitive now. These days, tribes are competing against each other for scarce resources.

Also, there is a lack of understanding of how competent tribal justice systems are and the positive results that they can reach. Tribal judges need the ability to get to the table in different places so that people see tribal justice in action. I'm really blessed to have a full-time position. I can actually get out to see what's happening other places and have that dialogue. The majority of tribal judges across the country are part-time, and as much as they may want to get out there and make changes, there are simply not enough hours in the day. It all boils down to hard choices tribal systems have to make about how to use limited resources.

**How important do you think it is for a tribal court judge to be, first of all, Native American and, second, a member of the specific tribe they're sitting in?**

I think it's very helpful if they're Native American because I think that creates a level of comfort for people who come before the court. Tribal members who come before a Native American judge may feel that they're treated more fairly and in a culturally appropriate way. But it all depends on the person. I know that there are non-Indian judges out there who do an excellent job as well.

As far as a tribal member being a judge, I think it can be very difficult. I would love nothing more than to be able to be a

judge for one of the tribes down in Kansas, but we're related to everyone. I think that that makes it very difficult. One thing that shapes the perception of tribal courts is that family connection thing. That's not to say that most tribal member judges aren't completely fair and impartial—it doesn't matter if their niece or nephew has messed up, the judge will do whatever the tribal law says needs to happen. But I think it can be an issue.

The best scenario I can think of is to have an Indian person who is not from that tribe, but understands their cultural values and ways. Then you avoid the potential for conflicts or the appearance of conflicts.

**What about the issue of judicial independence? Do you have any feelings about how important it is for tribal court systems to be independent and how they can go about achieving independence?**

They absolutely need to be independent. I think that if you want people to believe a system is fair, it needs to be independent. You can't have tribal councils running in and telling the judges what to do on their cases. The judges can't be afraid that they're going to be fired if they make a decision that affects a tribal council member's family member.

It's a two-level issue: first, you have the issue of whether the particular tribe has separation of powers—officially, in the constitution. And second, whether the court is independent in other ways. Independence can be established even in a tribe that doesn't have a formal separation of powers. A lot depends on how the judge works with the appointing authority—be it a tribal council or business committee, or whatever it's called in a particular tribe—to establish a track record of independence.

There may be ways to promote judicial independence through resolutions or judicial codes. If the code has a process in place for removing a judge that includes written notice and certain protections, that goes a long way to help judges feel that they have some safety to do their jobs. It all gets down to relationships. You need to be able to have discussions with the tribal council, and mutual respect needs to be developed and earned on both sides. I'm very proud to say that in the time that I've been a judge, no council member has ever tried to step

in on one of my cases or say, “Hey, you should think about doing this.”

**Does Leech Lake have a formal separation of powers in the constitution?**

No.

**Okay, so you’ve just been able to maintain separation through relationships and understandings?**

That’s correct.

**How important do you think it is for state and tribal courts to develop collaborative relationships and how can they most effectively go about doing that?**

I think it is essential and a lot of it is because of fiscal reality. But it’s up to each tribe to decide what that relationship will look like, based on local needs. It’s something that can be a great tool to strengthen tribal sovereignty in general, by the courts coming together to achieve better results. We say this over and over again about having those common goals. We’re all trying to keep kids from being placed away from home and address disproportionate minority contact. We frame our goals a little differently and our codes may get to those results in a little bit different way, but I think that by putting the power of both systems together we can create a better safety net and actually make lasting changes in our communities. It also helps to strengthen tribal systems by helping them build infrastructures incrementally. And then, when tribes are ready to take over and run their courts on their own, they’re able to do that.

**Could you briefly explain how the idea for the Leech Lake-Cass County Wellness Court<sup>3</sup> came about and what the process was to get that relationship going?**

In late 2005, Judge John Smith from the Cass County District Court and Reno Wells, who is the director of probation for Cass County, approached the Leech Lake Tribal Council—the chairman at the time—and wanted to get a DWI court started. At the time Cass County was one of the most deadly counties for drunk-driving fatalities in the state.<sup>4</sup> People were just com-

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3. See *id.*

4. See Monica Lundquist, *Students share message: Billboards around Remer promote safe driving*, BRAINERD DAILY DISPATCH, Sept. 22, 2004, available at [http://www.brainerddispatch.com/stories/092204/upn\\_0922040027.shtml](http://www.brainerddispatch.com/stories/092204/upn_0922040027.shtml) (“State

ing back through that revolving door. A lot of the people who kept coming back were our tribal members. Cass County wasn't having any success addressing their underlying problems. There was a general frustration among tribal members, not only because people were coming back through the system, but because there was a feeling that the state courts weren't helping. The county was looking at starting a drug court, so Judge Smith approached the Band and said, "We're going to do this and we can't be successful unless we have your help. Will you partner with us?"

This was one of those "right time, right place" sort of things, because I happened to be in the Tribal Council offices that day. It was before I took the bench; I was still a tribal attorney. As soon the judge and the probation director left, the question was, "So what do they want to do to us now?" There was huge mistrust of the state system. It all gets down to that lack of understanding. I told the chairman that I thought it was a good idea because the drug court model works and it's a great way for the Leech Lake Band of Ojibwe to start having a say in what happens to tribal members' cases. Minnesota is a Public Law 280 state,<sup>5</sup> and the Band has not yet enacted any criminal codes of its own, so all DWI cases are handled in the state court. Before we started our partnership, the Band had nothing to do with these cases. Basically the Band sat around on the sidelines and looked at bad results and continued to dislike the state system.

After I took the bench, Judge Smith and I went to work on developing policies and procedures and we looked for a joint-jurisdiction model out there that we could follow. We thought surely someone had to be doing this, but it turned out that there

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records released last year showed Cass County is one of the highest counties in the state for drunk driving fatalities.").

5. Enacted in 1953, Public Law 83-280, 67 Stat. 588 (codified at 18 U.S.C. § 1162, 28 U.S.C. § 1360, 28 U.S.C. § 1321-1326 (2006)) mandated the transfer of the federal government's criminal and civil jurisdiction over cases occurring on tribal lands to the state governments in several enumerated states: California, Minnesota, Nebraska, Oregon, Wisconsin, and Alaska (upon statehood). The law also allowed other states the option of assuming criminal and civil jurisdiction over cases occurring on tribal lands within their borders. Public Law 280 is the source of much controversy and has greatly complicated questions of criminal jurisdiction and law enforcement responsibility in the affected tribes and states. *See, e.g.,* CAROLE GOLDBERG ET AL., *LAW ENFORCEMENT AND CRIMINAL JUSTICE UNDER PUBLIC LAW 280* (2007), [http://www.tribal-institute.org/download/pl280\\_study.pdf](http://www.tribal-institute.org/download/pl280_study.pdf).

was nobody collaborating to this extent. So we just jumped in. We didn't even have anything in writing for quite a long time, I'd say for probably the first year. We just went forward on a handshake. We did have a Tribal Council resolution in support of forming the joint court. Eventually, we developed a written joint powers agreement between the courts.<sup>6</sup>

**That's the most amazing part of the joint jurisdiction experience—that it was just done on a handshake for a while.**

Well, we actually put a lot of time into trying to come up with some sort of memorandum of agreement, but we just got tangled up in the legalese. As it turned out, our joint powers agreement ended up being just seven lines. We agreed to exercise our jurisdiction jointly, on the cases where we could, toward a set of common goals.

**Some of our readers might think, “Oh that's great, but that would never work where we are.” Could you explain the relationship between the tribe and Cass County before all this happened?**

The relationships were terrible. There was mistrust. The county attorney's office was always fighting the Band's applications to have land placed into trust. Tribal members did not feel like they were treated fairly in the state court system, and the state court system thought that the tribal court system was a joke and not competent. Judge Smith took the initiative to come to us to ask for help, knowing there was a chance of having the door slammed in his face. But we had a common goal and that's what made it possible to move past historically bad relationships and begin our partnership.

**Has this project and this process over the last few years changed the county-tribal relations at all?**

Incredibly so. Judge Smith has said that through our collaboration, he came to realize that the tribal courts were “equal, parallel systems of justice to the state and federal systems.”

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6. The Joint Powers Agreement, which was signed by the judges from Leech Lake and Cass County on July 19, 2007, provides as follows: “Be it known that we the undersigned agree to, where possible, jointly exercise the powers and authorities conferred upon us as judges of our respective jurisdictions in furtherance of the following common goals: (1) Improving access to justice; (2) Administering justice for effective results; and (3) Fostering public trust, accountability, and impartiality.” See Wahwassuck, *supra* note 2, at 747.

That says a lot. In addition, the Leech Lake Tribal Council and the Cass County Board of Commissioners have joint meetings. To my knowledge, there haven't been any more challenges on fee-to-trust applications. Relationships between the tribal police and area law enforcement agencies have improved. Our Wellness Court is very time-intensive for tribal and state team who are part of it. But when you look at the big picture and how much of a benefit it has had in building relationships, it has been well worth the investment.

I'll give you an example of how far we've come. We're now building on these collaborations to start doing joint jurisdiction work on juvenile delinquency cases and that's going to be the next big step. The new initiative will be development of a multi-jurisdictional juvenile delinquency court involving the Leech Lake Band and the courts in the four counties overlapping the reservation. Cases from the state courts will be transferred to tribal court and probation services will be provided by county probation agents who will report directly to the tribal court. Our collaborative relationships have developed to the point that we're close to becoming operational with Cass County, and will add the other counties after we have the supervision system in place. Although we will develop a more detailed memorandum of agreement for this project since it involves more agencies, we really won't need much more than our seven-line joint powers agreement to get started.

**Has this relationship that started with Cass County produced similar efforts in other counties in Minnesota?**

It has. In 2007, the Band was invited to join a planning team from the Itasca County Wellness Court and we were able to have a say-so in how the court was developed and its policies and procedures. Now I take the bench alongside Itasca County District Court Judge John Hawkinson every Friday. There are tribal members and non-Indians in both programs [the Leech Lake-Cass County Wellness Court and the Leech Lake-Itasca County Wellness Court]. So it's not an agreement about allocation of jurisdiction; it's both courts exercising jurisdiction together.

It's also spreading to other parts of Minnesota. There's a drug court that's getting started down in the southern part of

the state and the state court plans to work with one of the Dakota tribes whose reservation is nearby. The Minnesota judicial branch has also included developing relationships with tribal courts as part of its new strategic plan.

I know a lot of tribes feel very strongly that everything should be handled in their tribal court rather than working with state courts. That's something that's very important to keep in mind—that we do have the inherent authority to handle all types of cases, including criminal cases. But many of us, like the Leech Lake tribal court, were established fairly recently and need to build infrastructure and gain experience and training for our people to take over these cases at some point. This is a good intermediate step.

In other places the joint model can be adapted to fit local needs. The Prairie Band Potawatomi down in Mayetta, Kansas, recently entered into a memorandum of agreement between the tribal prosecutor and the county prosecutor to keep tribal members from being prosecuted by both jurisdictions for the same offense. That's another example of overcoming mistrust. The state court did not trust the tribal court to be able to handle these cases. But the Prairie Band Potawatomi have been building their judicial system and have demonstrated their competence. Confidence in the tribal court has grown tremendously as a result, and the systems are looking at other ways to collaborate.

**How important do you think tribal courts are to the maintenance and restoration of tribal cultures?**

I think they're very important. Tribal courts can be a way to help culture regenerate and help teach people who they are. Let me give you an example: a lot of times someone will come into court and argue that "culture and tradition" apply to their case. And I ask, "Which tradition? Let's talk about this." Unfortunately a lot of people don't know their own ways. The tribal court has the ability to order juveniles and others to spend some time with their elders, spend some time with their *nokomis*<sup>7</sup> and learn about their old ways. You generally don't see that in the state system. The tribal courts can be a key in helping people reconnect and helping people learn about their

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7. In the Ojibwe language, *nokomis* means "grandmother."

culture and tradition and restore relationships. It can be a healing and learning experience for everyone involved.

**Given your experience working with joint jurisdiction courts, what do you think that state courts can learn about justice from tribal courts?**

I think that they can learn some easy ways to be compassionate in their own work. I've heard some state court judges say, "You know, I can't possibly give people individual attention because I have 60 cases on my docket and it's a madhouse and we've got people waiting in the hall." How much more time does it take to look a defendant in the eye instead of acting like they don't exist and saying, "Counselor, what's your client going to do?" It doesn't take a lot of extra time to look him or her in the eye and acknowledge that they're there. I think that's one thing—the human factor—that state court systems can learn. I think too many judges think, "That's great! I know restorative justice works, but I can't do it statutorily, we don't have time on the docket." The state system can learn that even looking someone in the eye and acknowledging their presence is restorative justice. It restores people's confidence in the justice system and gives people a little hope.

**Do you know of any examples of programs in state courts that you feel are either derived from tribal court practices or embody tribal court values?**

I think there are some things that state courts are currently doing, especially where they are collaborating with tribal courts. Many of the best practices that are being adopted by state courts are derived from indigenous notions of restorative justice. State systems need to realize how they can use existing tools and practices to achieve better results. For instance, a presentence investigation is often used to gather information about a defendant and determine his or her risk level and whether the person should go to prison and for how long. But this same information could be used in more restorative way, to begin formulating a solid treatment or re-entry program for the offender. A lot of very helpful information can be gleaned from tools like this, depending upon how you put them to use.

**In tribal court systems, how common is the idea of innovation and how do you mesh the idea of innovation with the idea of tradition and keeping traditional practices alive?**

I would say that we innovate every day, partly out of necessity, and partly because it's just our way to figure out how we can make the changes that need to be made in people's lives. Tribal traditions do tend to evolve and change over time, so the court system can evolve right along with them.

I think communication fosters innovation. Getting to know people, getting to know each other, is such a key in this. The innovation will come from that once the conversation starts. It's a local thing—what are our needs, what are our goals? You can look at it from two different ends of the spectrum. You can look at it from the perspective of what are our common goals or, on the other end of it, what are our common problems? Start the conversation there. I think that's where the innovation is. Innovation is not in a program, it's about action, it's about taking that first step. Tradition and culture vary from tribe to tribe, but each can use their judicial systems in innovative ways to foster healing and teach about the old ways.

**How well do you think the new ideas being used in the state courts such as the drug court model, the DWI court model, restorative justice practices, therapeutic jurisprudence, would mesh with tribal court systems?**

I think a lot of them like restorative justice are already there. I think that's where they came from—they're originally indigenous practices.

There are other things that tribal courts can use. Whether or not a tribal court adopts something wholesale from state systems, they can take bits and pieces that are going to help them achieve the results that they want. Tribal systems can learn so they can understand what the state court system is doing. So they'll be familiar with the practices being tried in state court; that in and of itself may be something that opens up some dialogue. Tribal systems need to remain distinct from state systems, to do things in their own way. But we can always learn, and take what works and incorporate it into our own systems.

**How well do you think ideas are being shared among tribes so everyone can learn from each other?**

I think there's an effort but again it gets down to resources. Judges and court staff who are lucky enough to be able to go to trainings and conferences learn about them that way. Unfortunately, too many tribal courts don't have the resources or time to put good ideas into practice when they get home. Instead, they're just trying to get through the day and stay on top of their dockets. I think there should be a way to bring concepts to people through use of technology like interactive video-conferencing or webcasts. It's always better to be there in person, but if you can't be, at least you can see each other. That's something we've been able to use to get fairly large groups of people together to talk about ideas without incurring travel costs. I think there needs to be more done to get the information out to tribes that can't travel to conferences or to other places to see their programs in action.

**Do you have any final thoughts before we wrap it up?**

Systems don't collaborate; people do. We as individuals make up "the system," be it tribal or state. It's not about whether or where we went to school or the degrees that are hanging on our walls, but about who we are inside. You may be a judge or a lawyer or all those things, but it's who we are as *Anishinabe*<sup>8</sup> or as we say, *Nishnabek*, that counts most.<sup>9</sup> That must come first. I'm *Sibikwe*<sup>10</sup> and I'm Fish Clan. Having that center is so important to making all these things come together for the benefit of future generations.

I'm so thankful for all the things that are happening with the joint jurisdiction work up here, and the fact that other juris-

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8. *Anishinabe* and *Ojibwe* are Algonquin words meaning "the people" and refer to the Algonquin-speaking peoples originating in the region of the Great Lakes and southern Canada. Today, the terms *Anishinabe* and *Ojibwe* encompass hundreds of separate Indian bands throughout these regions. These terms are generally considered to be synonymous with *Chippewa*, a term first used by French explorers and later by the government of the United States.

9. In the Potawatomi dialect, the term *Anishinabe* is rendered as *Nishnabek*. The Potawatomi were once part of a large confederacy of tribes, which also included the *Ojibwe* people. Today, there are several Potawatomi bands located throughout the Great Lakes region.

10. *Sibikwe*, meaning "River Woman," is Judge Wahwassuck's Potawatomi name.

dictions are adapting the concept to fit their local needs. I think it's really going to change the lives of our little ones when they get to be our age. And that's what it's all about.