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Professionalism in Tribal Jurisdictions

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Professionalism in tribal jurisdictions

BY MATTHEW L.M. FLETCHER

American Indian law is an important area of law. There are 12 federally recognized Indian tribes in the state of Michigan.¹ Indian tribes throughout the United States do business in Michigan. Indian tribal governments and corporations employ hundreds of thousands of non-Indians and received billions in federal pandemic relief. Indian gaming generated nearly \$40 billion in revenues nationally last year. Still, many lawyers ignore the field or claim ignorance about the basic precepts of federal Indian law.

This article will canvass several themes of professionalism in tribal practice, drawing from this author's tribal law experience over the last few decades. Many lawyers undervalue — and even disrespect — tribal governance. This lack of professionalism has significant costs to tribal governments, tribal business, and their business partners.

SKEPTICISM OF INHERENT TRIBAL POWERS AS INCIVILITY

As I was completing my final law school exams in 1997, the United States Supreme

Court issued a decision devastating the prospects of tribal governments and tribal justice systems to regulate the activities of nonmembers in Indian country in *Strate v. A-1 Contractors*.² That case involved a car wreck on an Indian reservation in North Dakota. The plaintiff was a non-Indian woman who married into a large Native family. The defendant was a nonmember-owned company. In a unanimous and casually cruel opinion by Justice Ruth Bader Ginsburg, the Court held that since both parties were nonmembers, the tribe and its justice system

Photo courtesy of Nottawaseppi Huron Band of Potawatomi (NHBP) Indians Communications Department
NHBP Indians attend a traditional tribal ceremony.

were “strangers” to the accident and rejected tribal court jurisdiction over the claim.

Later, I took my first job out of law school with the Pascua Yaqui Tribe of Arizona. At that time, Pascua had little common law. A large part of my job as in-house counsel was negotiating contracts on behalf of tribal procurement with outside vendors, hoping to steer any conflicts to tribal court. I “negotiated” dozens of contracts with the tribe’s business partners, but they were hardly negotiations. Vendors rarely consented to tribal court jurisdiction or tribal law as the governing law. Some of this had to do with the tribe’s bargaining power, but much of it had to do with *Strate*. Counsel representing the vendors argued to me that the Court had eliminated tribal jurisdiction over nonmembers. That’s not what the Court said — nonmembers could still consent in writing — but counsel for nonmembers also knew if they didn’t consent, they lost nothing. From their point of view, *Strate* gave nonmembers license to roam unfettered. My tribal client could either allow nonmember vendors onto the reservation to do as they wished or exclude itself from business. At that time, my client had little choice but to accede to these prejudices.

A few years later, it got worse. The Court issued another tribal jurisdiction decision in 2001 in *Nevada v. Hicks*, rejecting a tribal court’s authority to exercise jurisdiction under 42 USC 1983 over state officials.³ Once again, the decision was unanimous. This time, there was a concurring opinion by Justice David H. Souter roundly condemning tribal laws and tribal courts. Justice Souter wrote that tribal law was “un-

usually difficult for an outsider to sort out.”⁴ He described tribal law as “frequently unwritten,” the product of “customs, traditions, and practices ... handed down orally or by example from one generation to another.”⁵ This was the second Supreme Court writing in four years disrespecting and gutting tribal powers over nonmembers — both written by two different justices supposedly to the center-left of the Court.

As a tribal practitioner, Justice Souter’s description of tribal law was news to me. In 2001, I was working in house for the Suquamish Tribe on Puget Sound in Washington. My experience working with the Pascua and Suquamish (and in between, the Hoopa Valley Tribe in northern California) was completely different from the story Justice Souter told. These tribes took their cultures, customs, and traditions very seriously. In child welfare cases, property rights cases, and other cases involving *only tribal members*, tribal custom law that could be difficult for outsiders to understand might apply. But in relations with nonmembers, tribal law was written down — and in English. Where tribal law was silent, we looked to state commercial law and state court procedures for guidance, usually adopting blackletter law from the Restatements of Law. The last thing my tribal clients wanted was for tribal customs and traditions to interfere with the business dealings critical to funding basic tribal governmental services like health care, public safety, and child welfare.

Following that decision, when I worked with counsel for my tribal clients’ business partners and vendors, they were often radicalized by *Strate* and Justice Souter’s con-

IN PERSPECTIVE



MATTHEW L.M. FLETCHER

currence in *Hicks*. From their perspective, not only was tribal power over nonmembers unnecessary to tribal governance but was dangerous to nonmembers. The Supreme Court said so. Evidence to the contrary often was irrelevant. Outside counsel became far more aggressive with me.

A short while after *Hicks*, I returned home to work in-house for my own tribe, the Grand Traverse Band of Ottawa and Chippewa Indians in Peshawbestown. One attorney representing a vendor demanded that I provide him a hard copy of every tribal council resolution and ordinance and every single tribal court decision before he would even talk to me. A county attorney told me he could not discuss an agreement to plow snow at a tribal elder’s complex because, in his words, *Hicks* had overruled *Worcester v. Georgia*, an 1832 decision acknowledging tribal sovereignty and treaty rights over Indian lands.⁶ Yet another attorney, this time representing a tribal member in an employment suit against the tribe in a tribal forum, told me he would win a \$1,000,000

The views expressed in “In Perspective,” as well as other expressions of opinions published in the Bar Journal from time to time, do not necessarily state or reflect the official position of the State Bar of Michigan, nor does their publication constitute an endorsement of the views expressed. They are the opinions of the authors and are intended not to end discussion, but to stimulate thought about significant issues affecting the legal profession, the making of laws, and the adjudication of disputes.

judgment against the tribe as soon as he got the case moved to state court, where he believed the law was fair. Ultimately, each of those attorneys walked back their demands, but not before I wasted an enormous amount of time educating my friends on the other side.

IGNORANCE OF TRIBAL LAW AS COUNSEL'S LACK OF DILIGENCE

These uncivil incidents were relatively unusual; after all, most of the work of in-house counsel is not in dealing with nonmembers but with the tribal client. Still, these incidents evidence a lack of diligence on the part of counsel for my client's legal adversaries. It is a lawyer's job to learn the law on behalf of their client, not to demand legal research from opposing counsel, misrepresent precedent, or fail to research basic tribal jurisdiction and sovereign immunity questions.

A recurring theme in the Supreme Court's decisions on tribal powers and jurisdiction is concern for nonmembers being unfairly victimized by confusion around tribal laws. Justice Souter's worry for "outsiders" being subjected to tribal laws was just one example. As I drove in a moving van with my father from Ann Arbor to Tucson, Arizona, to start my legal career at Pascua, the Supreme Court issued a decision affirming tribal sovereign immunity in *Kiowa Tribe v. Manufacturing Technologies, Inc.*⁷ I was excited to see the Court actually rule in favor of tribal immunity, but Justice Anthony Kennedy's majority opinion ridiculed the notion of tribal immunity, asserting that it developed "almost by accident."⁸ Worse, he argued that Congress should abrogate tribal immunity in part because "[i]n this economic context, immunity can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity,

or who have no choice in the matter, as in the case of tort victims."⁹ Ultimately, as my friend Prof. Bill Wood pointed out years later, tribal immunity was no accident.¹⁰

Moreover, after careful consideration and multiple contentious hearings, Congress decided not to undo tribal immunity, which the Court acknowledged 16 years later in *Michigan v. Bay Mills Indian Community*.¹¹ The Court's signaling of disdain and skepticism of tribal immunity feeds practitioners' attitudes about tribal economic development. Throughout my career as in-house counsel, attorneys for my tribal clients' business partners sometimes insisted that my client abrogate its immunity entirely before they would even talk about a contract. These attorneys advised me that it was best to drop sovereign immunity or no one would ever do business with the tribe. These attorneys either talked their own clients out of a business partner by insisting on a complete tribal waiver or eventually walked back their initial demands, tails between their legs, when they learned about the possibility of a contract-based limited waiver of tribal immunity. These attorneys wasted everyone's time and money.

But many lawyers continued to engage me and my client in good faith. In the early 2000s, my client and the other Michigan tribes were negotiating with the state government over taxes¹² in light of a groundbreaking court rule cocreated by tribal and state court judges in the 1990s.¹³ The Michigan tribal courts and Michigan Supreme Court had agreed on a reciprocal court rule in which tribal and state courts would grant comity to each other's judgments, awards, and other orders so long as the other court system would do the same.¹⁴ The resulting state court rule formed the basis for a provision in Michigan's tribal-state tax agreements a decade later where the state agreed to litigate tax disputes in the tribal courts.¹⁵ Michigan probably is the only state government to consent to tribal court jurisdiction. The state's attorneys zealously advocated for their client but did so in respect for the sovereign prerogatives of Michigan's tribal nations. Once again, my



Michigan's 12 federally recognized Indian tribes: 1. Bay Mills Chippewa Indian Community | 2. The Grand Traverse Band of Ottawa and Chippewa Indians | 3. Hannahville Indian Community | 4. Nottawaseppi Huron Band of Potawatomi Indians | 5. Keweenaw Bay Indian Community | 6. Lac Vieux Desert Band of Lake Superior Chippewa Indians | 7. Little River Band of Ottawa Indians | 8. Little Traverse Bay Bands of Odawa Indians | 9. Pokagon Band of Potawatomi Indians | 10. Saginaw Chippewa Indian Tribe | 11. Sault Ste. Marie Tribe of Chippewa Indians | 12. Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians (Gun Lake Tribe)

lived experience as a tribal law practitioner was the polar opposite of the way the U.S. Supreme Court saw tribal law and courts.

OBSERVATIONS AS A TRIBAL JUDGE

Congress has been supportive of tribal self-determination for about the last half century, but in the last decade or so Congress recognized more tribal authority over nonmembers, primarily through the Violence Against Women Reauthorization Acts of 2013 and 2022.¹⁶ The Supreme Court's aggressive rhetoric skeptical of tribal powers has waned somewhat as well with the Court even recently acknowledging tribal powers over nonmembers in limited contexts.¹⁷

From my perspective as a tribal judge, I have seen tribal governmental powers litigated extensively. In 2013, I served as a special judge for the Lac du Flambeau Band of Lake Superior Chippewa Indians in Wisconsin. The tribe's economic development arm, known in Indian law circles as an economic development corporation (EDC), brought suit in tribal court against its business partners (and their counsel) over a large casino development deal gone bad. The EDC hoped to short circuit federal or state court claims, but the transaction documents included a forum selection clause allowing for Wisconsin federal or state jurisdiction, with Wisconsin law controlling. The nonmember defendants in tribal court moved to dismiss, primarily relying on the forum selection clause.

Interestingly, Wisconsin law was fairly liberal on the interpretation of forum selection clauses, allowing for parties to select a forum other than the one(s) delineated in the transaction documents so long as the clause did not explicitly prohibit an additional forum (in this case, the tribal court forum). Since the transaction documents ordered me as judge to apply Wisconsin law, I did so, and applied the more liberal rule from *Lake of the Torches Economic Development Corporation v. Saybrook Tax Exempt Investors, LLC*.¹⁸ In short, I declined

to dismiss the action on the pleadings. It all came down to use of passive voice (legal writing students pay heed) in very hastily drafted transaction documents. Perhaps with more development of the record, it would come to pass that the EDC really intended for the forum selection clause to exclude tribal courts, but it was far from obvious based on the text of the transaction documents alone.

The nonmember companies then sued in federal court to enjoin the tribal parties from invoking tribal jurisdiction. They prevailed, with the district court casually denigrating the tribal judge as a "blogger" who once published a law review article critical of federal courts.¹⁹ The federal courts chose not to follow Wisconsin law on forum selection clauses, instead choosing to apply their own precedent, leading to the opposite outcome I reached.²⁰ So be it.

Following that litigation from afar, I was surprised to see my name in the district court and appellate opinions.²¹ How odd. Later, I learned the nonmember companies, perhaps emboldened by the district court judge, used me and my writings in what appears to be an effort to denigrate the fairness of the tribal justice system.²² No party challenged my professionalism in tribal court but in federal court, tactics seemingly differ.²³ After all, Justice Souter's concurrence in *Hicks* gave attorneys license to do so.

That said, I think there has been a gradual shift in attitudes about tribal powers. In 2018, serving on the Nottawaseppi Huron Band of the Potawatomi Supreme Court, my colleagues and I decided *Spurr v. Spurr*, a case involving the power of the tribal court to issue a protection order against a nonmember who lived 100 miles from the reservation.²⁴ We invoked a federal statute granting full faith and credit to tribal civil protection orders against nonmember harassers.²⁵ The nonmember brought suit in federal court to challenge the order and, implicitly, the authority of Congress to recognize tribal powers; this was exactly the kind of case the Supreme

Court was likely to review with an eye toward undercutting tribal powers. But instead, after the U.S. Court of Appeals for the Sixth Circuit affirmed tribal powers, the Supreme Court declined the nonmember's petition for certiorari.²⁶ Perhaps a corner had been turned.

Even more recently, I have had the privilege of serving on tribal appellate cases involving nonmember defendants challenging tribal court jurisdiction. The first, *Rincon Band of Luiseño Indians v. Donius*, decided in 2020, affirmed the power of the tribe to inspect nonmember-owned property it suspected of being the source of pollution.²⁷ Serving on the *Rincon* court with me were retired federal court judges James Ware and Arthur J. Gajarsa. The second, *Cabazon Band of Mission Indians v. Lexington Insurance Company*, decided in 2022, affirmed the jurisdiction of the tribal court over a suit brought by the tribe against its insurance company over COVID 19-related business losses.²⁸ On the *Cabazon* tribal appellate court with me were Kevin K. Washburn, dean of the University of Iowa Law School, and Alexander Tallchief Skibine, professor at the University of Utah School of Law. In both cases, counsel for both sides exuded professionalism. Both cases are pending in federal court so I cannot speak further on them. However, my curiosity as to their outcomes is piqued, of course.

In 2011, I proposed to the membership of the American Law Institute a restatement project on federal Indian law. The first comment from the audience was not positive. The commentator asked how there could be a restatement of blackletter law when "the embers of sovereignty have long since grown cold."²⁹ I was told to expect skepticism from some members of the institute. Being used to questions like that from my days as in-house counsel for Indian tribes, I answered and we moved on. It was the last time anyone asked a question like that during the entire project, which we just completed.³⁰ The law is the law. Tribal sovereignty is a real thing. Professionals realizing that learn and react appropriately.

Matthew L.M. Fletcher is the Harry Burns Hutchins Collegiate Professor of Law and Professor of American Culture at the University of Michigan. An enrolled citizen of the Grand Traverse Band of Ottawa and Chippewa Indians, he serves as an appellate judge for four Michigan tribes. The Michigan Supreme Court recently appointed Fletcher to the Michigan Task Force on Well-Being in the Law.

ENDNOTES

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2. *Strate v A-1 Contractors*, 520 US 438, 439; 117 S Ct 1404; 137 L Ed 2d 661 (1997).
3. *Nevada v Hicks*, 533 US 353; 121 S Ct 2304; 150 L Ed 2d 398 (2001).
4. *Id.* at 385 (Souter, J., concurring).
5. *Id.* at 384-85 (Souter, J., concurring) (quoting Melton, *Indigenous Justice Systems and Tribal Society*, 79 *Judicature* 126, 130-131 (1995)).
6. *Worcester v State of Georgia*, 31 US 515; 8 L Ed 483 (1832).
7. *New Hampshire v Maine*, 532 US 742, 751; 121 S Ct 1808; 149 L Ed 2d 968 (1998).
8. *Id.* at 756.
9. *Id.* at 758.
10. Wood, *It Wasn't an Accident: The Tribal Sovereign Immunity Story*, 62 *Am UL Rev* 1587 (2013), available at <<https://digitalcommons.wcl.american.edu/cgi/view-content.cgi?referer=&httpsredir=1&article=1894&context=aulr>> [https://perma.cc/7K93-9XY5]. All websites cited in this article were accessed October 1, 2022.
11. *Michigan v Bay Mills Indian Community*, 572 US 782, 801-02; 134 S Ct 2024; 188 L Ed 2d 1071 (2014).
12. See generally Fletcher, *The Power to Tax, the Power to Destroy, and the Michigan Tribal-State Tax Agreement*, 82 *U Det Mercy L Rev* 1 (2004).
13. MCR 2.615.
14. See generally Cavanagh, *Michigan's Story: State and Tribal Courts Try to Do the Right Thing*, 76 *U Det Mercy L Rev* 709 (1998).
15. *Id.* at 39-40.
16. Congress' recognition of tribal powers are codified mostly in 25 USC 1304 (criminal jurisdiction over non-Indians for certain crimes) and 18 USC 265(e) (civil protection orders against nonmembers).
17. *United States v Cooley*, 141 S Ct 1638; 210 L Ed 2d 1 (2021).
18. *Lake of the Torches Economic Development Corporation v Saybrook Tax Exempt Investors, LLC*, order of the Court of the Lac Du Flambeau Band of Lake Superior Chippewa Indians – Lac Du Flambeau Reservation, issued August 27, 2013 (No. 13 CV 115), available at <<https://turtletalk.files.wordpress.com/2013/05/lake-of-the-torches-v-saybrook-tax-exempt-investors.pdf>> [https://perma.cc/MQ7A-8LJA].
19. *Stifel, Nicolaus & Company v Lac du Flambeau Band of Lake Superior Chippewa Indians*, unpublished opinion of the United States District Court for the Western District of Wisconsin, signed May 16, 2014 (No. 13-CV-372-WMC), aff'd by *Stifel, Nicolaus & Company v Lac du Flambeau Band of Lake Superior Chippewa Indians*, 807 F3d 184 (CA 7, 2015).
20. *Alzheimer & Gray v Sioux Manufacturing Corp*, 983 F2d 803 (CA 7, 1993).
21. The circuit court merely referenced my then-professional affiliation with Michigan State University College of Law, *Stifel, Nicolaus & Company*, 807 F3d at 192.
22. Brief of Appellees at 13, *Stifel, Nicolaus & Company*, 807 F3d 184 (CA 7, 2015) (quoting extensively from Fletcher, *Resisting Federal Courts on Tribal Jurisdiction*, 81 *U Colo L Rev* 973, 976 (2010)).
23. See generally Leeds, *[dis]Respecting the Role of Tribal Courts?*, 42 *Human Rights* 20 (2017), available at <https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/2016-17-vol-42/vol-42-no-3/dis-respecting-the-role-of-tribal-courts/> [https://perma.cc/ELS4-72K7].
24. *Spurr v Spurr*, opinion of the Supreme Court for the Nottawaseppi Huron Band of the Potawatomi, issued January 25, 2018 (No. 17-287-App), available at <https://nhbp-nsn.gov/wp-content/uploads/2018/07/Spurr-v-Spurr-17-287-APP_Opinion-of-the-Supreme-Court-for-the-NHBP.pdf> [https://perma.cc/ZCR3-2G4W].
25. 18 USC 1165.
26. *Spurr v Pope*, 936 F3d 478 (CA 6 2019), cert denied, *Spurr v Pope*, 140 S Ct 850; 205 L Ed 2d 465 (2020).
27. *Rincon Band of Luiseño Indians v Donius*, opinion of the Court of Appeals for the Rincon Band of Luiseño Indians, filed April 2, 2020 (Case No. AP-0205-19), available at <<https://secureservercdn.net/45.40.155.190/y3t.b1a.myftpupload.com/wp-content/uploads/2021/02/2020.04.02-Donius-v-Rincon-Band-Court-of-Appeals-Opinion.pdf>> [https://perma.cc/U8M6-8XV6].
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