6/6/04

Report to the Administrative Judges and Supervising Judges:
Federal/State/Tribal Courts
Committee Forum Topic, Full Faith and Credit

Of all the issues this joint committee proposes to tackle, this is the one which will provoke the most discussion. ICWA issues and protocols for better ways of working together to resolve them, more education for state and federal judges on Indian law and a database/repository for all tribal codes that is readily accessible are all doable; full faith and credit raises so many sub-issues it may prove difficult to resolve any of them without legislation (Seneca Peacemaker's Court judgments do receive full faith and credit already -- Indian Law §52).

One that even legislation might not help is how to treat those nations/tribes which do not have a court system per se but whose decisions on community and individual issues are all handled orally by a council of chiefs or elders (i.e., the Onondagas and to some extent the Tuscaroras). During sidebars at the November 3, 2003 meeting this issue arose with respect to the central-repository-of-Indian-laws-and-codes goal.

Representatives from traditionalist nations opined that their traditions and rules are oral, unpublished and will remain so. Thus, even a general statement that "The _____ nation's dispute resolution process has no written code and is carried out by the Council of Elders. Their designated contact person is _____ at _____" might be more than they would be willing to authorize for inclusion in the repository -- and the only persons who could make even that decision are the elders or clanmothers. If this poses such a dilemma at the "library level" there is virtually no chance that full faith and credit can operate in the traditional sense with respect to decisions by such bodies (although it does with respect to ICWA issues; see e.g. 41 AmJur2d Indians §14).

There are already three federal statutes which require full faith and credit and which, in the cases of the Onondagas and Tuscaroras, **are** at least honored by consultation with nation representatives:

-- 25 USC 1911(d) tribal court child custody orders unrelated to juvenile crimes or divorce proceedings;

-- 18 USC 2265(a) tribal court protective orders (reciprocity required);

-- 28 USC 1738B(a) tribal court child support orders (reciprocity required).

From the wealth of materials provided to our committee from the National Conference of Chief Justices and Judge Kahn reaching out to individual members, summarized below are some of what has also worked in the area of comity/full faith and credit beyond the federal statutes (and what hasn't).

Arizona via statute (Ariz. Rev. Stat. Sec. 12-136[A]) requires state court enforcement of tribal court involuntary commitment orders under the same rules applicable to such orders in Arizona courts, and their Supreme Court promulgated Rules of Procedure to accomplish it. It also enacted Rules of Procedure with respect to recognition of tribal court civil judgments, treating them as a matter of comity: they are presumed valid and recognized as a state court judgment/order unless an objecting party can show that it is not entitled to enforcement and recognition under common law comity standards (Wilson v. Marchington, 127 F.3rd 805 [9th Cir. 1997]). Reciprocity -- tribal courts recognizing and enforcing state court orders -- is apparently not required.

An excellent article distributed by Judge Kahn which appeared in the January 2003 issue of Arizona Attorney (Vol. 39, No. 5 at 24) addresses how Arizona's comity system works.

Reciprocity could become a major sticking point depending, in part, on the types of civil jurisdiction tribal courts seek to assert in New York. It certainly was in Minnesota.

In March 2003 Minnesota's Supreme Court rejected their Forum's proposed full faith and credit rule in large part because of concerns that 1) there be (pre-)existing legislative authorization, presumably on a case-type jurisdictional basis, 2) that interested parties whose substantial rights might be affected receive a (further?) opportunity to comment to their Forum and 3) that there be a reciprocal commitment to full faith and credit by the tribal courts -- something at least some of theirs, and probably ours as well, oppose vigorously (source: Ojibwe News, "Minn. Supreme Court rejects proposed 'full faith and credit' rule" by Clara NiiSka, March 7, 2003).

North Dakota has a comity rule (Rule 7.2) similar to Arizona's which does not require reciprocity but encourages it. Tribal court judgments may be objected to on the grounds of lack of personal and subject matter jurisdiction, fraud, duress or coercion, due process, the order or judgment is non-final or contravenes the public policy of North Dakota.

As of 1999, the date on the material we received via the National Conference of Chief Justices, Michigan's Forum felt full faith and credit was reachable via court rule on the theory their Constitution and Legislature had delegated to their Supreme Court the authority "to promulgate rules governing practices and procedure in the supreme court and all other courts of record...." (MCLA §600.223). Their proposed rule(s) would grant full faith and credit to the judgments of the courts of federally recognized Indian tribes provided those courts agreed to do the same for state court judgments.

Yet another approach, apparently in response to a 2000 court decision (Teague v. Bad River Band, 236 Wisc.2d 384, 612 N.W.2d 709) resulted in a 2001 Tribal/State Protocol between the four Chippewa Tribes of northern Wisconsin and the latter's 10th Judicial District concerning which system's courts would exercise jurisdiction when both have it. In New York, Seneca v. Seneca (2002 4th Dept., 293 AD2d 56) held that where our trial courts have concurrent jurisdiction with a tribal court in, there, a commercial dispute, there is no prohibition on exercising it. The federal rule that a litigant exhaust tribal court remedies before resorting to federal court was not persuasive.

Add to all this the fact that the federal Indian Civil Rights Act can conceivably trump even a tribal court judgment (it didn't in Shenandoah v. Halbritter, N.D.N.Y., reported in the NYLJ Wed., 8/13/03, apparently did in Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874, cert. denied 1996) and, as noted at the outset, the Committee and our Forum have our work cut out for us with respect to full faith and credit issues.

Attached are an updated description of Indian courts in New York originally prepared almost two years ago and an Indian law outline prepared in November 2000 for use in an elective course at the Town and Village Justices annual training in Canton. It has not been updated since as will be apparent from the dated treatment of "Gambling" on p. 4 and "Taxes" on its pp. 5 and 6; apologies to Judge Eppolito who in People v. Hill (2002, 194 Misc.2d 347) cited People v. Boots (106 Misc.2d 522) with approval re: criminal jurisdiction.

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