

21th Annual National Association of Drug Court Professionals Training Conference

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LEGAL ISSUES IN TRIBAL HEALING TO WELLNESS COURTS

**Common Challenges & Conundrums
for Tribal Healing to Wellness Courts**

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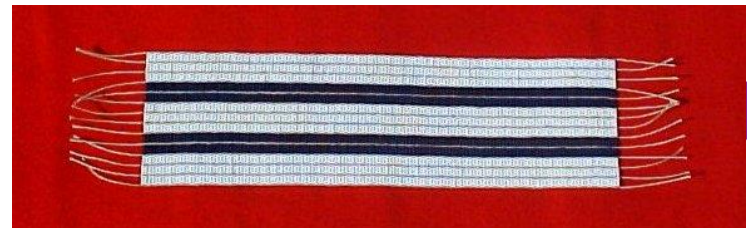
OVERVIEW

- Indian Law Basics
- Jurisdictional Issues
- Common Issues in Healing to Wellness Court



INDIAN LAW 101

- Indian Nations are sovereign nations outside U.S. Constitution
- Prior to colonization Indian Nations exercised full criminal jurisdiction
- Indian Nations are governed by tribal constitutions, codes, case law, customs and traditions
- U.S. interference in Indian nations' criminal jurisdiction
 - Federal jurisdiction
 - State jurisdiction
 - Non-Indians



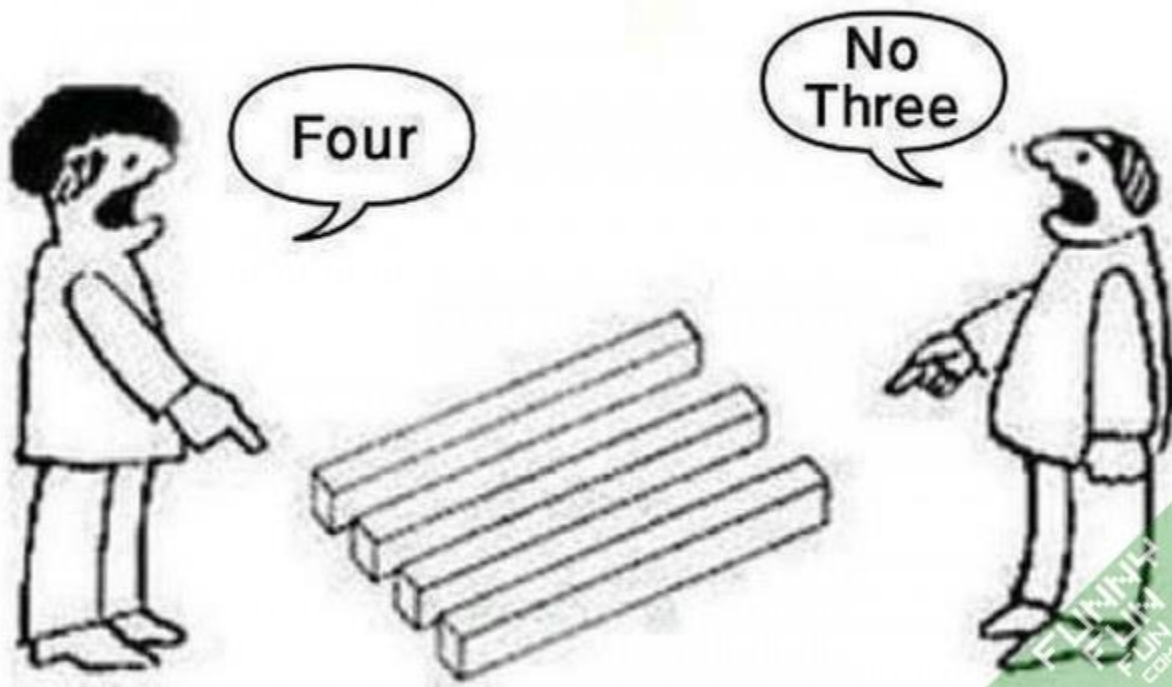
DOES YOUR HWC HAVE JURISDICTION?

- Tribal Constitutions, Codes and Policies
- Citizenship?
 - *Oliphant v. Squamish Indian Tribe*
 - Violence Against Women Act 2014 - Partial Oliphant Fix
 - Do you have necessary requirements in place?
- Defendant's History: Violent Offender Issues
- Type of Case: Civil, Family, Juvenile or Criminal



COMMON LEGAL ISSUES

It is really confusing!!!



PROBATION ISSUES

- Length of Probation
 - There have been no challenges to length of probation under ICRA
 - Length for federal and state criminal sentences defined by statute
 - What does your tribal code say?
- Consent to search ok for probation, maybe not for diversion/bond cases



COMMON CHALLENGES: “TIME SERVED”

- Argument: Time served as a sanctions should be credited toward unimposed jail sentence in underlying criminal matter.
- Held: Mixed - No consensus
 - Denial – Waived credit when signed participation agreement – if it’s specific
 - Credit for time served waiting to be admitted and/or following termination but denied credit for time served as participant
 - Credit granted
 - Credit not granted when serving for contempt of court



COMMON CHALLENGES: THE BASICS OF TERMINATION

- Generally – notice, hearing, a fair procedure
- Create an adequate record of drug court termination hearings
- Think – Due Process



TERMINATION ISSUES: HEARING REQUIRED

- Jurisdictions split but emerging trend is to require a hearing – Think Due Process
- What does this mean for you?
 - Need a separate judge?
 - Not necessarily
 - Creating a record is good process



COMMON ISSUES: RECUSAL OF JUDGE FOR SENTENCING

- Do I need another judge for sentencing?
- Jurisdictions split
- What does this mean for you?
 - You may not have another judge
 - Create a record
 - Provide due process
 - State findings and conclusions on the record – why you are imposing the sentence



COMMON ISSUES: USE OF INFORMATION REVEALED IN DRUG COURT

- Held: In most instances use of the information was allowed because information was not precluded by federal confidentiality requirements
- Take away: have a rule in your policy – provides notice and process



COMMON ISSUES: USING JAIL AS A SANCTION

- Can I use jail as a sanction in juvenile or family court? Or when the participant is pre-plea and there is no sentence?
- If you tribal law allows it
- Incarceration without a statute raises due process issues and can possibly be a violation against a person's right to be free from cruel and unusual punishment



TRIBAL COURT DECISIONS



POLICIES AND PROCEDURES

- Violation of civil rights to impose sanction in violation of your policies and procedures
- Violation of ICRA if you fail to provide notice of intent to revoke
- Policies and procedures not approved by Tribal Council are not valid*
 - *may be a requirement of the Tribal Code or Constitution
- What does this mean for you?
 - If you have policies/procedures ... follow them!
 - If Tribal Council approval is needed ... secure it!



EMERGING/ON-GOING ISSUES



SOCIAL MEDIA

- Participant's availability or use of social media
- Admissibility issues
- Reliability issues
- Authentication issues
- Messages should be authenticated on a case-by-case basis
 - State v. Fleck, 23 A.3d 818 (Conn. App. Ct. 2011)



YOUR ISSUES?





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TRIBAL LAW AND POLICY INSTITUTE RESOURCES

- www.WellnessCourts.org
- Tribal Healing to Wellness Court Publication Series
 - Tribal 10 Key Components
 - Preliminary Overview
 - Judicial Bench Book
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TRIBAL LAW AND POLICY INSTITUTE

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