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The First Tribal/State Court Forum and the Creation of MCR 2.615

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REMARKS OF JUSTICE MICHAEL F. CAVANAGH
MICHIGAN INDIAN JUDICIAL ASSOCIATION
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Good morning.

Before I begin, I would like to express my sincere appreciation to Judge Gasco for inviting me to this meeting and for extending this invitation to speak, and to Professor Singel and the MSU College of Law Indigenous Law and Policy Center for hosting the meeting. I would also like to thank Judge Petoskey for his kind remarks. I speak on behalf of the seven Justices of the Michigan Supreme Court when I express our appreciation for the good relationship that is shared between our State and Tribal court systems. Michigan is privileged to be the home of 12 federally recognized tribes and 10 tribal court systems. Fostering continuing good relations between our state and tribal courts continues to be of great interest to our Court.

I have been asked to say a few words about the history of this strong relationship between the Michigan tribal courts and our State judicial branch. In recent years, the relationship has been best exemplified by the development of our enforcement of tribal judgments rule, Michigan Court Rule 2.615. Because, as we all know, the recognition of tribal court judgments is central to the exercise and expansion of tribal sovereignty.

I would like to explain how we in Michigan arrived at our current rule. The real starting point came in 1992, with our Indian Tribal Court/State Trial Court Forum.

Many of you are familiar with the forum, or others like it. Our 1992 forum was funded by the State Justice Institute, and by the National Center for State Courts. Seven state and tribal judges met together and produced a number of recommendations.

Within a fairly short time after the report was issued, we managed to implement quite a few of the Forum's suggestions. Our State Court Administrative Office now works with tribal courts on request, to assist with administrative and infrastructure issues.

To further assist tribal courts, the Michigan Judicial Institute –the educational arm of the Michigan Supreme Court – has made its training sessions available to tribal judges and staff. The director of MJI, Dawn McCarty, extends a special invitation to all tribal court judges and their staffs to attend the MJI educational programs, and she will continue to send notices of the upcoming programs to the chief judge or named tribal representative of each tribe. MJI also attempts to educate state judges and staff about tribal sovereignty and the existence and functioning of tribal courts throughout the State.

One thing we have learned is that non-tribal lawyers, perhaps even more than judges, need to be educated in this realm. To accomplish that goal, and to provide Michigan lawyers with some of the basic information needed to deal with tribal authorities, we worked with the State Bar of Michigan to see that the annual Directory issue of The Michigan Bar Journal now contains a wealth of information.

The Directory issue, which is sent to every lawyer in the state, contains detailed information about each tribe located in Michigan:

- the nature and organization of the tribe's government,

- the structure of the tribe's court system,
- the territorial jurisdiction of the tribe,
- caseloads during the previous year,
- requirements for admission to practice before the tribal court,
- the tribal court's facilities,
- current personnel,
- the extent to which the tribe has entered into inter-governmental agreements, and
- the sources of tribal law and procedure.

Other recommendations of the Forum have also been implemented. Tribal materials are now available at the State Law Library. There is a very active State Bar Standing Committee on American Indian Law and a growing American Indian Law Section. Also, the organization represented here today – the Michigan Indian Judicial Association – was created since that time.

Recently, the State Court Administrator's Office updated our Michigan Supreme Court website – which is at http://www.courts.mi.gov – to incorporate a page devoted to tribal courts in Michigan, with links to tribal codes and ordinances, when they are available. This is page 3 of your handout. Pages 1 and 2 show how to access the tribal court webpage. From the homepage (page 1), one can click on either "Trial Courts" or "Links of Interest" (which is shown as page 2), and from there, to "Indian Tribal Courts Located in Michigan." That page depicts the rough location of the tribes in Michigan, and provides

contact information, as well as links to both the tribal websites and the codes. The enforcement of tribal judgments rule, MCR 2.615, appears at the end of the tribal courts page (page 4 of the handout), as does a link to the Tribal Government page that appears at the State of Michigan website. If anyone has any suggestions for improvement of this information, or any corrections, we would be very interested in hearing from you today.

Returning now to the history of the rule, it was the principal recommendation of the Tribal/ State Court Forum that full faith and credit be extended to tribal judgments. The Forum report acknowledged that the United States Constitution does not extend the doctrine of full faith and credit to Indian tribes, but it noted a variety of state and federal measures that have that effect.

After the State Bar formed its Committee on American Indian Law, the Committee turned its attention to this question and made an informal inquiry of the Michigan Supreme Court as to whether it would entertain such a proposal. Or whether the Court felt that the matter should be referred instead to the Legislature.

Encouraged by the response – again, informal – that the Court would be willing to look at such a rule proposal, the Committee then turned its attention to gaining approval of the idea through the internal processes of the State Bar of Michigan. In time, the committee caused the State Bar, through its Board of Commissioners, to recommend to the Supreme Court adoption of the proposed rule outlined in the Forum report.

Responding both to the informal inquiry of the Committee, and the full State Bar's formal proposal, the Supreme Court began to do its own research in this area. This was an interesting process for the Justices of our Court, many of whom initially shared the

unfamiliarity with American Indian Law that is common among most lawyers and judges in the state system.

Our research turned up the familiar principles of law that any of you will find if you begin to explore this area. One thing that quickly becomes clear is that there are several kinds of analysis that can lead to enforcement or recognition of tribal judgments.

The most familiar means, of course, is through implementation of the doctrine of full faith and credit. I understand that Professor Singel spoke at your last meeting about the nuances of full, faith, and credit, as compared to the competing concept of comity, so I will not purport to offer a scholarly discussion of the differences, but will summarize the topic only for purposes of describing the process that took place when the language of MCR 2.615 was being developed.

As you know, Section 1 of Article 4 of the U.S. Constitution says that:

> "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof."

The second sentence of that provision gives Congress the authority to enact implementing legislation. Exercising that power, Congress adopted the Full Faith and Credit Act, 28 USC 1738, which talks about full faith and credit for acts, records, and judicial proceedings of states, territories, and possessions.

Only a few jurisdictions have interpreted either the federal constitutional provision or the federal statute to require enforcement of tribal judgments. The problem is

simply that tribes are not "states," they are not "territories," and they are not "possessions." Just two states – Idaho and New Mexico – have held that the term "territories," as used in the Full Faith and Credit Act, is "broad enough to include Indian tribes." In these states, the judgments of tribal courts must be accorded full faith and credit by state courts, and vice versa. In other words, tribal courts are treated just like other states' courts. Oklahoma accorded full faith and credit to tribal court judgments through state legislative authorization and judicial rule. However, most states have not moved in the direction of full faith and credit.

There are some good reasons for this. Authors of the Forum report and the Indian law experts at the U.S. Department of Justice have noted that full faith and credit is not required by federal law. Another problem with full faith and credit is that, by requiring state courts to enforce tribal judgments, it would also likely require automatic enforcement of state judgments by tribal courts. An argument has been made by Professor Robert Laurence that the full faith and credit approach is disadvantageous to tribes because it allows for less flexibility and may force tribes to adopt needless uniformity. He believes that each of the state and tribal governments should design its own rules regarding how much respect to grant another jurisdiction's rulings.

Still, full faith and credit does apply in a number of specific situations as a matter of federal statutory law. Obviously, the Indian Child Welfare Act is the most important and most litigated of these statutes. And there are some state statutes that run parallel to ICWA. Full faith and credit also turns up in the Violence Against Women Act, the Uniform Child Custody Jurisdiction Enforcement Act, and a variety of federal statutes

relating to the administration of land. Some courts have also found a version of full faith and credit for tribal judgments in the earlier Uniform Child Custody Jurisdiction Act and the more recent Parental Kidnapping Prevention Act, even though their definitions of "state" do not expressly include Indian tribes.

Unfortunately, it is my understanding that, despite nearly 30 years of experience with ICWA, for example, in some states, tribal court orders regarding Indian children are still not always enforced. I hope that that is not the case in Michigan, but I am anxious to hear of your experiences in that regard.

At the opposite end of the spectrum from full, faith and credit, there is only one state, thankfully – South Dakota – that has adopted a statutory presumption against recognition of tribal court judgments. It requires a party seeking recognition to prove certain facts related to the validity of the tribal judgment by clear and convincing evidence.

Among the remaining states that have looked at this question, the prevailing approach is to enforce tribal judgments as a matter of "comity," and to expect that the tribes will enforce state judgments on the same basis. "Comity" also describes the approach of most federal courts to this issue, although there has been a history of change regarding the federal courts' relationship to the judgments of its sister tribal courts. In November 1994, this Association – then comprised of judges from the eight tribal courts exercising jurisdiction in Michigan – also advocated an approach premised on principles of comity in the Model Code of Tribal Court Rules and Procedures, which includes a detailed model for enforcement of foreign judgments.

Courts in Arizona, Minnesota, Montana, Oregon, New Jersey, and Connecticut have adopted principles of comity. Other states have codified their policy in the form of a statute or court rule, leading generally in the same direction. For instance, there are statutory provisions in Idaho, Nebraska, New Mexico, North Dakota, Oklahoma, South Carolina, Washington, Wisconsin, and Wyoming. The states of Maine, New York, and South Carolina extend comity to certain tribes only, through codified settlements and accords.

As you know, comity is a judicial doctrine, so legislation is not needed. And it arises from mutual respect – the receiving court may remain mindful of its own community's sensibilities while applying its standards of procedural fairness to a neighboring sovereign's judgment. Comity is thus entirely appropriate for use in this context.

After the Justices of our Supreme Court became familiar with what other states had done, we published the Forum proposal for comment. That happened in March 1995.

Such publication is a normal part of our administrative process. The idea is to give one and all a chance to speak up with suggested changes. Or support or opposition. Or whatever. Should the rule be in need of amendment at some point, this same process would be followed.

Over the years, we have learned that a good way to get more comments, and thus more help, is to publish more than one version of a proposed rule change. So, when we published for comment the rule proposed by the Forum, we also published an edited form of a rule that the North Dakota Supreme Court had adopted, just a few months earlier.

Perhaps the most interesting thing about the North Dakota rule, which is North

Dakota Rules of Court 7.2, is that it is a non-reciprocal provision. The North Dakota rule obliges state courts to honor tribal judgments, whether or not a particular tribal court returns the favor. (The rule does seek "to encourage reciprocal action by the tribes of this state," but does not require reciprocity.) When North Dakota's Chief Justice Gerald W. VandeWalle spoke about the rule at a Federal Bar Association conference, he said that he had supported the no-reciprocity approach because enforcing tribal judgments was simply the right thing to do. It was what North Dakota state judges should be doing, without regard to whether anyone else feels the same.

Another interesting aspect of the North Dakota rule was its resemblance, in many respects, to the MIJA proposed model rule for tribal courts.

When we published the Forum's proposal and the North Dakota rule for comment, we heard from several persons who offered helpful suggestions.

In the end, we understood that full faith and credit might be a better approach than comity. It would offer near-certainty of enforcement, and it would omit much of the temptation to second-guess the other jurisdiction's order.

However, it did not appear that full faith and credit was something that could properly be done by court rule. Despite the Forum's characterization of full faith and credit as an "evidentiary" principle, it does touch on the substantive rights of parties. Further, every state that had taken the full faith and credit approach had done so in reliance on a statute passed by Congress or by that state's Legislature. So we decided that full faith and credit would need to come from the Legislature, not us.

As I have said, though, comity is inherently a matter for the courts, in the exercise of judicial authority. Further, the doctrine of comity has a long-accepted history in Michigan. We therefore decided to head in that direction.

In making the decision to move forward in this manner, we first needed to examine closely the nature of the powers given our Supreme Court by the Michigan Constitution. Under various provisions, our court exercises law powers as an appellate court, administrative powers to supervise the judicial system, and other miscellaneous powers, including those over "practice and procedure."

I will spare you a full discussion of the nature and extent of our authority. But it was interesting, as we talked about whether this was something for us or for the Legislature. And, even if it was for the Court to do, could we do it by court rule, or did we need to wait for an appellate case that contained a properly presented question of law on this point?

In the end, we determined that it was an appropriate exercise of our constitutional authority. And a prudent one. To be honest, we were also aware that this is a procedural problem that we could probably handle better than the Legislature.

Without being critical, it is simply a fact that our process is more likely to focus on substance – on what has worked successfully in other states, and on the views of tribal leaders and those versed in American Indian law. The Legislature has to deal with a host of political considerations that can easily deflect its focus.

The fact of the matter, as we all know, is that it is very difficult for a legislative body to explore any issue relating to American Indian law, without someone wanting to take

a detour into such areas as fishing and gaming. Those topics have nothing to do with the subject at hand, and, obviously, we were able to move forward without becoming enmeshed in these distractions.

Further, our processes are much more responsive. Thus, if we do need to amend or correct the rule in the future – something that we have not done so far – that can be done fairly expeditiously.

So there we were. Up to that point, Michigan's state courts and tribal courts had built a solid pattern of cooperation and mutual assistance, but it was a fragile and informal system based on personal trust and telephone conversations.

We wanted to adopt a rule that would formalize this relationship by directing the state courts to recognize and enforce the judgments and other rulings of tribal courts, to the extent that those tribes reciprocate. Thus, the rule follows the "comity" approach and bears some resemblance to both the North Dakota rule and the MIJA model rule. It was adopted as MCR 2.615 in May 1996 – more than eleven years ago. My understanding is that the rule works well, but I would be very interested in hearing feedback today from those of you with direct experience in its implementation.

The phrasing of the rule is very broad. It covers every sort of "judgment, decree, order, warrant, subpoena, record and judicial act" that a court can issue or perform.

We also took a broad approach with regard to what tribes could be covered – "all federally recognized Indian tribes," anywhere. (The State Bar proposal had been a bit inconsistent, referring in one line to any "federally recognized Indian tribe," and in another place to a "federally recognized Indian tribe within the state of Michigan.") We took the

broader approach, and made the rule applicable to orders from any federally recognized tribe, including those outside the state of Michigan.

We included a reciprocity requirement because, while we appreciated what the North Dakota Supreme Court was doing, we have in mind a long-term relationship of mutual trust and assistance. We just couldn't see any good reason not to assume that this trust would be a two-way street.

We also made minor changes in Michigan Court Rule 2.112(J), which says how to plead a foreign judgment. It states that a party who intends to rely on or raise an issue concerning the law of a federally recognized Indian tribe must give notice of that intention.

Among other things, our rule calls for the State Court Administrative Office to keep track of the tribes that have adopted reciprocal enforcement provisions. As indicated on pages 3 and 4 of the handout, I am pleased to report that 10 of the 12 federally recognized tribes exercising jurisdiction in Michigan (all those that have a judicial department) have responded by transmitting their reciprocal ordinance, court rule, or other binding measure to our State Court Administrator. So far, though, only tribes located in Michigan have responded.

As I indicated earlier, the Court's website has recently been updated with this information and provides and links to the tribes' websites and to the tribal rules or ordinances, hopefully enabling more State and tribal judges and lawyers to access this important information. Again, if anyone has any corrections to the information that currently appears on the website, please let me know.

It is interesting to note that the Navajo Court of Appeals also adopted comity principles, rather than a full faith and credit approach to describe the relationship of Navaho courts to other courts, including other tribal courts. A Navajo court will honor and enforce foreign judgments upon consideration of the right of the foreign court to issue the judgment, of the propriety of the proceeding, and of any relevant public policy of the Navajo Nation.

One potential blip on the horizon of fully reciprocal enforcement of judgments between and among state and tribal courts is the Uniform Enforcement of Foreign Judgments Act, which the Michigan Legislature passed at the end of 1996, and is found at MCL 691.1171 and following. The act says nothing about tribal judgments. Apparently, it was based on a 1948 "uniform act" that was revised in 1964 – at a time when tribal sovereignty issues were rarely recognized. I understand that the current law uses the term "foreign judgment," which it defines as "any judgment, decree, or order of a court of the United States or of any other court that is entitled to full faith and credit in this state." Essentially, it provides the State with a speedy method of doing what the U.S. Constitution already requires in the full faith and credit clause. And, as we have seen, "full faith and credit" is not the analytical framework that most states use when they extend recognition and enforcement to tribal judgments.

It is interesting to note that state courts have allowed the registration, under the Uniform Enforcement of Foreign Judgments Act, of the judgments of United States territories, possessions, or dependencies, but, in most cases, not those of foreign countries. It is often said that "[a]bsent a treaty or statute, a foreign country judgment can be enforced

only under principles of comity." Regarding the recognition of federal judgments under the Act, there is a split of authority.

Although one state court has held that in order for tribal court child custody orders to be entitled to full faith and credit, they must comply with the requirements of the Uniform Enforcement of Foreign Judgments Act, another state distinguished the language of its statute granting full faith and credit to tribal judgments from the language of its Foreign Judgments Act. The Nebraska Supreme Court found that a tribal court was without subject matter jurisdiction to order a change in custody (in a non-Indian Child Welfare Act case), and thus, the judgment was not entitled to full faith and credit and could not be registered under its Foreign Judgments Act. Although there have been a few such cases, the interaction between State court rules or statutes recognizing and enforcing tribal judgments and the Uniform Enforcement of Foreign Judgments Act has yet to be considered at all by most State courts. These questions have not been litigated in Michigan vis à vis tribal judgments.

Some of the same issues come into play with the similarly titled "Uniform Foreign Money-Judgments Recognition Act," which is currently found at MCL 691.1151 and following. It defines "Foreign state" as "any governmental unit other than the United States, or any state, district, commonwealth, territory, insular possession thereof, or the Panama canal zone, the trust territory of the Pacific islands or the Ryukyu islands." This act, too, is a uniform act.

In Montana, the Supreme Court, considering the Uniform Foreign Money-Judgments Recognition Act, held that a tribal court judgment could not be enforced outside the boundaries of the Indian reservation, because then the state would "effectively replace the

Tribe's enforcement procedures with its own, and thus, plainly 'undermine the authority of the tribal courts over Reservation affairs' and 'infringe on the right of the Indians to govern themselves.'"

The Foreign Money Judgments Act has been recently revised by the National Conference of Commissioners on Uniform State Laws as, "The Uniform Foreign-Country Money Judgments Recognition Act." The conference would like states to adopt the new version, and the Michigan Legislature is currently considering it as House Bill 4650. It is my understanding that Sheila Gaskell will be speaking to you on this topic, so I only mention it in the vein of statutes that may interact with our court rule in some upcoming case posing an enforcement of judgments question.

In any event, I don't think these uniform foreign judgment statutes have posed significant problems up until this time. But tribal governments and scholars may wish to take a look at the proposed definitional amendments, which may impact how tribal judgments are treated in states that adopt the uniform changes. In Michigan, we have our court rule, under which judgments and orders can be enforced, and the rule so far has been unaffected by the foreign judgments statutes.

Our rule has now been in place for about 11 years. So far, no major implementation problems have been reported, but again, the Court is very interested in any feedback that the tribal judiciary or their staff can offer with regard to its practical – or theoretical – implementation. From our perspective, it appears that things should continue to go well. However, if anyone would like to comment on the rule or its application, please feel free speak afterwards.

Looking back on this whole process, I am struck by how rewarding it was, and by how much we have all learned about the law and about each other. Speaking for myself, I can tell you that I know much more about this area than I did 10 years ago, and I have new friends all across our two peninsulas.

There is so much to be encouraged about in this area. As you know, another very positive development since the time of the Forum has been the founding of the MSU Indigenous Law and Policy Center (our host today), which is under the capable direction of Professor (and Judge) Matthew Fletcher and Professor (and Judge) Winona Singel. I have found several law review articles by Professor Fletcher to be very interesting reading, especially the recent Houston Law Review article explaining his theory of intertribal and intratribal common law and the article providing a Restatement of the Common Law of the Grand Traverse Band of Ottawa and Chippewa Indians. I know that the Center has also sponsored some excellent seminars and conferences that are no doubt providing a useful forum for the exchange of ideas in the areas of law and policy, as well as making people more aware of the tribal nations located in Michigan. It seems that we have come a long way.

As tribal economic development continues and grows, no doubt more legal questions will arise, especially in the areas of jurisdiction and enforcement of judgments.

We are interested in continuing the efforts that were begun with the first Tribal/ State Court Forum in ways that would be most productive and useful for tribal, state, and federal court judges alike. I know that the idea of a Forum that would include the

participation of federal court judges and staff has been talked about in the past. But I would like to renew some attention to that possibility in the near future.

We have been in contact with the U.S. Attorney's Office for the Western District of Michigan, where 11 of the 12 tribes exercising jurisdiction in Michigan are located. Jeff Davis, whom some of you may know, is the tribal liaison for that office, and he has indicated that there would be interest on the federal side in getting together to discuss issues that are shared among the federal courts, the state courts, and the courts of each of the tribes. We will be exploring this further and, again, would be interested in the ideas and concerns of those represented here.

Certainly, a dialogue among the judiciary of the tribal sovereigns, the state and the federal government could only serve to improve the delivery of justice to all of our citizens.

There is also much to learn from the experience our sister tribal and state judiciaries. For example, in Wisconsin, they hold regular tribal and state court forums on a regional basis, so that the state trial judges at the county level have a chance to sit down with the judges from neighboring tribes to work out problems and develop procedures for the smooth interaction of their courts. In Wisconsin, this process has produced protocols designed to help resolve jurisdictional issues when they arise. I have read that the participants in the Wisconsin forums said that the process of sitting down and talking may have been more important that the guidelines that were produced. (Of course, the Wisconsin experience is not completely analogous to Michigan, since Wisconsin is a Public-Law-280 state.)

Another success story originating from a Tribal/ State court forum was in Minnesota, where a working agreement was signed between the Mille Lacs Band of Ojibwe and the Mille Lacs County District Court to deal with non-violent criminal offenders by referring them to a "Sentencing Circle" – a concept developed by the tribe, with an emphasis on restitution.

In Arizona, a Court Forum was established as an ongoing colloquium of tribal, state, and federal officials. It consists of four federal members, six state members, at least seven tribal members, one state bar member, and two public members, serving two-year terms. That forum has resulted in the amendment of court rules governing domestic violence orders, the development of a website for access to state and tribal court standardized forms, and the pursuit of intergovernmental agreements.

As the Minnesota example illustrates, the measure of a healthy government-to-government relationship is the understanding that learning is a two-way street. While tribal courts may certainly benefit from the application of methods developed in state courts, state and federal courts can also learn much from the tribal system.

Everyone has heard of Chief Joseph's famous 1879 surrender, when he said for his Nez Perce tribe,

"From where the sun stands, I will fight no more forever."

Well, a year later, he addressed members of Congress and others in Washington D.C. Toward the end of his speech, he said:

"If the white man wants to live in peace with the Indian he can live in peace. There need be no trouble. Treat all men alike. Give them the same law. Give them all an even chance to live and grow.

"All men were made by the same Great Spirit Chief. They are all brothers. The earth is the mother of all people, and all people should have equal rights upon it.

"We ask that the same law shall work alike on all men. If the Indian breaks the law, punish him by the law. If the white man breaks the law, punish him also.

"When the white man treats an Indian as they treat each other, then we will have no more wars. We shall all be alike – brothers of one father and one mother, with one sky above us and one government for all."

I am sure that Chief Joseph did not mean one government in the sense that part of us would rule the rest of us. He clearly meant a shared commitment to cooperation and respect.

We are trying in Michigan to build trust and good working relationships among tribal, state, and federal courts, and we believe that the Tribal/ State Court Forum that led to the adoption of the Enforcement of Tribal Judgments court rule was a significant step in that effort. We look forward to future collaborative efforts among the three types of court systems that exercise jurisdiction here in Michigan.

Thank you.

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