



## Judicial Profile

by Allyson Manny

# Hon. Elizabeth Ann Kronk Warner Acting Chief Judge, Sault Ste. Marie Tribe of Chippewa Indians Court of Appeals

In 2008, the Hon. Elizabeth Kronk Warner was appointed as an appellate judge for the Sault Ste. Marie Tribe of Chippewa Indians. Later the same year, she was named chief judge of the Sault Ste. Marie Court of Appeals. She served in this role from 2008 to 2012, when she was reappointed to the Sault Ste. Marie Court Appeals as an appellate judge for another four-year term. She now serves as acting chief judge.

After working throughout her legal career to educate others about tribal law, the position of chief judge provided Judge Warner with the platform in which to promote the integrity of tribal judicial courts. To that end, the judge has worked diligently for many years to eliminate stereotypes concerning tribal judicial courts, their purpose, and how they function.

Before being appointed chief judge, Judge Warner worked to educate herself—and, later, as a teacher, to educate others—about tribal law. Born and raised in Michigan near the Sault Ste. Marie Tribe's reservation, tribal culture and issues have always been an important part of her life. When determining which college and law school to attend, Judge Warner was greatly influenced by the opportunity to learn more about American Indian history and culture as well as tribal law. She decided to attend Cornell University largely because of its well-developed American Indian program, enabling her to learn a great deal about the Iroquois League.



In deciding thereafter to attend the University of Michigan School of Law, Judge Warner was attracted to its substantial American Indian population and programs. While at Michigan, Judge Warner was active in the Law School's Native American Law Student Association (NALSA) chapter. She competed in the national NALSA moot court competition twice, finishing in the semifinals the first time and winning the competition the second. Furthermore, when serving as NALSA's president during her 3L year, she won NALSA's national 3L of the Year award.

In addition to becoming active in NALSA, Judge Warner had the opportunity to participate in many events surrounding the affirmative action case, *Grutter v. Bollinger*.<sup>1</sup> As she recalls, "It was a wonderful time to be an Indian student at the University of Michigan." For one, the entire University of Michigan American Indian community was very much involved in, and coalesced around, the *Grutter* case.

The events surrounding *Grutter* cemented Judge Warner's commitment to Indian Country. When asked why *Grutter* had such an impact on her, Judge Warner said that it was the first time she "felt honored to be working for a cause important to Indian Country as a whole." Moreover, *Grutter* was a pivotal moment for her because she "realized that the law applicable to Indians and Indian Country

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differed from the law applicable to other racial minorities.” It was her work and involvement in *Grutter* that motivated the judge to dedicate her life to helping others understand these important legal differences.

Following law school, Judge Warner had an opportunity to work for two firms in Washington, D.C.—Troutman Sanders and Latham & Watkins—where she practiced energy, environmental, and federal Indian law. As a result, she learned more about the diverse and complicated problems facing American Indian people and tribes around the country. She then also had the opportunity to serve as chair of the Native American Bar Association of D.C. and to work with other bar associations of color.

It was also during this time that the judge was afforded her first opportunity to take what she had learned about native culture, history, and tribal law and teach. She served as an instructor for a summer program for native students at American University, teaching federal Indian law and policy. Following this experience, she decided to leave Washington to become an assistant professor at the University of Montana School of Law in 2006.

While at Montana, the judge taught Indian and environmental law. She continued to teach at the University of Montana School of Law until 2011, when she left to join the faculty at Texas Tech University School of Law, focusing on environmental and natural resources law. In 2012, she joined the faculty at the University of Kansas School of Law (KU), directing the Tribal Law and Government Center, where she continues to work. It was during her tenure at Montana, in 2008, that she was appointed and confirmed as an appellate judge for the Sault Ste. Marie Tribe.

As a tribal appellate judge, Judge Warner is focused on trying to balance the concerns of individuals external to the tribal community as well as providing the best legal system for the Sault Ste. Marie Tribe of Chippewa Indians. Individuals external to the tribal community often have negative opinions of tribal courts and judges. The judge works diligently to stop such misunderstandings in two ways: by educating others about tribal structure and procedure and by transparently and correctly applying the law.

Because many lawyers never work with tribal courts, they do not understand how such courts work. This often results in negative stereotyping of tribal courts. Historically, three stereotypes have been perpetuated in American society: tribal courts are inadequate; tribal courts are corrupt; and tribal judges are uneducated. The testimony from the 1960s hearings concerning the Indian Civil Rights Act (ICRA) serves as an excellent example. In debating the enactment of ICRA, the Constitutional Rights Subcommittee received substantial testimony regarding alleged incompetence of tribal courts and judges.

Regarding the adequacy of tribal courts, for example, Sen. Kenneth Keating (R-N.Y.) stated that the laws and codes of tribes can be very difficult to understand and that many tribes “have no written laws or regulations governing their courts.”<sup>2</sup> In a 1966 summary report, the subcommittee criticized tribal courts administrative abilities, finding that “[t]ypically ... the Indian’s day in court is likely to be a

haphazard, error-laden prospect at best.”<sup>3</sup> Other Senators apparently believed that tribal courts are corrupt. Sen. Sam Ervin Jr. (D-N.C.) for instance stated, “it appears that a Tribe may constitutionally deprive its members of property and liberty without due process of law and not come under the constitutional limitations applicable to Federal and State Governments as stated in the Bill of Rights.”<sup>4</sup> Concerning the qualification of tribal judges, many Senators stated that tribal judges are uneducated and not legally trained.<sup>5</sup>

Although these statements were made in the 1960s, Judge Warner finds that these stereotypes still exist. She works to eliminate them and promote the integrity of her court by educating others about the structure and processes of the court whenever she can.

The court system of the Sault Ste. Marie Tribe of Chippewa Indians, for instance, is generally divided between the trial court level and the appellate level. There is one level of appellate review from the Sault Ste. Marie Tribe of Chippewa Indians Court of Appeals. One judge, Judge Jocelyn Fabry, a University of Colorado School of Law graduate and Indian law expert, barred in Michigan, presides over the trial court level. The court of appeals comprises five permanent appellate judges, including Judge Warner. Of the five, two are attorneys and three are members of the tribal community (i.e., lay judges). There are also four reserve appellate judges who serve when the five permanent judges cannot. Of the reserve appellate judges, three are attorneys and one is a lay judge.

Judge Warner has written papers, conducted continuing legal education programs, and given presentations to educate others and eliminate misunderstandings concerning tribal courts and judges.<sup>6</sup> By promoting greater understanding of the tribal court structure and processes, Judge Warner strives to teach others that tribal courts are adequate and honest and tribal judges are competent.

In addition to working hard to avoid perpetuating unfair stereotypes of tribal courts and judges, Judge Warner also works to increase confidence in tribal courts by transparently and correctly applying the law. This is often much more complex than the transparent and correct application of the law in state or federal courts, because during a case, a tribal judge might be called upon to apply tribal code, tribal precedent, tribal customary law, federal law, and, in some instances, state law.

In any given case, Judge Warner must first look to her own tribes’ laws. The Sault Ste. Marie Tribe of Chippewa Indians, like many tribes, has enacted a tribal code govern-

**Grutter was a pivotal moment for Judge Warner because she “realized that the law applicable to Indians and Indian Country differed from the law applicable to other racial minorities.” It was her work and involvement in Grutter that motivated the judge to dedicate her life to helping others understand these important legal differences.**

ing resolution of matters as diverse as child welfare proceedings to hunting and fishing rights. Additionally, many tribes possess tribal customary law that has been developed and refined over the centuries. Application of tribal customary law is crucial in many instances to maintaining the internal validity of tribal customs and traditions. Accordingly, Judge Warner endeavors to include tribal customary law into court decisions whenever possible. Moreover, when no Sault Ste. Marie Tribe of Chippewa Indian law on point exists, in accordance with Sault Ste. Marie Tribe of Chippewa Indians Tribal Code, the judge must often consider other tribes' law.<sup>7</sup>

After looking to tribal codes and customary law, the judge is often called upon to consider federal and state law. The federal government plays a pervasive role in Indian Country. For example, the question of tribal court jurisdiction, both civil and criminal, often requires an examination of the complicated patchwork of federal Indian law applicable in such situations. When tribal and federal legal resources have been exhausted and no law on point found, the Sault Ste. Marie Tribe of Chippewa Indians Tribal Code allows the court to consider Michigan state law, which may be appropriate because the tribe in some instances may use Michigan law as a template to develop its own law.

Thus, it is possible for Judge Warner to consider tribal, federal, and state sources of law before rendering her opinion in a case. For this reason, she must carefully consider all applicable sources to reach the correct legal outcome. She strives to increase confidence in tribal courts by clearly explaining what sources of law and tribal customs led her to reach a decision, creating transparency in an otherwise complex area of the law. By clearly explaining how she formed an opinion, the judge hopes to build confidence in the legitimacy of tribal courts and negate any misunderstandings others might have concerning tribal courts.

Judge Warner's term as an appellate judge for the Sault Ste. Marie Tribe of Indians Court of Appeals runs through 2016. As she continues her term as an appellate judge—and now, acting chief judge—Judge Warner looks forward “to continuing to educate those external to tribal communities about the validity of tribal courts and abilities of tribal judges.” ☉

## Endnotes

<sup>1</sup>*Grutter v. Bollinger*, 539 U.S. 306 (2003) (holding the University of Michigan School of Law did not violate the Equal Protection Clause by using race as a factor in its admissions because the school of law (1) had a compelling interest in having a diverse student body and (2) the admissions program was narrowly tailored to serve this compelling interest).

<sup>2</sup>*Hearings Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 87th Cong. 3 (1962) (statement of Sen. Keating).

<sup>3</sup>*Summary Report of Hearings and Investigations by the Subcomm. on Constitutional Rights of the Senate*

*Comm. on the Judiciary Pursuant to S. Res. 194*, 89th Cong. 3 (1966).

<sup>4</sup>*Hearings Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 87th Cong. 3 (1962) (statement of Sen. Ervin).

<sup>5</sup>*Hearings Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 87th Cong. 6 (1962) (statement of Senator Roman Hruska).

<sup>6</sup>Judge Warner's publications include, among others, *Tightening the Perceived "Loophole": Reexamining ICRA's Limitation on Tribal Court Punishment Authority* in *THE INDIAN CIVIL RIGHTS ACT AT FORTY* (Kristen A. Carpenter, Matthew L. M. Fletcher, and Angela R. Riley, eds., UCLA American Indian Studies Center 2012); *Indian Claims and the Court of Federal Claims: A Legal Overview, Historical Accounting and Examination of the Court of Federal Claims' and Federal Circuit's Impact on Federal Indian Law*, 6 *Journal of the Federal Circuit Historical Society* 59 (2012); *Application of Title VI in Indian Country: The Key is Tribal Sovereignty*, 6 *Fla. A&M U. L. Rev.* 215 (Spring 2011); *American Indian Tribal Courts as Models for Incorporating Customary Law*, 3 *Journal of Court Innovation* 231 (Winter 2010); and *Civil and Regulatory Jurisdiction in Indian Country*, CLE Material for Dartmouth Lawyers Association Mid-Winter CLE & Ski (February 2009). Judge Warner's presentations on tribal courts include *Strengthening Tribal Judiciaries: Research Needs and Innovative Practices*, National Institute of Justice Conference 2011, Arlington, Va. (June 2011); *Ethical Considerations for Tribal Courts, Practice and Governance*, University of Kansas School of Law, Prairie Band Casino and Resort, Mayetta, KS. (Feb. 2010); *Re-examining ICRA's Limitation on Tribal Court Punishment Authority*, University of Colorado School of Law, Boulder, CO. (Aug. 2008) and at Michigan State University College of Law, Lansing, MI. (Oct. 2008); *Tribal Courts in the Modern Era: Creative Solutions to Emerging Problems*, “What Do We Know About Tribal Courts?” American University Washington College of Law (Mar. 2008).

<sup>7</sup>Given the tribe's Anishnabwe ancestry, typically, Judge Warner will consider laws of other Anishnabwe people, such as the Odawa, Ojibwe, and Potawatomie tribes.