



# WHAT SHOULD **TRIBAL JUDGES** AND **TRIBAL LEADERS** KNOW ABOUT **TRIBAL COURT ETHICS?**

One of the most important of sovereign powers any American Indian tribal government can exercise is the power of the judiciary. Each of the 573 federally recognized Indian tribes<sup>1</sup> may operate a tribal justice system or tribal court. Indigenous or tradition tribal justice systems have a primary goal of local dispute resolution.<sup>2</sup> Tribal courts developed pursuant to the Indian Reorganization Act<sup>3</sup> typically are designed to interpret, apply and enforce tribal constitutions and legal codes.

## **ESTABLISHMENT OF TRIBAL COURTS UNDER TRIBAL LAW**

Unlike the U.S. Supreme Court and many state justice systems, not all modern tribal courts have been established as separate branches of government under tribal constitutions. Many tribal judicial systems were created by legislation enacted by tribal councils pursuant to their constitutional authority. Even where the judiciary is an independent branch of tribal government, tribal judges may still be appointed through a legislative process. Independent or not, these political appointments can give rise to tribal citizen concerns about the professional competence and impartiality of tribal judges.

## **JUDICIAL INDEPENDENCE**

In order to preserve and promote the integrity and impartiality of tribal courts, tribal leaders, citizens and other court users must be assured that judicial officers, regardless of whether they are elected or

appointed, will conduct fair proceedings, render legally proper decisions and judgments, and issue valid orders free from undue or improper social or political influence from either within or outside tribal land boundaries.

## **JUDICIAL COMPETENCE**

Public perception of the integrity and validity of tribal courts is equally dependent on the legal knowledge and professional ability of the tribal judge to conduct fair proceedings, maintain order and provide direction, make appropriate findings of the facts based on evidence properly admitted in the case, and make clear and understandable legal conclusions by identifying and explaining the applicable law and legal principles to those facts, resulting in legally sustainable decisions.

## **TRIBAL COURT PERSONNEL**

Tribal court customers' perception of the integrity and impartiality of tribal justice systems is also dependent on the peoples' belief that their pending court matters are being addressed and processed timely, efficiently, and, where appropriate, confidentially. Tribes must ensure court users that court staff exhibit professionalism and are equally competent as the judges and follow established procedures for the administration of impartial justice.

## TRIBAL COURT PRACTITIONERS

Tribal court users also need to know that those individuals who are admitted to represent clients in tribal courts, whether state-licensed attorneys, non-attorney advocates, or traditional spokespersons or representatives, also demonstrate competence in tribal law and court procedure and exhibit professional character and trustworthiness when providing legal services.

## TRIBAL LAW AND ORDER ACT AND VIOLENCE AGAINST WOMEN ACT SPECIAL DOMESTIC VIOLENCE CRIMINAL JURISDICTION

In 2010, the Tribal Law and Order Act (TLOA) became effective allowing tribes to (among other things) sentence Indian criminal defendants to incarceration for up to 3 years for any one offense. One important provision of TLOA is that a tribe exercising enhanced sentencing must “provide an indigent defendant the assistance of a defense attorney licensed to practice

law by any jurisdiction in the United States *that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys.*”<sup>4</sup> (Emphasis added).

In 2013, the Violence Against Women Act (VAWA) Reauthorization Act recognized Indian tribes’ inherent authority (within specific criteria) to prosecute and sentence in tribal court a non-Indian defendant who commits an act of domestic violence against an Indian while in Indian country. One important provision of this Special Domestic Violence Criminal Jurisdiction is that the defendant must be afforded the same assistance of a defense attorney as required under TLOA.<sup>5</sup>

## CHECKLIST FOR DEVELOPMENT OF TRIBAL COURT ETHICS CODES

Listed below are factors for tribes to consider when thinking about tribal court ethics.

- Is “access to justice” important to your tribal members?
- Do your tribal members deserve competent and impartial judges?
- Will tribal members have more faith in your justice system with professional and competent court staff?
- Will competent and professional court practitioners best serve your members, preserve and maintain your tribal justice system, and promote tribal sovereignty?

<sup>1</sup> U.S. Department of the Interior, Bureau of Indian Affairs website, <https://www.bia.gov/bia>.

<sup>2</sup> U.S. Department of Justice, Bureau of Justice Statistics, Census of Tribal Justice Agencies in Indian Country, 2002, <https://www.bjs.gov/content/pub/pdf/ctjaic02.pdf>.

<sup>3</sup> U.S. Department of Justice, Bureau of Justice Statistics, Census of Tribal Justice Agencies in Indian Country, 2002, <https://www.bjs.gov/content/pub/pdf/ctjaic02.pdf>.

<sup>4</sup> See, 25 U.S.C. § 1302(c)(2).

<sup>5</sup> See, 25 U.S.C. § 1304(d)(2).