

A PORTRAIT OF TRIBAL COURTS: TRIBAL COURT TOOLS AND LEVERS TO ENSURE PROCEDURAL FAIRNESS FOR SELF-REPRESENTED LITIGANTS

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There are three distinct sovereign entities in the United States: the federal government, state

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governments, and Indian Tribes.¹ Each sovereign entity possesses its own distinct judicial system.² Even though there are similarities among state, federal, and tribal courts, “tribal courts are not United States courts.”³ The differences between the state and federal courts and tribal courts are due to the incorporation of cultural values and customs into the process and the different perceptions of justice. For example, in the *Matter of Seanez*, the Navajo Nation Supreme Court addressed a case in which an attorney faced permanent disbarment for conduct that violated Navajo laws.⁴ In reaching a decision on whether an attorney should be permanently disbarred for gross misconduct, the Navajo Nation justices declined to permanently disbar the attorney.⁵ In reaching that conclusion, the Navajo Nation justices determined that permanent disbarment serves no healing purposes and concluded that “this Court will do what it can in an effort to turn such things into positive dew or corn pollen.”⁶ The structure of tribal courts, legal processes, and tribal laws varies from one Indian Nation to another. However, the efforts of tribal courts to resolve disputes in a more restorative and compassionate manner includes more than only applying principles of traditional laws and customs to its cases.

Similar to state and federal jurisdictions, individuals utilizing tribal judiciaries at times struggle with navigating the processes, filing petitions, and presenting arguments to the court. In some cases, appearing in court may be traumatic. Furthermore, in the vast majority of cases, individuals are doing this without legal representation. As illustrated by the interviews with tribal court judges, staff, and the

1. Sandra Day O'Connor, Remark, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 TULSA L.J. 1, 1 (1997).

2. *Id.*

3. Korey Wahwassuck, *The New Face of Justice: Joint Tribal-State Jurisdiction*, 47 WASHBURN L.J. 733, 733 (2008).

4. *In re Seanez*, 9 Am. Tribal L. 329 (Navajo 2010).

5. *Id.* at 338.

6. *Id.*

authors' experience in tribal courts, tribal judiciaries have prioritized efforts to make tribal court more user-friendly and ensure access to justice. These efforts include revamping petitions and other legal forms and adding resources to tribal court websites. In order to address the lack of available attorneys, many Indian Nations allow for lay advocates to represent parties before tribal courts. Judiciaries across the nation are engaging in efforts to make their courts more user-friendly. The approach by tribal courts is unique, but tribal judges and court staff must still balance legal and ethical obligations.

This article will first provide an overview on the creation and background of tribal courts. Next, it examines the practices tribal court judges and staff use to provide access to justice. These practices were elucidated from interviews with tribal judges and our own experiences and work on increasing self-represented parties' access to justice. Once in the courtroom, tribal court judges use their discretion to balance the judicial ethics of impartiality with telling the story of the judicial process to help parties understand their roles and responsibilities. Courtroom language and environment are adapted to be trauma informed to reduce the overwhelming fear of coming to court. Finally, this article examines the use of lay advocates to demonstrate how tribal courts provide more access to justice than many state courts.

I. OVERVIEW OF TRIBAL COURTS

Since time immemorial, Indian Nations have administered justice in their communities. Prior to contact with settlers, those responsible for settling disputes in tribal communities between tribal members applied traditional law and customs.⁷ This form of justice was interrupted by the creation of Courts of Indian

7. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 4.05[4] (Nell Jessup Newton ed., 2019) [hereinafter COHEN'S HANDBOOK].

Offenses (CFR Court) in the 1880s, the enactment of the Indian Reorganization Act of 1934 (IRA), and other factors such as forced migration, settlement on reservations, and the imposition of unfamiliar Anglo-American institutions.⁸ Many of the tribal courts that exist today stem from the IRA because Indian Nations adopted constitutions and created judiciaries following the passage of that act.⁹ Other Indian Nations established tribal judiciaries through tribal law.¹⁰ There are also tribes that have not created a judicial forum and disputes are resolved by tribal leadership such as tribal councilmembers.¹¹ Some tribes have created alternative dispute mechanisms within their judicial processes and laws or established problem-solving courts such as a peacemaker court.¹²

The administration of justice in tribal communities is multifaceted and the structures of tribal judiciaries are decided by each Indian Nation's leaders and membership. No tribal judiciary is identical to another and structure varies from tribe to tribe. "More than 500 federally recognized tribes in the United States operate between 250 and 300 trial courts" and there are more than 150 tribal appellate courts.¹³ Many tribal courts look similar to federal and state courts, but they remain tribal.¹⁴ Tribal judicial systems tend to utilize a restorative justice approach and place an emphasis on keeping harmony in the community.¹⁵ To support this objective, tribes adopt laws that include restorative

8. *Id.* at § 4.04[3][c][iv][B]; O'Connor, *supra* note 1, at 1; Angelique EagleWoman, *Envisioning Indigenous Community Courts to Realize Justice in Canada for First Nations*, 56 ALBERTA L. REV. 669, 689 (2019).

9. O'Connor, *supra* note 1, at 1-2.

10. *Id.*

11. *Id.*

12. *See, e.g.*, EagleWoman, *supra* note 8, at 690.

13. Gregory D. Smith, *Native American Tribal Appellate Courts: Underestimated and Overlooked*, 19 J. APP. PRAC. & PROCESS 25, 25 (2018).

14. Lauren van Schilfgaarde, *Indigenizing Professional Responsibility: The Role of Ethics in Tribal Courts*, 59 JUDGES' J. (May 13, 2020), https://www.americanbar.org/groups/judicial/publications/judges_journal/2020/spring/indigenizing-professional-responsibility-role-ethics-tribal-courts/.

15. *Id.*

justice principles.¹⁶ Tribal courts also range in resources and size. For example, the Navajo Nation judicial system is a large court system with a specialized Peacemaker Court.¹⁷ The Navajo judicial system is made up of a supreme court, district courts, and has administrative offices of the courts.¹⁸ This structure requires numerous judges and court staff to administer the Navajo courts. In contrast, smaller tribal judiciaries have fewer court staff and available resources.

Today, tribal courts are located throughout the country in mostly rural areas. Most tribes have designated buildings for their courts. Typically, smaller tribal judiciaries are housed in one building and larger tribal courts may be spread between two or more buildings. Upon entering most tribal courtrooms, one is usually aware of the influence Anglo-American notions of adversarial justice due to the organization of the courtroom.¹⁹ In these courtrooms, there are typically desks for the parties, and the tribal judge and the court clerk are at a bench or separate desks.²⁰ Tribal courtrooms include microphones, recording devices, and other tech-related equipment that you see in other courts.²¹

In general, “Tribal courts often follow a hierarchy of law based upon: (1) prior decisions of the same court based on the local tribal statutes and customary law principles, (2) the tribal decisions of other Tribal courts, (3) relevant federal court decisions, and (4) relevant state court decisions.”²² Most Indian Nations have

16. *Id.*

17. EagleWoman, *supra* note 8, at 690.

18. *Courts & Peacemaking in the Navajo Nation*, NAVAJO NATION JUD. BRANCH, <https://courts.navajo-nsn.gov/> (last visited Feb. 18, 2023) (follow “Public Guide to the Courts” hyperlink); *The Administrative Offices of the Courts*, NAVAJO NATION JUD. BRANCH, <https://courts.navajo-nsn.gov/indexaoc.htm> (last visited Feb. 18, 2023).

19. JUSTIN B. RICHLAND, ARGUING WITH TRADITION: THE LANGUAGE OF LAW IN HOPI TRIBAL COURT 42 (2008).

20. *Id.* at 42–44.

21. *Id.* at 44–45.

22. EagleWoman, *supra* note 8, at 691.

promulgated rules of civil procedure.²³ Some tribes adopt rules that resemble the Federal Rules of Civil Procedure and others enact civil rules that contain similar provisions, but are unique to that tribe.²⁴ Generally speaking, the rules enacted by tribes provide the relevant processes for parties seeking to commence legal action, rules for service, and remedies that may be sought by a litigant and defenses. In most cases, the rules also include guidance on the kinds of information that pleadings must contain and the consequences of failing to meet these deadlines such as the entering of a default judgment.²⁵

Tribal courts handle a wide variety of cases. The subject matter jurisdiction of each tribal court varies based on tribal law. Moreover, the United States Supreme Court has also played a part in limiting criminal and civil jurisdiction.²⁶ As in all cases, the matters the court is deciding are of paramount importance to the parties. In the majority of cases, due to the remoteness of reservations and the financial means of the tribal populations that reside there, litigants rarely appear with professional legal representation. For purposes of this article, professional legal representation means an individual who has a law degree and is licensed to practice law. As a result, most litigants are self-represented and forced to navigate the complexity of legal filings and deciphering tribal law themselves to make arguments.

23. See COHEN'S HANDBOOK, *supra* note 7, § 4.05[8], nn. 63–64.

24. *See id.*

25. *See, e.g.*, SAINT REGIS MOHAWK TRIBE R. CIV. P. §§ IX [Rule 6], XIII [Rule 10], https://dvc479a3d0ke3.cloudfront.net/_uploads/site_files/RulesOfCivilProcedure22.pdf (last visited Feb. 19, 2023).

26. ANGELIQUE WAMBDI EAGLEWOMAN & STACY L. LEEDS, *MASTERING AMERICAN INDIAN LAW* 61–62, 74–77 (2d ed. 2019).

II. ACCESS TO JUSTICE: THE CHALLENGES FACED BY SELF-REPRESENTED PARTIES

To combat the barriers experienced by self-represented litigants, many tribal courts have taken the initiative to make their court more user-friendly to ensure litigants have access to justice—or in other words, get the legal help they need, understand court procedures, and get a decision on the merits. Tribal court staff play a vital role in the process because tribal court staff regularly interact with litigants and help guide them through the process. Tribal court staff also strive to assist parties with the filing process, while maintaining their ethical obligations. Tribal court judges balance their ethical obligations while trying to ensure self-represented parties understand the process. Tribal court staff and judges also implement trauma-informed practices to make the courtroom environment feel less daunting. Finally, many tribal courts use lay advocates to fill a gap left by lack of legal services. These efforts are to ensure that procedures do not stand in the way of a just result.²⁷ Moreover, the methods used by tribal court staff and assistance offered is unique to tribal judiciaries.

To most individuals, courts can be intimidating, discouraging, and foreign. This is due to a variety of reasons such as the complicated legal processes and unfamiliar terminology used in court processes. Tribal courts can also be seen as a barrier to justice by their community. This perception is usually based on arguments such as the court is applying foreign law or questions about the authority of the tribal court. Tribal judges and personnel notice the challenges faced by self-represented litigants, which are not unique to tribal courts. For example, the State of New York Unified Court System established the Permanent Commission on Access to Justice in 2010 to address the issue that

27. See Michele Statz et al., *“They Had Access, but They Didn’t Get Justice”: Why Prevailing Access to Justice Initiatives Fail Rural Americans*, 28 GEO. J. ON POVERTY L. & POL’Y 321, 323 (2021) (explaining the challenges faced by self-represented litigants in rural legal proceedings).

thousands of low-income New Yorkers interact with the court system as litigants.²⁸ The Permanent Commission's goal is "ensur[ing] that every New Yorker has access to effective assistance when facing a civil legal challenge that impacts the essentials of life" and primarily focuses on providing civil legal services to low income New Yorkers.²⁹ This includes "legal information assistance . . . ; in-court support and guidance through the Court Navigator Program; pro bono assistance from law students and attorneys at libraries and other locations; and full representation by legal services providers."³⁰ Organizations such as the Self Represented Litigants Network have been established to provide resources for court professionals on how to make courts more user-friendly that focus on self-help forms, available technology, and online resources among other matters.³¹

The approach applied by state courts to address the needs of self-represented litigants focuses primarily on providing resources for self-represented litigants to navigate the process, such as a self-help forms, providing ways to access the court by utilizing technology, and providing civil legal aid options.³² This is to ensure that there is access to justice.

The phrase "access to justice" means many things to many people. It usually connotes having legal "rights" and the freedom to demand remedies for

28. PERMANENT COMM'N ON ACCESS TO JUST., REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK, at 5 (Nov. 2018), https://ww2.nycourts.gov/sites/default/files/document/files/2019-10/18_ATJ-Comission_Report.pdf.

29. Letter from Helaine M. Barnett, Chair, N.Y. State Permanent Comm'n on Access to Just., to Janet DiFiore, C.J. of the State of N.Y. (Nov. 30, 2018), https://ww2.nycourts.gov/sites/default/files/document/files/2019-10/18_ATJ-Comission_Report.pdf.

30. PERMANENT COMM'N ON ACCESS TO JUST., REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK, at 5 (Nov. 2018), https://ww2.nycourts.gov/sites/default/files/document/files/2019-10/18_ATJ-Comission_Report.pdf.

31. *See, e.g.*, SELF-REPRESENTED LITIGATION NETWORK, <https://www.srln.org> (last visited (Feb. 20, 2023)).

32. *See, e.g.*, *Self-Help Resources / Self-Represented Parties*, UTAH STATE CTS.: THE JUD. BRANCH OF UTAH, <https://www.utcourts.gov/en/self-help.html#accordion-8cb1e8cb9d-item-73fd81b67d> (last visited Feb. 20, 2023).

civil wrongs or, when faced with a criminal charge or a civil infraction, the existence of a fair and transparent forum in which to defend oneself and an opportunity to be heard by an impartial decisionmaker. To others or in other contexts, access to justice is taken to mean the ready availability of specific law-related resources: a licensed attorney to represent one's interests, clarifying instructional materials, or other legal assistance capable of distilling the complicated processes and substantive rules of our justice system into something digestible.³³

In many ways, whether an individual has access to justice depends on whether the individual is able to locate court forms, perfect a lawsuit, and access the adjudicative process.³⁴

The success of the use of technology to provide access to justice in rural areas, including reservations, is uncertain due to location and broadband issues.³⁵ However, tribal court judges and court staff are taking steps to ensure that individuals receive the legal help they need, understand court proceedings, and get a decision on the merits. When writing about tribal courts, in her article, *Lessons from the Third Sovereign*, Justice Sandra Day O'Connor wrote:

Tribal Courts often act more quickly, and more informally, than do their counterparts [state and federal courts]. The factors considered to reach a decision, the procedures used, and the punishment or resolution arrived at, may differ in reflection of tribal values. . . .

. . . .

The special strengths of the tribal courts—their proximity to the people served, the closeness of the relations among the parties and the court, and their often greater flexibility and informality—give tribal

33. J. J. Prescott, *Improving Access to Justice in State Courts with Platform Technology*, 70 VAND. L. REV. 1993, 1994–95 (2017).

34. Statz et al., *supra* note 27, at 324.

35. *Id.*

courts special opportunities to develop alternative methods of dispute resolution.³⁶

A special strength of the tribal courts is also their ability to develop methods that promote access to justice.

The focus on access to justice by tribal court judges and court staff is reflective of tribal communities' needs and values. Often, tribal court judges and court staff are tribal members of the community that they are serving and as such have an investment in the judicial system. As Chief Judge Stacie FourStar, Fort Peck Assiniboine and Sioux Tribal Court, notes:

We have an investment in the system because the offenders are members of our community. In Bozeman, [Montana,] you may never see an offender again, but in tribal courts, you know his mom, his grandma, and his kids go to school with our kids. We want to stop cycles of violence and poverty because we have an investment in the community.³⁷

Judge FourStar also states, "We don't just give you a piece of paper that says what to do. We are going to grab your hand, walk with you, and sit with you until you get it done."³⁸ However, as noted by the Fort Peck Court of Appeals, in *King vs. King, II*, tribal court systems must maintain a balance between informality and the importance of complying with the law.³⁹

When one thinks about lawsuits or other disputes at a court, there tends to be a focus on the actual court appearance and the judge. However, there are several matters that take place prior to any court appearance that require a court user to come into contact with court staff such as filing a petition. Similar to other courts, tribal courts employ court clerks, court administrators, court attorneys/law clerks, and other administrative positions. Each court staff member plays a vital role in

36. O'Connor, *supra* note 1, at 3.

37. *Tribal Courts Fill Access to Justice Needs, Offer Practice Opportunity for Lawyers*, MONT. LAW., May 2021, at 9, 9.

38. *Id.* at 9–10.

39. *King v. King II*, 11 Am. Tribal L. 284, 284 (Fort Peck Ct. App. 2011).

ensuring that a court user has access to justice by working with the court user to navigate the legal process.

Like judges, court staff are limited in ways that they can help assist self-represented litigants in navigating the legal process. Many tribal judiciaries have enacted ethics rules or other guidelines providing rules that limit how court staff may assist a litigant.⁴⁰ For example, at the Saint Regis Mohawk Tribal Courts, court clerks are barred from providing legal advice.⁴¹ Examples of prohibited legal advice include recommending what to include in a petition or other pleading and assisting litigants with strategy.⁴² This limitation is to ensure the independence of the judicial system. Just like judges, court staff must balance litigants' need for assistance with maintaining the independence of the judiciary. However, even with the limitations of not being able to provide legal advice, court clerks and other court staff take on an active role in helping parties through the legal process that is unique tribal courts.

Common barriers experienced by tribal court litigants are difficulties understanding forms and legal language, challenges understanding legal requirements and procedures, service issues, and technology challenges. For larger reservations, such as the Cheyenne River Sioux Tribe, attending court in person may be a challenge.⁴³ To address these challenges, litigants often end up asking court clerks or other front-line staff their questions. In state courts, it used to be common that court clerks were explicitly trained to never answer questions from the public.⁴⁴ This is not a common practice of tribal court clerks.

40. *See, e.g.*, CODE OF ETHICS FOR COURT CLERKS Canon 2(F) (FORT PECK TRIBAL CT. 2019) (“A Clerk should not practice law.”).

41. COURT CLERK HANDBOOK § 2.1 (SAINT REGIS MOHAWK TRIBAL CT. 2021) (on file with authors).

42. *Id.*

43. Telephone Interview with Brenda Claymore, Chief Judge, Cheyenne River Sioux Tribal Court (Aug. 5, 2022).

44. JUD. COUNCIL OF CAL., HANDLING CASES INVOLVING SELF-REPRESENTED LITIGANTS: A BENCH GUIDE FOR JUDICIAL OFFICERS, at 1-5 (April 2019), https://www.courts.ca.gov/documents/benchguide_self_rep_litigants.pdf.

When starting a case, litigants often do not know which type of form they need to start their case, the filing fee, or the process for personal service. Court clerks are heavily relied on by court users to help the litigant navigate these matters in tribal courts.⁴⁵ If a litigant submits paperwork that is not completed correctly, court clerks commonly consult with their supervisor or the tribal judge to address the matter before it creates an issue in the judicial process. Court clerks also explain what a litigant needs to bring to the court appearance and what to expect at the court appearance.⁴⁶ It is common for tribal judges to instruct parties to submit additional documentation following the court appearance. Court clerks consistently monitor case files and alert their supervisor or the presiding judge when there is missing documentation. In most cases, tribal judges or the court clerk's supervisor directs them to follow up with the parties to alert them that there is missing documentation. However, when deciding whether to follow up, most tribal judges consider the individual party's responsibility in the matter.⁴⁷ Due to their careful attention to the cases, court clerks are also able to tell when parties are confused and need to come back for an appearance.⁴⁸ The court clerks assist in ensuring that the parties understand the processes and receive the necessary guidance they need to navigate the legal processes.

Tribal court staff are also required to keep in mind the legal history of the tribe that they are serving in order to assist litigants. Historically, Indian Nations utilized traditional dispute resolutions to resolve crimes committed by individuals that belong to that particular Nation. For example, decisions involving crimes committed within the Western Shoshone community

45. Telephone Interview with Caroline LaPorte, Judge, Little River Band of Ottawa Indians Tribal Ct. (Aug. 8, 2022).

46. Telephone Interview with John Powless, Judge, Oneida Nation Judiciary (Aug. 4, 2022).

47. *Id.*

48. Telephone Interview with Brenda Claymore, *supra* note 43.

were decided as a band. Many Western Shoshone communities in Nevada experienced Courts of Indian Offenses and/or set up their own tribal courts through constitutions in the 1980s.⁴⁹ In other tribes, such as the Saint Regis Mohawk Tribe, the judiciary as it exists today was not always the entity responsible for resolving disputes. In the Saint Regis Mohawk Tribe, probate matters were decided by the Tribal Council until the enactment of the Probate Law in 2017.⁵⁰ Until that time, the authority to probate tribal member estates was within the authority of the Saint Regis Mohawk Tribe.⁵¹ Thus, tribal members went to the Tribal Council for appointments of an administrator/executor and other related matters.⁵² Due to the legal history of a particular tribe or the beliefs held by a tribal member, tribal member litigants might not understand why they need to go to court or may even question the authority of the court. Court staff help with community buy-in.

The efforts of court clerks to assist litigants through tribal court legal processes helps ensure that litigants understand the legal process and mitigates the barriers that are felt by self-represented litigants. Court clerks also assist in providing the relevant rules and tribal laws to attorneys representing litigants in tribal court. The efforts by the court clerks make a difference as to the experience each litigant has with court processes and the perception of fairness. Research demonstrates “that when litigants believe the court process is fair, they are more likely to comply with court orders and the law generally.”⁵³ Moreover, as stated above, tribal members sometimes question tribal courts’ legitimacy. In these instances, the court staff’s active involvement in

49. See, e.g., CONSTITUTION OF THE TE-MOAK TRIBE OF WESTERN SHOSHONE INDIANS OF NEVADA art. VIII. § 1.

50. Tribal Council Resolution 2017-52 to Adopt the Saint Regis Mohawk Tribe Probate Law (Aug. 16, 2017).

51. *Id.*

52. *Id.*

53. Emily Gold LaGratta, *Procedural Justice: Practical Tips for Courts*, CTR. FOR CT. INNOVATION 1 (Oct. 2015), https://www.courtinnovation.org/sites/default/files/documents/P_J_Practical_Tips.pdf.

explaining tribal court processes is vital. By assisting in the process, court staff help those that may have distrust of a tribal judiciary gain a better understanding of the process. These efforts help assist in community buy-in of tribal judiciaries because it directly influences the image of the tribal judiciary to the community. The informality, flexibility, and efforts by tribal court clerks and other court staff may be perceived as compromising judicial integrity; however, these efforts remove barriers and are strengths of tribal judiciaries. As a result, litigants appearing in tribal court are more likely to feel that court processes were fair and that a lack of knowledge of legal processes did not hinder their case.

Like other jurisdictions, tribal court judges and staff are prioritizing designing their courts to assist self-represented litigants. Efforts to do this include revamping petitions and other legal forms and adding resources to tribal court websites. In regard to forms, there is a focus on using plain language instead of legal jargon.⁵⁴ Tribal court judges and staff are creating self-help forms with instruction sheets in order to make forms more understandable.⁵⁵ There is also an effort to simplify the form and make sure that the questions asked on the petition are related to the specific tribal law or ordinance.⁵⁶ Usually, tribal court forms and petitions look different from state-court forms. Tribal court staff also take time to draft guides that explain complex processes such as appeals and offer service to self-represented litigants in simple terms. Drafting a civil complaint and identifying remedies is often a difficult challenge for self-represented litigants. At times, self-represented litigants may not understand the stages of a lawsuit. For example, a self-represented litigant may believe it is necessary to attach every piece of evidence to a complaint, while in reality only allegations are

54. Telephone Interview with Lenor Scheffler Blaeser, Chief Judge, Upper Sioux Indian Community Tribal Ct. (Aug. 11, 2022).

55. Telephone Interview with Patricia Lenzi, Chief Judge, Washoe Tribal Ct. (Aug. 12, 2022).

56. Telephone Interview with John Powless, *supra* note 46.

necessary at that stage.⁵⁷ Court clerks play an important role in assisting litigants through the form completion process. At the Saint Regis Mohawk Tribal Courts, it is common for court clerks to advise parties that they must include all information that they would like the judge to be made aware of in their documents. This explanation can ease the stress felt by the litigant. Once the form is completed, the judge reviews and addresses any issues at the first appearance. Tribal court staff have also redesigned their websites to include information for self-represented litigants.⁵⁸ The Oneida Nation of Wisconsin's judiciary has dedicated resources for self-represented litigants on their website, including three videos to assist self-represented litigants through the legal process.⁵⁹

Tribal court judiciaries have also identified other ways to improve access to justice in their communities. For example, in 2013, the Cheyenne River Sioux Tribe located in South Dakota received a Department of Justice grant to establish “the first and only mobile courtroom in the United States.”⁶⁰ The Cheyenne River Sioux Tribe's government offices, including the tribal court, are located in Eagle Butte, South Dakota.⁶¹ The reservation is approximately 2.8 million acres.⁶² Travel to appear before the Cheyenne River Sioux Tribal Court in person is difficult for the vast majority of tribal members.⁶³ This travel barrier creates issues for not just those ordered to appear for a criminal matter, but also for those members who want to request an order of

57. See, e.g., SAINT REGIS MOHAWK TRIBE R. CIV. P. § IX [Rule 6], https://dvc479a3d0ke3.cloudfront.net/_uploads/site_files/RulesOfCivilProcedure22.pdf (last visited April 3, 2023).

58. See, e.g., *Self Represented Litigants*, ONEIDA, <https://oneida-nsn.gov/government/judiciary/self-represented-litigants/> (last visited Feb. 21, 2023).

59. *Id.*

60. Paula Woessner, *Mobile courtroom provides justice on wheels for the Cheyenne River Sioux Tribe*, FED. RSRV. BANK MINNEAPOLIS (Nov. 10, 2015), <https://www.minneapolisfed.org/article/2015/mobile-courtroom-provides-justice-on-wheels-for-the-cheyenne-river-sioux-tribe>.

61. *Id.*

62. *Id.*

63. See *id.*

protection or custody petition.⁶⁴ The mobile court filled this void and allowed for the judiciary to be brought to the communities located within the Cheyenne River Sioux Reservation.⁶⁵ This initiative by the Cheyenne River Sioux Tribe benefited the community and helped ensure that the entire reservation had access to justice.⁶⁶

Despite the diversity and locations of tribal judiciaries, there are efforts to ensure that litigants have guidance and assistance in navigating court procedures and processes. In *Cole v. Kaw Housing Authority*, the Kaw Nation District Court provided that “[a]djudication in tribal courts involves greater flexibility than non-Indian state and federal courts to accommodate tribal traditions and equity.”⁶⁷ Access to justice in tribal courts may look different than state courts due to the flexibility and the involvement of the tribal court staff in helping litigants through the process, but the goal is the same, to ensure the procedures do not stand in the way of a just result. Tribal courts use forms and electronic methods designed specifically for their communities. Other courts, recognizing travel as a barrier, bring the court to its community. Each method of assistance is unique and works to ensure access to justice.

III. ACCESS TO JUSTICE INSIDE THE COURTROOM

Tribal court judges, like their counterparts in state and federal courts, are regulated by judicial ethical rules. In *Indigenizing Professional Responsibility: The Role of Ethics in Tribal Courts*, Professor Lauren van Schilfgaarde writes about the role of ethics for attorneys in tribal courts and how tribal ethics rules, like tribal courts, strike a balance of tribal law, traditions, and customs, while still retaining a similarity to ethical rules in state and federal courts.⁶⁸ Professor Schilfgaarde’s

64. *Id.*

65. Telephone Interview with Brenda Claymore, *supra* note 43.

66. Woessner, *supra* note 60.

67. *Cole v. Kaw Hous. Auth.*, 4 Okla. Trib. 281, 296 (Kaw Dist. Ct. 1995).

68. Schilfgaarde, *supra* note 14.

discussion about the role of advocate ethics in tribal courts pertains to judicial ethics as well. Tribal judicial ethical rules, similar to advocate rules, provide clear rules that serve to attract advocates to tribal courts.⁶⁹ Because many tribal courts are located in rural areas, there is often a limited number of attorneys working in tribal jurisdictions. Clear judicial ethical rules assure practitioners that judges are regulated and will provide a fair forum for their clients. Tribal judicial ethical rules also ensures that judges abide by tribal laws and ethics.⁷⁰ Although this may feel unfamiliar or daunting to attorneys or new tribal court judges, who may be new to the community, it is no different from learning the rules or ethics of a new jurisdiction. Judicial ethical rules also help provide the community a forum that is accountable and reflective of their customs and norms.⁷¹ “Tribal Courts must balance adoption of Anglo systems while staying true to traditional values and forms of dispute resolution. As Tribal Courts continue to expand their presence and capacity, ethical rules provide a framework for internal legitimacy.”⁷² Furthermore, as tribal courts are often scrutinized by outsiders, judicial ethical rules, in companion with professional ethical rules of responsibility, serve to “curb against external critiques.”⁷³

Ethical rules have little consequence without a regulatory body. In state courts, judicial ethics are regulated by various bodies that review complaints.⁷⁴ Tribal courts are also typically regulated by various bodies that review ethical complaints. For example, the Saint Regis Mohawk Judicial Oversight Commission enforces its Code of Judicial Conduct, “while

69. *Id.*

70. *Id.* (“A judiciary with clear rules that are evenly and consistently enforced project a stable judiciary.”)

71. *Id.*

72. *Id.*

73. *Id.*

74. See generally Cynthia Gray, *How Judicial Conduct Commissions Work*, 28 JUST. SYS. J. 405 (2007).

safeguarding the right of judges to decide cases independently.”⁷⁵ The Penobscot Nation uses a Professional Responsibility Review Committee, which has the authority to hear complaints involving the conduct of judges, justices, and attorneys.⁷⁶ Fort Peck’s Judicial Conduct Commission is comprised of the Fort Peck Court of Appeals⁷⁷ and has “jurisdiction over the conduct of all judges.”⁷⁸ These institutions strive to provide accountability to the tribal court users, practitioners, and the community and promote public confidence in the judicial branch of Indian Nations.

Judicial ethical rules provide guidance to judges as they work with self-represented parties and strive to provide access to justice. Tribal court judicial ethics vary and are based on tribal law, custom, and tradition.⁷⁹ Some Indian Nations incorporate the basic ethical rules found in the ABA Model Code of Judicial Ethics.⁸⁰ Many tribal judicial canons require tribal court judges to promote public confidence in the independence, integrity, and impartiality of the judiciary, and avoid impropriety and appearance of impropriety.⁸¹ Thus, judges are required to be impartial in the decision-making process and not advocate for parties. The Grand Traverse Band Court Rules also require judges to guarantee fundamental fairness to all litigants.⁸² What does fundamental fairness, impartiality, and not advocating for parties look like when one or more of the parties are self-represented? Ensuring parties’ rights to be heard according to tribal law, while not permitting one-sided communication with parties, are important guide posts for maintaining impartiality while working

75. SAINT REGIS MOHAWK TRIBE CODE OF JUD. CONDUCT § I.

76. PENOBSCOT NATION JUD. SYS. R. CT. 22(A).

77. FORT PECK R. P. FOR THE JUD. CONDUCT COMM’N 2(a).

78. FORT PECK R. P. FOR THE JUD. CONDUCT COMM’N 8(a).

79. Schilfgaarde, *supra* note 14.

80. *Id.*

81. *See, e.g.*, CT. R. GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS TRIBAL CT. 1.001.

82. *See* CT. R. GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS TRIBAL CT. 1.104(A)(3).

with self-represented parties and providing fundamental fairness.⁸³ Grand Traverse Court Rules explains:

A Tribal Court judge should accord to every person who is legally interested in any proceeding, or his/her lawyer or other representative, full right to be heard according to Tribal law and except as authorized by law, neither consider nor permit one-sided or other communication with a litigant, his/her attorney, or lay advocate concerning a pending or impending proceeding unless all parties to the proceeding are present.⁸⁴

There is a new comment in the ABA Judicial Model Code that acknowledges that a judge is balancing impartiality and the right of parties to be heard. Rule 2.2 states, “A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.”⁸⁵ Comment 4 to this Rule states, “It is not a violation of this Rule for a judge to make reasonable accommodations to ensure pro se litigants the opportunity to have their matters fairly heard.”⁸⁶ Some state courts have adopted this provision, others have expanded on it, emphasizing the connection between access to justice and judicial discretion.⁸⁷ It is the judges’ duty, and within their discretion, to determine practices that will promote fundamental fairness and access to justice. Ohio’s Code states, “The rapid growth in litigation involving self-represented litigants and increasing awareness of the significance of the role of the courts in promoting access to justice have led to additional flexibility by judges and other court officials in order to facilitate a self-represented litigant’s ability to be heard.”⁸⁸ Essentially, the judges’ obligation to be fair and impartial does not preclude judges from using

83. *Id.*

84. *Id.*

85. MODEL CODE OF JUD. CONDUCT r. 2.2 (AM. BAR ASS’N 2020).

86. MODEL CODE OF JUD. CONDUCT r. 2.2 cmt. 4 (AM. BAR ASS’N 2020).

87. Cynthia Gray, *Pro Se Litigants in the Code of Judicial Conduct*, 36 JUD. CONDUCT REP. Fall 2014, at 1, 6 (Fall 2014).

88. OHIO CODE OF JUD. CONDUCT r. 2.6 cmt. 1A.

their discretion to make reasonable accommodations for self-represented parties that protect their right to be heard.⁸⁹

Tribal courts also balance impartiality and using judicial discretion to protect and promote a party's right to be heard. For example, the Ho-Chunk Nation Rules of Judicial Ethics instruct judges and justices to “uphold the integrity and independence of the tribal judiciary. . . . [and] help create and maintain such a judiciary, in accordance with Ho-Chunk Nation customs and traditions.”⁹⁰ Judges and justices “should observe high standards of conduct toward achieving this goal.”⁹¹ A judge “should at all times act in a manner that promotes public confidence in the honesty and impartiality of the tribal judiciary.”⁹² Judges are also required to give every interested party “a full right to be heard according to tribal law and tradition,” but avoid out-of-court communications.⁹³ The Rules also prohibit the judge from assuming the role of the advocate.⁹⁴ The Penobscot Nation Rules of Judicial Conduct also require judges to uphold “the integrity and independence of the judiciary.”⁹⁵ Judges must also give every person, legally interested in a proceeding, the “full right to be heard according to tribal law and tradition.”⁹⁶ The Penobscot Nation Rules of Judicial Conduct specifically state, “[a] judge shall not act as an advocate.”⁹⁷ The challenge judges face is balancing impartiality while ensuring a self-represented litigant, who may not understand the process, is afforded the right to be heard.

It can be a challenge to ensure that self-represented parties are heard, without crossing the line into legal

89. MODEL CODE OF JUD. CONDUCT r. 2.2 cmt. 4 (AM. BAR ASS'N 2020).

90. HO-CHUNK NATION R. OF JUD. ETHICS § 2-1.

91. *Id.*

92. § 3-1.

93. § 4-1.C.

94. § 4-1.D.

95. PENOBSCOT NATION JUD. SYS. R. CT.: R. JUD. CONDUCT § II, Principle 1.

96. Rule 58.C.

97. Rule 58.E.

advice, because often litigants do not understand the process and are unsure how to communicate their story. When a self-represented party steps in the courtroom, the tribal court judge knows it is not permissible to advocate for the party, but the judge must still strive to make courts user friendly and understandable to everyone. By doing so, tribal court judges allow parties to be able to tell their story. Judges balance the difficult line between being impartial, ensuring fundamental fairness, and protecting the parties' right to be heard, which requires that parties understand the legal process. How each tribal court judge balances these duties and rights is dictated by their judicial ethics of their Nations, which is based upon their tribal culture, customs, and traditions.

Indigenous culture, customs, and traditions are often taught in stories.⁹⁸ Indigenous stories teach how to live, how to treat one another, and how to engage in ethical thinking.⁹⁹ Traditional tribal stories are often about Mother Earth and teach “the realities of life; deeds right and wrong, mischievous and comical, performed by insects, birds, animals, fish and humans.”¹⁰⁰ The stories help people “understand how to uphold our responsibilities to one another and the rest of creation.”¹⁰¹ The stories and the lessons within the stories “bring about growth of heart, spirit, mind and the senses to provide youth with the means to meet the challenges of life.”¹⁰² The stories were created to “inspire their hearts to espouse compassion, selflessness, courage, love, respect, honesty, tenacity and all their kindred attributes.”¹⁰³ Indigenous stories guide people to a good path or course in life, teaching us “to live in

98. DIANNE BIN ET AL., PULLING TOGETHER: A GUIDE FOR RESEARCHERS, *HILĀLA* 39 (2021), <https://opentextbc.ca/indigenizationresearchers/>.

99. *Id.*

100. BASIL JOHNSTON, *THE GIFT OF THE STARS: ANANGOOG MEEGIWAEWINAN* 7 (2010).

101. DANIEL HEATH JUSTICE, *WHY INDIGENOUS LITERATURES MATTER* 2 (2018).

102. JOHNSTON, *supra* note 100, at 11.

103. *Id.*

harmony with the world.”¹⁰⁴ Anishinaabe scholar John Borrows explains that Anishinaabe people draw guidance from “the behavior of the sun, moon, stars, winds, waves, trees, birds, animals, and other natural phenomena” in regulating their behavior and resolving disputes.¹⁰⁵ As illustrated above, indigenous stories, customs, and traditions often teach responsibilities, which is different from the western legal system which focuses on rights. These stories provide us with ethical guidelines that direct us how to function in our lives, including our judicial roles, and help us understand our responsibilities.

Many Indigenous stories teach respect, love, and appreciation for people, animals, and every living thing. Love might seem an odd teaching or practice for judges, but it teaches people to respect every person, animal, and creation. It is not about romantic love but seeing or recognizing our connection and our responsibility to that person. “Love as it exists within the Native worldview is ever-present and connects all beings.”¹⁰⁶ Borrows explains that Basil Johnston, an Anishinaabe author and elder, taught him love is like a river and

should continually flow to sustain those around us. Its currents should be strong and lay down layers of nourishment, as the forces of life course through us and strengthen others. Love is about the free flow of support to others, which should be strongest where it meets others. It allows us to fortify those who gather around us.¹⁰⁷

Manitonquat, an elder from the Assonet Band of the Wampanoag Nation, stated “the way to heal society of its violence . . . and lack of love is to replace the pyramid of domination with the circle of equality and respect.”¹⁰⁸ A

104. *Id.* at 13.

105. JOHN BORROWS, *LAW’S INDIGENOUS ETHICS* 37–38 (2019).

106. Mallory Whiteduck, “*But It’s Our Story. Read It.*”: *Stories My Grandfather Told Me and Writing for Continuance*, 2 *DECOLONIZATION: INDIGENEITY, EDUC. & SOC’Y*, no. 1, 2013, at 72, 81.

107. BORROWS, *supra* note 105, at 39.

108. KAY PRANIS, BARRY STUART & MARK WEDGE, *PEACEMAKING CIRCLES: FROM CRIME TO COMMUNITY* 9 (2003).

judge who understands and truly recognizes each person's connection to each other is respectful of each party, regardless of whether the party is represented by an attorney. Because of this connection, many tribal court judges strive to make sure each party understands the legal process by explaining it to both parties and making sure parties' questions are answered, without giving legal advice. This process also fosters respect and can assist the parties with respecting one another. This respect acknowledges differences and the inherent worth of each individual in the courtroom.¹⁰⁹

In interviews with tribal court judges about working with self-represented parties, a common theme was respect. Even though it may not be specifically mentioned in written tribal law, judges indicated it is part of their various cultures and guides interactions with parties.¹¹⁰ Respect equates to giving people the chance to be heard. It was described as courtesy and letting everyone know that what they have to say is important and that the judge will take the time to listen.¹¹¹ Respect is practiced by speaking to people and not treating them as a case number just coming through the courtroom.¹¹² As a result of practicing respect, the parties have walked out of the courtroom and breathed a sigh of relief because court was not as bad as they thought it would be.¹¹³

Respect is fostered by tribal court judges as they explain the court process, including the roles and responsibilities of the parties. The lack of understanding of the process is one of the hardest challenges of working with self-represented parties.¹¹⁴ To address this challenge, judges tell the story of the judicial process.

109. *See id.* at 35.

110. Telephone Interview with Layatalati Hill, Chief Tr. Ct. Judge, Oneida Nation Judiciary (Aug. 5, 2022).

111. Telephone Interview with Korey Wahwassuck, Judge, Minn. 9th Jud. Dist. (formerly Judge, Leech Lake Band of Ojibwe Tribal Ct.) (July 27, 2022).

112. Telephone Interview with Gwendolyn Topping, Judge, Red Cliff Band Tribal Ct. (July 27, 2022).

113. *Id.*

114. *Id.*

First, an explanation is given at the beginning of a case, before anything gets started.¹¹⁵ The judge explains the basics of which party goes first and that every person will have a chance to speak.¹¹⁶ This explanation helps the parties understand when it will be their turn.¹¹⁷ Mapping out the judicial process for the parties also helps them understand what is happening and what is expected of them.¹¹⁸ Explaining the judicial process is telling the story about how the court works and the roles and responsibilities of the judge and the parties. Telling the judicial process story explains that all parties are equal and are connected as community members. It further demonstrates that as they gather around to share their stories, they must respect each other, listen, and follow the rules. Moreover, it is their obligation, as illustrated by the judicial process story, to fulfill their own responsibilities.

Once the story about the judicial process is shared, it is upon each party to fulfill their role in the process. And like any good story, sometimes the judicial process story needs repeating. Self-represented parties often speak out of turn or have outbursts because they want to respond to what is being said or make sure their side of the story is heard. As a result, judges continually remind parties that they will get a turn to speak.¹¹⁹ One judge explained that it is important to explain to the self-represented parties that they will get a chance to disagree and to speak.¹²⁰ A common technique at the Saint Regis Mohawk Tribal Courts is when a party wants to argue a point but it is not yet his or her turn, the presiding judge will explain to the party to make note of the argument by writing it down and then, when it is the party's turn, he or she can address that point. It is also the practice in the Saint Regis Mohawk Tribal

115. Telephone Interview with Layatalati Hill, *supra* note 110.

116. *Id.*

117. *Id.*

118. Telephone Interview with Korey Wahwassuck, *supra* note 111.

119. Telephone Interview with Gwendolyn Topping, *supra* note 112.

120. *Id.*

Courts to explain the process at the beginning of each case and then repeat it when a hearing or trial starts, to remind each party when it will be their turn. Often if the hearing or trial is lengthy and lasts longer than a day, parties may get confused as to where they are in the process and often a reminder of whether we are still in the plaintiff or respondent's case is helpful.

Respecting parties is also acknowledging self-represented parties may not understand what is expected of them. As the judges allow people to tell their stories, the challenge that often presents itself is that self-represented parties do not present legal arguments, because they are focused on wanting to tell their story.¹²¹ A simple outline of the process may not help them understand the laws involved in their cases. One judge tackles this issue in custody cases by providing a list of statutory custody factors to assist parties with understanding what information is needed by the judge.¹²² In the Saint Regis Mohawk Tribal Courts, parties may often be directed to be prepared to provide specific information regarding a land disputes or spousal support. This information is provided on the record or in a written order to all parties to maintain the neutrality of the court. By providing this type of information, the Court has enhanced the parties' right to be heard by ensuring the party understands what the judge needs to know. It is still the self-represented parties' burden to present that information.

Another technique some judges use to assist parties with telling their stories is employing a more informal approach. A judge allows the parties to have a conversation on the record and, if needed, will direct them if they are getting off-track.¹²³ Parties are reminded what the judge needs to know and if they want to rehash the same point over and over, the judge gently brings them back to the point in a way that is not

121. Telephone Interview with Layatalati Hill, *supra* note 110.

122. Telephone Interview with Corey Wahwassuck, *supra* note 111.

123. *Id.*

dismissive.¹²⁴ The parties are provided a reminder of the rules, the information the judge needs to make a good decision, and that the judge must follow rules.¹²⁵ Thus, the parties get to tell their story, but the judge is guiding them to keep them focused.

Another barrier self-represented parties face in telling their stories is they do not always understand the rules of evidence. Tribal court judges use several techniques to address this barrier, which balance following the rules that bind the court and ensuring parties have a right to speak or tell their story. Judges will often explain the evidentiary rules and also that judges are required to follow these rules.¹²⁶ Explaining an objection helps a party understand how to respond to the objection.¹²⁷ Once the judge makes a ruling, the judge explains the ruling so parties understand why certain evidence is not allowed.¹²⁸ Explaining the objection and the subsequent ruling frequently helps parties better understand when they should make an objection or even limit what they introduce as evidence. Often when a party develops a basic understanding of hearsay, they limit introducing that type of evidence.

As tribal court judges explain or tell the story of the judicial process in the courtroom, they strive to maintain the role of storyteller and do not become an advocate for parties. For example, in *Walker v. Laducer*, the Colville Tribal Court of Appeals stated, “A key distinction between tribal courts and state courts is often the role of the court in helping parties resolve disputes. Tribal Courts must, however, avoid becoming advocates in a case in the desire to problem solve.”¹²⁹ The Court noted that although the courts will question witnesses for clarification, they will not introduce legal theories, as

124. *Id.*

125. *Id.*

126. *Id.*

127. Telephone Interview with Layatalati Hill, *supra* note 110.

128. Telephone Interview with Korey Wahwassuck, *supra* note 111.

129. *Walker v. Laducer*, 13 Am. Tribal L. 156, 159 (Colville 2016).

this violates a party's due process.¹³⁰ When the Colville Trial Court stepped over the line and introduced a legal theory not raised by a party, the Appellate Court noted that there was no way for a party to prepare to examine the witnesses or call rebuttal witness to challenge the new legal theory.¹³¹ Thus, when a Court raises an issue on its own and "conduct[s] all the questioning of witnesses on this theory, the Court violate[s] the parties' right to due process."¹³² The role of a judge is to clarify issues by asking questions to ensure that everyone understands the story the party is attempting to tell in court, but a judge cannot interject a new story or legal theory.

During interviews, the tribal court judges all emphasized the importance of not providing legal advice. Providing legal advice steers the court away from being a neutral forum. Even when a party is not familiar with the law or does not understand what they can and cannot do, the judge must draw the line.¹³³ Judges may explain what the law says, but they should not explain what the law means, explain what a process means, or interpret the law for parties, because that is legal advice.¹³⁴ A judge can direct a party where they can find the answer, such as the law or if there is a legal aid service or help desk, but will not step into the waters of explaining what the law or process means.¹³⁵ One judge noted that although he will explain objections, such as what hearsay means, he will not explain exceptions.¹³⁶

It can be a more difficult balance when one party has an attorney, but during interviews, judges explained how they enlist attorneys to assist with explaining the process. One option is requiring the attorney to explain a hearsay objection and what portion of the testimony to

130. *Id.*

131. *Id.* at 159–60.

132. *Id.* at 160.

133. Telephone Interview with Layatalati Hill, *supra* note 110.

134. *Id.*

135. Telephone Interview with Korey Wahwassuck, *supra* note 111.

136. Telephone Interview with Layatalati Hill, *supra* note 110.

which the objection applies.¹³⁷ Another judge noted that when one party has an attorney, it is important to balance both sides to ensure they are able to tell their story.¹³⁸ Each party, regardless of whether they are represented by an attorney and have exhibits, are given the same consideration.¹³⁹

Tribal courts will also give self-represented parties latitude in their filings in order to allow a self-represented party to present their case or story. But judges will also require all parties, represented or not, to follow the rules. Thus, again they must balance giving parties latitude with requiring all parties to follow the rules. For example, in *Mashantucket Pequot Gaming Enterprise v. Kurdi*, the court followed the federal practice and required that self-represented parties must comply with rules but gave them latitude in doing so. In *Kurdi*, the defendant was not represented by counsel and did not file a formal Notice of Appearance. Instead, he filed a handwritten note that stated he did not believe he owed any money and if he did, it was less than the Gaming Enterprise was alleging. He also noted he was out of the country when the summons was served.¹⁴⁰ The plaintiff then filed a motion to dismiss for failing to answer the complaint.¹⁴¹ The court stated:

In the interest of justice and in the absence of Mashantucket Pequot law on the issue, the Court adopts the federal practice of liberal construction of the Defendant's pleadings. Nevertheless, the Court remains mindful that the *rules* "govern procedure in the courts of the Mashantucket Pequot Tribe in all suits of a civil nature" so shall err on the side of the published rules as it endeavors to construe and administer them to "secure the just, speedy, and inexpensive determination of [this]action."¹⁴²

137. *Id.*

138. Telephone Interview with Gwendolyn Topping, *supra* note 112.

139. *Id.*

140. *Mashantucket Pequot Gaming Enter. v. Kurdi*, 5 Mash. Rep. 130, 131–32 (Mash. Pequot Tribal Ct. 2008).

141. *Id.* at 132.

142. *Id.* at 132–33 (quoting MASH. PEQUOT R. CIV. PROC. 1(a)).

The court went on to liberally construe the defendant's submission as an informal *pro se* notice of appearance, but found it was too vague to qualify as an answer.¹⁴³ The court stated, "Liberal construction does not require this Court to assume the role of advocate for the *pro se* litigant, and further, does not allow this Court to ignore the rules in an effort to accommodate him."¹⁴⁴ Thus, the court went on to assess the plaintiff's motion to dismiss. In response to the plaintiff's motion to dismiss, the defendant had filed a document entitled motion to dismiss motion for default and failure to plead. It was not supported by an affidavit or any reference to law.¹⁴⁵ The court stated that although it would look beyond a failure to cite proper legal authority, the defendant cited none and that it would "analyze the Defendant's general objection and decide the merits of the Plaintiff's claim but it must do so without advocating for the Defendant."¹⁴⁶ The court found that because the defendant had failed to file an answer, the plaintiff was entitled to judgment.¹⁴⁷ Self-represented parties may be given some latitude, but rules must still be followed.

Tribal judicial ethics guide tribal court judges as they work with self-represented parties. Practicing respect, they strive to ensure the court's impartiality is maintained while balancing the party's right to be heard. Using their discretion, tribal court judges use different techniques to tell the judicial process story and continually remind parties of their role, responsibilities, and the rules. They work to explain the evidentiary and procedural rules, while not providing advice, so parties can tell their stories. They will allow some latitude with rules, but require that the rules must be followed. This is not an easy balance, but these respectful practices make tribal courts a place where fundamental justice is

143. *Id.* at 133.

144. *Id.* (internal citations omitted).

145. *Id.*

146. *Id.* at 134.

147. *Id.* at 134-35.

felt by the parties, as they are allowed to tell their stories.

IV. ACCESS TO JUSTICE THROUGH TRAUMA-INFORMED COURTROOMS

In addition to the challenges of trying to understand and navigate the legal system, courts can also be overwhelming, sometimes traumatic, to all parties involved. Like state courts, tribal courts are implementing more trauma-informed practices, which assist all parties, but especially those who represent themselves and do not have an advocate to speak for them. For individuals who have experienced violence or adverse events, “trauma is the psychological response to these events when they 1) are experienced as physically or emotionally harmful or threatening and 2) have lasting adverse effects on the individual’s functioning and physical, social, emotional, or spiritual well-being.”¹⁴⁸ Courts that use a trauma-informed approach, are “acknowledg[ing] the prevalence and impact of trauma and attempt[ing] to create a sense of safety.”¹⁴⁹ This entails examining “policies and procedures that may result in [individuals] feeling loss of control . . . , training staff to be welcoming and non-judgmental, and modifying physical environments.”¹⁵⁰ Trauma-informed also means that judges understand that self-destructive behaviors, such as intravenous drug use, substance abuse, prostitution, and self-injury, are “not character flaws or symptoms of mental illness, but . . . strategies . . . developed to cope with . . . trauma.”¹⁵¹ The use of trauma-informed practices that incorporate procedural justice in the court can “improve a victim’s experience

148. Substance Abuse & Mental Health Servs. Admin., Essential Components of Trauma-Informed Judicial Practice (2013 draft at 1), https://www.nasmhpd.org/sites/default/files/DRAFT_Essential_Components_of_Trauma_Informed_Judicial_Practice.pdf.

149. *Id.*

150. *Id.*

151. *Id.* at 3.

and long-term recovery, regardless of a particular outcome (e.g., conviction or acquittal).”¹⁵² Awareness of a person’s trauma assists judges’ effectiveness in the delivery of fairness and justice.¹⁵³

The Substance Abuse and Mental Health Services Administration (SAMSHA) states there are three important components to judicial trauma-informed practice. First, communication counts and a trauma-informed judge understands the role trauma plays in how an individual perceives what the judge says and how it is said.¹⁵⁴ Second, court process and procedures should be modified to guarantee physical and emotional safety.¹⁵⁵ The third component is the courtroom environment.¹⁵⁶ Court process and procedures were addressed above; thus, this section focuses only on the communication and courtroom environment components.

Tribal courts often use more restorative practices to foster a positive environment so individuals can tell their stories. As a result, they incorporate trauma-informed practices that are based on their culture, customs, and traditions into their courtrooms. This begins with the basic concept of respect, which was discussed above. It is understanding a party is an individual and that it is helpful to understand the person when trying to understand the story he or she is trying to tell the court. During interviews, judges focused again on the role of respect in their cultures and how that has assisted them to be more trauma-informed. While growing up, they learned about their cultures and traditions, which included understanding how to treat people well and with respect.¹⁵⁷ Respect in many Indigenous cultures is

152. Human Trafficking Task Force e-Guide: Strengthening Collaborative Responses, OFF. OF JUST. PROGRAMS, at 6.3, <https://www.ovcttac.gov/taskforceguide/eguide/> (last visited Feb. 23, 2023).

153. *See id.*

154. Substance Abuse & Mental Health Servs. Admin., *supra* note 148, at 4.

155. *Id.* at 5.

156. *Id.* at 6.

157. Telephone Interview with Layatalati Hill, *supra* note 110.

often focused on elders and youth, which includes taking care of them.¹⁵⁸ This understanding of respect guides judges in their interactions with parties, as they work to be more trauma-informed. Respect for individuals is conveyed at the start of a case by understanding who the parties are and the factual scenario, which will also assist the judge to know whether they need to take extra precautions when communicating with a party.¹⁵⁹ Violence or threats made by parties in a case is also a red flag. It alerts judges to be more aware of parties and judges will often look for intimidation even by facial expressions.¹⁶⁰ Respect also includes realizing that you may not know the experience of others or have an understanding of how trauma affects them.¹⁶¹ Respect includes listening to the parties to understand the issues they bring to a case, as this may help a judge understand how he or she can help the parties heal.¹⁶² Understanding the parties and issues, helps the judge empower parties, so they do not need to come back to court.¹⁶³

During interviews, tribal court judges gave numerous examples of how they use communication to create a trauma-informed experience in the courtroom. Not raising or lowering one's voice, but staying even keeled and not monotoned, is important.¹⁶⁴ Expressing calmness and respect with one's voice is an effective practice.¹⁶⁵ Word choice also matters. Often judges do not know which words are triggering to people, but avoiding phrases that are degrading or judgmental is important.¹⁶⁶ Also, when a person makes improvements, it is important to point it out and convey that the judge

158. Telephone Interview with Gwendolyn Topping, *supra* note 112.

159. Telephone Interview with Layatalati Hill, *supra* note 110.

160. *Id.*

161. Telephone Interview with Korey Wahwassuck, *supra* note 111.

162. *Id.*

163. *Id.*

164. Telephone Interview with Layatalati Hill, *supra* note 110.

165. *Id.*

166. Substance Abuse & Mental Health Servs. Admin., *supra* note 148, at 4.

is proud of that person.¹⁶⁷ This can be done even in civil cases when a party improves on making clearer arguments or waits their turn to speak. Another judge noted that is important to point out when parties are making hard decisions and to acknowledge their hard choices and strength in making that decision.¹⁶⁸ Doing so empowers the party and lessens any shame attached to those decisions, such as deciding to voluntarily relinquish their parental rights.¹⁶⁹ The judge stated it was important that the person left the court knowing they are not a horrible person for making a difficult decision.¹⁷⁰ Another empowering practice was when a party had a case plan in child neglect case with an overwhelming list of things to accomplish, the judge would give them a blank form and ask them to write down one specific item they wanted to work on. The judge would then sign it and tell the party to focus on that one item.¹⁷¹ All of these practices help the court to meet parties where they are and help them to have a positive experience in court.

Other trauma-informed practices used include smiling at the parties, being friendly, and making eye contact, which acknowledges them as a person.¹⁷² Also, when a party is upset, the judge will call for a break.¹⁷³ It is important not to rush people and push them into fight-or-flight mode, because rushing or pushing people can make them shut down or explode.¹⁷⁴ Another practice used by judges was not using legal terms and making sure that the parties understood the judge.¹⁷⁵ The parties are encouraged to ask questions and the judge understands that the parties may be nervous or

167. Telephone Interview with Gwendolyn Topping, *supra* note 112.

168. Telephone Interview with Korey Wahwassuck, *supra* note 111.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

have had a previous bad experience with a judge.¹⁷⁶ Also, when a person gets upset, it is important to not take it personally, but just redirect.¹⁷⁷

A challenge with using trauma-informed practices is that judges usually cannot fully understand a litigant's story in the short time available.¹⁷⁸ A judge stated that the western court system has so many cases it is difficult to give people the time they need.¹⁷⁹ Often performance measures used by a judicial branch looks to when a case should be completed and the judge can have a large calendar, but what is needed is to take time and address the party instead of just talking to the attorney.¹⁸⁰ Thus, tribal courts, like their counterparts in state and federal courts, must balance the demands of their jobs with the needs of the parties.

The setup of the courtroom is a critical component in creating a trauma-informed environment. Tribal courts will vary on what is a trauma-informed setup, as it may be dictated by culture, custom and tradition. However, all the judges interviewed agreed about the importance of the set up in the courtroom. One judge noted the importance of keeping it simple, because one cannot anticipate what might trigger someone.¹⁸¹ It is also important to keep the bailiff in the back of the courtroom and not standing over people.¹⁸² One judge encourages staff to look at people.¹⁸³ One judge noted they move the courtroom around to keep the judge at the level of the parties.¹⁸⁴ The same judge noted that so many of the parties have been oppressed for so long that judges should be willing to get on their level in the courtroom.¹⁸⁵ The judge lets the parties know it is the pen, not the robe,

176. *Id.*

177. *Id.*

178. Telephone Interview with Layatalati Hill, *supra* note 110.

179. Telephone Interview with Korey Wahwassuck, *supra* note 111.

180. *Id.*

181. Telephone Interview with Layatalati Hill, *supra* note 110.

182. Telephone Interview with Korey Wahwassuck, *supra* note 111.

183. *Id.*

184. *Id.*

185. *Id.*

that is important because the pen can sign something that can help them.¹⁸⁶

A trauma-informed courtroom increases access to justice. It creates a less-threatening environment so parties are better able to tell their story. However, some tribal courts, faced with limited legal representation for parties, seek to provide more assistance in the form of lay advocates. Lay advocates, who are not licensed attorneys, are allowed to represent clients in court to increase access to justice.

V. LAY ADVOCATES: A TOOL TO ENSURE ACCESS TO JUSTICE

Legal representation is a component of ensuring access to justice.¹⁸⁷ To meet the need for legal representation, many jurisdictions throughout the country, as well as many reservations, have created legal aid services and other pro bono services.¹⁸⁸ However, the success of some these programs is uncertain in rural regions where there are just not enough attorneys.¹⁸⁹ According to the American Bar Association, approximately 80 percent of low-income individuals cannot afford legal assistance.¹⁹⁰ The middle class also struggles: “a study shows that ‘forty to sixty percent of their legal needs go unmet.’”¹⁹¹ Many tribal court judges see a high percentage of individuals representing

186. *Id.*

187. Leonard Wills, *Access to Justice: Mitigating the Justice Gap*, AM. BAR ASS'N (Dec. 3, 2017), <https://www.americanbar.org/groups/litigation/committees/minority-trial-lawyer/practice/2017/access-to-justice-mitigating-justice-gap/>.

188. *See, e.g.*, DNA-PEOPLE'S LEGAL SERVS., <https://dnalegalservices.org> (last visited Feb. 23, 2023).

189. Michele Statz et al., *supra* note 27, at 325.

190. Wills, *supra* note 187.

191. *Id.* (quoting Jennifer S. Bard & Larry Cunningham, Opinions, *The Legal Profession Is Failing Low-Income and Middle-Class People. Let's Fix That.*, WASH. POST (June 5, 2017), https://www.washingtonpost.com/opinions/the-legal-profession-is-failing-low-income-and-middle-class-people-lets-fix-that/2017/06/02/e266200a-246b-11e7-bb9d-8cd6118e1409_story.html?utm_term=.434056628d2d).

themselves.¹⁹² As stated above, tribal court judges strive to explain processes and allow individuals the opportunity to tell their story to the court. Moreover, tribal court judges may provide a copy of the laws to the parties to provide the factors they are considering to decide a matter. However, even in instances that the tribal court judge offers a full and fair hearing and questions the parties and witnesses to elicit testimony, there may still be necessary evidence missing from the record. It is not uncommon for tribal courts to bring parties back for an additional hearing to gain the necessary evidence. However, this is not always the best solution, as it taxes already limited judicial resources.

Unlike most state judiciaries, many Indian Nations and tribal bar associations allow non-attorney lay advocates to represent clients before their courts.¹⁹³ States have taken similar steps to address this gap in access to justice. For example, the state of Washington has a limited license legal technician program that allows for nonlawyers to assist people with family law matters, such as divorce and child custody cases by consulting with and advising clients, completing and filing necessary court documents, and assisting pro se clients at certain types of hearings and settlement conferences.¹⁹⁴ However, in tribal judiciaries it is common that lay advocates act in similar capacities as an attorney and provide substantive representation.¹⁹⁵

The history and cultural relevance are different from tribe to tribe. Some tribes, such as the Hopi Tribe, have a long history with utilizing lay advocates.¹⁹⁶ The Hopi's existing tribal court was established in the 1970s.¹⁹⁷ In others, lay advocates started appearing later in their

192. Telephone Interview with Lenor Scheffler Blaeser, *supra* note 54.

193. Schilfgaard, *supra* note 14.

194. *Limited License Legal Technicians*, WASH. STATE BAR ASS'N, <https://www.wsba.org/for-legal-professionals/join-the-legal-profession-in-wa/limited-license-legal-technicians> (Jan. 26, 2023).

195. Schilfgaard, *supra* note 14.

196. *In re Sekayumptewa*, 3 Am. Tribal L. 434, 439 (Hopi 2001).

197. *See generally* RICHLAND, *supra* note 19, at 39–41.

judiciaries, such as the Seneca Nation.¹⁹⁸ The Seneca courts did not permit lay advocates until the 1990s. Lay advocates also at times have cultural relevance. For Dakota and Lakota people, it was custom for an individual to have a peer speak for them before a council in order to resolve a dispute.¹⁹⁹ Therefore, lay advocates can be an extension of tribal customs, depending on the specific tribes' customs and traditions.

Lay advocates in tribal judiciaries act as attorneys in representing clients and represent clients on a variety of civil cases, including family matters, and criminal cases. This includes all the work associated such as drafting filings and making arguments at trial. The Sixth Amendment, which guarantees the right to counsel in criminal matters, does not apply to tribal courts. Tribes are required to follow the Indian Civil Rights Act of 1968 (ICRA).²⁰⁰ Pursuant to ICRA, an Indian has the right to counsel in a criminal proceeding in tribal court, but only "at his own expense."²⁰¹ "As sovereign governments and in accordance with the historical congressional plenary framework, tribes have the inherent authority to shape procedural protections in their own courts, which must command the respect of the federal government."²⁰² Many Indian Nations, such as the Hopi Tribe, guarantee defendants the right to law-trained counsel at their own expense.²⁰³ "Hopi law further requires that a defendant 'knowingly [waive] his right to counsel' before proceeding either with the representation of a lay advocate or pro se."²⁰⁴ "With regard to effectiveness of counsel," Hopi courts have

198. Telephone Interview with Sylvia Patterson, Judge, Seneca Nation Ct. of Appeals (Aug. 1, 2022).

199. Telephone Interview with Angelique EagleWoman, Chief Justice, Sisseton-Wahpeton Sup. Ct. (Aug. 3, 2022).

200. 25 U.S.C. §§ 1301–1304.

201. § 1302(a)(6).

202. Lindsay Cutler, Comment, *Tribal Sovereignty, Tribal Court Legitimacy, and Public Defense*, 63 UCLA L. REV. 1752, 1762 (2016).

203. *Id.* at 1782.

204. *Id.* (quoting Hopi Indian Tribe, Ordinance 21 § 1.9.4, <http://www.narf.org/nill/codes/hopicode/title1.html> [<https://perma.cc/2WPG-CWMH>]).

“looked to federal and state case law” to make determinations in cases.²⁰⁵ Tribal case law demonstrates that tribal courts are capable of affording their litigants due process of law and have done so by looking to federal and state due process jurisprudence or focused on tribal customs and traditions.²⁰⁶

Lay advocates provide a unique resource to litigants. Usually, lay advocates are tribal members.²⁰⁷ In the event a litigant does not understand a particular legal phrase or word, the lay advocate may be able to explain it to them in a way they may better understand.²⁰⁸ Moreover, a tribal judge may ask the lay advocate to explain to their client what the judge said in order to ensure that the client understands what is happening at the proceeding.²⁰⁹ As previously mentioned, recently, some state courts have begun to permit the use of non-lawyer, limited licensed paraprofessionals to address the challenges experienced by self-represented litigants.²¹⁰ Additionally, states such as New York allow lay judges at some level of court.²¹¹ Thus, the use of non-legal professionals is not limited to tribal judiciaries. Many tribal judges also see lay advocates as a useful tool because they are after a solution and want the matter resolved in an efficient way and are less likely to hide behind procedure or evidentiary rules.²¹²

Many tribal judiciaries, such as the Navajo Nation, have established bar associations and have regulations that govern attorneys and non-lawyer advocates. These

205. *Id.*

206. *Id.* at 1783.

207. Telephone Interview with Angelique EagleWoman, *supra* note 199.

208. Telephone Interview with Alli Moran, Lay Advocate, Cheyenne River Sioux Tribe (Aug. 25, 2022).

209. *Id.*

210. Tara Hughes & Joyce Reichard, *How States Are Using Limited Licensed Legal Paraprofessionals to Address the Access to Justice Gap*, AM. BAR ASS'N (Sept. 2, 2022), <https://www.americanbar.org/groups/paralegals/blog/how-states-are-using-non-lawyers-to-address-the-access-to-justice-gap/>.

211. N.Y. TOWN LAW §§ 23, 31(2) (McKinney 2023); N.Y. VILLAGE LAW § 3-300 (McKinney 2023); UNIFORM JUST. CT. ACT § 105.

212. Telephone Interview with Brenda Claymore, *supra* note 43.

regulations range from tribe to tribe. Due to their role and the tasks they perform, many tribal judiciaries enact regulations to govern the professional conduct of lay advocates and their ethical obligations.²¹³ These rules also provide the qualifications for a lay advocate and range in requirements. The Sault Tribe of Chippewa Indians requires that a lay advocate be at least 21 years of age; possess a high school diploma; have good communication skills; have legal or law-related education and/or training; have legal or law-related work experience including but not limited to experience and practice before tribal courts; know and understand tribal traditions and customs; have an understanding of tribal laws, jurisdiction, and history; be able to perform legal research; possesses good character and moral fitness; and certify that they will conform to the Code of Ethics or Code of Professional Responsibility rules.²¹⁴ The Washoe Tribe requires a lay advocate to pass a bar exam with a passing score of 80% in order to become a lay advocate.²¹⁵ The bar fees associated with becoming a lay advocate range from tribe to tribe.²¹⁶ Some tribes have also utilized lay advocates supervised by an attorney as part of their legal aid services such as the Oneida Nation of Wisconsin.²¹⁷

In deciding how to regulate lay advocates, tribes consider the type of advocates they want appearing before the court. In doing so, tribes balance the needs of the tribal community and their culture and customs.²¹⁸ More stringent requirements, such as a two- or four-year

213. See, e.g., HOPI CODE § 1.1.2(b), <https://www.hopi-nsn.gov/wp-content/uploads/2013/05/Hopi-Code.pdf>.

214. SAULT TRIBE OF CHIPPEWA INDIANS ADMISSIONS TO PRAC. § 87.110(1)–(2).

215. Telephone Interview with Patricia Lenzi, *supra* note 55.

216. For example, the Te-Moak Tribe of Western Shoshone allows lay advocates to charge up to \$500.00 per case. Te-Moak Tribe Attorney and Lay Advocate Rules is file with authors. The Seneca Nation does not impose a limit on how much a lay advocate can charge. Interview with Sylvia Patterson, *supra* note 198.

217. Telephone Interview with John Powless, *supra* note 46.

218. Telephone Interview with Angelique EagleWoman, *supra* note 199.

degree, may keep elders with cultural knowledge from serving as a lay advocate.²¹⁹ But tribal leaders often do not want it to so easy pursuit that anyone can become a lay advocate and be entrusted with this responsibility. There has also been formal training for lay advocates developed at colleges such as the Sitting Bull Tribal College.²²⁰

In regard to the regulation of lay advocates, tribal judiciaries hold them responsible similar to attorneys based on professional rules of responsibility and other ethics rules. For example, in the Hopi Tribe, in the matter of *In re Sekayumptewa*, a lay advocate was suspended from practicing for six months before the Hopi courts.²²¹ The lay advocate had failed to appear in court for numerous clients between 1988 and 1990.²²² The Hopi Appellate Court wrote:

[T]his Court recognizes the contributions, Petitioner, and other lay advocates, have made to the development of the Tribal Courts in Hopi. . . .

With this heightened role that lay advocates play in Hopi Society, this Court acknowledges that the lay advocates' commitment to the people they represent must also be heightened. As lay advocates, Petitioner and others like him must recognize that though they are not lawyers, their role is similar and uniquely more important. Specifically, the lay advocate is the bridge that connects the ordinary person to the sometimes confusing legal system that they must now confront. Further, the role of the lay advocate is even more important than lawyers when it is considered that lay advocates usually share the client's culture and tradition and thus are better able to provide the client with a more well-rounded understanding of the process they are facing. Consequently, to require lay advocates to act by a

219. *Id.*

220. See SITTING BULL COLLEGE, <https://www.sittingbull.edu> (last visited Feb. 25, 2023).

221. *In re Sekayumptewa*, 3 Am. Tribal L. 434, 435 (Hopi 2001).

222. *Id.* at 435.

standard below that of lawyers would be contrary to the goals of the Tribal Courts.²²³

Many jurisdictions are taking action in addressing this need by expanding legal aid services and finding other ways such as creating positions within their judiciaries focused on providing some legal assistance. The use of lay advocates is a tribal solution and is unique to tribal jurisdictions to address the need of tribal communities. Indian Nations and tribal bar associations provide safeguards by enacting regulatory rules that govern attorneys and lay advocates. Lay advocates can help come to more favorable solutions and assist in providing access to justice.

VI. CONCLUSION

The lessons learned from tribal court judges as they strive to ensure access to justice for self-represented parties can be applicable to state and federal courts. They illustrate that courts are a part of the community and have a responsibility to help individuals, within the bounds of their ethical duties. Although communities, culture, customs, and tradition vary, many practices can be used by other courts to increase access to justice. Bringing justice to the parties is important. From simplifying forms to training staff, to answer questions without providing legal advice, to bringing the courtroom to distant communities, each of these practices increases parties access to justice.

When parties enter a tribal courtroom, they frequently are greeted by tribal court judges whose cultures direct them to respect the person, regardless of the case. Together, tribal court judges and court staff foster respect by ensuring the parties understand procedures and the courtroom process. As judges tell the story of the judicial process, the role of the parties and the judge, and explain objections while also following ethical rules, parties find their voices and tell their story.

223. *Id.* at 439.

Tribal court judges sometimes facilitate this by taking a more informal approach or asking questions, to make sure they understand the party's story.

Many tribal courts also use a trauma-informed approach to help parties feel at ease, so they may tell their story to the judges. In many tribal courts, lay advocates work with clients to help them navigate the legal process and helps ensure access to justice. Many of these efforts by tribal judges and court staff may seem informal for non-tribal judiciaries. However, the integrity of judiciaries is preserved when those utilizing the courts view the processes as fair.