

# **Tribal Court Development Nuts and Bolts**

**BIA Providers Conference  
November 2012**

Prepared by Lisa Jaeger  
Tribal Government Specialist  
Tanana Chiefs Conference  
Fairbanks 1-800-478-6822  
[lisa.jaeger@tananachiefs.org](mailto:lisa.jaeger@tananachiefs.org)



***In developing and operating a tribal court there is much potential for supporting traditional values and practices. But there is also a danger of weakening them. When designing and operating any part of tribal government always incorporate traditional values and practices when appropriate and possible, and avoid structures and procedures that are harmful to them.***

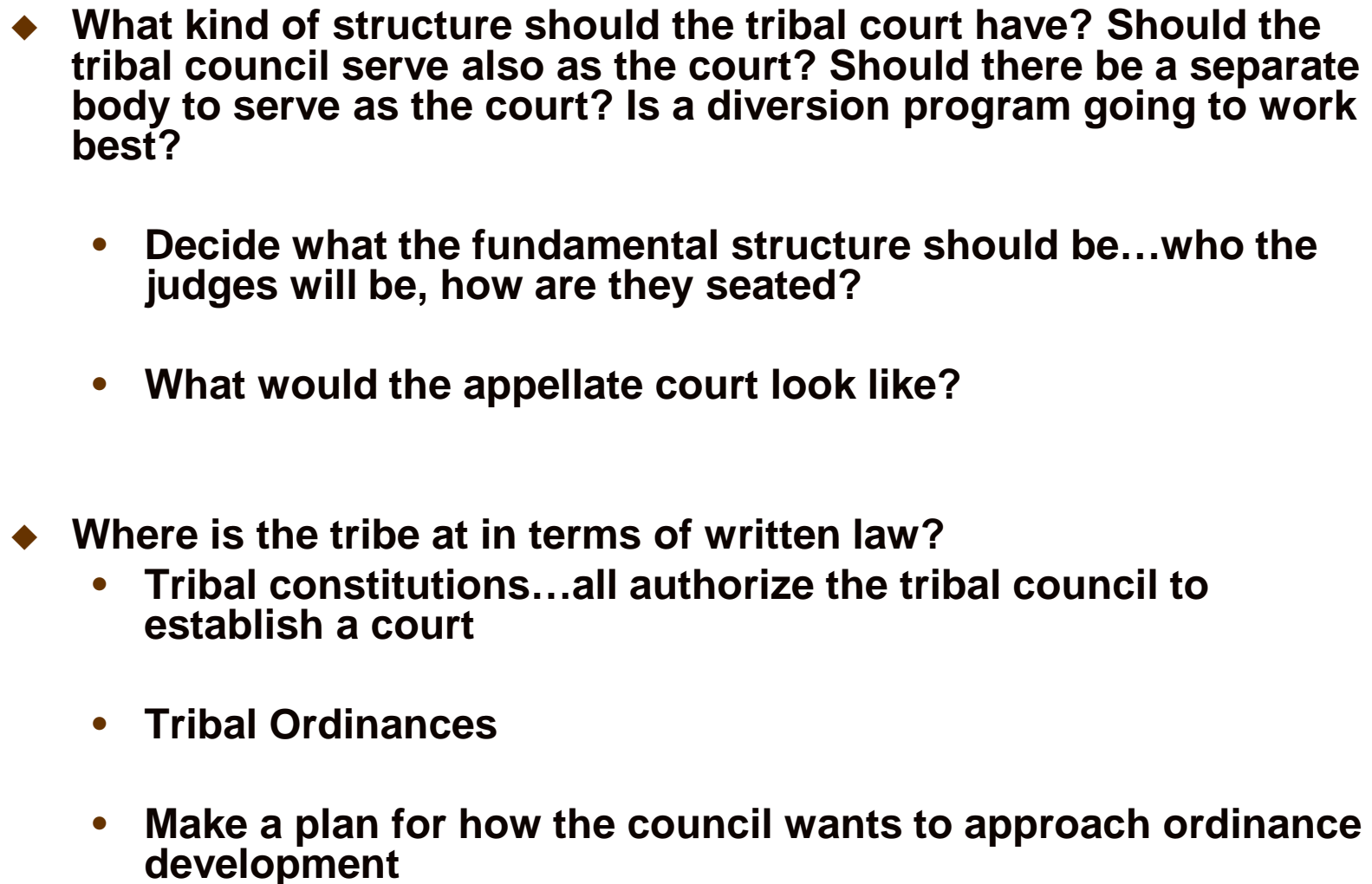
*Lisa Jaeger*



# Evaluating the Current Situation

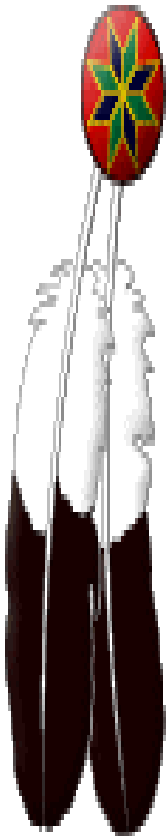


- ◆ **What problems in the village need to be / should be addressed by a tribal court? What subjects should the tribal court address?**
  - **Identify problems**
  - **Identify what subjects the tribal members will support the court in dealing with**
- ◆ **What are the resources available to work with?(human resources, financial resources, support services)**
  - **Inventory resources**
  - **Beware of being 100% dependent on DOJ Grant money for tribal court personnel**

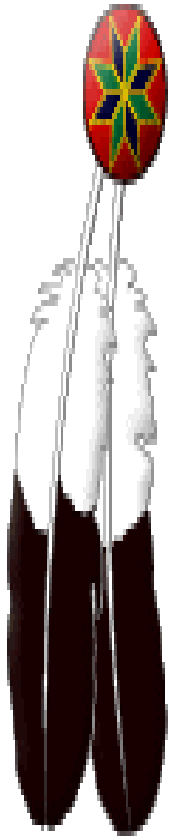
- 
- ◆ **What kind of structure should the tribal court have? Should the tribal council serve also as the court? Should there be a separate body to serve as the court? Is a diversion program going to work best?**
    - **Decide what the fundamental structure should be...who the judges will be, how are they seated?**
    - **What would the appellate court look like?**
  - ◆ **Where is the tribe at in terms of written law?**
    - **Tribal constitutions...all authorize the tribal council to establish a court**
    - **Tribal Ordinances**
    - **Make a plan for how the council wants to approach ordinance development**

# Structures of Alaska Tribal Courts

- **Tribal Councils as Tribal Courts**



- May use only officers of the council or certain members
  - Qualifications for tribal council may be an issue if felonies are not addressed in the qualifications for tribal council positions (Indian Child Protection and Family Violence Prevention Act of 1990)
- Often using a different quorum number (when panels of judges are used) than for regular council business
- Tribal council members plus a few non-council members added to make a ‘pool’ of judges



- **Separated tribal courts**
  - Tribal judges do not sit on the tribal council
  - Appointed by the council or elected by tribal members
  - May be used to provide a check and balance on the tribal council, for election disputes for example
- **Single judge courts**
- **Using ‘visiting judges’**
- **Specialty courts such as youth courts**
- **Inter-tribal courts, standing or ad hoc**

- ◆ **Appellate court structures are in place in most tribal court systems, but are rarely utilized**
  - **Highly recommended that each tribal judicial system include an appellate court**
- ◆ **Most are courts of 'general jurisdiction' but some tribes have placed jurisdictional limits on their tribal courts**
- ◆ **Generally the court clerk is an employee of the council wearing other hats, with the duties of the court clerk assigned to him or her**



# To Separate or Not Separate



**A fundamental decision a tribe must make in establishing a tribal court is whether the court should be a separate body from the council.**

## ◆ **Advantages of using a separate body**

- the possibility for more fairness in government, check and balances
- distribute the work load of tribal government among more people
- Perceived by many as the way governments should be set up
- Can establish different qualifications than the ones for council seats

## ◆ **Disadvantages of using a separate body**

- that there may not be enough people willing to participate in tribal government in the village to fill two bodies of government
- two groups of people have needs for training
- It may be contrary to traditional practices
- the two groups may 'fight' with one another



# Circles

- ◆ **Circles used for sentencing recommendations in State Court Cases**
- ◆ **Circles used for tribal court cases**
- ◆ **Circles used for tribal youth courts**
- ◆ **Circles used for prevention**
- ◆ **Circles used for political disputes**
- ◆ **Circles used for therapeutic value**



## **Circle Sentencing Offers Opportunities for:**

- ◆ **Hold offenders accountable to peers in the village, highlighting issues with other people who have influence over offenders**
- ◆ **Repair harm done to victims and communities**
- ◆ **Create positive behavior change in offenders**
  - **Why? Opportunity for community to share how much they care about the offender, what their concerns are, sentencing always include traditional values, and subsistence/cultural activities**

# Circle Sentencing Process

## ◆ Opening the circle

- A prayer, words from an Elder, or any other meaningful way to signal the opening
- The Circle facilitator describes what the situation is, generally describes the process, outlines the guidelines for speaking
- *Going around the Circle for introductions*



◆ **Phase one: Passing an object around several times**

- **Talking about the situation and persons involved**
- **Giving information about the situation and persons involved**
- **Describing feelings about the situation and persons involved**
- **Giving advise or counseling to the offender and victim if the victim is participating in the circle**



◆ **Phase two: Passing an object around several times**

- Talking about the solution.....writing ideas on paper chart
- Coming to consensus on the sentence



## ◆ Closing the Circle

- May be a prayer, words from an Elder, the Circle leader may offer closing words, or any other meaningful way to signal the closing



# Traits of Natural Circle Facilitators

- ◆ Generally respected, perceived as fair
- ◆ Open minded
- ◆ Value people and their ideas
- ◆ Think logically and quickly
- ◆ Excellent communicators
- ◆ Product and process oriented



**Good facilitators have personal characteristics and acquired skills that make them good at what they do!**

# **Tribal Courts and Their Relationship to Constitutions**



- **The structure and basic procedures of some tribal courts in the Lower 48 are outlined in tribal constitutions. At this time, very few are.**
- **The powers article of most all tribal constitutions in Alaska authorize the tribal councils to establish tribal courts.**
- **Tribal courts may or may not be authorized to enforce provisions of the tribal constitutions upon petition. This works best when the courts are separate bodies from the councils.**



# **Tribal Courts and Their Relationship to Ordinances/Codes**



- ◆ **Although it is technically possible for tribes to operate entirely on unwritten law, it is not practical and it may be a handicap in some ways**
- ◆ **The structure and general procedures for tribal courts should be written in ordinances if they are not in the constitution**
- ◆ **Written ordinances should clearly outline the laws the tribal courts enforce, and provide guidelines for making decisions for the subjects the court will be dealing with**

# Codes/Ordinances

Tribes should have codes covering the basic structures and procedures of the tribal court as well as covering the subjects the court handles.

- ◆ To provide fairness and consistency
- ◆ To inform parties of what the processes are
- ◆ To let people know what the laws are
- ◆ To provide evidence of the tribal court if challenged



# **Tribal Courts and Their Relationship to Written Policies**



- ◆ **Court rules:** Courts may develop written court rules to guide their procedures. These cannot be in conflict with the tribal constitution or ordinances.
- ◆ **Written Council Policies:** The tribal court may be empowered to enforce written council policies such as personnel policies.

## **Be Consistent!!!!**

***Whatever tribal court structure you use, be consistent with any written descriptions in your tribal constitution or codes/ordinances. Do not simply change the court structure without changing the written description as in the tribal codes/ordinances!!***

**No matter what style of court is decided on, it must provide due process:**

◆ **Due Process**

- **Notice of Hearings**
- **Opportunity to be heard**
- **Fair and impartial tribunal**
  - **Best Practices**
    - **Following your own rules**
    - **Explaining your decisions**
    - **Keeping record of court proceedings**
    - **Having an appellate process**



# Vision



**We envision our village as safe and healthy, where women, children, and all are secure. Justice in our eyes is fair and embraces traditional and community values. Justice is dispensed in a respectful and reparative way, through our tribal justice and partnerships with the state and federal governments. Taking responsibility and working together replaces arguments over jurisdiction. Funding, volunteers, treatment programs, and technical assistance are all available for our tribal courts.**