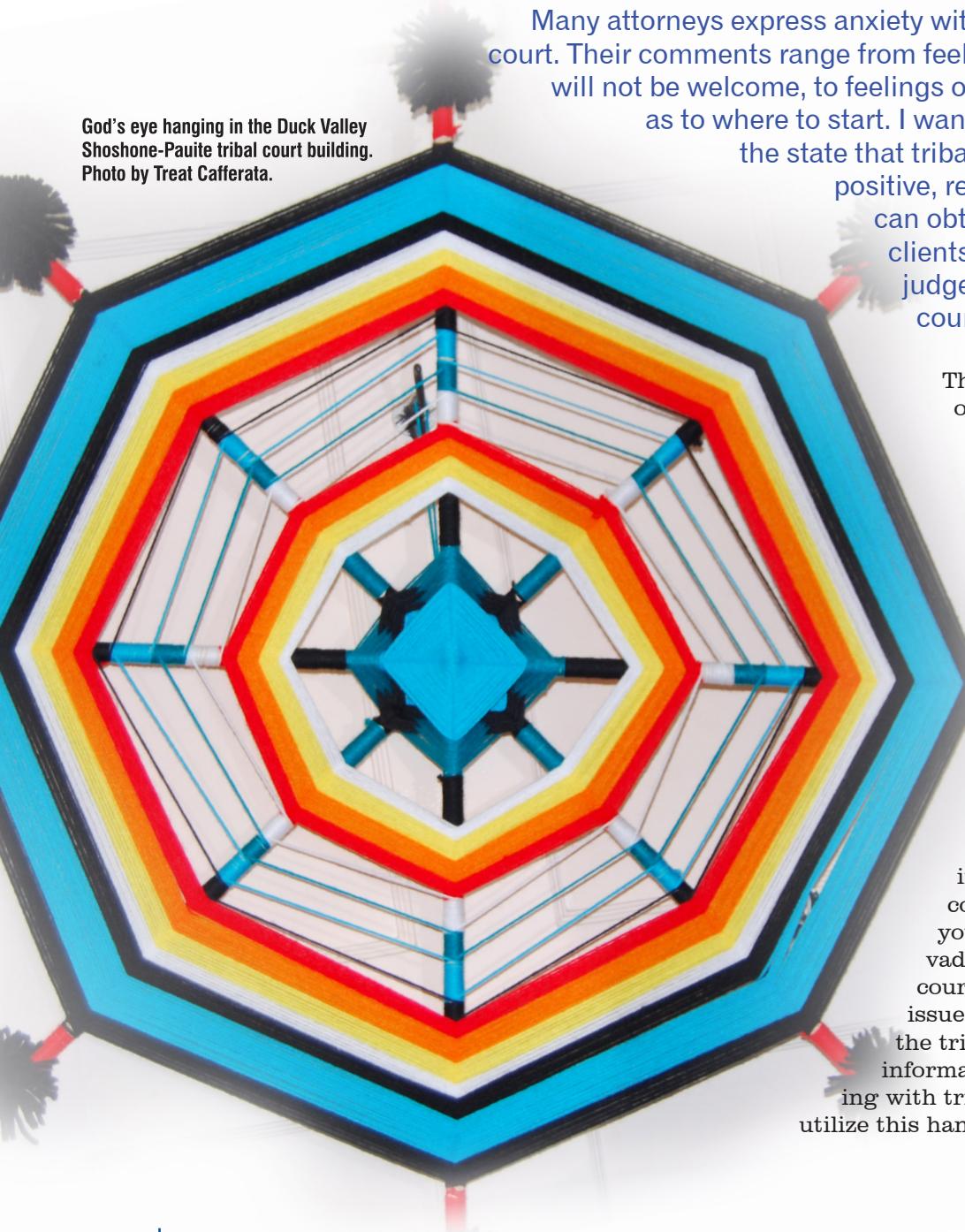


THE ABCs OF PRACTICING IN TRIBAL COURT

BY JULIE CAVANAUGH-BILL, ESQ.

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God's eye hanging in the Duck Valley Shoshone-Paiute tribal court building.
Photo by Treat Cafferata.



Many attorneys express anxiety with regard to practicing in tribal court. Their comments range from feeling that as non-Indians they will not be welcome, to feelings of complete bewilderment even as to where to start. I want to assure attorneys across the state that tribal court can be not only a positive, rewarding experience where one can obtain excellent results for your clients, but also that most tribal court judges welcome attorneys in their courtrooms.¹

This guide is a summary overview of some key points to practicing in tribal courts in Nevada; hopefully those of you reading it will feel a bit more comfortable.² Practicing in tribal court is kind of like learning your ABCs – just start at the beginning and sing your way through – or possibly sling your way through, depending on who is on the other side.

Admissions and Tribal Court Advocates

The first priority is to make sure you are admitted to practice in whichever tribal court you are considering; do not assume because you are admitted in the state of Nevada that you are admitted in tribal courts in Nevada. Included in this issue of *Nevada Lawyer* is a guide on the tribal courts in Nevada, along with information on admissions and practicing with tribal court advocates. Make sure to utilize this handy guide.

Be Patient

Many of the tribal courts set their dockets for morning and afternoon with no individual hearing times set. You may walk in and find 15 matters all scheduled for 9 a.m. and no one to tell you how long any of those matters might take. The judges may move a case up on the docket if they are aware that a private attorney is on the case and waiting in the courtroom, but do not assume this will be the case. There will be times when you find yourself waiting for an hour or more. If this is going to be a problem, you can always call ahead to the court clerk, explain your schedule and see if there is a way you can either continue the hearing or request a specific hearing time.

A problem I have experienced numerous times is receiving notice of a hearing only days, and sometimes only 24 hours, before the hearing. In those instances, depending on the case, one can either go in and handle the hearing, or simply call the clerk and ask if the hearing can be rescheduled to a time that is more convenient for you. Again, be respectful – the clerks, like the judges, are often handling large dockets and their lateness in sending notices may simply be due to shortness in staffing; a respectful request is going to get you a lot farther than a sharp demand. I have found in our practice that “kindness to the clerk” can be your best asset in tribal court – as in any court.

Choice of Law

Choose your law wisely. First, look to the Tribal Constitution; this will inform you as to the structure of the court system and the court’s jurisdiction. The choice of law provisions can be found in Law and Order Codes, or in a separate ordinance. In addition, the tribal courts prefer citations to other tribal court decisions before looking to federal or state decisions or statutes.³ Depending on the court, traditions and customs may weigh more heavily than the written law; I haven’t seen this come up too often, but it can arise so be prepared to ask your client if there are elders or other historians in the area, who may be able to testify on your particular issue. Whereas the Tribal Law and Order Code is typically the “core” law, there may also be ordinances and resolutions on specific issues – so again, make sure you do some preliminary research before coming to court.⁴

Do *not* walk into tribal court assuming Nevada law applies. This is the most frequent mistake we witness. In child custody matters, for example, many of the tribal courts will look to Nevada law as guidance if there are no specific provisions in the tribal law. However, they are not required to apply Nevada law – again, unless their law and order code has adopted those standards. So make sure you’ve done some research. If you can’t find anything specific, just open by respectfully informing the court that you were unable to locate anything specific under the tribal laws so you are looking to the NRS for

“guidance” or something to that effect. For example, the specific wording in the Ely Tribe Law and Order Code for applying Nevada law is:

The Nevada Revised Statutes, but *only* if there is no other law to apply, and then only for a guideline or procedure, not for substantive law.⁵ (Emphasis added).

Finally, with regard to court procedures, look first to see if there is a set of local rules; normally there is. Then, if not set forth in the law and order code, the procedure typically is analogous to the federal rules of civil procedure. If you can’t find a specific rule, you can look to the Nevada rules for “guidance.”

Clients

Potential clients that come to you with tribal court matters may be tribal members or they may be non-Indians. There may be instances, especially in child custody or divorce cases, where you may advise your non-Indian client to file in tribal court. The advantages of filing in tribal court may be lower costs, faster hearing times and ease in process. I typically charge a lower fee in tribal court because the time involved in filings is less and much of the time spent is either in travel or waiting in the courtroom lobby. In addition, the domestic violence program at ITCN has a court assistance program for victims of domestic violence and has been useful in covering a portion of fees in family cases.

Child Custody and Child Support

Custody and support cases are actually quite interesting in tribal courts. Whereas the tribal courts all seem to follow some form of the “best interests of the child” standard, they typically do not have anything as detailed as Nevada’s Chapter 125 so they can be much more flexible in rendering decisions. Oftentimes, you will be asked to provide legal representation a year or more into a custody dispute. For those of us who like to “untangle” a situation and lay the facts and the procedural background out for the court, these cases can be fun and very satisfying. The courts are usually pleased in those situations to have an attorney come in and basically clean up the file so a final decision can be reached.

Child support can be a bit trickier, given that you may have a hybrid case in which the custody was established in tribal court and the support was set by state court decision. This happens most often in those cases where one party has applied for state assistance and the support was set through the state district attorney’s office. One or both parties may then come to tribal court and ask for a custody order to establish visitation or otherwise. As the attorney, you need to determine where the jurisdiction lies. If the support issue is already established, the tribal

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court will normally defer to that decision although there is a preference for both custody and support to be in front of the same judge.

Conclusion

Hopefully this brief guide has made you feel a bit more comfortable about taking on your first tribal court case. Tribal court practice can be a very frustrating experience for those attorneys who expect it to be the same as practice in state court. However, if you are able to respect the separate jurisdiction, laws and procedures of the tribal court it can – and should – be a very satisfying and rewarding experience. I would encourage everyone to tackle the experience at least once or twice. ■

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JULIE CAVANAUGH-BILL has more than 16 years of Native American and indigenous rights experience. She previously served as Director of the Land Recognition Program for the Western Shoshone Defense Project. Before that Cavanaugh-Bill practiced in Minneapolis with the law firm of Winthrop & Weinstine, serving one year as general counsel to the Prairie Island Indian Community. Her experience ranges from government relations to active involvement in tribal, federal and international cases. She has worked on two separate U.S. Supreme Court cases involving jurisdictional and resource rights issues and has written and taught on indigenous rights, corporate engagement and human rights lawyering.

- 1 Many tribal court judges are non-Indians themselves, although some are tribal members, it is not always required.
- 2 For information regarding jurisdictional issues in cases such as contracts, torts and employment law, see *Reservations of Right: A Practitioner's Guide to Indian Law in Nevada*, by Gabriel S. Galanda, *Nevada Lawyer* (10/1/2002).
- 3 There are several sources for finding tribal court decisions, including LexisNexis' tribal law search engine.
- 4 The Te-Moak Court of Indian Offenses is a bit unique in that rather than a Law and Order Code, it follows the Code of Federal Regulations – which is available online, as well as those ordinances the Tribe may pass.
- 5 Ely Shoshone Tribe Law and Order Code Ordinance No. 97-2 (1-1-04 "Law to Be Applied by the Tribal Court").