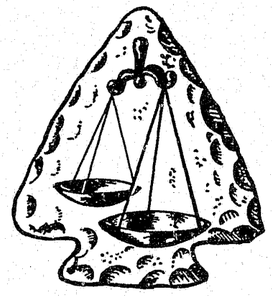
b.
CR Smt
3-23-82

CRIMINAL PROCEDURE FOR INDIAN COURTS



John W. Milne
Ralph W. Johnson

Published by the National American Indian Court Judges Association, Inc.

CRIMINAL PROCEDURE FOR INDIAN COURTS

John W. Milne

and

Ralph W. Johnson

Published by the National American Indian
Court Judges Association, Inc.

National American Indian Court Judges Association, Inc.

The fact that the Law Enforcement Assistance Administration of the Department of Justice furnished financial support for this material does not necessarily indicate the concurrence of either the LEAA or the Department of Justice in the statements or conclusions contained herein.

INTRODUCTION

This text has been developed for use in the National American Indian Court Judges Association's Criminal Law and Procedure Training Program to instruct Indian court judges on their responsibilities and function. The National American Indian Court Judges Association (NAICJA) was founded in 1968 with the following objectives:

1.) to improve the American Indian court system throughout the United States of America;

2.) to provide for the upgrading of the court system through research, professional advancement and continuing education;

3.) to further tribal and public knowledge and understanding of the American Indian court system;

4.) to maintain and improve the integrity and capability of the American Indian court system in providing equal protection to all persons before any Indian court; and

5.) to conduct any and all research and educational activities for the purpose of promoting the affairs and achieving the objectives of Indian courts and of the Association and to secure financial assistance for the advancement of the purposes of the Association.

The existence and effective operation of Indian courts are essential ingredients of the right of tribal self-government. In recognizing this fact, tribes are rapidly developing new court systems and adding to the responsibilities of their existing courts. Indian court assumption of criminal jurisdiction over Indian country is one of these expanding responsibilities.

Criminal Procedure for Indian Courts addresses the procedural aspects of criminal law at the trial and appellate levels. This text relies heavily on material presented in a prior NAICJA publication, Basic Criminal Law, developed by Professor Ralph W. Johnson, Mr. Jay V. White, Professor John T. McDermott and others. But this material has been substantially revised, updated, and supplemented. Chapter I considers the general duties and responsibilities of tribal judges.

Chapter II addresses trial court procedure, and Chapter III presents appellate court procedure. The discussion of the impact of the landmark Santa Clara Pueblo v. Martinez decision on the Indian appellate court in Chapter III is particularly significant. The Appendix presents a summary of federal statutes affecting Indians, a Glossary of Terms, and appendices with legal forms for each chapter.

This text may also be used in conjunction with the new NAICJA publication, Criminal Law for Indian Courts, which presents the substantive criminal law of jurisdiction, evidence, the warrant process, juvenile justice, and the elements of a crime.

The authors thank those who contributed to this book and hope it will assist the Indian people of this country in the effective administration of justice.

John W. Milne

John W. Milne

Ralph W. Johnson

Ralph W. Johnson

ACKNOWLEDGMENTS

The authors wish to thank the Board of Directors and Officers of the National American Indian Court Judges Association for general guidance in the creation of the original Basic Criminal Law text and for assistance in determining the concept and scope of this book. E. Thomas Colosimo, Secretary-Treasurer of NAICJA, provided administrative assistance and support, and Mr. Robert L. Bennett, NAICJA instructor and consultant, furnished invaluable material in the development of this text.

Arrow, Inc., a non-profit organization, also deserves mention for it's administrative assistance to NAICJA in the implementation of the American Indian Court Judges Training Program.

And, finally, this book would not have been possible without the secretarial and typing skills of Linda M. Sill, whose artistry touched every page.

About the authors:

RALPH W. JOHNSON, Professor, School of Law, University of Washington. B.S., University of Oregon, 1947; LL.B., University of Oregon, 1949. Professor Johnson has been on the faculty of the University of Washington School of Law since 1955, and has taught Indian law since 1968.

JOHN W. MILNE, Acting Assistant Professor, School of Law, University of Washington. B.A., University of Wisconsin, 1974; J.D., University of Wisconsin, 1979. Professor Milne has been on the faculty of the University of Washington School of Law since 1979, and currently teaches a legal writing and research course.

TABLE OF CONTENTS

CHAPTER I. THE DUTIES AND RESPONSIBILITIES OF TRIBAL JUDGES

Section 1. The Role of the Judge

A. The Importance of the Function of the Judge

i. Historical View

History books are filled with stories about great rulers - kings, chiefs, religious leaders - and about organized governments - councils, legislatures and senates. The story of any great nation or society will include details of its rulers and the accomplishments of that society. But the story would be incomplete without some mention of the society's judicial system -- the laws and the judges who interpret the laws. Thus it has been said that the measure of any society's civilization is the manner in which they treat those accused of crime. Certainly one factor in the greatness of a society is the quality of its justice and the central figure in the judicial system is the judge.

In ancient societies the ruler -- the king, the chief or the council -- often was also the judge. If there was a dispute between members of the society, it was resolved by the leader. This was the custom in many traditional Indian societies. As societies became larger and more complex, the leaders became less able to deal impartially with individual citizens. It became necessary for the leaders to appoint special assistants to resolve disputes between members of the tribe or clan. They became the first judges. The first experiments with democracy in Greece included a court system which had judges to resolve disputes between citizens.

ii. Judges in Today's Society

In this country the power of the government is divided among the three branches of government. The United States Constitution and the constitutions of each of the states provide for the "separation of powers." The three branches of government are the legislative, the executive and the judicial. The legislative branch of government -- congress, legislatures, councils -- make the laws. Enforcement of the law is the responsibility of the executive branch--the president, governors, mayors. Applying the law to individual cases and interpreting the law is the responsibility of the judges--the judicial branch of government. In many other countries--and in most Indian tribes--the legislative and executive functions are combined. However in most countries the judicial branch is separate and usually quite independent of the other branches.

The vast majority of citizens never have any contact with courts or judges. As a result, they frequently do not understand the important place in government which the courts hold. In a democracy where the powers of the law are split, all three branches of government must be strong. A society where the judiciary is weak will lack balance and be dominated by the executive or legislative branches. Rule and order imposed by the judiciary will succumb to political expedience and possibly a "tyranny of the majority."

The basic purpose of a court is to provide persons with a peaceful means of settling disputes. If the judicial process is unavailable or ineffective, people will take matters into

their own hands in seeking other methods for resolving their disagreements. It is also the place where the laws of a society are applied to individual citizens. Without strong courts the laws may be applied unfairly or even not at all.

B. The Judge's Relation to the Community

i. As Leader

It is because of the important role of the courts in the administration of justice that judges must assume such a great responsibility. He must be a leader in the same sense that the president is a leader. He is responsibile to the people for the proper application and interpretation of their laws, so they have a right to expect a great deal from him.

The judge's leadership is even shown by his position in the courtroom. Very often he is seated above the other persons in the courtroom, a symbolic gesture of his responsibility. He is not like the others in the room, the parties and their attorneys, who are there to look out for their own interests. The judge is set apart--he alone is responsible for the just application of the law to all parties. When the judge wears a robe, it is an additional reminder of the important office he holds and that the office, if not the individual, is entitled to great respect.

ii. Obligation to the Community

Because he is a leader and bears a great responsibility to his community, the judge cannot forget his obligations and the fact that others look to him for guidance. A judge may want to put aside his job when he leaves the court room, particularly

if he serves only part time, but the rest of the community will not forget. Even if the judge holds court only once a week he is a continual representative of justice in his community.

The judge owes an obligation to the people he serves. He cannot degrade his office by personal conduct which he may think has nothing to do with his job. He must remember that everything he does reflects on his office. It is because of this obligation that a judge is not allowed to do some things that other persons can do. These limitations, or "judicial ethics," will be discussed in detail in later sections.

Not only does a judge owe an obligation to the community in which he lives and works, he also has a duty to uphold the law and legal system itself. Even though a judge may be just an average citizen in his education and his regular job (if he is a part time judge), he is not an average citizen when it comes to the law. In fact, it may be said that he <u>is</u> the law as the representative of the legal system.

C. <u>The Judge's Relation to the Law and Legal System</u>

i. <u>Interpreter of Law</u>

The responsibility which the judge owes to the community and to the law cannot be overemphasized, but no judge must think that because he holds a special place in the community he is above the law. The judge cannot allow his personal feelings to control his decisions. This does not mean, of course, that a judge must be devoid of all feelings. Judge J. Braxton Craven, Jr., a noted federal appellate judge, has described a judge's responsibility in this way:

> The beginning of intellectual honesty in a judge is the recognition that, like other men, he has his own preferences and intellectual and philosophical attitudes that color and influence his viewpoints. Achieving it requires that he be constantly on guard against his own bias, not in pretending that there can be none. I do not believe that a judge has a duty of loyalty to a political administration with respect to any particular policy of that administration--international or domestic. Nor do I believe that he must pretend to believe that all policies or even all laws are wise and just. But I do believe that he must read, interpret and apply laws as written without regard to whether he would like to see them changed. <u>Lawton v. Tarr</u>, 327 F. Supp. 670, 671-72 (E. D. North Carolina 1971)

The federal prosecutor asked Judge Craven to disqualify himself because the case involved a draft-resister and the judge had frequently expressed his firm opposition to the continuation of the Vietnam War. The judge refused to do so because he firmly believed he could decide the case without considering his personal views.

Because of the separation of power, the judge is not usually the one who makes the law. That is the job of the legislature or the council. The judge's duty is to apply to each particular case the law which the legislative branch of government has made. The judge is bound by the law just as much as the parties are. The judge is bound to enforce the law whether he likes it or not. In the same way, the judge is bound by the law whether or not he happens to like the party before him; whether or not he happens to be personally convinced of the party's innocence or guilt. The judge must overcome his personal feelings and decide each case impartially according to the law. To do anything else is to violate his

oath and the confidence the people have in him.

One type of "judicial restraint" can be found in criminal cases. Often the evidence which is used against a defendant must be obtained as the result of a search by the police. Most criminal codes require that certain procedures be followed before a citizen or his property may be searched. Suppose the evidence proves without a doubt that the defendant is guilty, but it appears that the evidence was gathered improperly (which really means that the police themselves broke the law in gathering the evidence). The personal feeling of the judge may be that the law is too strict and should be changed. Nevertheless, it is the law and it is his job to see that the law is followed. Thus, the judge may have to release the defendant in order to uphold the law--even though he may be personally convinced of the defendant's guilt.

ii. Maker of Law

Even though the first responsibility of the judge is to apply the existing laws, that cannot always be done. There are times when questions arise which were not foreseen by the lawmakers. Often there are gaps in the law or the language is not clear. When such cases arise, it is not possible for the judge to ask lawmakers what they meant. He himself must fill in the gaps and decide what the law really means.

Where the lawmakers did not consider the question before the court, or where the law is vague or unclear, the judge must rely on his sense of justice and fairness to decide the question before him. He will also find it helpful to examine

local customs and traditions, the laws of other jurisdictions, and the decisions of other courts.

iii. Stare Decisis

In order to assist the judge in making his decisions, and to insure that the laws of a particular jurisdiction are consistent, the principle of stare decisis has been developed by anglo courts over the years. The words are Latin and in their original form meant "to stand by a former decision." In practice, this means that a judge should follow the decisions he or his fellow judges made on the same issue in prior cases.

The first requirement for applying stare decisis is that both cases--the older case being followed and the new case to which the former decision is being applied--must involve the same basic facts. This is not to say that every fact must be exactly the same. That would be impossible. The important facts, however, must be substantially the same. If the crime is burglary, for example, it does not make any difference that in the first case the accused was a man who broke into a grocery store, whereas in the second case the accused was a woman who broke into a gas station. The important facts are that a person broke into a building for the purpose of taking something inside. In other words, the essential elements of the crime or the civil action must be the same for the application of stare decisis. However, if the first case was decided by a different court (a state or federal court or another tribal court), the tribal judge may find the prior decision helpful, but he need not follow it and can decide the case in

a way which will better serve the ends of justice.

Finally, stare decisis does not require that the judge must blindly follow all prior decisions of even his own court. If there are reasons which convince the judge that the prior case was improperly decided, he is not bound to make the same mistake again. However, a judge cannot refuse to follow a former decision merely because he would have decided the prior case differently. He has an obligation to insure that members of his community are able to know what type of conduct is forbidden, what type of agreements are upheld, etc. The only way that people will develop confidence in their courts is if the judges decide similar cases in the same way. Thus stare decisis is a rule of consistency where like cases should be decided in a like manner.

Courts also use stare decisis to aid in establishing standards of judicial conduct. The broad rules of judicial ethics need application in each individual situation. For example, judicial ethics provide that a judge should not take on obligations which might affect his decisions. In a particular case, it might happen that a judge is brought before a higher court to answer for his business dealings which may have a questionable influence on his judicial conduct. The high court would then decide whether the judge's conduct is or is not acceptable, and the decision would become part of the general body of law known as judicial ethics. In this way court decisions themselves contribute to a fuller understanding of the standards of judicial conduct.

iv. Protector of Justice

A judge's responsibility does not necessarily end with his decision in a particular case. His obligation to the legal system demands more than merely deciding controversies; he must see that substantial justice is done. He must insure that his decisions are carried out. If a party disregards his decision, the judge has the power to make him comply either by holding him in contempt of court, or by instructing the law enforcement officials to take appropriate action.

It is not the function of the judge to stir up litigation. He should not go out looking for cases, but once they come before his court, he must follow through with whatever means are at his disposal to see that his orders are carried out and that justice is done.

D. Judicial Selection, Tenure, Removal and Discipline

i. Selection

a. In General

The importance of selecting the very best men and women to be judges was emphasized by Professor Arthur T. Vanderbilt who wrote in The Challenge of Law Reform (1955):

> The basic consideration in every judicial establishment is the caliber of its personnel. The law as administered cannot be better than the judge who expounds it, the jurors who find the facts under the instructions of the judge as to the law, and the lawyers who try the case. Each must fulfill his function properly or a miscarriage of justice may ensue.
>
> We need judges learned in the law, not merely the law in books but, something far more difficult to acquire, the law as applied in action in the courtroom; judges deeply versed in the mysteries of human nature and adept in

> the discovery of the truth in the discordant testimony of fallible human beings; judges beholden to no man, independent and honest and--equally important--believed by all men to be independent and honest; judges, above all, fired with consuming zeal to mete out justice according to law to every man, woman and child that may come before them and to preserve individual freedom against any aggression of government; judges with the humility born of wisdom, patient and untiring in the search for truth and keenly conscious of the evils arising in a workaday world from any unnecessary delay. Judges with all of these attributes are not easy to find, but which of these traits dare we eliminate if we are to hope for even-handed justice? Such ideal judges can after a fashion make even an inadequate system of substantive law achieve justice; on the other hand, judges who lack these qualifications will defeat the best system of substantive and procedural law imaginable.

Because of the heavy responsibility which the judge carries, care must be taken in the process by which he is selected. Any one of a number of procedures can be used as long as it produces the desired goal--a competent and independent judge.

b. The Problem

But the 1978 Report of the National American Indian Court Judges Association (NAICJA), entitled "Indian Courts and the Future" (hereinafter referred to as the "NAICJA Report"), states that:

> A lack of independence of the judiciary seems to be a serious problem with many tribes. Strengthening of judicial independence has been identified by the BIA as an important goal. Tribal courts sometimes are not respected by other jurisdictions because they are not independent of tribal council influence. Tribal council control over courts usually includes selection of judges, and there is little restriction upon a council's

> method of selection. (p.40)

Selection and appointment by the tribal council makes many judges particularly vulnerable to pressure from tribal leaders. On many reservations the politics are very intense and judges are not selected unless they are willing to bow to the desires of council members. (NAICJA Report, p. 70) These practices can prevent the hiring of competent people. The Report also states that, "on some reservations council and family influences cannot be separated because tribal society is so close knit." (p. 70) The potential for pressure to be brought on the judge to dismiss the case of a friend or relative of a member of the tribal council always exists. This occurs because on the majority of reservations the tribal council selects judges by the appointment process. The NAICJA Report states:

> Selection approval varies from a simple majority of the council to a consensus. The most common qualifications to become a judge are: tribal membership, at least 30 years of age, sufficient education to perform adequately in the courtroom, no felony convictions, and no misdemeanor convictions within the last year. Politics sometimes play a part in the selection of judges, and, in some tribes, full-blooded tribal members have the best chance of getting the job. (p. 40)

c. Recommendations

The image and appearance that the tribal judge presents is almost as important as the way he or she performs. The NAICJA Report relates that a person selected or elected only on the basis of popularity often will have no qualifications to perform the job of judge, and is likely to

engender little respect for the authority of that position. This makes law enforcement more difficult. Judges selected on the basis of politics or bias are likely to raise the suspicion of those who come before the court that they may not always have a fair and impartial proceeding. This may lead people to disregard the court and seek resolution of their problems in some other manner. The Report recommends that maximum effort be made to insure the quality of the judge with strong preference for Indian judges.

Many judges are selected by members of the community in an election. The advantage of this system is that the citizens through their votes have placed their confidence and trust in the person they select. But where the court covers a large area or when it must decide complex issues, selection by popular ballot may not be as desirable. All the voters in a large community may not know each candidate, and they may not be able to determine which one is best qualified to decide difficult questions of law. Some form of appointment system may be preferable in such situations. The better appointment systems usually involve a preliminary investigation by an impartial non-partisan panel of the prospective judges. Final selection is made from a list submitted by the panel and could be made by the tribal council.

More specifically, the NAICJA Report makes the following recommendations:

1. Minimum qualifications shall be set by the tribe for the office of tribal judge, and he/she should be selected by a subdivision of the tribal government or elected by the tribe at large.
   a. Qualifications should reflect a preference for legal knowledge, and understanding of the tribal code, experience in practice before the tribal court, and understanding of tribal traditions and customs, sufficient education to function effectively in the courtroom, and good moral character.
   b. Other considerations which may be included in the selection of judges could include a minimum age, being a tribal member, ability to speak the tribal language, and residence on the reservation.
   c. Qualifications should be designed to minimize the influence of popularity or improper preferences in the selection of judicial officers.
2. Except when it is inconsistent with tribal tradition, Indian judges should be hired.
3. The selection process must be designed to prevent personal gain or improper influence by any person on the selecting board.
4. Salaries for judges must be adequate to attract the most qualified individuals.

But, in sum, it is clear that an independent and honorable judiciary is essential to the vital workings of justice in tribal courts and the Indian community. The need for an independent and honorable judiciary will be further developed in the following discussions regarding tenure, removal, and discipline.

ii. Tenure and Removal

a. In General

The NAICJA Report states that terms of office for tribal judges vary widely, the most common term being two to four years. And most tribes provide a procedure by which the tribal council may remove a judge for just cause. The Report also relates the bases for removal and, again, the pressures brought to bear on the Indian court judge because of the power resting with the tribal council.

> Some reservations provide for recall by a vote of the general tribal population. Reasons for removal include drunkenness, use of office for personal gain, failure to perform duties, incompetence, and moral turpitude. Some tribes provide a hearing for an accused judge before removal; most do not. Most tribes require a simple majority vote of the council before removal, but several tribes require as high as a seven-ninths vote. Removal takes place for many reasons other than "just cause." In some tribes the judge changes whenever a new political faction takes power. Where recall is effected by a simple majority vote, judges are particularly susceptible to removal after making unpopular decisions. Short terms of office, council removal power, and tribal politics combine to make a judge susceptible to pressures from those in power to dispose of cases in particular ways. (p. 41)

b. Tenure

The NAICJA Report documents the chronic problem of judges being removed from office after short periods of time and it's consequences:

> . . . This removal problem results in a waste of training time and money invested by the NAICJA and its funding sources and in a waste of the valuable experience a judge has gained during his/her term in office. Removal of judges after short periods lessens the competency and respectability of the office and militates against a fair, impartial and efficient tribal judicial system. (p. 128)

To remedy this removal problem, the Report recommends structuring the reelection procedure to give preference to experienced judges by having the judge run only against his or her record, and not against challengers. And further, the Report calls for a national entity to set standards by which all judges' performance should be measured during a recommended probationary period. This proposal is in agreement with the current court review process utilized by NAICJA whereby any judge in the association can request an evaluation by a NAICJA committee assembled for this purpose. A favorable NAICJA review would provide tangible evidence of a judge's competence. This review could then be offered in defense to an undue or politically-motivated removal procedure.

The Report also makes these specific recommendations to insure the tenure, independence and honor of the tribal judge which are indispensable to justice in the tribal community:

1. Judges should be subject to a probationary period when they first enter office, during which time their performance should be reviewed periodically by a supervisory body of the tribal government according to objective standards set by a national entity.
2. Removal of judges during the probationary period should be subject to a hearing process incorporating Indian Civil Rights Act due process rights and tribal customs [This Act will be explained further in later chapters].
3. Once a judge has been in office for a specified period, he/she should be removed from office only for justifiable cause as set forth in the following section concerning the removal process.

4. The term of office for a judge should be long enough to acquire expertise in his/her job and to apply that expertise to serve the tribal population. In no event is a term of less than three years adequate, and a longer term is recommended.

5. The process for reelection or reselection of judges who have served a period in office and performed adequately should be structured to give those persons an advantage in retaining their office. (p. 127)

c. Removal

The tenure and removal problems described by the NAICJA Report are obviously interrelated. The Report presents the inevitable tension between a removal procedure that prevents arbitrary and politically-motivated removal, and the removal process that insures the removal of a judge for good cause.

> The vulnerability of a sitting judge due to an unpopular decision or change in governing political power must be checked. Judges are supposed to be fair and impartial. The possibility of quick and easy removal can influence a judge's decisions. On the other hand the removal process must be effective enough so those judges who should be removed are removed. The image of the judge in the community is important in engendering respect for the court's authority. Thus, for example, a sitting judge who is habitually drunk should be removed even if his/her drinking does not interfere with judicial duties. This is because a defendant who is sentenced for being drunk can have no respect for the court if the person sentencing him/her is also known to drink excessively, but suffers no consequences for it.

To balance this tension between arbitrary removal and removal for good cause, the Report makes the following recommendations:

1. A procedure to provide for the removal of judges must be set forth in the tribal code, in the tribal constitution, or by

resolution.

2. The procedure for removal of a sitting judge shall be fair, time consuming, and difficult to accomplish so that judges may not be removed arbitrarily or for political reasons.

   a. A vote of tribal members or members of the tribal council should be required before a judge is removed from office. The required vote should be a proportion over a majority of those voting, such as two-thirds or three-quarters.

   b. A fair hearing process as assured by due process provisions of the Indian Civil Rights Act and tribal custom shall be provided to allow the accused judicial officer to hear the charges and to provide a chance to respond and present witnesses and evidence.

   c. People involved in the removal process with interest or bias shall be disqualified from any aspect of the removal process.

3. A list of causes for removal should be developed and included in the tribal code. Causes that would justify removal of a sitting judge could include:

   a. Conviction of a felony.

   b. Professional incompetence.

   c. Chronic alcoholism.

   d. Conviction of a misdemeanor involving dishonesty or acts offensive to the morals of the community.

   e. Flagrant violations of ethical standards or tribal customs.

   f. Repeated failure to perform duties.

   g. Failure to complete required training.

4. Suspension with treatment should be considered as an alternative to removal when appropriate. Suspension while corrective training is obtained also should be considered as an alternative to removal.

iii. Discipline

Some attention must also be given to the problems of

disciplining judges short of removal who fail to meet their obligations. It is not enough to appoint or elect a person to be a judge without further evaluation. There must be a method of checking on judicial performance if a judge fails to perform his or her duties properly. Where the judge has jurisdiction over a great number of people, some type of grievance committee may be desirable. This committee could hear complaints about the judge, solicit the judge's response or explanation, and make recommendations to the tribal council for disciplinary or removal proceedings. This committee, like the judicial selection committee (one committee could perform both functions) must be impartial and non-partisan to avoid the problems discussed in the preceding sections on tenure and removal. The voters, practicing attorneys, and lay advocates could be polled periodically to insure that the judge measures up to the expected standards.

Several states have recently established non-partisan boards or committees to discipline or even remove judges from office. For example, Pennsylvania provides that "any justice or judge may be suspended, removed from office or otherwise disciplined for. . . misconduct in office, neglect of duty, failure to perform his duties, or conduct which prejudices the proper administration of justice or brings the judicial office into disrepute and may be retired for disability seriously interfering with the performance of his duties." Constitution of the Commonwealth

of Pennsylvania, Article 5, Section 18(d).

To discipline a judge because he has not measured up to these standards is a very difficult task. It should not be done merely because the decisions of the judge have been contrary to the wishes of the tribal council or have been reversed by a higher court on appeal. A judge who does nothing is the only one who will never make a mistake. A judge's competence cannot be decided on the basis of statistics, but only on the way he handles the specific cases which come before him. His duty is to bring justice to his community, and that alone must control both his decisions and those who review his decisions.

Accordingly, insuring the judge's ability to do justice should also serve as the measure in determining the selection, tenure, removal and disciplinary processes.

E. Questions

(1.) The law provides for a maximum fine of $100 for speeding violations and makes no provision for multiple offenses. Kim Maxwell has been convicted for speeding on five occasions. The judge wants to fine him $250 this time to teach him a lesson. Can he do it? Why or why not?

(2.) Judge Thomas has a case before him involving an interpretation of the tribal law of disturbing the peace. Two years ago, before he became judge, the former judge had a case involving substantially the same facts and decided that the law did not apply. Should Judge Thomas follow that former decision? Why or why not?

(3.) Judge Yellowtail decided a case some time ago requiring that the defendant pay the plaintiff $250 which was owed on a bad debt. The judge now discovers that none of the money has been paid. What are the judge's obligations on the case? Is it a judge's duty to find out if his judgments are being satisfied?

(4.) Judge Williams has a case before his court which involves a section of the criminal code recently adopted by the tribal council. Some of the language can be interpreted two ways: one that would result in the defendant's conviction, the other in his release. What should the judge do to properly interpret this law?

(5.) In another jurisdiction they are having trouble selecting their judges. Over the years the judges have been appointed by the tribal council, but now the people object saying that the appointees have been relatives or friends of the council members and have not been competent judges. A citizens committee has asked your advice on methods of selection which might prove more effective. What would you suggest?

(6.) When the new criminal code was adopted last year, Judge Jackson objected to a provision requiring a mandatory jail sentence for certain offenses. He contends that probation can be more effective in some cases. A defendant has been convicted of one of those offenses in Judge Jackson's court. Can the judge place him on probation?

(7.) Two years ago Judge Bear interpreted a section of the criminal code in one way and convicted the defendant. He is convinced that he was wrong in his interpretation. Must he convict another defendant under the same circumstances or can he rule differently in this case?

Section 2. The Independence of the Judge

A. The Necessity for Independence

i. In General

As mentioned in the previous section on the role of the judge, an independent and honorable judiciary is essential to justice in the tribal community. In order for the tribal court to maintain its respect in the community, it is essential that each judge be free from political pressures and avoid even the appearance of impropriety. Because of these general principles there are certain rules of conduct which are designed to insure that the judge not only is impartial and proper in his

conduct, but that his conduct is free from doubt and suspicion. These rules are designed to preserve his independence as a judge and to insure that the people know that he is independent of outside influence. Whenever a judge is not independent--but is subject to some outside influence--he will be unable to decide the case correctly.

An incident which occurred during the Korean War is a good example of the importance of an independent judiciary. A nationwide strike had paralyzed the steel industry and President Truman decided to use federal troops to run the mills in order to keep them open. The owners of the steel mills appealed to the United States Supreme Court. In the famous case, Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579 (1952), the Supreme Court said that the President did not have the power under the Constitution to take such action. The judges on the Supreme Court, some of whom had been appointed to the Court by President Truman, did not simply give in to the wishes of the President nor were they influenced by the patriotic feelings of the nation. The case was decided according to the law. Such decisions are only possible where the judges are truly independent and where they possess great courage.

ii. The Problem

Anglo justice is based on the important precept of the independence of the judiciary. A tension exists in the Indian judiciary between duplicating non-Indian court systems and incorporating more concepts of Indian traditional justice subordinate to other branches of tribal government. And further,

the majority of Indian judges are appointed by tribal councils and serve at the pleasure of elected leaders, as previously discussed. A judge is rarely secure in his or her position because terms are usually short. This situation makes the judge highly susceptible to political influence and interference. The NAICJA Report presents the following problems concerning the judge's independence:

> There have been repeated instances of tribal leaders putting pressure upon an Indian court judge to rule a certain way, under an implied threat that the judge must comply or lose his/her job. Impeachments and recalls of judges are frequent. Such extreme actions are rare in non-Indian systems. There, individuals are elevated beyond their personal status to a position of respect; even when they make highly unpopular decisions, they are seldom targets for removal from office on that basis alone. The different treatment Indian judges receive is perhaps a by-product of Indians seeing them as part of a political system, rather than as independent officers charged with application and interpretation of the law. (p. 94)

iii. Recommendations

To remedy the problem of the tribal court's susceptibility to political influence, the NAICJA Report recommends the education of tribal councils and tribal government officials as to the nature and function of the Indian court. Tribal government officials must be made to realize that the tribal court ultimately defends the tribe's sovereignty.

> Establishment of Indian courts is still a recent phenomenon for many tribes; thus, they have only begun to assimilate the court into the workings of tribal government. Joint training sessions between council members and judges and increased community education are seen as methods to rectify the lack of knowledge about the court's functions. Information concerning the court's place in tribal government is also needed by the general tribal population. (p. 86)

The conflict in the role of the tribal court in the tribal government system between the demands of the non-Indian legal system and traditional Indian concepts of justice has already been mentioned. NAICJA reports that because most traditional Indian justice systems were an arm of the tribal council or chief, it is often difficult for tribal councils and tribal members to recognize the current need for independent status of the Indian judiciary to avert possible Indian Civil Rights Act and tribal political problems. The Report makes the following specific recommendations as to the place of the court in the tribal government structure:

1. The judicial branch should be independent of other parts of the tribal government whenever consistent with tribal custom and tradition.
   a. Independence of the tribal court as a decision making body in the tribal government should be expressed in the tribal constitution.
   b. If separation is not possible because of tradition, a judiciary subordinate to, for instance, the tribal council should be assured of independence in decision making in individual cases.
   c. Tradition should not be used as a means to hide the expression of influence in individual cases.
2. Judges of the tribe should have status and respect equal to other tribal officials. (p. 115)

The Model Code of Judicial Conduct for Indian Courts, a code setting forth standards of judicial conduct for tribal judges, also recommends the independence of the Indian judiciary through separation from other branches of tribal government. Canon I, "An Indian Court Judge Should Uphold the

Integrity and Independence of the Indian Judiciary," commands:

A. A judge should encourage and maintain a separation of function and power between the judicial branch and other branches of tribal government and should avoid any contact or assumption of duties which may violate such a separation of governmental powers.

B. A judge should not participate in legislative or executive decision making except where such participation is in accordance with the tradition of the tribe. If, in addition to his/her judicial duties, a judge serves on a tribal council or other such legislative body, special procedures should be implemented to avoid conflict of interest or the appearance of conflict of interest. Furthermore, where the combination of legislative, executive and judicial functions are based on tribal tradition, a person serving in the capacity of a judicial officer must insure fairness and due process for the protection of individual participants in tribal judicial proceedings.

Very few reservations have a separation of powers clause as part of the tribal constitution. If lacking, effort should be made to include such a clause in your tribal code. A tribal court should be perceived as a distinct part of tribal government by the Indian community. Independence includes financial independence from the other branches of government, independence in decision-making, freedom from undue influence, and preferably a physical separation of court facilities from the facilities for law enforcement or other branches of government. The NAICJA Report reiterates the need for an independent and impartial judiciary in the following recommendations:

1. Separation of powers should exist between the judicial branch and other branches of tribal government, and should be expressed in the tribal constitution.
2. The tribal judges shall avoid informal contacts with the law enforcement branch of the tribal government regarding judicial business.
3. The tribal judges shall avoid informal contacts with officials and offices of the Bureau of Indian Affairs, and other state and federal agencies regarding judicial business.
4. Judges shall avoid ex parte contacts; discussions with the judge shall be held only when all parties are present or represented.
5. Judges should disqualify themselves for reasons of bias, relationships, or interest in a case.
6. Solicitation of legal advice by tribal judges from lawyers, judges or other persons should be limited to points of law and hypotheticals, and there should be no discussion of the merits of a particular case. (p. 130-131)

Canon III of the Model Code of Judicial Conduct for Indian Courts, "An Indian Court Judge Should Perform The Duties Of The Office Impartially And Diligently," echoes the NAICJA Report recommendations:

> An Indian Court judge should adhere to the laws, customs and traditions of the tribe. He/she should be unswayed by partisan interests, public clamor, political pressure, or fear of criticism, and should resist undue influences on the court by other tribal officials, governmental officials or any others attempting to improperly influence the court.

In sum, the independence and integrity of judges in Indian courts can be insured, and their susceptibility to political pressure reduced, in several ways. The NAICJA recommendations as to selection, tenure, and removal should be followed. A commitment to high standards of independence for the judiciary must be made by both judges and tribal leaders. Programs of community education can improve attitudes of people in the Indian community and promote a better understanding of the role of the Indian court. And most importantly, as the NAICJA Report suggests, "If the Indian judiciary incorporates more

concepts of Indian traditional justice and locally held values, rather than automatically replicating non-Indian systems, it should increase overall respect for the Indian judiciary." (p. 95)

B. Personal Independence

The personal independence of the Indian court judge is also related to his professional independence just discussed. But pressures on personal independence originate from the judge's personal background in terms of business and political relationships existing before, during, and after becoming a judge.

i. Private Law Practice

In some courts, particularly the larger ones, the judges may be lawyers who were in private practice before they became judges. Most part-time judges who are also lawyers retain their private practice while they are on the bench. This is not a good situation, but there may be no alternative if the case load is too small to justify a full time judge, or if funds are not available to pay the lawyer's full salary. Where full-time judges are hired, they should, by tribal ordinance, be prohibited from practicing law. Even where a judge is not prevented by law from engaging in private practice, many ethical problems arise. It is obvious that a judge cannot be both judge and attorney in the same case. If he represents or has ever represented a party in a suit before him, he must disqualify himself. The rules of judicial ethics prohibit a judge from practicing in the same court where he sits as judge, even if another person is acting as judge at the time. In areas

where there are not enough lawyers, this rule may have to be relaxed somewhat. Nevertheless, a judge should practice in his own court only as a last resort when there is no other way for the client to obtain representation.

Some tribes use their tribal attorneys as tribal judges either regularly or only in special cases such as where there is a lot of money involved or where there will be a long jury trial. Such a procedure is not recommended because it impairs the independence of the judge. After all, the tribal attorney is generally appointed by the tribal council and can be fired by the council. Suppose the council is being sued or one of the council members is involved in the suit; can the tribal attorney now sitting as tribal judge render a fair and impartial decision? Equally important, how will a decision in favor of the councilmember look to the other parties and the rest of the community?

If an attorney is to be employed to serve as a part time judge or to handle certain kinds of cases, it should not be the tribal attorney or any other attorney who practices law on or near the reservation. It would be best to try to find a retired judge, or lawyer for the job. He should be someone who is completely independent from local pressure and influence.

ii. Politics and Candidacy for Office

As a general rule, judges should not engage in active politics. If they do, some people may think that the judge is using his judicial office for some political reason. A judge must decide cases on the merits and according to the law, not

according to political preferences. A judge's independence is threatened whenever he actively takes part in politics.

A judge may still have his own political preferences. However, there is a difference between acting as a private citizen in a private way and taking an active and public role in political controversy. It is this active and public role which is harmful to the court and should be avoided.

For example, it is improper for a judge to be an officer in a political party. It is also improper for a judge to give public support to a candidate for political office or to make a major contribution to his campaign fund. The judge should also discourage members of his court staff from engaging in local politics. Since the court staff is so closely associated with the court, political activity will be harmful to the judge and the court itself. All members of a judge's immediate family should avoid active involvement in politics so that it will not seem that the judge is using them as a front for his own political involvement.

Because a judge is a leader in his community, it is natural that some judges will want to run for other political offices. However, before announcing his candidacy, a judge must resign from his judicial office. Even though he continued to be fair and impartial, a judge would have little credibility if he continued to decide cases while campaigning for elective office. It is proper, however, for a judge to retain his office while he runs for <u>another judicial</u> office.

Whenever a person campaigns for a judicial office, it is

improper for him to announce in advance how he would decide a particular case which might come before him. He should not make any promises concerning decisions he may have to make while serving as judge. A candidate for judge may describe his general judicial philosophy, but he cannot decide cases in advance.

If a judge runs for another political office, even another judicial office, he cannot have the title "judge" used on the ballot since in doing so he would be improperly "using" his position as a judge to further his personal ambitions.

iii. <u>Private Business Associations</u>

The same general rule applies to a judge's business associations; he may not use his position for his own personal gain, nor enter into business relations which might affect his independent judgment. Therefore it is improper for a judge to own or run businesses which are likely to be involved in litigation before his court. If he owns such a business before taking office as judge, he should sell it within a reasonable time.

Consider the case of a judge who is part owner of a grocery store which extends credit to its customers. Because of the credit agreements, the store will often file civil suits in the tribal court to recover bad debts. It would be improper for a judge in these circumstances to retain his interest in the business. He would have to sell out within a reasonable time.

Sometimes in the course of litigation, the judge and the members of the court staff come across information about a

business which could be used to their own personal gain. It is unethical for a judge or any court employee to make use of information which he learns through court proceedings. For example, it might be necessary in some cases for a judge to examine the records of a business. If the judge were to discover that the business was deeply in debt he could not use that information and offer to buy out the owner. Again, the judge is prevented from taking unfair advantage of his position as an officer of the court for his own personal gain.

A judge may not use his office to promote a particular business or even a charitable organization. He should not actively solicit funds for charities such as church groups. This does not prevent him from being actively involved in the affairs of such groups. What is prevented is the using of the judicial office to recruit funds for a particular group. The reason for this prohibition is that the prestige of the office should not be used for the gain of a private organization even though it may be a worthwhile cause. Persons might also think, rightly or wrongly, that they can gain the judge's favor by contributing to the church or other agency he supports. This will create the impression that "justice" can be bought by making a large donation--an impression which will destroy the reputation of the court.

A full-time judge should not be an officer or director of a bank or any profit-making organization. He may be an officer or director of a professional or other non-profit organization such as the National American Indian Court Judges Association.

Where the judge is employed on a part-time basis, he may take part in some business activities. Naturally the judge can not be expected to give up his primary source of income merely because he has agreed to serve as judge one day a week. He may be placed in a difficult ethical position, however, particularly if he has to decide important civil cases. The general principle that no judge--full or part-time--may use the office for his own gain must guide the conduct of the judge who retains his own business while serving as a part-time judge. Where there is a conflict, real or apparent, the judge should step down and ask that another judge be appointed to hear the particular case which creates the conflict.

C. Outside Influences

i. Special Interest Groups

As already discussed, almost any judge will, at one time or another, have certain pressures brought to bear on his decision. He may have to decide a case which involves an unpopular defendant or a large number of people. In such cases it will be difficult for the judge to retain his independent judgment. If he is elected, he is under pressure by the electorate to decide the case in the way the majority of voters would like to see it decided. He may have the unpleasant duty to insure the proper treatment of a defendant accused of a particularly atrocious crime well known to the community, or he may have to see that a prominent citizen does not receive special treatment because of his popularity.

In all of these cases the judge has to retain his indepen-

dence. The only defenses he has against the special interest groups trying to persuade him to decide the case in a particular way are the law and his own personal courage. Certain aspects of government are subject to majority rule in a democracy. Justice is not. The only majority that counts is the jury's. Public criticism, fear of losing an election, or personal preferences are not factors which should influence the judge's decision. The judge is sworn to uphold the law--not the interest of a particular group, no matter how large or influential the group is.

ii. Gifts

As has been mentioned before, a judge must avoid even the appearance of improper conduct. No one would deny that it is wrong for a judge to accept a bribe, a payment to influence his decision. Some might think that accepting a small gift could do no harm. A judge might accept a gift from a friend who also happens to be involved in litigation in the judge's court. There may be nothing wrong with the gift, but it will appear to others that the friend is trying to buy the judge's decision. This is why it is always improper for a judge to accept a gift, no matter how small, from a lawyer or from a person who is involved in litigation before the court, or even from a person who is likely to be involved in such litigation. It makes no difference that these gifts are of little value or are given for a particular occasion such as a birthday.

The problem is even more difficult in a very small community where most of the people are friends or relatives of the judge.

It is not necessary for the judge to give up his friendships to become judge. What the judge must keep in mind is that once he accepts a position on the bench, his friends and acquaintances must treat him a little differently. If there is a likelihood that a gift will appear to be a purchase of a favor from the judge, then he must refuse it. If the situation is explained to the friend, he will understand why his gift cannot be accepted. It will be easier to explain this to the friend, than it will be to explain the appearance of unethical conduct to the community. In the rare instance where the judge decides that he can accept a gift from an old friend or relative, he should take great care that the gift is not more costly than those he has received in the past.

If it is necessary that the judge run for his office, it is proper for him to accept legitimate campaign contributions, even from lawyers. Where it is possible, the contributions should be made to the judge's election committee rather than to the judge himself. In this way it is obvious that the money is being used to help elect or reelect the judge, not to buy future favors.

iii. Disclosure

A judge may avoid the appearance of accepting an improper gift or being involved in an unethical business relationship by disclosing his outside sources of income. Disclosure may be required by the Tribal Council, or it may be a policy established by the Tribal Court. The disclosure should include a statement of all outside income, investments and gifts and

should be available for inspection by all parties and attorneys who come before the court. Filing the statement with the clerk would provide this ready availability.

Some disclosure systems require that the judge report outside income, investments or gifts only if they exceed a certain dollar amount. This procedure might still leave the judge open to criticism of partiality and, even if the law does not require full disclosure, it would be advisable for the judge to make all the information available to those before the court and let them decide whether they should attempt to disqualify the judge because of his outside interests.

Since the clerk of court also holds an important judicial position, he or she should also make the same disclosure required of the judge.

iv. Relatives

Whenever a close relative, for example a child, brother or sister of a judge, is involved in litigation before his court, the judge should always disqualify himself. If another judge is readily available, a judge should consider disqualifying himself if he is related by blood or marriage to any of the parties. He should advise the parties of the relationship and ask them if they want a different judge.

In small communities where everyone is related to everyone else, some arrangements should be made to have a substitute judge from a nearby community available to replace the local judge. This must be done where the members of the judge's immediate family are involved in the law suit. If the judge

himself decides the case he may be either too lenient, or more likely, too strict on the members of his own family. It is not right for the judge to appear to have been too lenient because he was influenced by the family relationship. Neither is it fair to the members of the judge's family to receive harsher treatment merely because they are relatives.

D. Disqualification

Federal law requires a federal judge to disqualify himself "in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal or other proceeding therein." 28 U.S.C. § 455. This law places the burden on the judge to decide whether to excuse himself or to decide the case. His duty is two-fold: he has a duty to excuse himself where there is a conflict of interest, but he also has a duty to take all cases assigned to him. He must balance them both--he can not excuse himself from all difficult cases just because he knows some of the parties or is distantly related to them. This federal rule is very practical because the judge's decision is subject to appellate review. The decision will often be difficult; the following test may be helpful:

> A judge should recuse (disqualify) himself if he is conscious of any bias or prejudice. A recusal is in order if circumstances exist that would tend to impair the confidence of the public and the parties in the integrity of the court, or any fact or circumstance exists which may later bring into question an accusation of bias or prejudice on the part of the judge.

Criser, Judicial Ethics--Recusal--Financial Disclosure, 55 F.R.D. 95, 97 (1972).

A judge should never disqualify himself merely to get out of work or to avoid having to decide a difficult or controversial case. On the other hand, he must disqualify himself, regardless of any inconvenience to court, if he is not absolutely certain that he can decide the case fairly and impartially or where circumstances exist which would make it appear that he could not do so.

E. Relationships with Parties and Their Attorneys

Not only is it important for the judge to maintain his independence outside of court, he must avoid improper relationships in court as well. A polite distance must be maintained between parties and their attorneys and the judge. Even though the judge is completely impartial in his decisions, suspicion will be aroused if he is too friendly with one of the parties or one of the attorneys involved in a case before him.

A court session is not the place to socialize with friends. The judge and the parties must maintain proper court room decorum and stick to business. A judge should not allow others to refer to him by his first name in court, nor should he refer to the parties or their attorneys by their first names. A judge can use first names with young witnesses or older persons. He must avoid the appearance of favoritism by using first names. While he is acting in his official capacity he must be addressed by his official title. If the court recesses during the day, the judge and parties should maintain their respective

roles during the recess. A judge should not have lunch or even coffee with one of the parties or one of the attorneys during a case. He should avoid private discussion in chambers unless both sides are present.

Judicial ethics do not require that the judge give up former friends, nor that he be anti-social. However, when he is in court he functions as a judge, not as a friend. The only way he can perform his judicial duties properly is to maintain some degree of judicial decorum.

F. Questions

1. Judge Jones has been asked by Joe Green, an old and trusted friend, to support his candidacy for Tribal Council. How much "support" can Judge Jones give to his old friend?

2. Judge Smith used to be half owner of the Ford dealership in his local community, but he sold his interest when he became judge. Now Mr. Ray is suing the Ford dealership in the judge's court. Must the judge disqualify himself?

3. Mr. Norbert is an old friend of Judge Smith. He has never been in trouble and has no business dealings. Can the judge accept a Christmas present from Mr. Norbert?

4. Mr. Norbert has been sued by Mrs. Williams because she fell on his sidewalk and broke her arm. The case has been assigned to Judge Smith. Can the judge accept the Christmas present from Mr. Norbert?

5. There are two judges in local court. The first cousin of one of the judges is being tried for drunk driving. Should the judge hear the case?

6. The local chapter of the American Cancer Society has asked Judge Williams to be chairman of the annual fund drive in his community. Can he accept? Can he use court stationary to solicit donations?

7. Judge Defoe wants to run for Council chairman, but doesn't

think he will win. Can he continue to serve as judge until the election is over?

8. Judge Lone Wolf wants to buy a ranch. He knows that Bill Smith is thinking about selling his ranch, but Smith is being sued in the judge's court. Can the judge still offer to buy the ranch?

Section 3. The Personal Qualities of the Judge

A. Qualifications

i. Competence

The important role that the judge plays in his community requires him to develop certain personal qualities beyond those expected of the average citizen. It is not enough to be a "good guy" or an "honest man." The administration of justice demands more.

Every job requires certain knowledge and ability. These words may broadly be described as "competence." Whether the occupation is business, farming, or serving as a judge, there is simply no substitute for competence. A judge must know what the law is so that he can protect the rights of those before him. A judge without understanding of the law is like a doctor who knows nothing about the human body--both can do more harm than good.

This is not to say all judges have to be lawyers or have extensive formal legal training. In some courts the type of cases heard is limited by law or custom. However, the man who decides cases involving serious crimes or large civil suits must have more legal training than one whose court hears only traffic offenses. The judge's understanding of the law must be equal to the case before him. If it is not, he is likely

to be swayed by the ability of the attorneys or lay representatives appearing before him. In such a case, justice is not served, for it must be the judge--not the lawyers--who decides what the law is and how it should be applied.

In England, Magistrates or Justices of the Peace handle the same type of criminal cases as do tribal judges. Although it carries no salary, an appointment as a Justice of the Peace is a great honor. Most Justices of the Peace are not lawyers and have no formal legal training. However in England the clerks in these courts are lawyers and serve as legal advisors to the judges. A similar procedure is now used by several Indian tribes which have hired a lawyer as a legal advisor to the Tribal judges. In this way the tribe can insure that applicable legal rules and procedures are being followed but that the actual decisions are being made by Indian judges and not non-Indian lawyers.

A part of judicial competence includes being able to take command of the court situation. Rarely is the judge a passive arbiter or mediator of a dispute. Most of the time he has to take an active role in controlling the course of the proceedings so that the rights of all parties will be protected. For example, in the questioning of witnesses, the judge has to see that the questions pertain to the facts in issue. He cannot allow the questioner to delay the trial or harass the witness. The judge must also maintain order in the court room so that the trial may progress smoothly. As one federal court has recently emphasized:

> The court room is something more than an arena and the trial judge is something more than a referee. Trial counsel should be permitted, within proper bounds, to try his case his own way. While the advocate has the privilege of putting his client's best foot forward, the trial judge has the right and may have a duty to see that there is no stepping out of line. Anderson v. Louisiana & Arkansas Railroad Co., 457 F.2d 784, 785 (5th Cir. 1972).

Unless the judge has the ability to control his court, he will be an ineffective judge, even though he may have great legal ability and knowledge.

ii. Continuing Education

A judge may come to the bench without any formal legal training. While such training may not have been necessary for his appointment or election, some legal training will certainly be necessary if he is to perform his judicial duties properly. A program of continuing legal education is a must for all judges, regardless of whether or not he is a lawyer. The Federal Judicial Center in Washington, D.C. was established several years ago to train new federal judges and to continue formal training for more experienced judges. The legal study engaged in by the judge may be as informal as his own reading about changes in the law. Or it may be formal course work or a training program for judges. Whatever the source of his learning, a judge has to keep up with his profession. The law is always changing. A single legislative act or a United States Supreme Court decision may change the rights of the parties before the court. This has happened frequently in the last twenty years, and there is no indication that the pattern of change will stop.

In order to keep up with legal happenings, most judges find

it helpful to belong to a professional association. These groups of judges have as their purpose the betterment of the judiciary, and the education of their members. The National American Indian Court Judges Association (NAICJA) is a good example of this type of organization. Its functions are geared specifically to the needs of tribal courts, and its programs are aimed at the continued improvement of the quality of justice in tribal court. Tribal judges should also consider becoming members of the Judicial Administration Division of the American Bar Association. Judges who are not lawyers may become associate members of the American Bar Association. (Address: American Bar Association, 1155 East 60th Street, Chicago, Ill. 60637).

B. Conduct

i. The Appearance of Impropriety

The social conduct of a judge is dictated to some extent by his status in the community. As a part of the judicial system in his jurisdiction, the judge has an obligation to instill confidence in that system. Any conduct which might appear to be improper or illegal will have a detrimental effect, not only on the judge, but on the entire tribal court.

Judicial ethics or norms of conduct require that the judge avoid not only those situations which are improper, but also situations which may appear improper. The judge may not be able to explain his conduct to an observer, so that even though there may be nothing wrong with the judge's actions, they still may appear wrong.

For example, it is improper for a judge to accept a loan from a party before his court or an attorney who is involved in litigation before the court. Even though accepting such a loan may not influence the judge's decision, it may appear to others, particularly other parties in the lawsuit, that the judge is acting improperly in accepting the money. In the same way, a judge should not agree to hear a case which involves a business in which he is a partner or investor. Nor should he hear a case involving a close friend or relative. He may have to excuse or disqualify himself and have the case assigned to another judge even if one has to be appointed for the occasion. A judge will frequently have control over money which comes into the court as a bond or a fine. He must see that court funds are kept separate from his own. Separate bank accounts, proper marking of the funds, and complete records are necessary in order to avoid any appearance that the judge is mixing court funds in with his own. Even though the judge is not using the funds improperly, the appearance of improper conduct must also be avoided.

After leaving the office of judge, a man may be offered a job with a company or person who had been involved in litigation in his court. If he accepts such a job, he is leaving himself open to the criticism that his decision in the case had been influenced by the job offer. Therefore it is improper for the judge to accept such an offer.

For most people it is enough that they conduct their affairs within the law. That is not enough for a judge. Even though

his conduct may be legally and morally correct, he violates judicial standards if his conduct appears to be improper. These standards will be discussed in the following section.

ii. Social Relationships

It is not necessary that a judge withdraw from society in order to be impartial. On the contrary, it is important that he take an active role in the affairs of his community. What is required is that his social life be conducted so that he does not create the impression that he is engaging in improper activities which might influence his decisions or that he is using his judicial office to improve his social or financial position. If a judge releases a defendant one day and the next day they are seen together in the local tavern, his impartial role as a judge will certainly be questionned.

A judge should be moderate in his conduct and public activity. If the judge is loud or raucus in public he is bound to offend some members of the community and lose their confidence. It will be difficult for them to see how a man can be extreme in his personal conduct while being wise and fair to all parties when he is in court.

This places additional pressure on a judge who has an emotional temperament. He cannot pass off his obligations to his office by saying that "they will have to accept me as I am." He has accepted the office and he must make the necessary adjustments in his personal life. The working day of the judge may last for only eight hours, but the task of representing justice and fairness in the community will follow him the rest

of the day and night.

An important part of moderation is patience in dealing with others. It is not easy to be patient when those before the court are losing their composure. It is not easy to be patient when the same point has to be explained for the third time. Much of a judge's day is filled with human problems which dramatize the weak side of human nature. If the judge is unable to be patient and understanding with the weakness of those before him he will be in for a very frustrating judicial career. Since patience comes only with understanding the other person's point of view, however wrong it may seem, the judge should make every effort to put himself in the other man's shoes.

C. Courtesy

i. In the Court

One of the greatest qualities which should be found in every judge is courtesy. He is the servant of the people. Harsh or rude treatment will send people away from the court feeling bitter and cheated. A judge must never forget that the court exists for the litigants, not for him. It is not, strictly speaking, his court. He presides over the court which belongs to the people. A proper understanding of the court and his function will aid the judge in his relations with those who come before him. Even though he is a leader, the judge is first of all a public servant.

Attorneys and witnesses in court are entitled to courteous treatment. The judge may disagree with the approach taken by

an attorney or other person representing a party in court. It is not a part of the judge's function to ridicule the attorney or to be discourteous merely because the judge does not agree with his methods. But the judge should not tolerate any discourtesy in his court room even if it means clearing the court of all spectators or holding a party or his attorney in contempt of court. A judge's courtesy and tolerance are particularly needed when those involved are young or inexperienced.

There are times when a judge may disagree with the verdict reached by a jury. In these instances it is proper for him to tell the jury of his disagreement in a polite and dignified manner. However, he should not indicate that the jury is stupid or incompetent. Since the judge has the right to demand courteous treatment from all those in the court, he must likewise be courteous to all before him.

Part of judicial courtesy is being attentive to the court proceedings. In long cases which involve complex issues, that may be difficult. The only way the judge can properly discharge his duties in court is to understand fully all the issues which are before him. He must give each case his full attention.

ii. Promptness

In order to have a court run smoothly it is necessary that all the parties to the action be at the right place at the right time. This often requires coordinating the presence of the litigants, witnesses, the jury, attorneys, and the court

personnel. Obviously delay on the part of one of the participants will cause wasted time by all others. The judge is the one who must insure the promptness of all participants. If he is going to demand that everyone else be on time, he must be on time himself. Continual or unnecessary tardiness will be seen by others as an indication of the judge's poor attitude and lack of interest. Their respect for him and their confidence in his decisions will be weakened. A punctual judge is a must for a well-run court.

D. Industry and Organization

It is often said that "justice delayed is justice denied." With many courts there is no problem getting a prompt hearing of a case. With others the case load is considerably greater, and it is much more difficult. There is one guarantee of slow justice--a slow judge. Because of the independence most judges have in running their court calendars, it is possible for a judge to delay hearing cases for his own personal convenience. Judicial ethics require the judge to be diligent and not to take time off when there are cases to be heard.

In order for the judge to function properly in a court where the case load is great, it is necessary that he keep careful watch over the court schedule. If the court is properly administered cases will be heard quickly. Just as the judge must be industrious himself he must see that the clerks and other court personnel are doing their jobs properly.

In jurisdictions where there is more than one judge, they must cooperate with each other, particularly with respect to

the use of court facilities and personnel. Where the judges fail to adequately coordinate their work there will be much wasted time, unnecessary delays and an inefficient use of the court facilities. A judge who maintains a proper court organization can insure that cases are speedily and efficiently handled.

E. Impartiality

All of the characteristics described above are important ones for everyone to develop. The feature which distinguishes the judge is that he/she must, above all, be impartial in his/her decisions. Others may be swayed by personal likes and dislikes. The judge may not. His job requires that he give a fair hearing to all sides of a question, no matter how he may feel personally about it. This does not mean that the judge can have no personal opinions on important local issues. This would be impossible. But he cannot let his personal opinions control. It is the law which must rule the case.

Many of the rules of judicial conduct deal specifically with the independence and impartiality which must characterize the judge's actions. It is because impartiality is so difficult to measure that the rules of judicial ethics attempt to define what may and may not be done. It is often easier to be an advocate or attorney championing a cause than to be the judge who must set aside personal feelings to hear impartially all sides of the question.

F. Courage

All of the important personal qualities mentioned in this lesson will come to nothing unless a judge has the personal courage to maintain high standards in his conduct and action. It is hard enough to develop qualities of personal integrity and industry. It is even more difficult to maintain them when pressure is brought to bear against the judge. The right decision may often be a very unpopular one. Without courage, the judge will be swept with the winds of public opinion or kept under the influence of outside pressures. What is needed is a judge with high personal standards and the courage to uphold them.

G. Questions

(1.) A nearby tribal council is revising its procedures for the selection of judges. Because of your experience as a judge, they have asked you to help them by drawing up a list of qualifications which they can use in their selection process. What qualifications do you think are most important?

(2.) James Bailey has just been selected as tribal judge for a local tribal court. While he finished two years of college, he has had no formal legal training. He has come to you for advice as to how he should prepare himself for judicial duty. What will you tell him?

(3.) After retiring from the bench, Judge Bartlett was offered a job as assistant manager in the local supermarket. The judge had once been in the grocery business before assuming duties as judge. During the ten years that the judge was on the bench, the supermarket had been involved in court action to collect debts at least once every month. What should the judge consider in making his decision about accepting the job?

(4.) The local banker has been charged with reckless driving in Judge Eagle's court. Before the trial the judge's wife becomes seriously sick and has to have an operation which will cost the judge a great deal of money. Can the judge go to the banker to get a loan? What problems might arise if he does?

(5.) Your court budget includes expenses for such things as books, instructional magazines, and travel to Judge's meetings. Several members of the tribal council are interested in cutting down on expenditures. They feel that all a judge has to do is to listen to both sides of a case and make a decision. They do not like the idea of a judge studying on their money. What would you say in response to them?

Section 4. The Judge and the Court

A. Facilities and Staff

i. Insuring Proper Facilities

Although the chief judge is primarily responsible for his court's facilities and its staff, the responsibility should be shared by all other judges whether they are full-time or part-time officers of the tribal court. The previous sections have emphasized the way in which a judge should conduct himself so that he presents a proper image as the representative of justice in his community. The same holds true for the courtroom itself. It should add to the dignity and solemnity of the proceedings of court. The tribal courtroom should be set aside for the dispensing of justice and should not be used for any other purpose. Even if located in the tribal jail or law and order building, the courtroom must never be used by the tribal police as a "booking" or interrogation room. If the courtroom is used even occasionally by the tribal police, many defendants will think the tribal court is a part of the tribal police department and that they cannot possibly receive a fair trial.

Although the larger and more established tribal courts may not face the problem of not having their own courtroom, their facilities may still not be adequate. They might not have enough courtrooms or the courtrooms might be too small to handle the participants and spectators adequately. Each tribal judge should make every effort to see that his courtroom is adequate in size and furnishings to make a suitable setting for the determination of the rights of the citizens of the community. The courtroom must be kept clean and orderly at all times. The lighting should be bright enough to allow the participants to read documents without eye strain. The room should not be too bleak or too comfortable--it is not a jail, nor is it a club room. The courtroom should, as should the judge's tone and demeanor, reflect a sense of importance and dignity.

Tribal judges, like all other judges, will find that the funds for their courts are inadequate. (The Chief Justice of the United States has recently severely criticized Congress for spending far too little money on the Federal courts.) Each tribal judge must make his needs known to those who furnish the money, usually the council or the BIA. He should encourage members of the council and the Superintendant to visit the court frequently and to compare its facilities with those of neighboring state courts. The judge's duty is to educate his community to the needs of the court and the necessity of having a properly furnished courtroom.

The NAICJA Report makes the following recommendations as to the facilities of the Indian court:

A. Judicial control over facilities and personnel.
   1. The tribal court shall have full control and authority over its facilities and personnel, without interference by other arms of the tribal government.
   2. The tribal court should have authority over all funds allocated for court purposes.
   3. Control over all operations of the tribal court should be in the hands of the chief judge or a court administrator under authority delegated by the chief judge.

B. Courtrooms.
   1. Courtrooms shall be located where they are convenient to most of the tribal population.
      a. If the caseload merits, court branches should exist full-time in different areas of the reservation.
      b. If the caseload is small but distances are great, court branches that can be visited on a regular basis should be set up.
   2. A full-time court shall include the following, although several facilities may be combined depending on court needs:
      a. A courtroom.
      b. A special area for the jury.
      c. A special area for witnesses.
      d. Judge's chambers for each judge.
      e. Jury deliberation room.
      f. Offices for court clerks.
      g. Offices for support personnel.
      h. A recording system.
      i. Law library research room.
      j. Filing system.
      k. Typewriters and other necessary equipment. (p. 139)

Again, not all tribal courts will have the need nor the funding for all the above-mentioned facilities. But these NAICJA recommendations may serve as a reference point in approaching funding sources.

ii. Personnel and Staff Training

The number of people required to assist the judge will vary with the size of the court and the number of cases to be heard. In larger courts there may be at least two persons who serve on a full-time basis: the clerk and the bailiff. These people assist the judges in the performance of their duties and each judge, and particularly the chief judge, is responsible for their performance. For this reason, the clerk and other court personnel should be selected by the tribal judges and not by the tribal council.

The Clerk. The basic job of the clerk is to assist the judge with the administrative work that must be done. The clerk's major function is to maintain the court's records and files. In some courts the clerk may also be the judge's secretary and may type his letters and orders. Also in the small tribal courts, the clerk may serve as the courtroom recorder and keep a record of everything that takes place in the courtroom. In larger courts this job is usually performed by a deputy clerk, sometimes called a courtroom deputy. Deputy clerks should be selected either by the clerk of court or by the chief judge.

The clerk of court may, where permitted by local rule or custom, perform other important administrative functions. (This may be necessary where a judge is very busy and does not have time for simple procedural or administrative matters.) For example, the clerk can rule on motions for extensions of time and may grant continuances. The clerk may enter a default

judgment where the defendant has not answered the complaint within the time permitted by tribal ordinances or court rules. The United States Supreme Court has recently held that court clerks could issue arrest warrants and search warrants provided that the clerk is "neutral" and "capable of determining whether probable cause exists for the requested arrest or search." Shadwick v. City of Tampa, 407 U.S. 345, 350 (1972). Thus the clerk, if used to his or her fullest capacity, can be a very important member of the tribal court and can help the judge in many important ways.

The Bailiff. The bailiff serves as the protector and custodian of the court. He assists the judge in maintaining order in the courtroom; he insures that the jury is able to deliberate without outside influence; he maintains custody of the defendants while they are in court and has custody over any exhibits or evidence used in the trial. In general he is responsible for the orderly management of the facilities and the persons in the courtroom. The bailiff may be a tribal police officer who is assigned either permanently or temporarily to the court. He may also be used to serve summons and other court papers on parties and witnesses.

The NAICJA Report makes the following recommendations as to the personnel needs of small, medium and large Indian courts:

> The recommended positions and numbers should provide an adequate staff for court operations. However, as individual tribes identify their actual court needs, they may call for different or additional personnel.
> The basic staffing patterns used here are predicated solely on the number of cases handled annually. They

assume an even distribution of cases throughout the year and a high number of guilty plea dispositions. The sizes of court staffs needed in practice will vary based upon:

- caseload
- nature of cases handled
- number of cases resolved short of a full trial (such as by guilty plea, mediation, etc.)
- number of jury trials
- number of appeals
- land area
- distance
- physical limitations of facilities

The most important ingredient of a good court system is its staff. . . Some guidelines follow for basic court staffing.

Small courts (under 1,000 cases/year)

judge
associate judges (part-time)
clerk
prosecutor
defender (part-time)
probation/parole officer (one-half time)

Medium courts (1,000-3,000 cases/year)

chief judge
associate judges (full and/or part-time)
chief clerk
deputy clerk
prosecutor
defender (part-time)
probation/parole officer

Large courts 3,000+ cases/year)

chief judge
associate judge for each 2,000 cases over 1,000 cases/year
court administrator
chief clerk
deputy clerk for each branch court or each 3,000 cases/year over 2,000/year
secretary for each 3 full-time judges
2 prosecutors plus 1 additional prosecutor for each 3,000 criminal cases/year in excess of 5,000
defender plus 1 additional defender for each 3,000 criminal cases/year in excess of 5,000
2 probation/parole officers plus 1 additional officer for each 3,000 criminal cases/year in excess of 3,000 (p. 166, 167)

The court staff has a great deal of responsibility. While the judges should not dominate it's work, they should nevertheless insure that the staff performs their functions in a competent and dignified manner. Their work reflects on the court itself. Since they have an important part to play in the court proceedings the member of the court staff must be as impartial as are the judges. They must treat all matters before the court with proper confidentiality.

The larger the court the greater will be the demands placed on the court personnel. The chief judge should take care in their initial selection to see that they have the skills and personality suited to their job. Time must be allowed for training programs which are available to help improve their skills. If one of the members of the staff is going to leave, the judge must hire a replacement far enough ahead so that there is sufficient time for the training of the replacement.

All of the judges have a responsibility to establish good working relationships with the court personnel. Each judge should take time to learn what their problems are and to assist the staff if he is able. The Chief Judge must see that the staff is working to keep the court current with its cases, but he must also make sure that they are not overworked. Competent court personnel with the support of the tribal judges can do much to create a court which is efficient and professional in the administration of justice.

B. Court Rules

A court must have its own rules of procedure. They need

not be complicated nor must they be written, but there must be a set of "ground rules" which govern the course of the proceedings in the court. A court which has no rules to govern its procedure will be disorderly and cumbersome. Whenever possible the rules should be written so that everyone who appears before the court will know what is expected of him. This is particularly necessary when attorneys come before the court on an irregular basis, and when complex matters are to be heard. While court rules may take some time to compose, a good set of rules will save a lot of time in the long run.

And further, according to the NAICJA Report, court procedures are important to insure the effective operation of the court and to help make tribal courts "courts of record." Clear and concise rules of procedure are needed to prevent reviews under the Indian Civil Rights Act in federal courts, to promote orderly and efficient proceedings, and to preserve Indian governmental autonomy. The goal of protection of individual rights in the court should be achieved by maintaining unique Indian traditions and heritage in harmony with the establishment of such individual rights. Model rules of courtroom procedure should be developed which can be incorporated into tribal codes with the primary purpose to protect individuals from arbitrary tribal action. The NAICJA Report specifically recommends written courtroom procedures in the following areas:

1. Traditional ways that reflect the Indianness of the court.
2. Arraignment procedures and pretrial conferences.

3. Requirements for practice before the court.
4. Rules of evidence.
5. Motions.
6. Courtroom procedure.
7. Verdicts.
8. Procedures for sentencing or other dispositions.
9. Provisions for written decisions or case summaries. (p. 117)

Other general areas for rules might include the procedure to be used in filing pleadings with the court; the method to be followed to give the opposing party notice of the action against him; the procedure to be used when exhibits are needed during trial; and how a jury might be selected.

C. Judicial Opinions

Most of the time the trial judge merely decides the merits of a case and which party wins. However, where the matter is complex or where important issues are involved, it may be necessary or at least desirable for the judge to give reasons for his decision. This decision, sometimes referred to as a judicial opinion, may be given orally in court or in writing.

The judge's reasons for his decision may not only be important to the parties, they may be important to other judges. If the judge's decision is subject to an appeal to a higher tribal court, or is attacked in federal court, his opinion assists the reviewing court in determining whether his decision was right or wrong.

There is no particular form which a judge must follow in giving an opinion. He may present his views in any way which he feels will satisfactorily explain his reasons for the

decision. Most opinions include the following items: (1) a brief description of the law suit; (2) the facts which the judge thought were most important; (3) the issues raised by the parties or by the court itself; (4) the law (state, federal, or tribal) which he intends to apply; (5) how the law can be applied to the facts in this case; and (6) the final determination of the case.

If the judge's decision is announced at the end of the proceeding, he might consider assigning the writing of an opinion to the winning party. This opinion would then be submitted subject to the court's review and satisfaction.

D. Judicial Immunity

Under traditional doctrines of Anglo-American law, judges and other court personnel are protected by judicial immunity. Stated simply, immunity means a judge cannot be sued for mistakes he makes.

Judges are granted immunity not because they are above the law. They are subject to the law just as everyone else. Immunity is given in order to protect the office of the judge and to protect the judge from being subject to personal liability because of innocent mistakes he may make in carrying out his duties. The custom of immunity grew up because it was felt that it would be unfair to expect a person to hold an office with all the power of the judiciary, and then to blame him when he makes an innocent mistake in using the power. Immunity is thus designed to protect the independent decision of the judge.

The judicial privilege of immunity protects the judge from civil liability for errors or mistakes he might make when discharging his office. In other words, if a judge makes a mistake and finds an innocent man guilty, the innocent man cannot later come back to sue the judge for damages because of the mistake. The privilege may even extend to cases where the judge deliberately violated a person's rights, but usually does not apply if the judge knows he does not have jurisdiction.

When other officers of the court, the clerk, the tribal prosecutor or public defender, are acting in their official capacity, they are serving as "quasi-judicial officers," and are also protected by the doctrine of judicial immunity from civil liability for errors they make in the course of their official duties.

Judicial immunity is not designed as a shield to protect incompetent judges. Its purpose is to allow the judge to perform his function with complete independence and objectivity. If a judge was threatened with a civil suit every time he made a decision in a case, he would find it very difficult to perform his job and would be subject to extreme pressure. It is just this type of pressure that the immunity principle is designed to prevent. A strong code of judicial ethics guarantees that the judge will carry out his duties fairly and impartially. An impartial judicial selection and review board should be established to protect the public from judges who intentionally abuse their office.

E. Questions

(1.) The court clerk in Judge Boudreau's court is the local gossip in town. The judge discovers that the clerk has been talking about cases which have not yet been decided and are still confidential to the court. What should he do?

(2.) What are the reasons for having a set of rules of procedure for the court?

(3.) Judge Bear has just decided a complicated case involving an automobile accident. He wants to give the reasons for his decision. What should he include in his opinion?

(4.) Al Petri is a defendant in Judge Gross' court. The judge has disliked Al since he was a small boy and set fire to some papers in the judge's garage. The judge has a very strong feeling of revenge. Should he hear the case or disqualify himself?

(5.) Judge Williams is a juvenile judge, but he issues an order requiring a defendant to pay a plaintiff some money. It turns out that the money was not due. Can the defendant sue the judge for taking his property?

(6.) A tribal judge convicts and sentences a non-Indian when he knows of the case law that tribal courts do not have jurisdiction over non-Indians. Can he be sued for damages for false imprisonment?

Section 5. The Judge and Trial Proceedings

A. The Necessity for Order

One of the main themes which has been emphasized in previous sections is the necessity for maintaining proper courtroom decorum. The entire court staff and each of the judges must strive to create the best possible setting for resolving disputes involving the rights and responsibilities of the members of the tribe. This section discusses the most

important aspect of court decorum--the conditions which prevail during actual trial proceedings.

The whole purpose of a trial proceeding is to give all parties the opportunity to present their side of the story before a final determination is made. This cannot be done unless the trial proceeds in an orderly manner. Unless the judge controls the trial and the participants, he may jeopardize the rights of those who come before him. He must see that each side is able to present its arguments fully and fairly, that the jury--if there is one--is made aware of the law, that distracting or irrelevant matters are excluded, and that the trial moves at a proper pace, without unreasonable haste or unnecessary delay.

B. Rules of Order

All parties before the court must know and understand the rules under which the court operates. There are at least three sources for rules of court procedure.

The first is statutory. Many court practices, such as the right to a jury trial in criminal cases, are required by the Indian Bill of Rights. Other court practices are required by the tribal constitution and relevant tribal ordinances.

The second source of court procedures are the rules which the court develops for its own use. Each judge may develop and use his own rules, but a multi-judge court should develop a standard set of rules which all judges must use.

The third source of court procedures is the judge himself. Unless the written rules are very comprehensive and detailed,

there will be many situations which are not covered by them. These situations must be taken care of during the trial and may not apply to other law suits. For example, an unusual case may require that the jury be taken to the scene of the incident. If the rules do not provide for such situations, special arrangements will have to be made. When making rules for a particular situation, the judge should make sure that he or she is fair to both sides. Where attorneys are involved in the case, they should be asked their ideas, but the final decisions must be made by the judge.

C. Maintaining Control

i. Judge

Since the judge has the duty to maintain order during the trial, his first obligation is to keep control of himself. He must set the example to be followed by the other officers of the court, the parties and their attorneys. He should never become engaged in arguments with the parties or their counsel. After considering the arguments of counsel, he must make his decision. Once made, he should not generally permit further argument or discussion, but should proceed to the next issue or stage of the trial.

The judge must at all times maintain a dignified manner. The parties and their attorneys can be expected to present their side of the case with all the persuasiveness they can muster. At times they may even become over zealous. However, the judge must not become emotional or partisan. His manner need not be stiff and formal, but it should be dignified and

match the solemnity of the occasion. Displays of temper or emotional outbursts by the judge may, if the case is appealled, be grounds for reversal. The judge can only expect orderly proceedings if he keeps his own conduct orderly and proper.

ii. Attorneys

The judge must keep in mind that under the anglo system of justice, an attorney has an ethical responsibility to defend his client zealously, but always within the law. While zealous advocacy may at times try the patience of any judge, he must not prejudice the case by becoming angry at the attorney. When an attorney objects to questions or statements which he feels are improper, he must be given a full hearing as to his reasons for the objection. Although there is a fine line between zealously defending the rights of a client and interfering with the orderly progress of the trial, each judge must be patient with attorneys but sometimes firm with those who abuse their role and the court.

The judge must maintain a careful control over the lawyers to prevent disruptive or delaying tactics, or other conduct which detracts from the orderly movement of the trial. If an attorney engages in such unethical or improper conduct, the judge has the power to impose a penalty on him. Ordinarily, a mere warning or reprimand will impress the attorney with the fact that his conduct is unacceptable, and he will correct his methods. If an attorney persists, however, the contempt power (discussed below) may be used to force his compliance. If the conduct of the attorney is intentional and malicious,

the judge may prohibit the attorney from further practice in his court. He should also recommend to the state supreme court, state bar association or state grievance committee that the attorney be formally disciplined for his conduct.

Attorneys should diligently question the witnesses in proceedings, but they should not be allowed to bring up irrelevant material, nor should they be permitted to badger witnesses. The judge should not allow the attorneys to confer together in the presence of the jury, as it might give the impression that something underhanded is going on even though their conversation may be entirely innocent. The judge should not allow an attorney to address him in any way but by his formal title while they are in court. And while the judge must be patient with the zealous lawyer, he should never allow counsel to question the judge's integrity nor his motives in making a ruling during the trial.

iii. Parties

Unlike federal and state courts, tribal courts seldom have any problem controlling the parties themselves during trial. In most circumstances, a party will do his best to comply with the instructions of the court. Recently there have been numerous occasions where a party, particularly a defendant in a criminal action, has disrupted proceedings in federal and state courts. This may also happen in the future, in tribal courts. Of course, the disruption may not be intentional, especially where the party does not understand the proceedings or his rights. If the improper conduct is unintentional, a

warning coupled with instructions on what is expected of the parties and what will be done if further outbreaks occur will generally be sufficient to handle the problem.

The intentionally disruptive party presents a very difficult problem for the judge. This is the type of person, for one reason or another, who does not want a fair trial, but wants to disrupt the proceedings. When this has happened, some courts have had the individual bound and gagged, but have permitted him to remain in the courtroom. If this step is taken, naturally the court must appoint someone to represent him. Using physical restraint will naturally have an adverse reaction on the jury and cause prejudice either for or against the party being restrained.

Rather than physically restraining the disruptive party, he may be removed from the courtroom. Illinois v. Allen, 397 U.S. 337 (1970). Again, a representative must be appointed to remain in the courtroom to protect the party's rights. The party should be allowed to stay nearby so he can assist the person representing him. He should also be permitted to return if he promises that disruptive conduct will not recur.

iv. Spectators

Criminal defendants have a right to a public trial, and in the absence of very good cause, excluding the public (spectators) will be a violation of the Indian Civil Rights Act and will be "reversible error." Although this may sometimes make the judge's task more difficult, he must keep the courtroom open to the general public. The judge is not

required, however, to allow the spectators to disrupt the proceedings or to distract the court's attention from the case. When a spectator or group of spectators engage in disruptive conduct, the judge has several options open to him. The first recourse should be a warning. Because of what is at stake in a trial, a spectator may be overcome with emotion and not intend to disrupt the proceedings. A warning will generally prevent repeated disruptive conduct. If the disruption is severe or repeated, the judge may have the person removed from the courtroom. Where the disruptive conduct is obviously intentional, the judge may hold the spectator(s) in contempt of court. This remedy will be discussed in the next section.

The primary task of the judge is to see that the trial is carried out in a calm atmosphere, suitable to the administration of justice. While the court should be open to the public, the judge need not put up with disrespectful or disorderly conduct on the part of any spectator. The right of the parties to receive a fair trial is more important than the right of a spectator to be present in the court.

v. Media/Pretrial Publicity

Proper reporting of a trial is one of the chief safeguards of an open and fair trial. For that reason, reporters are not outsiders who have no business in the court, but are, in effect, the eyes and ears of the general public. As with other spectators, the press must follow the rules of court.

Most courts prohibit the taking of photographs or the use of sound recording equipment in the courtroom while the trial

is in progress. While this would allow many members of the general public to witness what goes on, it would also affect the participants. It must always be remembered that the courtroom is a place for the dispensation of a most precious commodity--justice. It is not a theatre or a sound stage for exploitation by the press or other reporters.

A different but related problem may arise as to what is reported outside the courtroom. Sometimes in this country, different constitutional rights come into conflict. Such a conflict occurs when the defendant's constitutional right to a fair trial collides with the public's right to know, as guaranteed by the First Amendment's "freedom of the press." The public has a right to know what's going on, but a defendant is entitled to have his case tried in the courtroom and not in the newspaper. The Indian Bill of Rights (25 U.S.C. § 1302 (6)) guarantees defendants in tribal courts these same rights.

Thus the judge has the responsibility to protect the defendant from pre-trial publicity which might make it impossible for him to obtain a fair trial. The judge is thus caught in a dilemma of making the trial public, but not allowing the information to so prejudice the public that the defendant is denied his right to a fair trial. The judge may compromise by distinguishing between public and private records. The public record is that information which is contained in the official court documents: the charge sheet, arrest warrant, etc. This information is open to the public and can be published in the newspapers. However, information disclosed in

the hearings, evidence which is suppressed, discussions in chambers between the judge, prosecution and the defendant, are matters of a private nature. This information is not part of the official record and the judge may deny public access to it and may enjoin the local newspaper reporter from printing it.

To protect the defendant from prejudicial publicity, the judge must also maintain tight control over officials of the court--for example, the clerk or bailiff--who may have access to private information. No matter how carefully the judge protects the defendant's rights, all his efforts may be undone by a clerk who talks too much.

When matters are closed to public view, as in the case of certain sex crimes or juvenile matters, the judge has the additional duty to see that the court records are "sealed" and are not made public without his approval. If such matters do become public, the lives of innocent people may be forever harmed through the action of a careless court official or an inattentive judge.

D. The Contempt Power

i. Nature

From what has been said, it is apparent that the trial judge has a great responsibility not only for the legal aspects of the trial, but also for the orderly conduct of trial proceedings. To assist him in maintaining the respect and order which the court demands, the judge has the power to charge individuals with contempt of court. It should be noted that

the contempt power is not a shield to protect the judge from criticism which he may find personally offensive. Contempt of court, as the name indicates, refers to actions which are directed to the court itself or the members of the court in their official capacity. Contempt, in the broad sense, may be defined as conduct which brings discredit to the authority of the court, either by physical or verbal attacks on the judge or anyone else in the courtroom by disrupting the conduct of the trial, or by refusing to obey an order of the court, such as an order to appear before the court or pay a fine. The purpose of the contempt power of the judge is to help him maintain control over the proceedings and to enforce the orders and directives which he issues.

ii. Limitations

In exercising the contempt power, the judge must remember its limitations. The judge cannot, for example, charge a newspaper man with contempt merely because he publishes an article which is critical of the judge. The freedom of speech and the press can be restricted only when it interferes with the administration of justice.

While the judge must maintain control of the court, the control is not for his convenience, but for the orderly adjudication of the rights of the parties. The judge must, for example, allow the parties' representatives some freedom to present their case. However, where the tactics of a lawyer cause delay or disruption or are unprofessional, the judge may use the threat of contempt to make the lawyer behave.

Although a discussion of the difficult question of tribal court jurisdiction over non-Indians is deferred to later sections of this book, it seems clear that the tribal court does possess the power to punish by way of contempt any person, Indian or non-Indian, who disrupts the court. An attorney, by practicing in tribal court, subjects himself to the authority of the court to be punished for abusive, disrespectful, or disruptive conduct.

iii. Notice

Since contempt of court must be intentional before it can be punished, the judge should, whenever possible, warn the party of the potential consequences of his conduct. Of course, there are times when a warning is unnecessary. For example, if a party assaults an officer of the court during the course of a trial, he may be cited with direct criminal contempt and immediately sentenced to imprisonment or assessed a fine.

As a general rule, the judge should try to use the least drastic measures to control the court. Thus, if a warning and explanation of the consequences of an act can deter the party's conduct, the judge should first try to restrain the conduct in that way. Removal from the court may be used in the case of spectators before there is a need for a contempt citation. The charge of contempt of court should be used only as a last resort when nothing else can be done to enforce compliance with the rules of the court.

iv. Hearing

There are two types of contempt, direct and indirect.

Direct contempt. Direct contempt is committed in the actual presence of the judge. Under these circumstances the judge knows the facts surrounding the incident, and there would be no reason for him to call a hearing to gather the evidence of the contempt charge.

Indirect contempt. Indirect contempt occurs outside the presence of the judge. For example, a party may make a public statement that the judge decided a case against him because the judge had accepted a bribe. To cast such a charge at the court is a contemptable offense. But the judge must make sure that the statement was made and that the elements of contempt were present. In this situation the judge must hold a hearing to determine whether the person was actually guilty of contempt.

Where the contempt is directed at the judge, or where the judge is personally involved in the conflict with the party charged with contempt, the judge should, if at all possible, ask another judge to hear the contempt case. This prevents the impression that the judge is out to get the party. When the judge is personally involved, he may not be able to give an impartial judgment on the facts of the case.

v. Punishment

Just as the judge has a great deal of discretion in dealing with disrespectful conduct, he also has discretion in the punishment which he finds appropriate once the contempt has been proved. The punishment for contempt of court may be established by a tribal ordinance. It is usually limited to a fine or imprisonment. Imprisonment for criminal contempt

must be limited to six months in jail under applicable provisions of the Indian Civil Rights Act. On occasion, the judge may find that some other punishment is sufficient. For example, an apology may be sufficient punishment for someone who has insulted an officer of the court. In all situations the judge should attempt to tailor the punishment to the offense committed.

Civil contempt, as distinguished from criminal contempt, is the wilful refusal of a party to comply with an order of the court. For example, if the court orders one party to pay another party a sum of money or return certain property to the other party, and the party refuses to do so, he can be held in contempt of court and may be put in jail until he agrees to obey the order. Since the defendant has the "keys to the jail," meaning he can get out whenever he decides to obey the court's order, he need not necessarily be released at the end of six months. He must be released as soon as he complies with the court's order or when compliance is no longer possible. To be guilty of civil contempt, a party must be able to comply with the order. If, for example, he has no money he cannot be held in contempt for failure to pay the other party. Similarly, if the property to be returned has been lost or destroyed, the party cannot be held in contempt for failing to return it. Thus a hearing will always be necessary before holding a party in civil contempt for failing to obey a court order as it must be shown that the party could obey the order, but deliberately refuses to do so. [See the sample "Order to Show Cause for Failure to Appear," "Order to Show Cause for Failure to Pay Fine," and "Order-Indirect Contempt" in the Appendix to this Chapter.]

E. Questions

(1.) C. J. Brown is a young attorney who is representing a defendant charged with malicious destruction of property. He feels that the complaining witness is trying to frame his client. During cross examination of the witness, he continually brings up the witness's personal problems which have nothing to do with the case. The judge has repeatedly warned him not to mention these irrelevant matters, but he persists. What should the judge do?

(2.) Robert Fishback has been charged with petty theft, and has plead not guilty. He is not represented by counsel. During his trial he becomes outraged at the testimony against him. Finally he jumps up and calls the policeman who is testifying against him a liar. What measures should the judge take? What should be done if the conduct persists?

(3.) The trial of Alice Lame Deer has received a great deal of attention in the community, and the courtroom is filled as the trial begins. During several parts of the trial the noise level is so high that the jury has a difficult time hearing some of the witnesses. There is no particular group causing the disturbance. What can the judge do?

(4.) The judge has told the young reporter from the radio station that no tape recorders are allowed in the courtroom during a trial. Following a trial at which the reporter was present, the judge turned on his radio and heard exerpts of the actual testimony from the trial that day. What should the judge do?

(5.) The judge recently sentenced a juvenile for an extended term. The editor of the local paper wrote an editorial severely criticizing the judge and his sentencing practices. Can the judge charge the editor with contempt of court?

(6.) During the course of a trial the mother of the defendant jumped from her seat in the gallery and shouted that the police were trying to frame her son. She then broke down

sobbing. What should the judge do?

(7.) After a trial the judge discovers that the father of the defendant tried unsuccessfully to bribe a juror. Should the father be charged with contempt of court? Suppose he is a non-Indian?

(8.) Before the trial of a leading citizen charged with drunken driving, the judge receives a telephone call from one of the members of the tribal council. The councilman tells the judge that if he wants to keep his job he had better find the defendant not guilty. Can the judge charge the councilman with contempt?

CHAPTER II. TRIAL COURT PROCEDURE

Section 1. General Principles

A. The Role of the Indian Judge in Trial Proceedings

Some Indian judges have had extensive experience at trying cases, both with and without juries and attorneys. Other judges have had less experience because they are newly elected or because they live on reservations where few trials occur. The following comments are aimed primarily at Indian judges who are relatively inexperienced in this role, although these general principles apply to all judges and might usefully be studied by all.

Appearance and conduct. The judge should wear a robe or some form of dignified ceremonial dress at least during the time he presides on the bench. He should establish a time schedule for holding court and adhere to that schedule to the extent practicable. The judge should appear at all court sessions and expect promptness from those summoned or scheduled to appear in court. He should conduct the court with firmness and courtesy, paying close attention to proceedings in the courtroom.

General powers and duties. The judge is responsible for the dignity of the court and for its respect in the eyes of the public. He is required to hear and take care of all cases brought before the court. It is his responsibility to rule on all motions filed with the court or made

during the trial. The judge is expected to be familiar with and follow the rules of procedure applicable to courts generally and with any rules adopted by the reservation court system.

Court procedure. Proper courtroom procedure is probably the most important and most difficult challenge confronting the judge, especially if he has had no prior experience with formal judicial systems.

Opening ceremony. The tone of the whole proceeding before an Indian judge will be set in the first minutes during which court is opened for the day's business. If the judge comes in unassisted and seats himself and immediately begins processing cases, those who have been summoned into the court may have difficulty feeling that they are involved in a dignified proceeding requiring attention and respect. In a model court, the bailiff or clerk precedes the judge into the courtroom, commands attention of those present, usually by rapping a gavel, and requires them all to rise. The judge then enters the courtroom, takes his position on the bench, and stands while the bailiff or clerk makes the formal statement opening court for the day.

Opening of court. The opening announcement may vary from court to court, but it should contain the following:

a. A command that all present give attention.

b. The exact name of the court and its jurisdiction.

c. A statement that the court is open.

d. The name of the judge presiding.

A sample opening statement may take the following form: The bailiff or clerk raps gavel, and states, "Will all persons please rise; this court of the Ute Mountain Tribe of the Ute Mountain Indian Reservation, State of Colorado, is now in session. Honorable Joe Whitefeather, Judge, presiding."

The judge should sit as soon as his name is called and the bailiff should then announce that everyone may be seated.

Judge's opening statement. Once the announcement opening court has been completed, the judge should make an opening statement. The substance of this opening statement will be developed more specifically in later sections, but he should take care to make certain that everyone present in the courtroom understands the procedure to be followed. In general, he should instruct the parties as to what to do when their name is called, the rights that they have in the court, the various pleas that are available to them, the probable results of each plea, and the availability of jury trial if requested. For example, if the judge is addressing a traffic violator, the judge should inform him that conviction may result in

loss of his driver's license.

In preparing the opening statement, the judge should make sure that his opening remarks are not too long or rambling. If possible, not more than five or six minutes should be used. It is not a good idea for a judge to read the opening statement unless he exercises great care to make certain that his voice does not begin to drag on in a dull tone. Persons in the courtroom must get the impression that what the judge is saying is important and it must command their full attention.

The judge is "in charge" of the courtroom. One of the most important principles to remember is that you, the judge, are "in charge" of the courtroom. An orderly, respectful, and fair atmosphere in the courtroom is essential, and the authority for maintaining such an atmosphere is held by the judge. Ordinarily you will have no trouble maintaining an orderly courtroom. Your presence and demeanor, along with the presence of the bailiff or clerk (or both) and the tribal prosecutor will assure orderliness and respect. In addition, the parties are aware that you decide the case or, in a jury trial, determine the sentence to be imposed. They will wish to maintain your respect.

In the event difficulty should arise, there are a number of actions you can take. You can admonish a party

or witness to conduct themselves properly. If the offending conduct occurs during a jury trial you can instruct the jury to disregard any actions or testimony that are inadmissible or improper as evidence. You can advise a party, a witness, or an attorney that if they do not conduct themselves properly in the courtroom they may be held in contempt, as already discussed. Lastly, you have the power to impose a reasonable fine and/or prison sentence for contempt on anyone, including parties, witnesses, attorneys, or spectators, who refuse to obey the lawful orders of the court concerning the orderliness of the courtroom or the conduct of the trial. Needless to say, this last remedy is seldom if ever necessary, but its existence - along with a warning about its potential use - may be important in a given case for maintaining a proper atmosphere in the courtroom.

Fairness and objectivity is essential. Fairness and objectivity should be your goal as a tribal judge. Respect for the courts and the legal system on the reservation will flow directly from the reputation you build for these qualities. One thing this means is that you should not automatically conclude that anyone, either policeman, friend, businessman, defendant or prosecutor is always absolutely correct about what happened during an event under trial. You should listen to all witnesses fully

CONTINUED

1 of 5

and carefully and then decide where the truth lies. If you have been a judge for a time you realize that the differences in witnesses testimony often results not from lying, but from differences in the place from which the events were observed, or differences in witnesses' powers of observation or accuracy of recall.

Search carefully for the truth. Recently in a law school class we conducted a surprise, pretended "murder" and then asked the class to write down what they saw and heard, and what they would testify to if called as witnesses in a trial of the event. The results were both interesting and instructive. A surprising number of students recorded the events incorrectly, and were shocked to discover their mistakes when we ran the fake murder again in precisely the same way. For example, the "victim" at one point called out the name of the assailant. Out of a class of 40 students, roughly one third reported hearing the wrong name, some of which were not even similar to the name actually called.

Just before the "murder", which was performed using a finger as a gun and a verbal "bang", the victim turned and yelled at the assailant "I told you I'd kill you", and drew a pencil out of his pocket. Nearly half the students reported that the assailant made this statement; this is important because if the assailant said this, it

would indicate premeditation on his part, and possibly a conviction of first degree murder instead of some lesser offense. In spite of the fact that only a finger was pointed as a "gun", some students thought they actually saw and heard a gun. This whole event occurred in a calm classroom setting, not the emotionally charged setting of a real killing. The students were relaxed and unafraid, and knew it was some sort of game. They wrote down their observations within minutes afterwards (not several weeks or months later as in a real trial).

The point of this story is to urge you to be wary of making quick assumptions about which witness is telling the truth, or which is most accurate. You are usually well advised to reserve judgment until all the testimony is in, listening carefully to all the witnesses and exploring with questions each of the important facts. Only then can you exercise your best judgment in making a decision.

How to handle attorneys. If attorneys are present in the courtroom you should remember that they owe a duty not only to their clients but also to the judge and the jury to assist in arriving at the truth, and in rendering justice. Most attorneys recognize this responsibility and you can depend upon them for appropriate assistance.

In a sense, you are better off with either no attorneys

in a trial, or with two, one on each side. With no attorneys present you can actively participate in questioning of witnesses for both sides, and can more easily maintain your appearance of neutrality. If an attorney is present for only one side as, for example, only for the defendant, you may want to assure fairness for the prosecution by questioning the defendant's witnesses more actively; this can easily create an impression of favoritism for the prosecution and care should be taken to avoid such an impression if possible. If two attorneys are present they can do all the questioning. You act primarily as arbitrator of their arguments and objections.

You need not be concerned that attorneys may know more "law" than you do. Your responsibility as a judge depends largely upon your common sense, objectivity, and sense of fairness. If an attorney raises an unfamiliar question of law, ask him to write you a brief memorandum on the question which you can study overnight, or at some later time, before making your final judgment. Also, when one attorney raises an objection or makes a motion, you can ask the opposing counsel for his views on the matter and, after hearing both sides, make your decision.

Disqualify yourself as judge if necessary. Occasionally you may wish to disqualify yourself as a judge in a particular case, as discussed in Chapter I. This might happen,

for example, where you find you are a close relative or friend of the defendant, or some other key party in the case, or if you have personal knowledge of the events coming up at trial. Under such circumstances, the case should be assigned to another judge on the reservation, or possibly to a judge from an entirely different reservation. This is not an unusual practice, and should be considered anytime you conclude that (1) you could not really try the case fairly in view of your relationship to the parties or personal knowledge of the events, or (2) that the appearance of fairness would be lacking so that whichever way you decided the case the parties would believe your decision was not fair.

You can disqualify yourself on your own initiative, that is, without waiting for one of the parties to raise the question. Or you can wait until one of the parties makes an objection to your being judge, and then decide what to do. Most courts permit such challenges to judges. In some jurisdictions, the judge automatically removes himself from the case when such a challenge is made. In other courts the judge to whom the challenge is made exercises his discretion about hearing the case, and may proceed to try it if he personally believes he can do so fairly and objectively.

Use the clerk and bailiff. A clerk and bailiff can

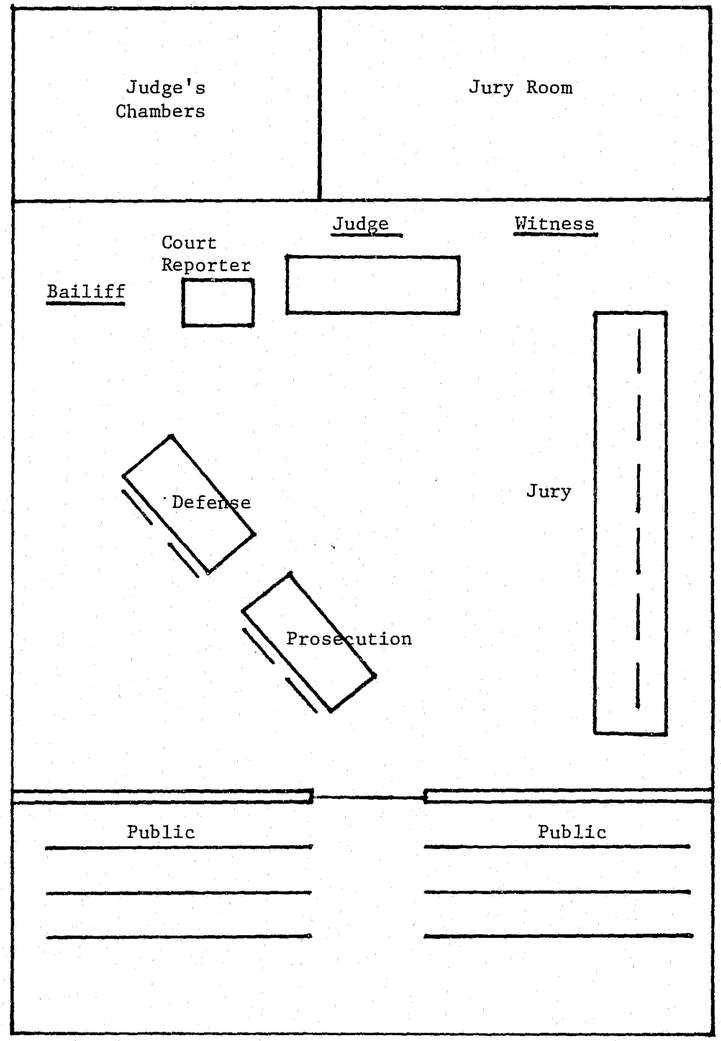
be very helpful to the operation of a trial court. By handling the paperwork, keeping spectators quiet, and generally helping the court, they free the judge to concentrate on the important issues in the trial of a case. Having such staff present in the courtroom also tends to add a sense of efficiency and dignity to the court's operations.

B. Courtroom Arrangement

Each reservation court system will want to arrange its courtrooms to fit the needs of the Indians on that reservation. Nonetheless it might be useful to include here a sketch of a typical courtroom arrangement. As illustrated by the accompanying sketches,

1. The judge's bench should be located in a position to manage the entire courtroom. It may be helpful to place the judge's chair and bench on a slightly raised platform so it is easier for the judge to see and hear everything, and to be seen and heard by everyone in the courtroom.
2. Place the spectators chairs or benches back away from the operating area of the courtroom. It may be desirable to put up a light railing or other barrier to discourage spectators from entering the working area of the courtroom.

SKETCH OF COURTROOM



3. Place the court reporter (if there is one) in a central position so that he or she easily can see and hear everything.
4. The jury room should be sufficiently private so that the jury's conversation, while deliberating on the case, cannot be heard by persons outside the room.
5. Appropriate tables and chairs should be provided for the prosecution and defense, and for attorneys if they are present.

C. A Suggested Law Library

If at all possible, you should acquire a small law library. There is no substitute for the immediate availability of the appropriate law books. Funds for these books are usually available, either through your tribal treasury, or through government sources. A minimum trial court library should include:

i. Federal Materials
   a. The Treaty, Executive Order or Federal Statute creating the reservation.
   b. Federal laws applicable to Indian reservations in general - normally Titles 18 and 25 of the United States Code (U.S.C.).
   c. Title 25, Code of Federal Regulations.

ii. State Materials
   a. Official State Statutes
      ex: Revised Code of Washington (RCW)

iii. Tribal Materials
   a. Tribal Constitution
   b. Tribal law and order code, and other tribal ordinances
   c. Copies of tribal appellate court opinions, if any
   d. The Rules of Court adopted by the courts of the reservation

iv. Other Materials (In Order of Importance)
   a. Black's Law Dictionary (or another law dictionary)
   b. McCormick on Evidence (or another evidence book)
   c. Lafave's Hornbook on Criminal Law (or another criminal law text)
   d. Cohen's "Handbook of Federal Indian Law"
   e. Federal or State court opinions
   f. Calamari's Hornbook on Contracts (or another contracts text)
   g. Prosser's Hornbook on Torts (or another torts book)

You may find still other books helpful for handling problems arising on your reservation. These should be acquired and kept handy during your trial of cases. Materials prepared for judges by the National American Indian Court Judges Association, in addition to this text, address specific areas of Indian law.

D. Indian Courts As "Courts of Record"

Only some Indian Courts are "courts of record". Judges should give serious thought to making their courts "courts of record". A "court of record" is one where a complete record is kept, either in shorthand or on sound tapes, of all the proceedings that go on in court. This includes everything that is said during the course of the trial, not merely summaries of what was said and done.

Obviously a complete record costs money. If a court reporter is used, then his (or her) salary must be paid during the time his services are in use; funds must also be found to pay for additional equipment. A record can, of course, be kept through the use of tape recorders. The tapes must be complete enough that a secretary can prepare a typed copy of the record if an appeal is taken. Several microphones will probably be required at strategic locations about the courtroom. The voices of different participants will have to be identified so the typist can identify who was speaking.

But there are several advantages of making a court a "court of record", no matter what method of recording courtroom proceedings is used. (1) The greatest advantage is that it permits a bona fide appeal "on the record" to the Indian appellate court. If a complete record is not kept by the trial court, then the appellate court has no "record" to review and is forced to try the case "de novo", that is, from the beginning again. This duplicates the effort of the trial court, and can be terribly expensive if many appeals are taken. In certain instances, the Indian Civil Rights Act of 1968 requires the reservation to grant an appeal by a convicted defendant. If no appeal is available in the Indian court system, then the defendant is very likely to be successful in getting a federal court to review his case by means of a writ of habeas corpus. As later discussed in Chapter 3, the lack of proper record for the federal court to review in such event may mean that it will virtually try the case over again to find out what happened at the first trial. Such a process could seriously undermine the authority and standing of the Indian courts.

(2) Another advantage to having a court of record is that it permits the reservation to build a body of written case law to guide trial courts in future cases. Appellate court decisions should, of course, be typed up

and reproduced in sufficient numbers to be available to all judges on the reservation, to advise them of the "law of that reservation".

(3.) One further advantage of having a court of record concerns the movement toward retrocession. The Civil Rights Act of 1968 authorized retrocession, namely, the return of criminal and/or civil jurisdiction assumed by states under Public Law 280. Unfortunately, retrocession is possible only with the concurrence of either the governor or the legislature of the state where the reservation is located. That concurrence is more likely to occur if the governor and legislature can see a viable and effective legal system actually operating on the reservation; the existence of a "court of record" with an appropriate appellate procedure will be of great significance in that regard.

E. Attorney and Lay Advocate Admission Requirements

The judge will also have to decide who is eligible to practice before the court. Defendants may represent themselves (pro se) or may have an attorney or, if the court permits, a lay advocate appear on their behalf. The judge will then have to decide what qualifications an attorney or lay advocate must have before admission to practice before the court. The establishment of standards for

attorneys and lay counsel insures a basic competence in practice and representation of defendants in trial proceedings. The needs and requirements for each tribal court will differ, but the following general requirements might be considered.

Attorneys. The following requirements are suggested for attorneys applying for admission to practice before a particular tribal court:

(1) membership in good standing of the bar of any state of the United States or the District of Columbia;

(2) be of good moral character;

(3) demonstrate to the judge a thorough knowledge of the tribal code of laws, the rules of the tribal court, and federal laws and regulations applicable to the tribe; and

(4) demonstrate some knowledge of the culture and traditions of the tribe.

Lay Counsel. The following requirements are suggested for lay counsel applying for admission to practice before a particular tribal court:

(1) a minimum age requirement;

(2) be of good moral character (demonstrated perhaps by an absence of any misdemeanor convictions in the past year);

(3) demonstrate to the judge a thorough knowledge of

the tribal code of laws, and the rules of the tribal court; and

(4) demonstrate some knowledge of the culture and traditions of the tribe.

Provisional Admittance. A judge will also have to consider the provisional admittance of an attorney or lay advocate to practice before the court in special situations. Such a situation might arise where:

(1) the attorney or advocate represented the defendant in other jurisdictions and has a familiarity with the circumstances of same or similar charges filed in tribal court;

(2) admitted attorneys or lay counsel disqualify themselves from representing the defendant because of conflicts of interest; or

(3) if it generally appears in the interest of the defendant or parties to do so and where no special knowledge of tribal custom or tribal law is required.

Licensing. The judge and tribal code might also require that attorneys and lay counsel admitted to practice before the court obtain a business license from the tribe. Exceptions to this licensing requirement might be made for counsel affiliated with the reservation legal office or employees of a non-profit organization of a legal aid nature.

[See the sample admissions information sheet in the Appendix to this Chapter]

Section 2. The Duties of the Judge Before Trial

A. The Summoning Process

i. Explanation and Definition

Summoning the defendant constitutes the first phase of the judicial process. A criminal action or case in a tribal court should be initiated by a specific complaint or accusation which can be made by either a law enforcement officer or a private citizen. The action is brought by and in the name of the tribal jurisdiction regardless of who makes the complaint. The relief asked for in the complaint is always a determination of the guilt of the accused party followed by entry of an appropriate judgment against him with whatever fine or jail sentence permitted by ordinance, or the tribal code.

The process of summoning the defendant into court leads to three subsequent judicial procedures, though one or more of these may take place at the same time:

(1) arraignment, at which a person charged pleads guilty or not guilty;

(2) the trial of the issues if a "not guilty" plea is entered;

(3) sentencing or judicial disposition of the defendant if the result of the previous procedures is a guilty plea or a guilty finding.

The importance of the summoning process cannot be

underestimated. It is here that the complainant (the person filing a complaint with the court) and the alleged violator will form their first impression of legal and judicial procedure at the community level. The strength and clarity of the summoning process are vital to the total effectiveness of the Indian court.

ii. Judicial Responsibility

It should be apparent to the Indian Court Judge that there is a vast body of technical law relating to the initiation of criminal proceedings. In all states, there are constitutional considerations as well as statutes and procedural rules governing the procedure by which a defendant is summoned to court. These references serve as guides for the development of a proper and workable system of processing alleged violators through tribal court.

The basic question is: To what extent should the Indian Court be involved in the establishment of the summoning process? Because summoning procedure is a part of the total judicial process, the judge and his clerical staff must, of necessity, be involved with and assist in the development and management of this work. But the court should retain its position of neutrality in ruling on the validity of the charges brought before it. It should be remembered the court itself is not the initiator

of any of the actions heard by it. The court is not a law enforcement agency of the tribe but serves rather as an impartial tribunal for an orderly hearing and determination of the charges.

The summons and complaint forms are the instruments used to implement the summoning procedure. These are the responsibility of the tribal attorney to develop and draft. The court should make constructive comments or suggestions on the content of these forms, but the judge himself should avoid being placed in the position of ruling upon the validity of his own forms. The clerk of the Indian court is in the best position to work with the tribal attorney and other officials in the actual design of the summoning forms. [See the sample "Criminal Summons," "Affidavit of Service," "Criminal Complaint," and "Affidavit of Complaining Witness" in the Appendix to this Chapter.]

iii. Developing the Summoning Process

A number of factors should be considered in developing a legal and effective summoning process. Some of these relate to the general public and others to the administrative convenience of various public agencies or officials involved with the enforcement of tribal ordinances or codes. A sound set of procedures and forms requires careful balance of all of these interests.

The Public. The summoning process should be clear

and understandable, so that the alleged violator knows exactly what he is expected to do and where he is expected to appear. The overall procedure should be one which can be easily explained to him.

The Police. Since it is the busy tribal police who actually enforce most tribal ordinances or codes, the summons form should be designed for quick and easy completion. It should be comprehensive and compact, allowing the enforcing officer to check appropriate boxes rather than engage in extensive and time consuming writing. The summons procedure and court schedule should take into account the police department's duty schedule for individual officers, allowing them to appear in court when necessary without undue delays or interference with other police duties.

The Courts. The summons forms should provide the judge with the basic information needed to indicate the circumstances or gravity of the alleged offense at the time of arraignment (which will be discussed later in this chapter) or sentencing of the defendant. The size and makeup of the summons should fit the record system maintained by the clerk of the court. The summoning procedure should be geared to the arraignment and trial schedule established by the judge, allowing sufficient time delay for the court clerk to obtain important records from the

tribal officials.

The Tribal Attorney. The summons procedure should be designed or approved by the tribal attorney, accommodating the other interests described here, as well as his own if he acts as prosecuting attorney for the tribe. The summons and complaint forms should enable him to determine with relative ease whether he has a sufficient case to prosecute in court.

Legal Guides. It is fundamental that the court must have the authority to hear the charge against the person accused. In other words, the person of the defendant must be under the legal control of the court. Generally, there are two methods by which an individual comes within the control, or jurisdiction, of the court. Some defendants will be within the jurisdiction of the Indian court as a result of physical arrest and custody, after which charges are filed. Others will appear as a result of non-personal service, such as where the summons and complaint is mailed to a person's local address requesting their appearance before the court at a given time and date.

Certain legal guides must be considered in developing an appropriate set of forms and procedures for handling all of these situations.

Due Process Requirements. Certain due process tests must be met before a court can proceed to determine

whether an alleged violator has actually broken the laws of the tribe. These requirements should be utilized in defining and explaining the summoning process. Basic due process requires the following minimum guarantees:

1. a law creating or defining an offense;
2. a court of competent jurisdiction (a court which has control over the alleged violator and the type of alleged offense);
3. an accusation (complaint or information) in proper form;
4. a notice and an opportunity to answer the charge;
5. a trial according to generally established judicial procedure;
6. a right to be discharged unless found guilty.

The Summons and Complaint. The summons and complaint is usually one document, but it is in essence two concepts: (1) the summons, and (2) the complaint. The summons is the order to appear in a certain court, while the complaint is an accusation made by a person, usually a tribal officer, against the accused, who is named in the summons and complaint. These two documents have been merged into one for convenience.

The summons and complaint, often referred to merely as the summons or the complaint, is the initiator of the court process. It is the formal means of making an

accusation and creating a court action. The summons and complaint then serve two functions: (1) to inform the defendant that he is accused of a certain crime and must appear in court to answer the charges stated in the summons and complaint form; and (2) to start the court process, to set down a time and place for the accused to appear in court and answer the charges he faces.

Summons and Complaint: Contents. The contents of a summons and complaint will vary somewhat, depending on the general nature of the violation. In general, the following are the common elements of a summons and complaint.

1. commencement in the name of the prosecuting jurisdiction (Tribal law requires that the action be commenced "in the name of the tribe in which the court is located, as, by and on behalf of the people of the Navajo Nation.");
2. date of the alleged offense;
3. time of alleged offense;
4. name and identification of accused;
5. approximate location of alleged offense;
6. venue (or place) of court;
7. description of offenses (identification of the ordinance allegedly violated by title and ordinance number or section number of the code);

8. conclusions (i.e., "Against the peace and dignity of same.")
9. signature of the complainant, the person who the offense was committed against or who witnessed the offense (sworn to by that citizen and usually not by police);
10. a section which includes instructions to the named defendant that tell him where and when he must appear -- and what he must do -- the aforementioned summoning process.

Judicial Determination and Interpretation. The summons and complaint forms and summoning process should be developed with a view toward judicial application at the time of arraignment or trial. Fairness and justice are the prime objectives throughout. The tribal judge may occassionally feel compelled to dismiss the charges against the alleged violator because of defects in the complaint and summons procedure. For example, the summons may be issued against the wrong party, or the alleged offense may have been committed outside tribal territorial limits, resulting in a lack of court jurisdiction, or the complaint may not be sufficiently clear for the defendant or the court to know the precise nature of the charge or ordinance violation.

The judge should always endeavor to put substance over form in interpreting and applying the summons procedure. In other words, care should be exercised not to be overly technical, but material defects warrant judicial relief. If the defect is not a material one (e.g., minor error in spelling), the issue should be reserved for formal trial, where all of the relevant facts can be determined.

Warrants. The tribal court may issue a bench warrant when a defendant fails to appear in court as required by the summons and complaint. A warrant is basically a written order issued by a judge directed to a police officer to perform a specified act. In this instance, the warrant would direct the police officer to arrest the named individual to compel his or her appearance before the court. This is appropriate in many instances, but it should usually be preceded by a letter or other reminder for a second appearance, particularly when the alleged violator is a resident of the community and within the continual jurisdiction of the court. Warrants will be discussed to a greater extent in Chapter VII.

B. Bail Procedure

Like the summoning process, bail is another legal process to compel a defendant to appear for court proceedings. In the instance where a defendant might be within the jurisdiction of the Indian court as the result of physical arrest and custody by tribal police, depending on the case, the

defendant might be required by the court to post an amount of money before release which would be forfeited if the defendant failed to appear for later proceedings. And, like the summoning process, bail procedure will also be shaped by certain minimum requirements of due process.

The right of an accused to be released on bail pending trial is an attempt to find a middle ground between locking up all those accused of crime or letting them all go free without any restriction. To limit the freedom of a person accused of a crime is, in effect, a type of punishment. Loss of wages, separation from family, and the general hardship of detention can seriously and often permanently harm the accused. Pretrial punishment violates the fundamental principle that even an accused is presumed to be innocent until he is convicted after a full and fair trial. Therefore it is important that accused persons be given as much freedom as possible before trial.

Again, the purpose of bail is to ensure that the defendant will appear for his trial. If there is no reason to suspect that the defendant will fail to appear in court, the judge should release him on his own recognizance (solely the defendant's promise to appear later). In making this determination the judge should consider the following factors:

(1) the likelihood that the accused will fail to appear;

(2) his previous record of flight and criminal activity;

(3) his ties with his family and the community;

(4) his general reputation, and the statements of other reliable parties as to his assurances of not fleeing; and

(5) his general financial circumstances. [See the sample "Recognizance Bond" form in the Appendix to this Chapter.]

If release on the accused's own recognizance does not seem justified, there are several other options open to the judge. He may release the accused to the custody of a responsible person or to an officer of the court, for example, the probation officer. The judge may also restrict the travel of the accused, or restrict his association with certain parties who might induce him to flee. The judge may permit the accused to work during the day while requiring confinement during the evening hours.

Bail in the form of money should be used only as a last resort. It should not be used as a punishment or a fine, but should be used to insure that the defendant will appear for trial. In determining the proper amount of bail, the judge should consider the facts of each case, and not by using a pre-determined schedule. If the accused has little or no money, his right to bail must not be denied merely because of his inability to pay. However, the judge should take into consideration the fi-

nancial status of the accused, and if the court's purpose will be served by requiring a small amount of bail in a particular case, the judge should exercise his discretion accordingly.

For very minor offenses, for example, minor traffic offenses, bail may be set in an amount equal to the amount of the fine which will be imposed if the accused is found guilty. This procedure allows an accused to forfeit the bail rather than appearing to answer the charge. An accused may find it to his advantage to pay the fine by simply forfeiting bail rather than, for example, take time off from work to appear in court to answer the charges. This procedure should be used very sparingly as it encourages an accused to waive his right to a trial. A judge must protect the right of the accused to have a trial on the charges and should never, intentionally or inadvertantly, pressure an accused into waiving that right.

Where money bail is used to insure attendance at trial, the court should adopt a procedure which eliminates use of the bail bondsman. To obtain a bail bond, a person usually must put up 10% of the amount of the bond in cash and frequently must put up some type of collateral for the balance. Thus, if bond is set at $250, the defendant must pay the bail bondsman $25 and may have to pledge his

car or furniture as additional collateral. Even if he appears when the case is called for trial and is found innocent, he cannot get his $25 back--the bail bondsman keeps it as payment for paying the remainder of the bail amount to the court. Thus the defendant has been "fined" $25 even though the jury found that he was innocent.

This injustice can be avoided by adopting the system now being used in all federal courts. Under this procedure, if bond is set at $250, the defendant deposits 10% ($25) with the clerk of court. If the defendant appears when the case is called for trial, he get his money back. If he fails to appear when called, the $25 is forfeited and he has to pay the court the balance ($225). He may also be charged with non-appearance, or "jumping bail", which is a crime under most tribal codes. This procedure is just as effective in making the defendant appear in court when required as is the use of a bail bondsman, but the defendant is only punished if he fails to appear when required. If he obeys the orders of the court he gets his money back. [See the sample "Appearance Bond" and "Order for Release of Defendant" in the Appendix to this chapter.]

C. Arraingnment Procedure

i. In General

The arraignment is the first formal court process that a defendant charged with the violation of a criminal ordinance will face. The arraignment is built into the criminal justice system to sort out guilty and not guilty pleas, and to serve as the point at which a defendant will be notified of his constitutional rights. This procedure follows the summoning process and is usually combined with the bail process.

In general, the purpose of this process is three-fold:

1) to inform the defendant of the actual charges he faces;
2) to make sure that the person charged is the defendant and that he is within the Indian court jurisdiction; and
3) to advise the defendant of his rights under the law, to have him make a plea before the court of either guilty or not guilty to the charges, and to make a decision on bail.

Broadly defined, the arraignment of a person consists of calling him by name, reading him the charges he faces, and requesting from him his plea to these charges. It is a very important stage and must be handled properly or a defendant may not receive the justice that the

criminal justice system promises the defendant under the Indian Civil Rights Act of 1968. And further, Indian court judges need to be especially skillful and knowledgeable in this area because statistics show that most cases on the reservation are terminated with a guilty plea at the arraignment stage. Therefore, it is of prime importance that this guilty plea, when accepted by the trial judge, is done so with the best procedure and fairness possible.

More specifically, the purposes of the arraignment process are:

A. To bring the defendant before the Court and to advise him of the specific nature of the charges against him.
B. To advise the defendant of his rights under the Indian Civil Rights Act of 1968.
C. To advise the defendant of the penalty which could be imposed if the defendant were found guilty of or pleaded guilty to the offense charged.
D. To ask the defendant to plead to the charges. The defendant can plead not guilty, guilty or no contest.
E. If the defendant pleads not guilty or if a not

guilty plea is entered for the defendant by the Court, to set a trial date.

F. If the defendant pleads guilty or no contest, to impose sentence or set a date for sentencing.

G. If a not guilty plea is entered, to determine whether the defendant is entitled to pretrial release and, if pretrial release is proper, what conditions and/or money bond are necessary to ensure the defendant's presence on the date set for trial.

H. If a guilty or no contest plea is entered, to determine whether the defendant is entitled to release prior to the date set for sentencing and, if such release is proper, what conditions and/or money bond are necessary to ensure the defendant's presence on the date set for sentencing.

ii. Arraignment Step-by-Step

The court should set standard hours for arraignment, depending on it's caseload, and these hours should be strictly met.[All defendants should be in the courtroom about 15 minutes before the hour set for the court to commence arraignment.] The bailiff or clerk should start the court session at the time set for arraignment and during the clerk's opening remarks the judge will enter from his chambers and take his seat at the bench.

At the beginning of the arraignment session it is suggested that the judge make an opening statement or introductory remarks to those gathered in the courtroom. The judge in this statement should take care to make certain that everyone present understands the procedure to be followed. The following procedure for the arraignment, taken from the NAICJA Criminal Court Procedures Benchbook, is suggested: (an outline of points to be covered at an arraignment may be found in the Appendix to this section)

A. Opening Statement

Judge: "Ladies and gentlemen, an arraignment is being held by the Court in order to read the charges against each defendant, to advise each defendant of his rights and to ask each defendant to enter a plea of guilty, not guilty, or no contest to these charges. Each defendant will be asked how he pleads to the charges. The Clerk will call each defendant's name. When a defendant's name is called, he will be asked to step before the Bench and will be asked how he pleads to the charges. If the defendant is not ready to enter a plea with the Court at this time, a con-

Judge: tinuance may be granted at the request of the defendant and in the discretion of the Court. If a continuance is granted, a later date will be set at which time the defendant will be required to appear before the Court and to plead guilty, not guilty or no contest to the charges against him.

The defendant may plead guilty, not guilty or, with the permission of the Court, no contest. If the plea is guilty, the defendant admits the charges contained in the complaint. In that case, the Court will either set a date for sentencing or impose a sentence immediately. If the plea is not guilty, the defendant denies the charges contained in the complaint. In that case, the Court will set a trial date. If the defendant makes no plea, the Court will enter a plea of not guilty for the defendant. In that case, the Court will set a trial date. If the plea is no contest, the defendant does not admit the charges contained in the complaint but chooses not to defend himself against the charges at

Judge: a trial. In that case, if the Court accepts the no contest plea, the Court will set a date for sentencing or impose a sentence immediately the same as if the defendant had pleaded guilty.

Pending the next proceeding in the case, a defendant may be released on bail or on personal recognizance under conditions determined in the discretion of the Court."

B. Appearance of the Defendant Before the Bench for Arraignment

If several defendants are being arraigned at one time, the Court asks them all to stand and be identified. The Court then explains their rights as indicated below. It is also recommended that a printed statement of a defendant's rights be distributed to each defendant prior to the arraignment. As each individual case is called, the Court asks the defendant if he heard his rights and if he understands them.

If only one defendant is being arraigned, the Court calls the case and then asks the

defendant to step before the Bench and be identified. After the identification, the complaint is read to the defendant and a copy of the complaint is given to the defendant. After the Court advises the defendant of the charges against him and the possible penalty for the offenses charged, the following dialogue should take place:

Judge: "The Court will now explain your rights in further detail.

1. If you plead guilty, the Court will consider the facts of the offense, anything you want to say in your behalf, your background or reputation, and any past criminal record which you might have. From this information, the Court will impose sentence.

2. If you plead not guilty, your case will be set for trial at a later date. If you and the Tribe are ready for trial now and all the witnesses are present, we may be able to hear the case later today.

3. If you want a continuance to consult

Judge: counsel, you may have one upon request until a later date set by the Court.

4. If you are not sure how to plead, you should enter a plea of not guilty to the charge.

5. If you plead not guilty, the Court will listen to your case or you can request a jury trial.

6. You have a right to obtain counsel at your own expense.

7. Any witnesses against you will be required to appear and testify and you have the right to cross-examine them and ask them questions.

8. You have the right to a speedy and public trial. You have the right to trial by jury, which means by a Judge and six jurors, or if you give up your right to a jury trial, you may be tried by the Court, which means by a Judge alone.

9. You have the right to be informed of the charges against you.

10. You have the right to call witnesses in your own behalf and the tribal police will serve the subpoenas issued by the

Judge: Court notifying your witnesses to appear and testify at your trial.

11. At your trial, you may testify or you may remain silent. You cannot be compelled to testify because you have the privilege against self-incrimination. Neither the Court nor a jury can infer guilt from your silence, nor can the prosecution make any argument at your trial inferring your guilt from your decision to remain silent.

12. If you are found guilty, you have the right to appeal by filing a request as provided in the Tribal Code.

13. You have the right to file a writ of habeas corpus in the United States District Court if you feel your constitutional rights or your rights under the Indian Civil Rights Act have been violated.

14. If you are in custody, you have the right to be released on bail or on your own recognizance under conditions determined by the Court.

15. You have been advised of your rights. Do you understand them as they have been explained to you?

Judge: 16. Do you have any questions? Do you want time to consult with an attorney prior to making a plea to the charges against you?

17. Are you now ready to make a plea to the charges against you or do you wish a continuance?

18. If you wish a continuance, the Court will reset your arraignment for another date at which time you should be ready to enter a plea of guilty, not guilty or no contest at the new arraignment date.

19. If you are ready to make a plea to the charge, how do you plead, guilty or not guilty?"

C. <u>In Case of A Request for Continuance</u>:

Judge: "In response to your request for a continuance, the Court will set the date for your arraignment at which time you must be prepared to enter a plea of guilty, not guilty or no contest."

D. <u>In Case of A Plea of Not Guilty</u>:

Judge: 1. "Since you have entered a plea of not guilty, do you wish to be tried by this

Judge: Court or do you wish a jury trial?

2. You are entitled to a speedy and public trial, so I am setting a trial date of _____."

(NOTE: The defendant should be given at least five (5) days to prepare for trial unless he consents to be tried at an earlier date.)

Judge: 3. "Will you be ready to defend yourself against the charges on the date set?

4. To ensure your presence in this Court on the date set for trial, the Court has determined to release you from custody under the following conditions: (Select A, B, or C with D.)

a. On your own recognizance.

b. Posting of cash bail in the amount of $_____.

c. Post of a surety bond in the amount of $_____.

d. Other conditions of your release are: (Here, state any special conditions).

E. In Case of A Plea of Guilty (Or No Contest):

Judge: "You have made a plea of guilty (or no

Judge: contest) to the charges against you. Before this Court accepts your plea, the Court would like to ask you some questions:"

1. If defendant is not represented by an attorney:

Judge: "Are you aware that under the Indian Civil Rights Act you have the right to retain an attorney at your own expense? To consult with your attorney prior to entering a plea to the charges against you and to have your attorney represent you before this court? Do you now waive your right to retain an attorney at your own expense?

2. Do you understand that you have an absolute right:

a. to a speedy and public trial by jury;

b. to the assistance of an attorney at your own own expense at all stages of the proceedings;

c. to be confronted by the witnesses against you;

d. to present evidence on your own behalf in defense of the charges against you;

Judge: e. to the privilege against self-incrimination?

3. Do you know what a jury trial is? Tell me what a jury trial is. Do you realize that by pleading guilty you give up your right to a jury trial? Do you then give up your right to a jury trial?"

(NOTE: See Boykin v. Alabama, 395 U.S. 238, 23 L.Ed.2d 274, 89 S.Ct. 1709 (1969), where the Supreme Court states that a defendant must personally and expressly waive his right to trial by jury. The waiver must be intelligent and with understanding of the consequences.)

Judge: 4. "Do you understand fully the charges which have been made against you? What is the name of the charge to which you want to plead guilty? What does a person have to do to be guilty of that charge?

5. Do you understand fully the possible penalty which may be imposed aginst you if your guilty plea is accepted by this Court? What is the maximum sentence for _____ _____?"

(NOTE: See Boykin v. Alabama, 395 U.S. 238, 23 L.Ed.2d 274, 89 S.Ct. 1709 (1969) for the Supreme Court's analysis of the requirement that a defendant understand the nature of the charges against him and the possible consequences of a plea of guilty to those charges.)

Judge: 6. "Has anyone threatened you or forced you to plead guilty, such as the police or the prosecutor?

7. Has anyone at all brought any kind of pressure on you to plead guilty?

8. Are you making this plea of your own free will?"

(NOTE: See McCarthy v. U.S., 394 U.S. 459, 465, 22 L.Ed.2d 418, 424, 89 S.Ct. 1166, 1170 (1969) for the Supreme Court's requirement that a plea of guilty be entered voluntarily.)

Judge: 9. "Has anyone promised you that this Court would go easier on you or be more lenient with you if you pleaded guilty?"

(NOTE: A plea of guilty or no contest induced by a promise made by the prosecution to limit the sentence imposed or

to dismiss additional or more serious charges is nevertheless a valid plea. The plea must only be a voluntary and intelligent choice among the alternatives open to the defendant. See: Brady v. U.S., 397 U.S. 742, 751, 25 L.Ed.2d 747, 758, 90 S.Ct. 1463, 1474 (1970) and North Carolina v. Alford, 400 U.S. 25, 27 L.Ed2d 162, 91 S.Ct. 160(1970). In every case in which a guilty plea is accepted where it is disclosed that a bargain has been reached between the prosecutor and the defendant, the terms of the agreement should be fully disclosed to the Court and for the record)

Judge: 10. "Are you pleading guilty because you are actually guilty?

11. Did you commit the act or acts which are charged against you in the complaint?"

(NOTE: The Supreme Court has upheld a guilty plea entered by a defendant who stated that he wanted to enter a plea of guilty even though he refused to admit his guilt where a factual basis for the plea existed. See: North Carolina v. Alford, 400 U.S. 25, 27 L.Ed.2d 162, 91 S.Ct. 160

(1970). If such a plea is made, the Court should require the prosecution to state for the record what facts exist which would be offered at trial to prove the defendant's guilt.

F. Non-acceptance of A Plea of Guilty:

Judge: 1. "This Court is not going to accept your plea of guilty, but will enter a plea of not guilty for you for the following reasons:

_____

_____

2. The Court will set a trial date for _____."

G. Acceptance of A Plea of Guilty:

Judge: 1. "This Court is satisfied that you are aware of the nature of the guilty plea which you have made and of the consequences of such a plea, that you have made the plea voluntarily and that a factual basis exists to support your plea of guilty. Therefore, the plea of guilty which you have made will be accepted and this Court finds you guilty as charged.

2. Do you have anything to say in your behalf before sentence is imposed on you?

Judge: 3. Are there any facts which you would like the Court to consider before sentence is imposed on you?

4. The Court now requests that the prosecution come forward and state for the record those facts which would have been offered at trial to prove this defendant's guilt had the defendant entered a plea of not guilty. The prosecution shall also state any facts of aggravation, mitigation or relevant aspects of the defendant's background to assist the Court in imposing sentence in this case."

[NOTE: The prosecution will at this time be allowed to make a statement. The Court may question the prosecution concerning any facts which are relevant to the guilt of the defendant or to the sentence which should be imposed. Thus, the record will contain the plea of the defendant and sufficient facts to justify the court's acceptance of the guilty plea. The Court will also be provided with important facts to assist it in determining the appropriate sentence to be imposed.]

Judge: 5. In case of immediate sentencing: "It is the judgment of this Court, considering all the facts and circumstances, that you be sentenced as follows:_____." (Penalty to be governed by the provisions of the Tribal Code.)(See "Sentencing", §4.B. of this chapter)

Judge: 6. When sentence is set for a later date (in lieu of 2,3,4,5): "This Court sets the date of _____ at which time you will be present in this Court and sentence will be imposed upon you."

(NOTE: At the later date set for sentencing, the Judge will follow the provisions of 2, 3,4,5, above.)

7. Release Conditions: (Use one of the alternatives listed below.)

Judge:

a. "In the meantime, you shall remain in custody until the date set for sentence."

b. "In the meantime, your present release conditions will be continued until the date set for sentencing."

c. "The Court hereby establishes the following conditions for your

release as follows"

(Select (1),(2),or(3), with (4)).

(1) "On your own recognizance."

(2) "Posting of cash bail in the amount of $_____."

(3) "Posting of a surety bond in the amount of $_____."

(4) "Other conditions of your release are:" (here, state any special conditions.)

[See the sample "Notice of Rescheduled Arraignment" and "Advice of Rights" in the Appendix to this chapter]

iii. A Special Note About Guilty Pleas

The voluntariness of the defendant's plea is the prime consideration in evaluating a guilty plea by a defendant. It must be noted that a guilty plea is not merely a confession but is equal in law to a conviction with all the ramifications of a conviction.

When looking at the voluntariness of a guilty plea, the judge should consider the "totality of the circumstances" under which the plea was made. If the plea was induced by improper physical or mental pressure or threats of the same or, before entering the plea, the defendant was not fully aware of the consequences of his plea, the plea should not be accepted by the court.

When evaluating promises made to a defendant by the prosecutor, in any case where the promises were not performable at all or were, contrary to the defendant's understanding, not within the power of the prosecutor, or were disregarded once their purpose was accomplished, the defendant should not be allowed to enter a guilty plea without reconsidering his position. This is because any plea made under these circumstances was induced or coerced illegally.

Before accepting a plea of guilty from a defendant, the judge must insure that the defendant understands the nature and consequences of his plea. The judge cannot merely ask whether the plea is understood and accept a "yes" answer. He must carefully explain what the plea means in practical terms and require that the defendant's responses show that he understands what he is doing. In each case, the judge should compare the acts of the defendant with the elements of the crime the defendant is charged with to determine if a factual basis exists for the charges. The judge can get information regarding the defendant's actions from the complaint or by questioning the defendant when he appears in court. And, before the plea is accepted, the defendant should be informed by the judge of the maximum and minimum sentence he could possibly receive if convicted and also whether or not probation is available if he is convicted.

The United States Supreme Court has pointed out that understanding the meaning of the plea requires that the accused fully comprehend the nature and meaning of the charge, what acts constitute guilt under that charge, and the consequences of pleading guilty. Edwards v. U.S., 358 U.S. 847. The judge must ask the accused whether he understands that, by pleading guilty, he will lose the right to a jury trial and the right to inform the court of other facts which the defendant may want to make known.

Even if the accused is represented by counsel, the judge still must satisfy himself that the defendant understands the charges and the consequences of a guilty plea. The presence of counsel does not eliminate the judge's responsibility to make a full explanation to the defendant. In addition, if the accused desires to waive his right to counsel, the judge, before accepting the waiver, must make sure the defendant understands the nature and seriousness of the offense. Only then can the accused understand the importance of counsel and the effect of such a waiver. Von Molthe v. Gillies, 332 U.S. 708. The judge must be personally convinced that there is a factual basis for the guilty plea. If the judge does not believe that the accused is guilty of the crime charged, he must not accept the plea even if the defendant insists that he is guilty.

iv. Summary - Guilty Pleas

In sum, the defendant must:

a. plead voluntarily;

b. understand the nature of the charge and consequences;

c. have the possible penalty clearly explained to him; and

d. understand he is waiving a jury trial, which he is entitled to.

Only literal compliance with the above procedure will carry out it's two purposes to: (1) assist the judge in making certain that the guilty plea is truly voluntary; and (2) to develop a complete record to support his decision in a subsequent post-conviction attack on the judgment. A detailed record kept at all arraignments is the only way a judge can show on appeal or in a later trial that the defendant was fully informed of his rights and the crime with which he was charged, and that the judge fulfilled his responsibilities in protecting the rights of the accused. A simple form can be used--filled out and signed by the judge or clerk--which shows that each step has been followed and that defendant's rights have been protected. [see the sample "Acceptance of Plea of Guilty" in the Appendix to this chapter]

v. Plea Bargaining

Plea negotiations by prosecutors with defendants or defendant's counsel are a common occurrence. The most common arrangements in "plea bargaining" are: (1) pleading guilty to a lesser included offense; (2) dismissal of some of the charges in the complaint or other charging paper; and (3) recommendations by the prosecutor to the court as to the sentence the defendant should receive for committing the offense. Where sentence recommendation is used, the prosecutor, in return for a plea of guilty by the defendant, agrees to recommend to the court a sentence favorable to the defendant. This recommendation could take the form of a shorter than usual sentence for the offense, a reduced fine, a recommendation for probation, or a suspended sentence or a combination of the above.

Sentence recommendation is a relatively new idea in plea bargaining and the judge should be careful to see that the defendant receives the recommendation he bargained for from the prosecutor. When the defendant pleads guilty to a lesser included offense, the court should be advised that this is what the prosecutor has recommended or agreed to and the court usually is allowed to accept or reject such a plea without being bound by the prosecutor's promise but the court in most instances certainly should give favorable consideration to the recommendation.

Where a prosecutor agrees to dismiss some of the charges against the defendant in return for a guilty plea to the remaining charges, the prosecutor should move for dismissal of the charges as agreed by the defendant.

The defendant should enter his plea after the prosecutor has advised the court there is a disposition to be made in the case. Once the defendant has pleaded the prosecutor should move for dismissal of the remaining charges and usually these charges should be dismissed as a matter of course.

As noted, a prosecutor can bargain with a defendant or his counsel regarding a guilty plea. However, if the prosecutor promises something he cannot control, then he has induced a plea from the defendant and the judge should refuse to accept a guilty plea from such an individual. For example, if a prosecutor promises a defendant a suspended sentence without telling the defendant the judge is the only one who can set the penalty and all the prosecutor can do is recommend a certain sentence in a given case, the judge should refuse to accept the defendant's plea. Only if the prosecutor promises something within his control in return for a guilty plea can the plea be accepted by the court.

Both the prosecutor and the judge have a responsibility to deal with the defendant fairly in negotiating

and accepting a guilty plea. As noted above, the prosecutor has limits on the type of promise he can make to a defendant in return for a plea of guilty. Briefly it can be said that if: (1) the prosecutor makes a promise to do something which he does not have control over or (2) fails to keep the promise as the defendant believes it was made, the prosecutor has overstepped his limits and a guilty plea tendered where such circumstances exist cannot be accepted by the judge as voluntary.

Other problems may confront a judge with regard to a guilty plea. Just as the prosecutor can't induce a defendant to plead guilty, neither can the judge. It is a common practice in many jurisdictions to give persons pleading guilty lighter sentences than persons convicted by a court or jury. However, the judge should never try to influence a defendant to plead guilty by telling him that persons who plead guilty usually get lighter sentences than persons who are convicted by the court or a jury. The reasoning behind this prohibition is that in mentioning the possibility of a lighter sentence to the defendant the judge is putting a price on the right to trial.

In a few jurisdictions it is common for the prosecutor to ask the judge what sentence a defendant might expect in a given case considering the defendant's acts and past record. If the judge promises the prosecutor

he would sentence the defendant to a certain term given the facts in the case, he must give the defendant that sentence or a shorter one or withdraw the defendant's plea of guilty. In other words, if you promise a defendant a sentence in a given case, if you change your mind for any reason you must withdraw the defendant's guilty plea and allow him to replead in light of the changed circumstances. This principle also is applicable to the prosecutor. If he changes his mind with regard to a promise or bargain made with the defendant, the defendant must be so informed and allowed to plead again.

The rule for deciding when to allow a defendant to withdraw his plea is usually expressed as a means of correcting a "manifest injustice." A judge should order a defendant's plea withdrawn or allow the defendant to withdraw his plea, even after a defendant has been sentenced if it appears the ends of justice would be better served by allowing the defendant a chance to reconsider his plea. Plea withdrawal will usually occur in cases where the court is presented with new evidence that: (1) the defendant did not commit the act; or (2) a bargain made by the prosecutor with the defendant was not kept.

vi. Questions

1. What is the nature and purpose of an arraignment?

2. Why should a judge explain the effect of a guilty plea to a defendant?

3. Does the Civil Rights Act of 1968 apply to arraignments or only to trials?

4. Is a defendant entitled to an attorney at an arraignment? What if he cannot afford to pay for one?

5. What action should the judge take if a defendant does not show up for arraignment? Would it make a difference if the judge saw the defendant that morning leaving on a fishing trip?

6. Suppose the defendant pleads guilty and then appears to be lying when he tells the court about the circumstances of the offense. Can the tribal court call on additional witnesses to clarify the circumstances of the offense to aid the judge in imposing sentence?

7. Tom White has just been charged with possession of stolen property, a watch that was found in a search of his car. He pleads guilty to the charge, but the judge thinks he is covering up for someone else. Does the judge have to accept Tom's plea?

D. The Judge and the Jury

i. In General

Jury trials are required by the United States Constitution in both criminal and civil cases. The Seventh Amendment which became effective in 1791 provides:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

Although the right to a jury trial in criminal cases has been held by the United States Supreme Court to be fundamental to the American scheme of justice and thus required in state criminal proceedings by the "due process" requirements of the Fourteenth Amendment, the federal constitutional guarantee of a jury trial in civil cases has not been incorporated into the Fourteenth Amendment and does not bind the states. As the federal constitution is concerned, a state is free to modify or even abolish trial by jury in civil cases as long as its system does not deny "due process" or the equal protection of the law to litigants in state court.

The 1968 Indian Bill of Rights, 25 U.S.C. § 1302,

follows the same pattern as that for the states. A defendant in tribal court accused of a criminal offense punishable by imprisonment is entitled, upon request, to a trial by jury of not less than six persons. The Indian Bill of Rights does not require jury trials in civil cases although the parties are entitled to both "equal protection" and "due process," concepts which will be further explained in Chapter 3. Although not required by federal law, most tribal constitutions and tribal codes do provide for jury trials in civil as well as criminal cases. But, as developed in the following discussion, the judge in jury cases is still the predominant figure. He must select the jury, insure they are qualified, instruct them as to what the applicable law is and even set aside their verdict when necessary.

Demand for Jury Trial. The Indian Civil Rights Act requires a jury trial upon request for all persons who face imprisonment as punishment if convicted as accused. In all cases (unless the tribal council or tribal court have rules providing for a jury trial as a matter of right or in the discretion of the tribal court) the party to the suit who desires a jury trial must request one. In civil cases, in the absence of a demand for a jury trial, it is usually considered that both parties waive their right to a jury trial and accede to having their case tried by the

judge. In criminal cases, the judge must inform the defendant at arraignment, as previously noted, of his right to a trial by a jury.

Waiver of a Jury Trial. Subsection 10 of the Indian Civil Rights Act requires that in a criminal case, waiver of a jury trial can only be done by the defendant and should be agreed to by the court and the prosecution. Their agreement is not a requirement, but should be taken into consideration. The defendant's waiver must be specific and not implied or inferred from the acts and words of the defendant or his attorney. There must be express waiver by written stipulation to the court or by oral waiver in court by the defendant or through his attorney in the defendant's presence. It should be clear to the tribal judge that the defendant understands that by waiving the right to trial by jury he submits his case to the judge who is to determine the truth of the facts presented during the trial and apply the law to these facts.

As a general rule, once a waiver has been given, it cannot be withdrawn except as provided by law, by rules of court procedure, or in absence of these, in the discretion of the court.

The procedure for withdrawing a waiver for jury trial should be based upon circumstances of each individual

case and involve the following: (1) that the prosecution agrees to withdrawal; (2) that the court agrees to withdrawal; (3) that the withdrawal request is based upon valid reasons; (4) that the request is made before the other party has acted in detriment to its case; and (5) that the request is made with sufficient time to select a jury and still allow the trial to proceed as scheduled.

It must be remembered that local law and custom is the determining element in allowing withdrawal of waivers and providing the procedures to be followed.

In Federal Rules of Criminal Procedure, 23(a), all cases required to be tried by jury must be tried accordingly unless the defendant waives his right to trial by jury in writing, approved by the court, and consented to by the prosecution. Once the waiver is made, withdrawal of the waiver is ordinarily within the discretion of the court. The facts and circumstances will very often determine whether withdrawal is allowed. The tribal court should also consider the facts and circumstances of each case when withdrawal is requested.

In civil and criminal cases not involving possible imprisonment, trial by jury is not a matter of right, unless local law provides otherwise. When trial by jury is not a matter of right, it is incumbent upon the party

desiring trial by jury to demand a trial by jury. If a party does not make demand, the court considers in the absence of demand that both parties have waived any right to trial by jury.

Rule 38(d) of the Federal Rules of Civil Procedure provides that unless the parties to the suit demand a trial by jury in accordance with the procedures for demand, the right to trial by jury will be considered waived. [See the sample "Accepting Waiver of Jury Trial" in the Appendix to this chapter.]

ii. Jury Selection

a. In general

The Anglo-American tradition of trial by jury, both in civil and criminal cases, requires an impartial jury drawn from a cross-section of the community. This does not mean, of course, that every jury must contain representatives of all the economic, social, religious, racial, political, and age groups of the community. But it does mean that prospective jurors shall be selected by court officials without systematically--intentionally or unintentionally--excluding any group from jury service. Jury competence is an individual rather than a group or class matter. The method used to select jurors is left largely to the discretion of the individual courts, but procedures

must be developed which do not favor or discriminate against any group. Thiel v. Southern Pacific Co., 328 U.S. 217 (1946).

While the mechanics of jury selection may vary according to the size of the court and the number of jurors needed, the basic procedures used in all jurisdictions are generally quite similar. There are generally four stages in jury selection: 1) establishing the jury list; 2) selecting a jury panel; 3) filling the jury box; and 4) examination of the prospective jurors.

b. Establishing the Jury List

The first stage in jury selection is the most time-consuming because it involves drawing up a list of prospective jurors. The list should be made far in advance of the time a jury will be needed for trial. The method used for selecting names must insure that the list contains a cross section of all members of the community within the jurisdiction of the court. While a minimum age must be established, it is not proper to exclude groups because of income, religion, or sex. In state and federal courts, jury lists are usually based on voter registration or tax rolls, but an Indian court probably can use tribal

membership rolls.*

Some states automatically exclude certain older persons, women with young children and persons with certain occupations, for example, doctors and teachers, from the jury lists. Such automatic exemptions are generally not favored and the better practice is to allow certain persons to exclude themselves because of old age, family responsibilities, or occupation.

One simple way of selecting a jury list is to estimate the number of jurors who will be needed during the next year or two and establish a ratio between the number of jurors needed and the number of adults on the tribal rolls. If, for example, the court anticipates twenty jury trials during the next two years and a panel of twenty is needed for each trial, a jury list of 400 names will be required. If the tribe has 4,000 members, but half are children or live off reservation, one out of every five eligible members will be selected for the jury list. The court clerk or jury commissioner (not the tribal secretary

---

*It is generally assumed that non-members and tribal members living off reservation need not be included on the jury lists, although as a policy matter, the court or tribe may decide to include them.

or a B.I.A. official) must then go through the rolls and select every fifth name for the jury list. This selection process must be done strictly mathematically; the clerk MUST NOT attempt to pick persons whom he or she feels will be good jurors. The clerk MUST pick every fifth name.

c. Selecting a Panel

Once the jury list has been completed, panels may be selected from the list whenever they are needed. The panel is a smaller group of potential jurors from which the final jury of six will be chosen. The panel is selected by drawing names at random from those on the original list. Experience will determine how many potential jurors need to be called to get the six who will hear the case. One might start by calling 20-25; the number then can be increased or decreased as required. An easy method is to write the name of each person on the jury list on a separate slip of paper and then place all the slips in a box. The clerk can draw out the required number of names for each panel.

Although the actual selection of jury lists and panels is an appropriate job for the court clerk, the chief judge is responsible to see that the jury is properly chosen and that it represents a cross section

of the community. The judge will also have to rule on all requests to be excused from jury duty. [See the sample "Jury Summons/Affidavit of Service" in the Appendix to this chapter.]

d. Filling the Jury Box

The court clerk or jury commissioner must estimate the number of jurors to be called or summoned in order to be sure to have enough left after all excuses to be exempt from jury duty have been approved and pre-emptory challenges and challenges for cause (concepts which will be explained in later sections of this chapter) have been made. In making such an estimate, the clerk will have to consider the type of the case to be tried, who the parties are, how long the trial may last, if either or both sides are represented by attorneys and how much publicity there has been about the case in the community. Where the law and order code provides for a six-member jury with three pre-emptory challenges per side, the clerk may want to call 20-25 jurors.

The jurors should meet with the clerk at least 30 minutes before the case is called for trial. In this way the clerk can see how many people have failed to appear.

She can also check to insure that each is qualified and if any seek to be excused they can be taken to the judge.

The jurors are then taken to the courtroom and seated in the spectator section (an area should be reserved for them so they will not come in contact with any of the parties, witnesses, their relatives or attorneys). The case is called for trial and the examination is begun.

e. Examination

Before a juror can be selected to hear a case, he must be questioned to determine whether he or she is competent (mentally and physically capable of serving on the jury) and impartial. The examination of prospective jurors takes place before any of the matters of the trial are discussed in court. Normally the examination is referred to as the "voir dire" of the jury. "Voir dire" is a french term which literally means "to speak the truth", and in practice refers to the process of examination of a jury panel in order to select a qualified and unbiased trial jury. The general purposes of the voir dire examination are:

(1) To determine whether the jurors meet the qualifications for jury service set out in tribal ordinances (for example, that the

juror is an Indian and is not a minor);

(2) To determine whether any grounds exist for challenges for cause (a term to be explained shortly); and

(3) To provide the parties with sufficient information that they may exercise intelligently their right to make preemptory challenges (also to be explained shortly).

In general a juror should be excused on a challenge for cause if his relationship to a party or his attorney by blood, marriage, or business ties is such that partiality could be presumed, or in any situation where he admits to bias or prejudice concerning the merits of the particular case before the court.

Whether these grounds exist is usually developed by the answers of the juror through the questions on voir dire examination. Sometimes a juror will admit to some past or present connection with the party, or to having overheard information about the case or having read a newspaper about it and formed an opinion on it. The juror can then be asked whether he can disregard the prior experience and decide the case according to the law and the evidence presented at the trial. Notwithstanding an affirmative answer to such a question he may still be challenged. Whether or not to sustain

the challenge rests within the sound discretion of the judge. In ruling on these challenges the judge will need to review all the answers of the jurors to determine, if taken as a whole, they indicate bias or prejudice. Each side ordinarily has an unlimited number of challenges for cause.

During voir dire, the prospective juror can be asked questions: 1) solely by the judge, 2) solely by the tribal prosecutor and defense attorney, or 3) in order by all three parties. It is in the judge's discretion to decide what procedure to follow.

In most federal courts all questions are asked by the judge, although the parties or their attorneys may submit questions for the judge to ask. No matter which method is used, the judge must make sure that the questions are proper and are used only to determine the juror's ability to be impartial. The "voir dire" examination should never be used as a means of convincing the jury that either party should prevail.

The method used by federal courts insures that the questioning will be proper and will not be used as an opportunity for the attorneys to present their sides of the case before the trial begins. Under this method the judge draws up a list of questions designed to discover whether the jurors will be biased. He tells

parties or their attorney what questions he will ask and gives them a chance to submit additional written questions which they feel are necessary to obtain an impartial jury. If the judge finds that the questions are proper he adds them to his list.

Examination by the Judge. Before the judge questions the jury panel, he should impress on all of them the importance of jury duty and the great responsibility which is given to them. He should explain the problems involved in the case before the court, and in a general way familiarize the jury with some of the essential facts set out in the pleadings. After these preliminary matters, the judge asks the panel specific questions which pertain to possible bias, opinions of the case they may have formed in advance, relationships to the parties or counsel, a similar experience in their own lives which would influence their judgment, or a financial relationship with any of the parties. What has been said in previous lessons about the impartiality of the judge applies equally to the impartiality of the jury. The judge by his questions must try to uncover any factors which might lead to a biased judgment by a member of the jury.

The following procedure is suggested if the judge wants to begin the general or specific questionning of the prospective jurors.

Immediately after court has been called into session and the judge has determined that the parties are ready for trial, he should make some brief introductory remarks to the assembled jury panel.

The following is suggested:

"Good morning (or afternoon), Ladies and Gentlemen of the jury panel. Today we will hear the case of _____ _____ Tribe vs. _____, Defendant.

"You people have been selected for the jury panel and from your number there will be chosen six (or some other number) persons to hear this case. The prosecution and defense will have an opportunity to ask you some specific questions to determine if you should sit in this case, but before this is done I will direct some general questions to all of you. First, please rise and you will be sworn concerning the answers you will give to the questions to be asked of you.

"Do you solemnly swear that you will truthfully answer any questions concerning your qualifications to serve as jurors during the present term of this court SO HELP YOU GOD."

The judge must then instruct the court clerk to draw six names from the jury list. Prior to this, all names have been placed on slips of paper and put into a box. The judge at this point says:

"When your name is drawn and called, please take a seat in the jury box."

After six names have been called, the judge will then proceed as follows.

"You ladies and gentlemen who have taken a seat in the jury box, please listen closely as I ask certain questions. The others of you who are on the jury panel should also pay close attention, because the same questions will probably also be asked of you.

"1. The defendant is on trial today charged with (state the offense and briefly describe the charge by referring to the complaint). Have any of you heard anything about the case, or do you have any prior knowledge of it?

2. Now to this charge the defendant has pleaded not guilty. Throughout the trial he is presumed to be innocent until his guilt is proved beyond a reasonable doubt. The prosecution or the tribe has the burden of proving this guilt. Do you understand that the defendant has these rights and do you agree with them?

3. Is there anything in the type or kind of charge involved that would make you prejudiced against the defendant, or difficult to judge the case?

4. Are any of you closely related to the defendant?

5. Is there anything that you can think of which would make it impossible for you to give the defendant a fair and impartial trial?"

[See the sample Jury Questionnaire in the Appendix to this chapter]

Prosecution and Defense Examination. After the judge has asked the questions listed above and any others he may have, counsel for prosecution and defense usually have the opportunity to conduct a voir dire examination of the six prospective jurors in the box by asking questions. Thus counsel for both sides are merely asking questions which relate to the juror's ability to be fair and impartial in judging the case.

The kinds and types of questions the prosecution and defense may ask on voir dire examination cannot be set forth in this manual because of their specific nature to each case. The judge must exercise common sense in determining the nature of the questions he should or should not permit. In ruling on these questions he should be guided by the legal proposition that the purpose of voir dire questioning is to obtain for both prosecution and defense fair and impartial jurors without any bias or prejudice for or against either side.

To assist both sides in selecting a jury, each has an unlimited number of challenges for cause. Thus, if a

particular juror is partial, biased or prejudiced for or against one side, he would be challenged for cause on the ground he is not fair and impartial. In a challenge for cause the judge is being asked to excuse or disqualify that juror. In ruling on these challenges the judge will need to review all the answers of the juror to determine, if taken as a whole, they indicate a bias or a prejudice.

If both sides are not represented by counsel the judge must assume a greater role in the voir dire examination in order to see that only fair and impartial jurors are selected.

Exercise of challenges

a. When the prosecution and defense have completed their voir dire questioning of the six prospective jurors, the judge should ask each side to approach the bench to exercise their challenges. The exercise of challenges should be done in a low tone of voice so that it is outside the hearing of the jury. The normal procedure is that the judge asks both sides if they have any challenges for cause, and if so, to state them. As the challenge is made to the specific juror, the judge will rule on it by either allowing or denying the challenge. If either side is not represented by counsel, the judge will have to exercise the challenge for cause.

b. In almost all courts the defense and prosecution have what is called preemptory challenges. These may be exercised without the necessity of having to state the grounds or reasons for such. In other words, absolutely no reason at all need be given for the exercise of a preemptory challenge. It may be that the party challenging the juror does not like the way the juror is dressed. His reasoning can be that arbitrary. The number of preemptory challenges for each side should be set by the rules of the court. If this has not been done, it is suggested that a total of three preemptory challenges per side is adequate.

If either side is unrepresented, the prosecuting or complaining witness and the defendant should be informed of the right to exercise preemptory challenges, the number available, and the method by which they are exercised.

Continuation of jury selection process. After the first six jurors in the box have been questioned by the judge, the prosecution and defense, and preemptory challenges and challenges for cause have been exercised, those jurors left in the box will constitute a part of the trial jury. The remaining seats will be filled by new prospective jurors when the judge instructs the clerk to call the required number of names. The same process of jury selection will begin again and continue until six jurors have been chosen. If none of the original six were challenged, they would, of course, compose the jury.

All remaining jurors who have not been selected should be told that they are excused until a later date.

iii. Jury Control

Once the jury has been selected, it must be sworn. The oath given to the jury should be administered in a solemn way to impress them with the importance of their role in the administration of justice. The oath is administered by the court clerk or judge, and could be as follows:

Do you solemnly swear that you will truly and fairly try this case between the _____ Tribe and the defendant, so help you God?

This simple ceremony sets the tone for the entire trial in the minds of the jurors. The judge must then instruct the jury on their responsibilities both in and out of court. He has to explain that once they leave the courtroom they cannot talk about the matters of the trial until the trial is completed. (A sample jury instruction is included in the Appendix to this chapter.) If a flagrant violation should arise, the judge may use

the contempt power to discipline a delinquent juror. The jurors are officers of the court as long as they are in the process of hearing a case. As officers, they fall under the direct supervision and control of the judge.

To preserve the integrity of the jury during the trial, there should be a jury room available which is reserved for their use alone. Unless such a room is available it will be nearly impossible for the judge to prevent the jury from coming into contact with persons or information which might affect their deliberations.

The unique feature of the jury system is that laymen who are not familiar with legal principles may be called on to decide some very complicated cases. To accomplish their purpose, they must receive legal assistance from the judge. At the outset of the trial he is called on to explain their duties, and to give them an initial lesson in the legal terminology which they will need to understand the proceedings. Some judges prefer that this orientation be given orally in a very informal manner. While this has the advantage of not frightening the jury by a formal presentation, it may not be as accurate nor as complete as desirable in a difficult case. For this reasons some courts use a written handbook or information sheet for jurors. The handbook outlines the responsibilities of the juror, some of the legal principles he must deal with, and any

other matters which the court feels will aid the juror in his deliberations.

During the course of the trial some jurors may want to take notes to aid them in following the facts which are presented. Centuries ago this practice was forbidden because only a few members of the jury could write, and it was thought that written notes would unduly influence the other members of the jury. However, today most courts encourage jurors to take notes so long as they do not try to record everything that happens during the trial. The court may want to furnish notepads and writing instruments to the jurors.

Ocassionally it becomes necessary for the jury to view the scene of an event or a piece of evidence which cannot be brought to the court. Such views are left to the discretion of the judge and, if conducted at all, must be handled carefully. When the jury leaves the court the judge should direct the bailiff to see that no one talks to them and that they do not engage in conversation or question anyone else. The area to be viewed by the jury should be carefully prepared in advance to insure that the site has not changed since the event took place.

Several times during the course of the trial a juror will want to ask a question which he feels is important to his decision. While such questions are sometimes

allowed under certain circumstances, it is a practice that should not be encouraged, and if permitted, should be carefully controlled. Questions from the jury are often improper or pertain to matters which are outside the scope of examination. While the questions may reflect a sincere attempt on the part of the juror to get at the truth, they may also undermine the legal protections which are given to the parties during the trial. The judge should never permit a juror to ask any questions directly. He may, however, permit questions to be submitted by the juror in writing so that the judge has an opportunity to review the question before it is asked. If it is an improper question, the judge can reject it without the necessity of one of the parties objecting to the question in open court--a situation which would undoubtedly prejudice at least the questioning juror, if not the entire panel.

Ordinarily the judge does not give explanations of parts of the law until the end of the trial when the formal instructions are presented to the jury. If something should arise during the course of the trial which needs an explanation, it may be done at that time. However, since this would tend to break the continuity of the trial, it should be done only where the lack of an explanation might adversely affect the rights of the parties.

iv. Responsibilities of a Jury

Jury conduct during the trial is closely guarded so that both parties will be sure to receive a fair and impartial trial. The jury must remain open-minded throughout the trial, free from outside influences and able to base their judgment solely upon the facts presented and the law as it is told to them by the judge.

Basically, it is the duty of each juror during the trial and during all recesses:

(a) not to discuss with other jurors any subject concerning the case being tried before them;

(b) not to discuss with anyone any subject concerning the case being tried before them;

(c) not to allow any other juror or anyone else to discuss with them any subject concerning the case being tried before them;

(d) to tell the judge of anyone, another juror or anyone else, who talks to them concerning the case being tried before them;

(e) not to talk to counsel for either party in the case about any matter whatsoever (a juror cannot under any circumstances or for any reason talk to counsel for the prosecution or the defense);

(f) not to talk to any witness about any matter whatsoever;

(g) not to have any information about the trial before them except that information given to them in court while the trial is in session;

(h) not to try to learn any facts concerning the case which are not presented during the trial;

(i) not to read any newspaper, magazine or other articles about the trial or about the law and facts affecting the case;

(j) not to listen to radio or television broadcasts concerning the case, facts, or law involved in the trial; and

(k) not to form an opinion on the case except based upon all the evidence presented and in light of the law as told to him by the judge. His verdict must be based upon all the evidence presented during the trial and that evidence only.

v. Jury Instructions

In a trial by jury, the jury decides questions of fact (whether confiscated fishing nets owned by the defendant were placed in the river on thursday), but they must apply the law which the judge gives them (no fishing nets may be placed in the river on thursday). The explanation of the law is given to the jury by way of "jury instructions." There is no particular form required for proper instructions although model instructions are available for different

types of cases. If these model or pattern instructions are used by the judge, he must be careful that the law upon which the instruction is based applies in his court and that there is a factual basis for the instruction. Instructions should only be given when (1) they accurately state the law in that jurisdiction, and (2) there is a factual basis--some evidence--to support the instruction. For example, a defendant in a criminal case is not entitled to the standard "self-defense" instruction unless under existing tribal law self-defense is a proper defense to the charge AND there is some substantial evidence that the defendant may have acted in self-defense. No instruction should be given simply because it is "good law"--it must be relevant to the particular case.

Although instructions are generally given to the jury orally, they should be prepared by the judge in advance. Because of the importance of a proper understanding of the law by the jury, the judge should take the time and effort to write his instructions.* He should then read them to the jury in a conversational tone. A minor error can create an inaccurate picture of the law in the mind of a

*If both sides are represented by attorneys, it is perfectly proper for the judge to ask both attorneys to submit proposed instructions so that he can choose those that seem to be the best.

jury member. Written instructions avoid such misunderstandings.

There are two things which are present in all good instructions. First, they must be an accurate presentation of the law. Second, but equall, important, the law must be presented in a way that the jury can understand. The judge does not write instructions for himself or for others with legal training. He must remember that the jury cannot be presumed to know anything about the law. The most precise statement of the law is useless if the jury does not understand it. Legal terminology should be used only where absolutely necessary and then carefully explained to avoid misunderstanding.

While the form of the instruction is left to the judge, good instructions include the following elements. First, the judge should caution the jury to stay within their legally defined limits in reaching a decision, that is, to stay with the law he gives them. Second, the judge should briefly present those contentions of each side which have been substantiated with proper evidence. He should tell the jury where the burden of proof rests, and what each side must prove in order to win. Finally, he should explain to them the applicable law in terms which they will understand.

The importance of proper jury instructions cannot be

overemphasized. It is through the instructions that the law and the facts are brought together in the minds of the jury so that they can reach a proper decision. Only with good instructions can the jury system operate with maximum effectiveness.

vi. Jury Deliberations

Deliberation is the discussion by the jury, once the case has ended, of matters of fact, determining the truth of these facts and, in light of the law applicable to the case and issues involved, reaching a verdict as to the innocence or guilt of the parties involved.

After receiving the instructions on the law from the judge, the judge directs the bailiff to take the jury to the jury room for deliberation. Once in the jury room, the jurors are to select a foreman who is to preside over the proceedings while in the jury room. Once he or she is selected the deliberations among the jurors may begin.

The jurors are to discuss with each other for the first time the evidence and law presented to them during the trial. They discuss thoroughly their opinions and feelings in relation to the facts and the law of the case. Each juror must examine the issues in the case, the evidence presented and the law. He must listen to the opinions of the other jurors, respect them if possible and look at them impartially. He must with an open mind be

aware that his opinion may be wrong and that others who don't hold his same view could be right. He must consider every aspect of the trial and the deliberations as fairly and reasonably as possible so that his final decision is fairly and correctly made by himself and not by others around him. Each juror's final decision must be his own based upon the trial, the issues, the law, the deliberations and his own true belief.

vii. Reaching a Verdict

As mentioned previously, a jury room is essential when it comes time for the jury to reach their verdict. Whether they meet for ten minutes or ten days, the jury must be provided with surroundings which enable them to concentrate their entire energies on the verdict without any outside influence or distractions. Occasionally, the trial may last for several days. If the judge feels that the jury might be influenced by returning home for the evening, he may order them to be sequestered or kept away from all outside contact. This is done by having the court furnish accommodations for the jury during the trial. This will seldom, if ever, occur in most tribal courts, but the court may frequently have to make arrangements for the jury to take their meals together or to have their meals brought to them in the jury room. It is imperative that the judge instruct the bailiff, clerk, or other officer of the court

to see that no one tries to influence the members of the jury while they are out of court.

Sometimes members of the jury may request to take certain items to the jury room with them. What goes with the jury is left to the discretion of the judge. Ordinarily notes which a juror has taken during the trial may be used in the jury room. Depositions or sworn statements of a witness which have been taken out of court generally may not be taken to the jury room. It is feared that written evidence taken to the jury room may be given greater weight than is the testimony which is left to their own recollection. In the case of exhibits or photographs used during the trial, the questions become more difficult and the judge must decide each case individually. On the one hand he must try to give the jury access to as much information as possible. On the other, he must not allow one piece of evidence to unnecessarily attract the attention of the jury, and thereby unduly influence their decision.

viii. Returning the Verdict

The types of verdicts that a jury will be asked to return will be discussed in section 4 of chapter 2. The return of the jury verdict occurs at the end of the trial and therefore will be discussed with the duties of the judge after trial.

ix. Questions

1. The procedure in Judge Brown's court requires him to select the jury. In a trial for drunken driving the defense counsel has asked the judge to question whether the prospective jurors have ever received a traffic ticket. Should the judge include that with his question?

2. The defendant is being tried for assault in a widely publicized and controversial trial. It is now time for lunch. Should the judge release the jury members to go to their homes for lunch? What other alternatives are open to him?

3. The defendant's attorney has challenged a prospective juror for cause. He says that the juror has traded in the plaintiff's store and that he would therefore be prejudiced for the plaintiff. The case involves a bad debt. The plaintiff is owner of a large grocery store where over 60% of the community does its shopping. Should the judge remove the juror?

4. During the course of the trial three of the jurors have been taking notes. When it comes time for the jury to retire to decide the case the prosecution objects to the jurors taking their notes to the jury room. How should the judge rule on the objection?

5. During a trial for disorderly conduct Judge Franks permitted jurors to ask questions of the defendant. Without telling the judge in advance what the questions would be, they asked a total of 43 questions. The defense attorney objected to some of the questions but after receiving scowls from the jurors when his objections were sustained, he quit objecting. He now requests a new trial. How would you rule on his motion?

E. The Pretrial Conference or Hearing

The pretrial conference or hearing is a meeting held shortly before trial between the judge, prosecutor, and defense attorney (if the defendant has one) to accomplish the following possible objectives:

1.) narrow and simplify the issues to be tried;

2.) obtain admissions of fact and of documents which will avoid unnecessary proof;

3.) exchange the names and addresses of prospective witnesses;

4.) examine and identify proposed exhibits;

5.) rule on motions or other requests then pending and find out whether any additional motions or requests will be made at trial; and

6.) discuss any other matters that may expedite pretrial proceedings and trial.

In addition to expediting pretrial proceedings and trial, the pretrial conference might also be viewed as an opportunity for the parties to attempt to settle the case before trial. In a criminal case, the judge and counsel might confer as to any plea bargains the prosecutor and defense may have tentatively agreed to. Judicial encouragement and subsequent approval of a plea bargain at this point would eliminate the need for trial.

The pretrial conference or hearing is not compulsory,

but the court might make their scheduling routine or by application of counsel. The hearing or conference might be formal, or extremely informal, taking place in either the judge's chambers or open court. The judge may choose whether to play an active or inactive role in seeking to narrow the issues or achieve a pretrial settlement. Counsel should be required to make a full and fair disclosure of their views as to what the primary issues at trial will be. But the entire proceeding, however conducted, is aimed at reducing the impending trial to its simplest terms consistent with the protection and preservation of the litigants' basic rights and positions.

Following the pretrial conference or hearing, the judge makes an order reciting agreements, stipulations, or other actions taken at the proceeding. This order, unless subsequently modified, controls the later course of the case. [See the sample "Order for Pretrial Hearing" in the Appendix to this chapter]

Note the sample "Stipulation to Evidence-Nets" in the Appendix to this chapter which is a good example of a prosecutor - defense attorney agreement to narrow and limit the issues at trial regarding a fishing violation and fishing net seizure.

Note also the "Order on Motion by Plaintiff for Discovery" in the Appendix to this chapter which is the

judge's form in response to a prosecutor's motion for discovery. Discovery is a procedure used by either the prosecutor or the defense before trial to determine what witnesses either side will call at trial, obtain scientific and medical reports to be used at trial, and to compel the defendant to provide evidence such as finger prints, voice prints, blood, hair or other materials. This discovery motion is a good example of the type of motion a judge would have to rule on prior to trial.

Section 3. The Duties of the Judge at Trial

A. Introduction

The trial of an individual accused of a violation of the tribal code follows the summoning, arraignment, and jury selection procedures (if the accused has requested a jury trial). The judge must set a trial date within thirty days of the defendant's arraignment, unless this right is waived, if the charges have not been dismissed prior to trial, no agreement has been reached deferring prosecution, or the accused entered a plea of not guilty at arraignment. [See the sample "Order Deferring Prosecution, "Order for Trial Continuance," "Waiver of Right to a Speedy Trial," and "Notice and Order of Trial" in the Appendix to this chapter] The following section will address the duties of the judge at trial, and the order and manner of presentation of the prosecution and defense cases'.

The trial basically gives the prosecution and defense the opportunity to present their evidence as to whether the accused committed the charged offense. Each side tells their respective stories through the testimony of witnesses and by the presentation of exhibits. The prosecution (the tribe) has the burden of proof in a criminal case. That is, the tribe has the burden of proving to the jury,

beyond a reasonable doubt, each and every one of the elements of the offense charged. The failure to meet this burden as to any element of the offense will mean a failure of the prosecution's case, resulting in the defendant's acquittal.

The order of presenting evidence at trial is for the trial judge to decide. Ordinarily it will follow this pattern.

First: The tribe presents its case against the defendant.

Second: The defendant presents his defense.

Third: The tribe presents rebuttal evidence, if any.

Fourth: The defendant presents surrebuttal evidence, if any.

However, in virtually every case circumstances will arise which require modifications in this pattern. Thus the rule is well established that the order of proof in a particular trial is left to the discretion of the judge and is not subject to review on appeal except for a gross abuse of that discretion.

B. Opening of the Trial

i. Opening Statement of the Court

The trial is commenced by an opening statement of the court calling the name of the next case to be heard and asking counsel for the prosecution and defense

whether they are ready for trial. The following is a sample opening statement by the court:

"The case of _____Tribe v. _____, Defendant, criminal case No. _____ of this Trial Court. The record will show the defendant and the prosecution are present.

Is the prosecution ready for trial?

Is the defendant ready for trial?"

In cases where either party answers these questions in the negative, the court should inquire as to the reasons and then postpone the trial or order the trial to proceed.

ii. Jury Instructions

If the trial proceeds, in the event of a jury trial, the court generally makes some introductory remarks to the jury. These remarks should briefly explain the nature of the trial proceeding, the order that the trial will proceed in, and the basic nature and function of the jury itself. The following is an example of basic instructions given the jury at the beginning of a criminal trial:

LADIES AND GENTLEMEN:

What I will say now is intended to serve as an introduction to the trial of this case. I will also give you further instructions on the law and the

evidence which has been presented in this case at the close of the case and before you retire to consider your verdict.

This is a criminal case brought by the _____ Indian Nation, which I may sometimes refer to as the prosecution, and sometimes as the Tribe, against_____ _____. The case is based on a complaint, which reads as follows: [Judge reads the complaint].

You must understand that the complaint is simply a charge, and it is not in any sense evidence that the defendant committed this crime or any other crime.

The defendant has pleaded not guilty to the complaint. The prosecution therefore has the burden of proving all of the essential elements of the complaint beyond a reasonable doubt. The purpose of this trial is to determine whether the prosecution can meet this burden.

The charge is based on Section _____ of the _____ _____ Tribal Code, which provides, in part, as follows: (The Court should also give the jury a general instruction as to the essential elements of the offense charged.)

The trial will proceed in the following order:

First: The parties, that is the prosecution and the defendant, have the opportunity to make a short

opening statement which has the purpose of introducing you, the members of the jury, to the evidence which the party expects to produce. The prosecution will make its opening statement at the beginning of the case, and the defendant may make his opening statement following the prosecution, or he may defer the making of an opening statement until after the prosecution has completed its case. Neither party is obliged to make an opening statement. What is said in the opening statement is not evidence and shall not be considered by you in reaching your verdict.

Second: The prosecution will introduce evidence in support of the charges contained in the complaint.

Third: After the prosecution has presented its evidence, the defendant may also present evidence, but is not obliged to do so. The burden is always on the prosecution to prove every element of the offense beyond a reasonable doubt. Law never imposes on the defendant in a criminal case the burden or responsibility of calling any witnesses or introducing any evidence in his behalf.

Fourth: At the conclusion of the evidence, each party may present oral argument in support of his case. As in the opening statement, what is said in closing argument is not evidence and shall not be

considered by you in reaching your verdict. The arguments are designed to present to you what the parties contend the evidence has shown and what inferences they contend may be drawn from the evidence. The prosecution may both open and close the argument.

Fifth: I will instruct you on the applicable law and you will then retire to consider your verdict. Your verdict must be by two-thirds majority (as to every party and on every count).

Your purpose as jurors is to find and determine the facts; you alone are the sole judge of the facts. If, at any time, I make a comment regarding the facts you may disregard my comments completely. It is especially important that you perform your duty of determining the facts fairly and honestly for generally there is no way to correct an erroneous determination of the facts made by a jury.

On the other hand, and with equal emphasis, I instruct you that the law as given by the court constitutes the only law for your guidance, and it is your duty to accept and follow it even though you may disagree with it.

You are to determine the facts only from the testimony you hear and the other evidence introduced in court. It is up to you to draw whatever inferences

you feel may be proper from the evidence presented in this trial.

The parties or their attorneys may sometimes object to some of the testimony or other evidence; this is entirely proper, and you should not be prejudiced by a party or an attorney who makes objections. If I sustain such objections and direct that you disregard certain testimony or other evidence, you must not consider that testimony or evidence in any way in reaching your verdict. You must also not consider anything that you may have read or heard about this case outside of the courtroom, either before or during this trial.

In considering the value of the testimony of any witness, you may take into consideration the appearance, attitude and behavior of the witness, the interest of the witness in the outcome of the case, if any, the relationship of the witness to any party in the suit, the inclination of the witness to speak truthfully or not, the probability or improbability of the witness's statements, and all other facts and circumstances in evidence in this case. Thus, you may give the testimony of any witness just such weight and value as you believe the testimony of the witness is entitled to receive.

No statement, ruling, remark, comment, expression or other mannerism which I may make during this trial is intended to indicate my opinion as to how you should decide the case, or to influence you in any way in making your determination of the facts. At times I may ask questions of witnesses for the purpose of bringing out matters which I feel should be brought out, but again this is not to indicate my opinion about those facts or to indicate that those facts should be given special weight or value. If I find it necessary to rebuke the parties or their lawyers, you should not show prejudice to the party because I have found it necessary to be critical of them.

Once you have returned your verdict, if it is a verdict of guilty, it is my responsibility to determine what sentence should be imposed on the defendant. You should not concern yourself in any way with the sentence that the defendant might receive if you should find him guilty. Your function is solely to decide whether the defendant is guilty or not guilty of the charges against him. If, and only if, you find him guilty of one or more of the charges, then will it become the duty of this court to pronounce sentence.

Until this case is concluded and submitted to

you for your determination, you must not discuss it with anyone, including your fellow jurors. After it has been submitted to you for decision, you must discuss it only in the jury room and only with your fellow jurors. It is very important that you keep an open mind and not decide any issue in the case until the entire case has been presented and you have received the instructions of the court.

C. The Opening Statement

i. In General

In the trial of a criminal case, the prosecution has the burden of proof and has the right both to open and close the trial. This is a valuable right, especially in jury trials, because the one who opens and closes has the double advantage of creating first impression and of having the last word.

The purpose of an opening statement is to give an outline of the case so that the trier of the facts, the judge in the case of a non-jury trial, or the jury in the case of a jury trial, may more easily follow the evidence as it is presented. The opening statement is of less importance where the case is being tried to the judge without a jury since the judge probably has gained some familiarity with the facts from the charge and possibly the arraignment. However, when the case is being tried

to a jury, the importance of the opening statement can hardly be exaggerated because the jury usually comes to the case fresh and with no previous knowledge of the facts.

A clear and concise statement by counsel of the evidence he intends to present, not only creates a first impression in the minds of the jurors, but will be a great aid to them in putting the entire trial together, especially in view of the fact that it is often impossible to present the evidence in a logical and chronological order. Sometimes a witness is late, or fails to appear, and another witness must be called out of turn so that the evidence cannot be presented in precisely the order that the party would like. If a proper opening statement has been made the jury will understand these things and make necessary adjustments in its thinking.

ii. Rules Governing Opening Statements

The opening statement is not evidence, and the court should so instruct the jury. The opening statement is an outline of the evidence counsel hopes to produce. If counsel has been too optimistic and later fails to produce the evidence he has promised, the result may be devastating when opposing counsel reminds the jury of this in his closing argument. If, however, counsel gives the jury a clear picture of the evidence, which he can, and later does produce, the opening statement can be a crucial factor

CONTINUED

2 OF 5

in the case.

The opening statement of defense counsel follows that of the prosecution unless the court grants permission for the defense to reserve his opening statement until he begins the presentation of the defendant's case. What we have said here as to the proper limits of the plaintiff's opening statement also applies to that of the defendant.

After the opening statements of counsel, the prosecution then presents its evidence.

Counsel ordinarily is given considerable latitude in the opening statement, but there are limits to what can, or should, be allowed at this time. For example, counsel should not be permitted to discuss proof that would clearly be incompetent and objectionable if offered as evidence. Nor should he be permitted to make a statement for the purpose of creating prejudice or bias in the minds of the jury. Counsel ordinarily may not discuss an anticipated defense unless it appears on the record in some way. Counsel can discuss the principles of law that are deemed applicable to the facts if the judge, in his discretion, believes this is appropriate.

If counsel goes beyond these limits in the opening statement, such conduct may call for a word of caution or even a reprimand by the judge. If the statements by counsel are such that they might prejudice the jury the

judge can grant a mistrial either upon his own motion or by motion of the opposing parties. In an extreme case such statements might even be grounds for reversal on appeal.

It is important to remember that the scope and latitude of the opening statement, the length of time permitted for it, and its general character, are within the discretion of the trial judge to determine. The basic criteria should be (1) to permit an opening statement that will assist the jury in understanding the facts to be presented at the trial, and (2) to encourage both balance and fairness for both sides of the case.

D. The Prosecution's Case

i. Presenting the Evidence

During the tribe's initial presentation of evidence, the prosecutor (attorney or law-and-order official) should put on the witness stand each of those witnesses who know about the offense charged. It is important, whenever possible, that witnesses be presented in some logical, chronological order so that the jury or the judge can get a clear picture of the events.

To insure the timely appearance of witnesses at trial proceedings, the court must order the clerk to issue subpoenas to witnesses that the prosecution and defense have indicated will be called to testify. The subpoena is

basically an order by the court commanding the appearance of the witness at a particular time and date. Failing to appear in disregard of the subpoena makes the prospective witness liable for contempt of court. [See the sample "Request for Subpoenas" and "Subpoena" in the Appendix for this chapter]

During this stage each witness for the prosecution first will be questioned by the tribal representative, on direct examination, then cross-examined by defendant or his counsel; each witness is also subject to redirect and re-cross examination. When the tribe has presented all its evidence, and each witness has been both examined and cross-examined, then the tribe announces that it has completed its case and rests.

The defendant then presents his witnesses and documentary evidence, following the same procedure. Thus the defendant puts a witness on the stand and questions the witness. The tribal representative then has an opportunity to cross-examine the witness and, if appropriate, further direct and cross-examination can be allowed.

In summary, the examination of the witnesses may pass through these steps.

First: The direct examination, conducted by the party who calls the witness.

Second: The cross-examination by the adversary party.

Third: Redirect.

Fourth: Re-cross.

In a criminal case, the defendant ordinarily will attempt to show that the events did not occur exactly as claimed by the tribe, or he may even attempt to prove that he had nothing to do with the events and it is a case of mistaken identity. When the defendant has completed his case by presenting all his witnesses and documentary proof he announces that he rests his case.

The tribe is now entitled to another turn. The tribal prosecutor or representative may wish to present evidence in rebuttal. At this stage, the tribe is <u>not</u> entitled to present witnesses who merely give further support to the facts presented in the tribe's original case. Rebuttal evidence should be limited to testimony and documents designed to answer defenses that were presented by defendant in his case. Assume, for example, that defendant claims in his case that he did not commit the burglary because he was at a pool hall with friends at the time. On rebuttal, the tribe might want to present witnesses to show that the pool hall was closed that night, or that the defendant was not there.

In this, as in other stages, the witnesses may not only be examined, but cross-examined and re-examined. When the tribe's case in rebuttal is finished, the tribal

representative closes his case. If new points were brought out by the tribe in this rebuttal evidence, the defendant may meet them by further evidence. For example, in the burglary illustration noted above, defendant may put on evidence to show that although the pool hall was not open to the general public on the night in question, he and his friends were permitted by the owner to use it for a private party. If, however, the defendant does not have any new evidence to present at this stage, which is often the case, then he closes his case at once. When both parties have announced they have closed, the hearing on the facts comes to an end and the trial proceeds with the closing arguments of counsel and the court's instructions to the jury.

At this point, the parties cannot, without permission of the court, offer further evidence. The case is "closed", and the order of procedure follows this general plan:

(1) The arguments of counsel (or parties) to the jury; first, by the tribe; second, by the defendant; third, by the tribe.

(2) The jury is given their instructions.

(3) The jury is sent to the jury room to decide the case.

ii. Rules on Examining Witnesses

It is appropriate, at this point, to summarize briefly some general rules about the examination and cross-examination of witnesses.

The direct examination of a witness generally should cover all the points that the party putting the witness on the stand wants to establish. Cross-examination ordinarily may not be used to establish new facts; rather, its purpose is to test the truthfulness, bias, or memory of a witness in connection with what he said on direct examination. Consequently on cross-examination almost any reasonable question which might elicit a reply affecting the credibility of the witness will be allowed.

Leading questions are generally not permitted on direct examination. A leading question is one which suggests to the witness the answer desired by the examiner. In a practical sense, the test of whether a question is "leading" is whether an ordinary person would get the impression that the questioner desired one answer over another. An obvious example of a leading question is: "You were going less than 30 mph, weren't you?" Questions requiring a yes or no answer may also be leading because they imply to the witness the answer desired. For example, it would ordinarily be "leading" for the defendant's lawyer to ask a defendant charged with speeding "Were you really traveling terribly fast?" The defendant would obviously know he should say "no". But no hard and

fast rule can be stated here. It depends on the context in which the question is asked, the inflection and tone of voice of the questioner, and other facts. Thus the judge must decide the propriety of such questions based on experience and sound discretion.

There are, however, circumstances in which leading questions might be permitted. They are usually allowed on preliminary matters, such as residence, occupation, and other facts about which there is no controversy. They are also usually permitted where the purpose is to test the credibility of the witness on cross-examination. Finally, a leading question may be permitted on the examination of a hostile witness. A hostile witness may be illustrated as follows: Defendant is charged with drunken driving. Two policemen were present at the arrest, but the tribe calls only one to testify. Defendant believes the second policeman may testify more favorably toward him and so calls this witness to the stand. Under such circumstances it may be proper for the defendant to ask this witness leading questions, e.g., "It's true, isn't it, that the day after defendant's arrest, you admitted to defendant that he wasn't really intoxicated?" Also, in some cases, at the careful discretion of the judge, a leading question may be appropriate to help a witness recall an event which has momentarily

slipped his recollection.

E. The Motion to Dismiss

The motion to dismiss is appropriate whenever the prosecution, which has the burden of proof, has presented all of its evidence. Normally the judge hearing the motion will assume, for the purpose of deciding that motion, that all of the evidence introduced by the prosecution up to that point is valid and believable. Of course none of it will have been rebutted yet by defendant's witnesses. If, with this liberal interpretation in its favor, the prosecution's evidence still falls short of proving the case, then the charge should be dismissed.

However, the judge naturally will want to be sure his decision is correct, and if there is any doubt in his mind of the sufficiency of the evidence, he should deny the motion and allow the trial to go forward with the defendant's evidence. After all, there is always the possibility that more complete evidence might be extracted from the defendant's witnesses when they testify, and that still more might be obtained from the prosecution's evidence in rebuttal. In general, motions to dismiss made at the end of prosecution's case are promptly denied. Often they are made in a perfunctory manner by attorneys, more for the benefit of their client than the judge, and

are therefore denied as a matter of course, having served little purpose.

In a few cases the judge will find that a vital element of the prosecution's case is lacking, and simply is not going to be supplied by additional evidence. In such event the motion to dismiss the prosecution's case should be granted.

One purpose of the motion to dismiss at the end of the prosecution's case (even where the defendant expects it to be denied) is to give the defense counsel an opportunity to direct the court's attention to specific weaknesses of the prosecution's case, which defense counsel may want to pursue with greater emphasis later in the trial. It is the first opportunity that defense counsel has to comment upon the prosecution's evidence.

If the motion to dismiss is obviously without merit then it may be denied by the judge without stating the reasons. However, if the motion has merit the judge should give reasons for denying it.

F. The Defense Case

i. Presenting the Evidence

The defendant presents his case at the end of the prosecution's case unless the court has granted a defense motion for dismissal. Defendant usually starts his case with an opening statement, unless it was made at the

beginning of the trial.

The defendant's opening statement is subject to the same rules that are applied to the prosecution's opening statement as previously discussed. To recapitulate, the opening statement may not be used to argue either law or facts. Its purpose is to outline the defendant's forthcoming evidence, and is especially useful in a jury trial to assist a jury in understanding that evidence. The jury should, of course, be instructed that the opening statement represents only the views of counsel about the evidence and is not evidence itself. If the opening statement is not supported by actual testimony and exhibits, the jury is likely to think less of defendant's case.

Following his opening statement, the defendant presents his witnesses. Defendant's presentation of evidence is subject to the same rules outlined in the preceeding discussion as applicable to the prosecution's case. One major difference is that defendant need not personally testify, and if he chooses to remain silent, then neither the court nor the prosecution can comment to the jury about his silence. Under the Indian Civil Rights Act of 1968 no inference of guilt can be drawn from a defendant's refusal to testify on his own behalf.

ii. Rules on Examining Witnesses

The defendant may, of course, call as witnesses persons who were not witnesses for the prosecution. For example, if a defendant was charged with burglary, he might present new witnesses who would testify that they saw him in another city on the night of the burglary. Also, the defendant might recall witnesses who had earlier testified for the prosecution. This should only be done, however, when new testimony is to be presented by the witnesses, i.e., testimony not covered when the witness was on the stand for the prosecution.

Thus, in the above burglary example, assume that a police officer testified for the prosecution that he found some of the stolen property in an abandoned shed located near the defendant's home. Later, during the defense case, the defense might call the same officer to testify to new facts, e.g., that he also found in the abandoned shed two radios that had been stolen in two other burglaries, and that he knew these other burglaries had been performed by another person who had no connection with the present defendant. Assuming this testimony had not been brought out when the officer testified for the prosecution (or on cross examination at that time) the defense might want to call him as a witness for the purpose of telling about it.

Often it is difficult to present the facts of a case in perfectly chronological and logical order. Witnesses are sometimes not available at the best time to put them on the stand. For example, Witness A may be the logical witness to put on the stand next, to tell defendant's story, but because of a job, or some emergency, A may not be available at that time. Thus, Witness B is put on the stand. Witness B's testimony may now appear unrelated to the case because Witness A's testimony has not been presented first to explain it. In this instance, the prosecuting attorney might object to B's testimony claiming that it is irrelevant to the case. But the judge might admit the testimony "subject to connection" if the defense can explain at this point how the testimony will later connect with testimony by A to be relevant.

As an illustration, the defendant in the previous hypothetical charged with burglary might want two witnesses, Friend and Doctor (a medical doctor) to testify on his behalf. Friend would testify that on the night of the burglary defendant was visiting his sick mother 300 miles away, and that Friend had seen defendant enter his mother's house in the early evening. Doctor will testify that the defendant's mother became seriously ill on the afternoon before the alleged burglary and that he personally telephoned the defendant to tell him of this illness

about 3:00 PM in the afternoon. Now assume that Friend's car breaks down and he is unable to get to the courtroom to testify before Doctor, thus defendant puts Doctor on the witness stand first. Doctor's testimony (about defendant's mother becoming ill, and about telephoning defendant) now appears unrelated to the case; the jury does not yet know that defendant will claim he went to visit his sick mother that night.

If the prosecutor objected to Doctor's testimony at this time, on the ground of irrelevance, the court might admit it "subject to connection" by other later evidence. The judge, in his discretion, can do this on the basis of the assertion by the defense that the evidence will be connected later, or the judge might ask both defense and prosecution to approach the bench (or go into another room, out of the hearing of the jury) where he might ask the defense to explain how he intends to connect up this evidence; the judge can then rule whether to admit it.

Sometimes a court needs to make sure that a witness testifies to facts rather than to conclusions. As an example, Tuffguy is charged with assaulting Whitecloud. At trial, Witness Johnson, who knows Tuffguy and Whitecloud, is asked if Tuffguy intended to hurt Whitecloud. Such a question is objectionable, as would be Johnson's answer if he gave one because the witness was asked to

state a conclusion, rather than merely the facts. The proper approach would be to ask Johnson if he had heard Tuffguy say anything about Whitecloud. Johnson might then answer "Yes", and on further questioning could explain "about two weeks ago I heard Tuffguy say he disliked Whitecloud and intended to bust his nose some day". This is a statement of fact, something that Johnson actually heard, and is not merely a statement of his personal opinion or conclusion about Tuffguy.

As another example, Hardcore is charged with selling dangerous drugs on the reservation. Witness Hawkeye is asked whether Hardcore is a "seller of drugs." The question is improper, as would be the answer. Instead, Hawkeye should be asked about facts concerning Hardcore. These facts might be, for example, that Hawkeye actually saw Hardcore exchange some white pills for money with X on January 8, 1978, or that on a certain date he heard Hardcore say "I made $500.00 last month selling the hot stuff." These are facts about which Hawkeye can testify, not his conclusions drawn from those facts.

Another problem might arise when witnesses speak too fast and give long rambling answers to questions posed by counsel. Several kinds of evidence, such as hearsay or irrelevant evidence (evidenciary concepts which will be discussed in Chapter Five), are generally not admissible

at trial. But, if a witness who is testifying rambles on and on or speaks very quickly, then the opposing attorney has no way of objecting to or keeping out the improper evidence. As an example, Speedy is charged with driving 60 miles per hour in a 30-mile per hour zone and causing an accident. Witness Fasteye is on the stand, and is asked whether he saw defendant driving on the day of the accident. Fasteye says yes, he saw defendant driving 50 or 60 miles per hour two blocks before the accident. But then Fasteye continues talking to say that "Speedy often talks about driving fast; his friend told me the other day that Speedy frequently drives too fast; everyone knows that Speedy doesn't have any sense of responsibility about driving." These latter statements are not admissible and could be kept out of evidence. But it is difficult for the other attorney (or the judge) to keep them out if the witness simply rambles on. The attorney has no way of knowing in advance what the witness is about to say. The best thing for the trial judge to do in such a situation is to interrupt the witness and instruct him to wait until a particular question is asked, then to answer that question, and wait until the next question is asked. Further, if the opposing attorney anticipates an objectionable answer, he can object at the time the question is asked, and the judge can rule on the objection before the witness answers.

G. Rebuttal and Closing Arguments

Defendant closes his case when he has presented all his evidence. The prosecution then presents rebuttal evidence. If new issues are raised here (in theory they should not be, but sometimes are) then the defendant may present further evidence on these new issues. The judge should exercise discretion about (1) whether to allow new issues to be raised here and (2) how much new or cumulative evidence to permit to be introduced at this point.

Before jury instructions, the prosecution and defense make their closing arguments. Here they attempt to sum up the evidence and argue their case most convincingly to the jury. Usually the person making the closing argument (counsel or party) is allowed considerable latitude. Courts generally depend on the jury's own memory and judgment to evaluate closing arguments and determine whether the evidence supports those arguments. Exaggeration or distortion of the facts at this point by either side may weaken their arguments. At the end of the closing arguments it is appropriate for the trial judge to instruct the jury that these arguments are merely the views and opinions of counsel (or the parties) about the evidence, and that they are not evidence; thus the jury should listen to and weigh these arguments, but should make up their minds on the basis of the testimony and evidence

actually presented in the case.

When both sides have completed their cases, and have "rested," defense counsel will often renew his motion to "dismiss," which in most cases was made earlier at the end of the prosecution's case. If this motion is denied then the judge will give his instructions to the jury.

H. Post-Trial Jury Instructions

Following the completion of the trial, in the event of a jury trial, the judge must give instructions to the jury. These remarks briefly reiterate the nature of the jury's function to resolve the issues of fact presented by the prosecution and the defense, to apply these findings of fact to the law applicable to the criminal charge, and to deliver a verdict of guilty or not guilty. The following is an example of basic instructions given the jury at the end of a criminal trial:

"MEMBERS OF THE JURY:

Now that you have heard the evidence and the arguments, it becomes my duty to give you the instructions as to the law to be applied in this case. It is your duty as jurors to follow the law as stated in the instructions to be given to you and to apply these rules to the facts as you find them from the evidence in this case. You are not to single out one instruction alone as stating the law, but must

consider all of the instructions taken together as a whole.

Neither are you to be concerned with the wisdom or purpose of any rule of law and, regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty to base a verdict upon any other view of the law than that given in the instructions of the court, just as it would be a violation of your sworn duty as judges of the facts to base a verdict upon anything but the evidence received during the trial of this case.

Justice through jury trial must always depend upon the willingness of each individual juror to seek the truth as to the facts from the same evidence presented to all the jurors, and to arrive at a verdict by applying the same rules of law as given by the court.

You have been chosen and sworn as jurors in this case to try the issues of fact presented in the complaint and the denial made by the "not guilty plea" of the accused. You are to perform this duty without bias or prejudice as to any party. You are not to be governed by sympathy, prejudice or public opinion. Both the accused and the public expect that you will carefully and impartially consider all of the evidence

in the case, follow the law as stated by the court and reach a just verdict regardless of the consequences.

It is important that, upon entering the jury room for your deliberations, you refrain from expressing a fixed opinion or a determination to hold out for a certain verdict. Each of you must decide the case for yourself but should do so only after an open-minded discussion of the evidence and instructions with the other jurors.

Once you have reached a conclusion, you should not change it merely because other jurors disagree with you or merely because you want to render a unanimous verdict. However, if in your deliberations you are convinced that you have reached a wrong conclusion, do not hesitate to change that opinion and then vote for a verdict according to your final conclusion. Remember this, that you are not advocates or proponents of either side in this case, but that you are impartial judges of the facts.

You shall now retire and select one of your number to act as foreman, who will preside over your deliberations. In order to reach a verdict, a majority must agree to the decision. As soon as a majority have agreed upon a verdict, you shall have it dated and signed by your foreman and then shall return with it to this room."

I. Questions

(1.) What basic information would a judge want to give the jury in introductory remarks at the beginning of the trial?

(2.) What is the purpose of the opening statement?

(3.) Why does the defendant's attorney often decline to make an opening statement prior to the prosecution's case, and reserve the opportunity to make such a statement at the beginning of defendant's case?

(4.) What does it mean when the judge instructs the jury that their task is to find the facts and that they should ignore the arguments of counsel about questions of law?

(5.) In the questioning of a witness, the prosecutor pointed to a map exhibit and commented about where the events of the alleged crime occurred. The defendant's attorney objected to the form of question asked by the prosecutor. The judge granted the defendant's objection and told the prosecutor to rephrase the question.

State the question asked and tell why it was objectionable.

(6.) When a witness was describing the defendant's actions he said that "she was drunk." The defendant's attorney objected to this testimony and the judge granted the objection and told the jury to ignore the statement. Why?

(7.) On cross-examination is it appropriate for an attorney to ask leading questions?

(8.) Why would the defendant's attorney make a motion to dismiss the prosecution's case?

(9.) The judge overruled the prosecutor's objection to testimony regarding the health of the defendant in saying that the testimony was "subject to connection" later. What did he mean by this?

(10.) During closing argument the prosecutor (1) expresses his personal opinion that the defendant was lying and (2) says that the judge has clearly been prejudiced against the prosecution. The defense counsel objects to each of these statements. If you were the judge, how would you rule on the objection?

Section 4. The Duties of the Judge After Trial

A. Trial Verdicts

i. Non-Jury Verdicts

Following the completion of a non-jury trial, the court renders it's decision as to the guilt or innocence of the defendant. This decision is called a verdict and is made based upon the facts and law in the case. The reasonable doubt standard is used by the judge in determining guilt or innocence. If the verdict is "not guilty," immediate provision should be made for the release of the defendant if he or she is in custody at the time. [See the sample "Order for Release of Defendant" in the Appendix to this Chapter] If the verdict is guilty, the judge may immediately impose sentence or defer sentencing to a later date. Deferring sentence for a pre-sentence investigation is customary and will be developed to a greater extent in the following section.

ii. Jury Verdicts

a. Returning the Verdict

Following a jury trial in a criminal case, the jury deliberates and returns a verdict as to the guilt or innocence of the defendant. The verdict of the jury is rendered (given) in open court with both parties present. The verdict may be given in several ways. The foreman may state the finding of the jury.

Once he has given the verdict, either party to the suit may demand a polling of the jury whereby each juror is asked by the judge to give his verdict.

If the jury reaches its verdict in the late afternoon or in the evening or at any other time when court is not in session or able to be in session, the verdict of each juror is written down and placed in a sealed envelope to be opened the next session of court when the jury is to give their verdict. Usually the foreman will open the sealed verdict and read it to the court. The reason for sealing the verdict is to protect the verdict reached by the jury. Once the verdict is reached and the jurors leave, not to come back until court is reconvened, something might influence one or more of them to change their mind in the intervening period. The sealed verdict is to prevent this changing of minds. If this procedure is used the jury must be told not to discuss their verdict until it is announced in court.

If the verdict is "not guilty," the court should announce the verdict and state, "The finding of the jury being not guilty, the defendant is ordered released from custody." If the verdict is "guilty," the court should announce the verdict and then dismiss

the jury thanking them for their participation in the trial. After dismissing the jury, the court can impose sentence immediately or set a later date for sentencing. If a later date is set for sentencing, the defendant may be continued in detention until that time or may be released under conditions established by the court. [See the sample "Verdict" in the appendix to this Chapter]

After the verdict has been delivered, the judge should question each member of the jury to make sure the verdict does represent the majority (or unanimous) vote of the jury. If he disagrees with the result he may tell the jury as long as he does so politely and courteously. He must not criticize or belittle the members of the jury for reaching a verdict which he finds unacceptable. The jury is entitled to courteous treatment at all times, even when the judge is disappointed in the result or when the verdict requires a new trial.

If the jury announces that it is unable to reach a verdict, the judge may require them to return to the jury room and continue their deliberations. The judge should not prolong useless deliberations in an effort to avoid a divided or "hung" jury. But where there is an indication that additional time may break

the deadlock and avoid the necessity of a new trial, he may direct the jury to continue their deliberations. But "hung juries" are exceedingly rare in tribal courts which accept majority verdicts from the jury. Most American courts require unanimous verdicts although there is a strong trend towards six-man juries and majority verdicts, at least in civil cases.

b. Rejection of the Verdict by the Court

As a general rule the judge is bound by the verdict rendered by the jury. If the judge could accept or reject the verdict of the jury he would be substituting his judgment for that of the jury and the purpose of a jury trial would be destroyed. Jury verdicts are not merely advisory opinions which the judge can accept or reject; they are binding on the judge unless there are no facts which would support the verdict or the size or amount of the verdict shows that the jury was biased or prejudiced.

But occasionally verdicts are rendered which are totally unacceptable to the court. The most frequent example of an unacceptable verdict is one which is clearly in opposition to facts presented during the trial. It is the function of the jury to decide disputed facts and to give their verdicts based on the facts as they see them. However, they cannot

make up facts nor reject clear, convincing and undisputed evidence. When the jury has arbitrarily disregarded the facts, the judge may render a judgment opposite to the jury's verdict, or simply set the verdict aside. This is called a judgment notwithstanding the verdict. This special judgment is reserved for those cases where the jury clearly has not rendered its decision in accordance with the instructions on fact and law which the judge has given them. A judgment notwithstanding the verdict can be used only when there is substantial error in the jury's verdict, and can only be given in favor of the defendant in a criminal case. Errors in the form of the verdict, such as mistakes in spelling, grammar, obviously misunderstood legal terms, etc., cannot give rise to a judgment notwithstanding the verdict.

Neither can the verdict be rejected because one or more jurors <u>later</u> tell the judge that they misunderstood the instructions, or that their vote was not properly counted, or that they have changed their minds. If such changes were allowed it would subject the jurors to strong outside pressures to change their decision after the verdict has been rendered and the court has adjourned. Jurors cannot, therefore, impeach or reject their own verdict. Once filed and accepted, the verdict cannot be changed, unless

there is strong evidence of fraud or bribery.

The defendant might also file a motion for a new trial based upon errors or mistakes by the court or on the basis of newly discovered evidence. The motion should be granted only if the errors or mistakes substantially effected the case or prejudiced the defendant, or if the newly discovered evidence would result in an acquittal.

B. <u>Sentencing</u>

i. <u>In General</u>

There is perhaps no greater judicial responsibility than that of sentencing and corrective penalization; this is exclusively a judicial function which cannot be shared or delegated, however pre-sentence reports may be requested by the court. Proper sentencing practice requires a fundamental knowledge of human nature and common sense. Unfortunately, there are no magic rules to success in this process. The sentencing process must be applied on a case-by-case basis, and the lessons must be learned from experience.

Sentencing comes into play after a plea of "guilty" or after a finding of "guilty" by either the court or the jury. Proper sentencing requires the application of penalization or corrective actions to the particular individual before the court. Uniform penalties and tribal

deterrent factors are also involved, but the prime emphasis should be placed upon finding an appropriate sentence or penalty for each individual violator within the limits set by code or ordinance.

In most jurisdictions the judge is solely responsible for sentencing the defendant. In a few jurisdictions the court is authorized by statute to impose an indeterminate sentence for the maximum period defined by law. This sentence can then be terminated at any time after the service of the minimum time, if there is any, by a parole board or other agency.

It would be well to keep in mind the purposes of sentencing. This could be stated as the minimum amount of custody or confinement which is consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant. You should also be aware that the maximum sentences provided for in your tribal code are for use in only a very few cases. Most defendants will require a much less severe sentence to accomplish the purpose of sentencing.

If your tribal code does not provide for a breakdown of the various crimes with regard to their seriousness, you should make such a breakdown yourself. A possible way to order crimes in relation to seriousness of the

offense would be to find all crimes dealing with: (1) protection of persons; (2) protection of property; and (3) protection of the community peace, social and moral order.

It is suggested that crimes in the first category should be considered more serious than those in the other two categories and persons committing such crimes should be dealt with more severely than persons committing crimes against property or the community's social or moral values.

ii. The Presentence Investigation

Once a judge has accepted a guilty plea from a defendant he must then sentence the defendant. In order to make an intelligent decision regarding the sentence, the judge should have a probation report or conduct a hearing with witnesses. If the defendant waives a hearing then the court can use written statements. Such procedures will provide the court with information about the defendant. This presentence report will generally be one of three types. A minimal report might consist of the defendant's previous court and driving records. More detailed presentence reports are usually of two types: (1) a full social history and (2) psychological/mental health reports. [See the sample "Order for Presentence Investigation" for psychological evaluation or alcohol treatment in the Appendix to this Chapter] It might be

noted that these reports are often referred to as probation reports in some jurisdictions and usually contain the same information. Before a defendant pleads guilty the judge should not examine the presentence report. It must be noted that a presentence or probation report is a confidential document and only the officials of the court, probation officials, and the defendant should have access to such reports. Before a defendant is sentenced on the basis of a presentence report, he should have an opportunity to rebutt the information the judge uses in coming to a decision. For example; if defendant has pleaded guilty to a traffic offense and the judge notices he has many prior convictions, the judge should tell the defendant that his past record is not favorable and give the defendant a chance to explain his conduct. Such a statement by the defendant may tend to lessen or "mitigate" the severity of the offense to which he has just pleaded guilty and the judge should consider this in sentencing the defendant. Every defendant after pleading guilty should have an opportunity to make a mitigating statement before the judge imposes a sentence.

Following the presentence investigation, the court might want to consider deferring sentencing by placing the defendant on probation. If the defendant complies with the terms and conditions of probation, the court

can set aside the finding of guilt and dismiss the proceedings against the defendant. The utilization of this procedure should depend on the severity of the charge and the individual's background as shown in the presentence investigation. If the defendant violates any of the terms or conditions of probation or is convicted of a new offense committed within any period of probation, the court could then pronounce any sentence which might originally have been imposed. [See the sample "Order Deferring Sentence" and "Notice of Sentencing Hearing" in the Appendix to this Chapter]

iii. Pronouncement of Sentence

After the judge has accepted a guilty plea or there has been a finding of guilt, has examined the presentence report, and has declined to defer sentencing, he is ready to pronounce the sentence. After having studied the presentence report, which may or may not have a sentence recommendation included, he must choose a sentence which will accomplish the purposes of sentencing. The two most conventional punitive measures used in sentencing are confinement to jail for a fixed term and imposing a fine on the defendant or both. In addition, there are, or at least should be, many other alternatives available to the court in passing sentence.

Confinement may be of two types, total, where the

defendant serves a set term without being allowed any liberty; and partial, which can have several variations. Partial confinement would be where the defendant is allowed to keep his job while serving time. This can be accomplished in two ways, by allowing the defendant to work his normal hours and requiring him to return to jail in his off-hours or by allowing the defendant to serve his sentence on his days off or weekends. [See the sample "Pronouncement of Sentence" and "Work-Release Rules" in the Appendix to this Chapter]

When using a fine to punish a defendant either by itself or in conjunction with some type of confinement, the judge should consider the following:

1. what are the financial resources of the defendant in light of other financial obligations? (For example, a fine of $20.00 to a person making $200.00 a month and having a family to feed, clothe and care for is a substantial penalty. However, a fine of $20.00 to a person earning $600.00 a month would apt to be a far less severe penalty.);
2. is the defendant able to pay a fine on an installment plan. (It is becoming much more common to allow this type of payment rather the sentencing a person to $10.00 or 10 days.);
3. if you have ordered the defendant to make restitution for property destroyed or stolen will this substantially affect his ability to pay a fine?;
4. the purpose of a fine is to make the defendant sacrifice and hopefully then he will think about what he has done. Never impose a fine simply to raise revenue;
5. if the imposition of a fine will put the defendant in a worse socio-economic position -- try to find a sentencing alternative.

Whenever you have occasion to sentence a defendant on more than one charge, the sentence may run concurrently or consecutively. Also, you should give a defendant credit on any sentence you impose for time he has served awaiting an opportunity to plead and be sentenced.

A third commonly used measure in sentencing is the use of probation, which was previously mentionned in the discussion of deferred sentencing. Probation should be available for most defendants coming before the court. Probation should be used as a rehabilitative measure to help the defendant by providing him with supervision and counseling over an extended period of time. Just as the judge must specify the length of the term the defendant is to serve if confined, he should specify explicitly the conditions upon which probation is granted and for how long it is to run. There will probably be few

instances where probation should run for longer than a one-year period. The defendant should be warned that if he violates his probation he may be punished for this as well as the original crime. [See the sample "Order Granting Probation" in the Appendix to this Chapter]

iv. Sentencing Alternatives

The judge should familiarize himself with other possible sentencing alternatives that are available. One commonly used alternative is to sentence the defendant to work for the tribe for a given period of time. There may also be many educational and vocational institutions which defendants can attend, some free of charge. Another alternative in traffic cases would be driver improvement courses. In some cases it may be best for the court to request hospitalization of the defendant for physical or mental health reasons as a sentencing measure. One crime where this is especially true is public drunkenness. Unlike many crimes, habitual drunkenness is more of a disease than a crime and should be treated as such and it is by many tribes. It would be wise for the judge to encourage development of programs to help alcoholics such as Alcoholics Anonymous and public and private treatment for alcoholics in health institutions. The problem of alcoholism will be further developed in Chapter IX.

C. Post-Trial Proceedings

i. Right to Appeal

Following conviction, the defendant should be advised of his right to appeal to a higher court. The appellate procedure will be developed to a much greater extent in Chapter III, but at a minimum, the defendant must be told the length of time within which to file the appeal. The burden is then on the defendant to perfect this right of appeal to a higher court by a timely filing.

ii. Stay of Execution of Sentence

While an appeal is pending, the court may grant a Stay of Execution of any sentence imposed by the court and order the defendant released on his own recognizance or continued in detention or released under conditions established by the court.

D. Questions

1.) Why should the jurors be told not to discuss a verdict until it is announced in court where the verdict was reached late at night, written and sealed, and given to the foreman to open and read in court?

2.) Why should each member of the jury be polled by the court after the verdict has been delivered?

3.) In a criminal trial the judge becomes convinced that the jury did not follow an instruction on the law. Their verdict of guilty could only have been rendered by disregarding the judge's instructions. What should he do?

4.) The day after the trial in a criminal case two

members of the jury approach the judge saying that they want to change their votes. They explain that they did not understand the instructions at the time they were given, but that they do now and therefore want to change their views. With the changed votes, the convicted defendant would be found innocent. What should the judge do?

5.) The defendant was acquited of a charge of assault by a vote of 4-2. Two of the jurors later tell the judge that they were afraid of what the defendant might do to them if they found him guilty so they voted to acquit him even though they were sure he was guilty. They are now willing to change their votes. What should the judge do to the defendant? to the jurors?

6.) What are the purposes of sentencing?

7.) What is the purpose of the presentence investigation? Why should the judge not examine the presentence investigation until after a finding or plea of guilty?

8.) Why should the defendant be given an opportunity to explain his prior conduct or background presented in the presentence report?

9.) When might a judge want to defer sentencing and place a defendant on probation?

10.) What factors should a judge consider in imposing a fine on a defendant as punishment?

Section 5. Practice Non-Jury Trial

A. Introduction

The preceding sections of Chapter II concerning trial court procedure outlined the duties of the judge before, during, and after trial. As a next step, two practice trials are outlined in this and the following section to illustrate the role of the judge in a factual hypothetical situation. In each trial, the factual background, issues involved, and the participants are presented followed by reference to a recommended outline of the proceeding in the NAICJA Criminal Court Procedures Benchbook. This recommended outline can be located in the Benchbook by referring to it's Table of Contents. You should proceed through the NAICJA outline step-by-step to see how the factors of the factual background, issues involved, and normal participants will shape the development of the trial. There are obvious procedural differences between a non-jury and jury trial, as discussed in the preceding sections, and you should consider how your role as judge might change to suit either proceeding.

The facts presented in this section are designed for a non-jury trial. The prosecution's case could be presented either by a tribal policeman or a tribal prosecutor depending on the customary procedure in your court. The defendant could be represented by either an attorney or a

lay advocate. Consider what requirements on counsel you might impose before practice in your court. Consider how the presence or absence of counsel on either side may affect your role as judge in a non-jury trial.

The facts presented in the following section are designed for the jury trial. Again, note the procedural differences between a non-jury and jury trial. It is recommended that attorneys represent both the tribe and the defendant at a jury trial for the reasons in the following discussion about the function of attorneys in actual practice.

If the defendant is to be represented by counsel, it is usually desirable for the tribe to obtain an attorney to prosecute the case. In this way the judge can more easily maintain his or her neutrality. If only a defense attorney is present then the judge may be put in the unfortunate position of having to assist the prosecution too much. If two attorneys are present, then if one raises an objection the judge can ask the other to respond and, having heard both arguments, the judge can then rule on the question.

Further, one or both of the attorneys may raise an issue of law at the trial that is new and strange to the judge. In one recent trial, for example, an attorney argued that because of a particular federal statute, which

was unfamiliar to the judge, the tribal court had no jurisdiction over the case. One response for a judge to make in such a case is to ask the attorney to prepare a brief written memo on the question and present it to the judge for his later study. If the argument lacks merit, no such memo will probably ever be prepared. If the point has some merit then a memo will give the judge a better opportunity to study the question and make a wise decision.

The point to remember is that the attorney's function is both (1) to represent their clients, and (2) to assist the court in arriving at a just decision. The judge should not hesitate to ask the attorneys to provide assistance wherever appropriate in informing himself about the law and arriving at a just decision.

Immediately following are the facts of the practice non-jury trial.

B. Big Salmon Reservation v. Screaming Eagle

(i.) Factual Background

Defendant Screaming Eagle is charged with resisting arrest under Tribal Ordinance 25 which provides:

> Any Indian who shall willfully and knowingly, by force or violence, resist or assist another person to resist a lawful arrest shall be deemed guilty of an offense and, upon conviction thereof, shall be sentenced to labor for a period not to exceed 30 days.

He is also charged with violating an anti-litter ordinance, Tribal Ordinance 47 which provides:

> Throwing or depositing glass or other matter on highways
>
> (a) No person shall throw or deposit upon any highway any glass bottle, glass, nails, tacks, wire, cans or any other substance likely to injure any person, animal or vehicle upon such highway.
>
> (b) Any person removing a wrecked or damaged vehicle from a highway shall remove any glass or other injurious substance dropped upon the highway from such vehicles.

On January 10, 1980 Screaming Eagle was driving his new Datsun sportscar on Back Creek Road located within the boundaries of the Big Salmon Reservation in Washington State. While cruising along the road near the Indian village of Quimsey, Screaming Eagle heaved an empty six-pack of Budweiser beer out of the window of his car, just missing Anna Twickle, a member of the Tribe who lives in Quimsey. Anna had been standing near the edge of the road at the time Screaming Eagle drove past. Unfortunately for Screaming Eagle two tribal policemen, Big Ahrm and Tuff Hyde were parked in their patrol car behind some trees 200 yards away and saw Screaming Eagle throw the sixpack out of the car window. Big Ahrm and Tuff Hyde

immediately pursued Screaming Eagle and pulled him over to the side of the road. They were in uniform at the time. Screaming Eagle is a member of the Shell Mountain Reservation in North Dakota. He lives in Seattle, Washington, which is about 150 miles from the Big Salmon Reservation. On the day in question he had been visiting a girl friend on the Reservation.

After stopping Screaming Eagle's car, the tribal police asked Screaming Eagle to get out and stand six feet to the rear of the car. He stepped out of the car but stood beside it, refusing to go to the rear. As Screaming Eagle got out of the car he shouted, "You can't arrest me. I am not a member of this Tribe".

Officer Big Ahrm said, "That doesn't make any difference." Screaming Eagle responded angrily by saying, "I don't care, you don't have the power to arrest me." Then Officer Tuff Hyde bellowed "This is it, we're taking you in", and grabbed Screaming Eagle by the arm. Screaming Eagle squirmed loose, pushed past Officer Hyde and attempted to re-enter his car. Both officers then drew their pistols and frisked Screaming Eagle. Big Ahrm said "We are arresting you for littering and resisting arrest. You don't have to say anything if you don't want to". They then took him to jail where he was booked and released on his own recognizance.

Anna Twickle observed these events from about 200 yards away. After Eagle's arrest she went to the car and said to Screaming Eagle "I hope you get six months for throwing those bottles at me".

Mr. John Lawder is the attorney for Screaming Eagle. Lawder is a member of the Big Salmon Tribe and is a licensed attorney. In talking with his client, prior to trial, Screaming Eagle tells Lawder that he had no intention of resisting a lawful arrest. He did not realize that he could be lawfully arrested by these officers, and that if he had realized that he was being put under arrest he would have cooperated. At the trial it can be expected that the officers will convey quite a different impression about Screaming Eagle's attitude.

(ii.) Issues Presented

The following are some of the issues that might be raised in the case. These might be raised by the tribe, by defendant's attorney, or by the judge. As the judge, you would have to dispose of them during the course of the proceedings.

1. Does the Big Salmon Tribe have jurisdiction over an Indian from another reservation?
2. Was the littering ordinance intended to cover the type of conduct of the defendant?
3. Was the defendant resisting arrest at the time he pushed past the officers and tried to get in his car, or did the arrest occur later?
4. Were the officers legally justified in arresting defendant for littering?
5. Should a motion by defendant to dismiss the case at the end of the prosecution's case be granted?

(iii.) The Participants

Who are the participants in the trial proceeding? A full list of the participants at trial would probably include the judge, the clerk, the reporter, the bailiff, the prosecutor, the tribal policemen, the witness, the defendant, and the defendant's attorney.

(iv.) Non-Jury Trial Criminal Procedure

An arraignment would be held for Screaming Eagle because he is in custody and has been charged with the violation of a criminal ordinance of the Big Salmon Tribal Code. At arraignment, Screaming Eagle would be informed of his rights and of the charges against him, and permitted to enter a plea of guilty or not guilty. He pleads not guilty and asks for a trial.

You now have the complete factual background, the issues involved, and an idea of who will be the participants at trial. At this point, refer to the NAICJA Benchbook outline, entitled "Criminal Trial Procedures Before the Court Without a Jury," in the Benchbook manual. Proceed

through this outline step-by-step, considering the nature of Screaming Eagle's case, from the opening of the trial, through the presentation of the prosecution and defense case, to the final decision of the court. Contrast the procedural development of the non-jury trial to the following discussion of the jury trial in another factual hypothetical situation.

Section 6. Practice Jury Trial

A. Introduction

This is the second practice trial to illustrate the role of the judge in a factual hypothetical situation in a jury trial. As in the preceding non-jury trial discussion, the factual background, issues involved, and the participants are presented followed by a referral to the recommended outline of the proceeding in the NAICJA Criminal Procedure Benchbook. Note the procedural differences between the non-jury and jury trial, and how your role as judge will change to suit each proceeding.

B. Dry Gulch Reservation v. Fass Jawe

(i) Factual Background

The defendant, Fass Jawe, a member of the Dry Gulch Tribe, is charged with violating a tribal ordinance concerning speeches, and concerning the distribution of literature about termination. The ordinance, enacted

January 15, 1978, provides:

> Whereas Congress is attempting to terminate the reservation and violence has resulted from disputes over termination, the following provision shall be law: No person shall knowingly cause to be printed, published or distributed literature advocating the termination of Indian Reservations, or shall give public speeches advocating the termination of Indian Reservations. This provision shall apply throughout this Reservation, and shall be effective for 60 days only.

One witness is Elder Weel who is a member of the Council of the Dry Gulch Tribe. On January 20, 1978, Weel was entering the tribal headquarters building on the Reservation to attend a closed meeting of the Tribal Council when defendant handed him a leaflet at the door. The leaflet had the following material printed on it:

> Although I am generally against termination of Indian reservations I believe the people of Dry Gulch Reservation would be better off if the Reservation were terminated and the assets distributed directly to the members. Remember, this would mean that each enrolled tribal member would receive approximately $20,000. (Signed) FASS JAWE

Later, while Elder Weel was talking to the police at their headquarters about two blocks away, the Tribal Council started its closed meeting. Fass Jawe, who was a member of the Council, asked for permission to speak as the meeting opened and then read the printed statement to the members of the Council. This created so much tension on the Council (a fight almost occurred) that after disposing of one unrelated business matter the Council adjorned.

Complaints against Fass Jawe were signed by Elder Weel, for allegedly handing out leaflets in violation of the previously quoted Tribal Ordinance, and by Lawran Norder, who was present when Fass Jawe read his statement at the beginning of the Council meeting. Fass Jawe was then arrested by Tribal Officer Harry Gotgun.

The Dry Gulch Reservation is in the State of New Mexico. The events in question occurred on January 20, 1978.

Witnesses Elder Weel and Lawran Norder should sign appropriate complaints. An arraignment should be held where the judge can decide whether to release the defendant on bail, or on his own recognizance.

(ii.) Issues Presented

Some of the legal issues that might be raised at the trial are as follows:

1. Does the ordinance violate the Civil Rights Act of 1968?
2. Assuming the facts are proven as above stated, does defendant's conduct constitute a violation of the ordinance? Did he, for example, "knowingly cause to be. . . distributed any literature advocating termination of Indian Reservations?"
3. Did defendant give a public speech advocating termination of Indian Reservations?

4. Various issues on the presentation of evidence could be raised by the attorneys at the trial.

(iii.) The Participants

Who are the participants in the trial proceeding? As in the non-jury trial, a list of the participants would again include the judge, the clerk, the bailiff, the policemen, the prosecutor, the defendant, and the defendant's attorney. The witnesses at trial would include the councilman and the councilwoman. And, most importantly, the jury would be present at trial.

(iv.) Jury Trial Criminal Procedure

As in Screaming Eagle's case, an arraignment would be held for Fass Jawe because he has been charged with the violation of a criminal ordinance of the Dry Gulch Reservation Tribal Code. At arraignment, Fass Jawe pleads not guilty and asks for a jury trial.

You now have the complete factual background, the issues involved, and an idea of who will be the participants at trial. At this point, refer to the NAICJA Benchbook outline, entitled "Trial by Jury," in the Benchbook manual. Proceed through this outline step-by-step, considering the nature of Fass Jawe's case, with the additional procedural responsibilities of empaneling the jury, selecting the jury, instructing the jury, and receiving the jury verdict.

If, in selecting the jury, the prospective jurors gave the following responses in voir dire questionning, what should your reaction or the reaction of the prosecution and defense counsel be?

Juror 1: A second cousin to defendant, playmates as children, but has not seen the defendant for 20 years.

Juror 2: Chairman of the "Anti-Termination Task Force" of Dry Gulch Reservation.

Juror 3: Brother in law of the judge.

Juror 4: Borrowed $50.00 from Fass Jawe two weeks ago and still owes it to him.

Juror 5: A close friend of Officer Gotgun.

Juror 6: Has severe loss of hearing.

Contrast your procedural responsibilities in Fass Jawe's jury trial to those in the case of Screaming Eagle. More than 90 per cent of all Indian tribal court criminal cases are disposed of before trial by guilty pleas. The majority of the remaining criminal cases are disposed of in non-jury trials, as in Screaming Eagle's case, and only a small minority are disposed of by jury trial, as in the case of Fass Jawe. But the Indian Civil Rights Act of 1978 requires that any person accused of an offense punishable by imprisonment be given the right to a jury trial. For this reason, in those instances where

the criminal defendant exercises this right, you as a judge have the responsibility to master jury trial criminal procedure.

CHAPTER III. APPELLATE COURT PROCEDURE AND THE INDIAN CIVIL RIGHTS ACT OF 1968

Section 1. An Overview of Appellate Court Procedure

A. Introduction

Chapter II focused on trial court criminal practice and procedure presenting what happens to a defendant who is accused of a crime and subsequently tried for that offense in an Indian tribal court. Chapter III will discuss what happens if a defendant believes that he has been treated unfairly or unjustly by the trial court. For example, in a criminal case tried in tribal court, the defendant either is found guilty or innocent. If he is found innocent, he is released from the custody of tribal authorities and is free to return to the community at large. If he is found guilty, he is either fined or jailed, or both. Chapter III will also consider the impact of the Indian Civil Rights Act of 1968 on Indian trial and appellate court practice and procedure.

But what if the defendant is found guilty but believes he can prove he did not receive a fair trial because of some procedural error? For example, suppose a potential juror admitted during voir dire that he could not give an impartial verdict in the case because the victim of the offense with which the defendant is charged was a good friend. What can the defendant do if that potential juror is seated on the jury which returns a guilty verdict against him? Or, suppose he is guilty of some crime but not guilty of the crime for which he was convicted? For example, the trial judge could misinterpret a criminal ordinance in deciding what crime the defendant

committed. What then?

Indian tribes have the power to provide a criminal defendant convicted of a crime (or a civil defendant who has had a judgment rendered against him) the right to appeal his conviction to another court, referred to as an "appellate court". An appellate court is a "higher" court, meaning it has the power to review the decision of the trial court and affirm, modify, or reverse that court's decision. In short, the appellate court serves to correct errors made by the trial court. In this and following sections, the importance of having an appellate court system in Indian jurisdictions will be discussed, and how an appellate court on an Indian reservation might operate. Although much of the discussion is presented in the context of criminal appeals, it should be kept in mind that most principles of appellate practice are equally applicable to civil appeals.

The emphasis is upon practice, meaning a concern primarily with the details of how Indian appellate courts might operate and what they have the power to do. Thus, this section begins with an outline of appellate procedure as it exists or could exist on an Indian reservation. In Section 2, we shall consider the nature of an appellate court, with emphasis upon the impact of the Indian Civil Rights Act of 1968 upon Indian court systems. Methods of selecting Indian judges and the importance of an independent judiciary will also be noted. Section 3 deals with the daily operation of an appellate court, including matters ranging from the physical appearance of the courtroom

to the formulation of rules of court. In Section 4, the procedure for preparing the trial record for review by the appellate court is outlined. Section 5 is a discussion of rules an appellate court might establish for the writing of "briefs"--documents in which the parties to a lawsuit set forth their legal arguments in writing--and what a brief might look like. Section 6 deals with how an appellate court can get the most out of the oral arguments presented to the court by the parties to an appeal at a hearing held for that purpose. Section 7 outlines "remedies,"namely, what sort of "relief" or type of decision an appellate court can render in criminal cases. Finally, in Section 8, we shall examine the very important process by which an appellate judge writes his decision in an appeal--his written legal opinion--in which he sets forth the reasoning which led him to select a particular remedy to resolve a given case, either affirming, reversing, or modifying the decision of the trial court.

B. The Need For Indian Appellate Courts

Indian tribal judges, just as all human beings, are capable of making mistakes. Thus, it is possible in a civil case that the tribal judge might misunderstand the facts that are presented such that the findings and conclusions he reaches in a particular case would be completely unsupported by the evidence.

> Example: John Jones sued Sitting Bird for $100, claiming Sitting Bird owed him that much money under a contract to paint Sitting Bird's barn. Sitting Bird never denied the money was owing, and Jones and three witnesses testified that the money was, in fact, due and had never been paid. No other evidence was presented. The trial judge entered the following findings:

[1]

> That John Jones painted Sitting Bird's barn for which service Sitting Bird agreed to pay $100.

[2]

> That the paint job must have been done poorly because Sitting Bird never paid John Jones the $100 agreed to.

The trial judge also entered the following conclusion of law:

> Sitting Bird is not obligated to pay John Jones $100 and the case must therefore be dismissed.

Or, in a criminal case, rules for the admissibility of evidence, or for the search of the defendant's property, might be violated in such a way that the defendant would be deprived of rights under the Indian Civil Rights Act of 1968:

> Example: Yellow Horse was charged with petty theft after he allegedly stole a hammer from the tribal hardware store. At his trial, the incriminating hammer was offered in evidence, along with testimony that the hammer was found in Yellow Horse's home. Yellow Horse objected to the admission of the hammer into evidence, and pointed out to the trial judge that the Indian Civil Rights Act of 1968 prohibits "unreasonable" searches and seizures. Yellow Horse presented uncontradicted testimony that tribal police discovered the incriminating hammer only after breaking down the door of every house in Yellow Horse's neighborhood at 3 a.m. and conducting an immediate search of each house, and by this procedure finally found the hammer in Yellow Horse's bedroom, hidden under the mattress of his bed. Despite this testimony, the trial judge ordered the hammer admitted into evidence over Yellow Horse's objection. As a direct result, Yellow Horse was convicted.

If the community is to have complete faith in the tribal court system, it appears self-evident that there must be some procedure whereby any errors made in that system may be corrected. The purpose of an appellate court is to correct any such errors which can be established. Quite literally, the underlying theory of an appellate court system is that such

courts will keep innocent criminal defendants out of jail or prevent innocent civil defendants from paying unjust judgments. In short, appellate courts serve to assure fair trials and to guarantee all persons the equal protection of the laws of the community they serve.

As a matter of simple justice, there is a great need for appeals courts on Indian reservations. Moreover, the presence of such courts of review is a protector of self-government. Ironically, although the Indian right of tribal self-government has been limited in other areas, there is nothing in history or in federal law to prevent Indian tribes from having an appellate court system--yet, as a practical matter, on many Indian reservations, there is no way in which an Indian can appeal the decision of an Indian tribal court. Thus, Indians are denied rights in Indian courts which would be available to them in non-Indian courts. This situation can have the effect of undermining the effectiveness of Indian tribal courts and of eroding the Indian right of tribal self-government.

There is no question about the fact that Indian tribes have the right to establish appellate courts. In this connection, it is notable that the Code of Federal Regulations provides for appeals from decisions by a Court of Indian Offenses. 25 C.F.R. 11.6CA states:

> Two judges of the reservation other than the trial judge shall sit together, at such times and at such places as they may find proper and necessary for the dispatch of business, to hear appeals from judgments made by any judge at the trial sessions. Any party aggrieved by a judgment and paying a filing fee of $5 may appeal to the court upon giving notice of such appeal at the time of judgment and upon giving proper assurance to the trial judge, through the posting of a bond or in any other manner that he will satisfy the judgment if it is affirmed. In any case where a party has perfected his right to appeal as established in this section or by rule of court, the judgement of the trial judge shall not be executed until after final disposition of the case by the court. The court may render judgment upon the case by unanimous vote.

Similarly, in the case of tribal courts, provision is made in numerous tribal constitutions and tribal law and order codes for appellate proceedings. For example, the Law and Order Code of Confederated Tribes and Bands of Yakima Indian Nation provides in Section 5:

> Three judges shall sit together as a Court of Appeals at such times and places as they may find proper and necessary for the dispatch of business, to hear appeals from judgments or sentences made by any judge at the trial sessions. The three judges to sit as a Court of Appeals shall be designated from the associate judges by the chief judge; provided, however, that a trial judge shall not act on an appeal from a judgment or sentence rendered by him at a trial session. Any motion as to the qualifications of judges to sit on said Court of Appeals shall be directed to the chief judge who shall make determination as to their qualifications to act on said court. Appeal from judgment or sentence made by any judge of the trial sessions shall be taken by notice of appeal in open court or by written appeal ten days from the date said judgment or sentence was rendered. There may be established by rule of court, the limitations, if any, to be placed upon the right of appeal, and as to the types of cases which may be appealed, and the grounds of appeal, and as to the manner in which appeals may be granted, according to the needs of the jurisdiction. However, no appeals shall be taken from other than a final order of the trial court. In the absence of such rules of court, any party aggrieved by judgment or sentence may appeal to the Court of Appeals upon giving proper assurance to the trial judge through the posting of bond, cash, or other security or any other manner, that he will satisfy the judgment if it is affirmed. This assurance and the approval thereof is necessary to perfect the appeal. In any case where a party has perfected his right to appeal as established herein or by rule of court, the judgment of the trial judge shall not be executed until after final disposition of the case by the Court of Appeals. The Court of Appeals may render such judgment

upon the case by a majority vote of those judges eligible to act on such appeal.

A comparable provision appears as Section 5 of the Law and Order Code of the Coeur D'Alene Tribe of Indians:

> Each of the judges shall sit as the Court of Appeals at such times and places as they find proper and necessary for the dispatch of business, to hear appeals from the judgments or sentences of the other judge made by either at the trial sessions. The chief judge shall hear all appeals from the judgments and sentences of the associate judge or alternate associate judge. The associate judge, or in the cases of his unavailability, the alternate associate judge, shall hear all appeals from the judgments and sentences of the chief judge. Appeals from convictions and sentences in criminal cases shall be made either by oral notice given in Open Court at the conclusion of the case, or by written notice given within five days thereafter. The right of the person to have his sentence or fine held in abeyance and suspended pending the appeal shall be contingent on that person posting such bail as will, in the judgment of the trial judge, give adequate assurance of the serving of the sentence or the payment of the fine if the appeal court affirms or modifies the action of the trial court.
>
> Any person aggrieved by a judgment or the other disposition of a civil case may also appeal to the other judge by filing a written notice of appeal within five days and serving a copy of said appeal upon the adverse party or parties. All other procedures and requirements on appeal in civil matters shall follow exactly the procedures and requirements, including fees and bonds, as provided for in the Laws of the State of Idaho for appeals and in civil matters from the Justice Courts in the State of Idaho to District Courts.
>
> Unless by virtue of Federal regulations or legislation there exists further remedies in the Department of the Interior or in the Federal Courts, any judgment on appeal shall be final.

Despite the fact that provisions similar to those quoted exist in many tribal law and order codes across the nation, Indian appeals courts remain, for the most part, little used, or existing only on paper. At the same time, as Indian tribes move to assume greater responsibility for governing their own affairs, the situation is changing. Notable examples of this

trend are the appellate court proceedings which have been in practice on the Yakima Indian Reservation in Washington and on the Navajo Reservation in Arizona.

Further, if Indians are going to maintain the integrity and independence of their present tribal court systems, the creation of an effective court for the hearing of appeals is essential. Of great significance in this regard is the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1303. This legislation will be examined in greater detail in the next section, but one aspect of it should be noted here. Section 1303 of the Act provides:

> The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.

The "writ of habeas corpus" is a very narrow remedy available to a criminal defendant seeking appellate court review of a conviction and sentence to jail. In general, the writ allows a court to review the question of whether the defendant was accorded due process at the trial which resulted in his imprisonment. In other words, the writ allows an appellate court to review the question of whether or not the defendant was given the opportunity for a fair trial; questions going to the merits of the defendant's conviction cannot be considered by means of the writ.

If more Indian tribes do not move to provide an appeals court, at least two facts will continue to be true for most Indian criminal defendants who are sentenced to jail by tribal courts: (1) They will have no right to appeal a conviction

on the merits; and (2) the limited review that is available to them will be through the narrow writ of habeas corpus under the Indian Civil Rights Act of 1968 and that review will be undertaken by a federal court, not an Indian court.

As will be discussed in greater detail in the next Section, it is entirely possible that the lack of an Indian appeals court will result in a greater use of the writ of habeas corpus to secure federal review; the Indian right to have an appellate court system is similar to all other Indian legal rights in that it is not likely to be recognized unless it is exercised. In practice, if Indians do not provide a means for the hearing of appeals, the federal courts, rather than tribal courts, will have the last word in many Indian cases.

C. What Issues May Be Raised On Appeal?

At the outset, it should be recognized that in terms of power, or "jurisdiction," the tribal constitution and provisions on the tribal law and order code dictate what may be reviewed in an Indian appellate court in the absence of federal law to the contrary. In addition, the appellate court itself may establish rules governing the form and procedure by which appeals may be presented.

Nevertheless, we can outline generally what issues ordinarily would be considered on appeal because of the nature of the appellate process itself. It is apparent that the word "appeal" indicates that there must be something from which to appeal before any appeal will be considered by an appellate court. This "something", of course, is a decision by a trial court.

In this connection, a good general rule is that only final orders or decisions of a trial court may be considered on appeal. The purpose of such a rule is to prevent delay at trial and to avoid duplication of the trial process.

For example, suppose evidence, such as the stolen hammer in our previous example, was taken from a defendant as the result of an unreasonable search and seizure prohibited by the Indian Civil Rights Act of 1968. Under such circumstances, it would be error for the trial court to allow the stolen property into evidence at the trial, and this is an error which may be corrected by an appellate court. Very likely, an appellate court would reverse a conviction based solely upon illegally obtained evidence. Notice, however, that under the general rule allowing only appeals from final orders the defendant could not appeal the trial court's order admitting illegal evidence until the trial was over and he was convicted. A conviction is a final judgment; an order admitting illegal evidence is not. On appeal from the final judgment of conviction, a defendant may challenge that judgment on the basis that error was committed by the trial court, namely, the ordering the admission of illegally obtained evidence.

It should be apparent that we are talking about a very practical rule. If every order of a trial court could be reviewed prior to final judgment, every order would be appealed and great delay in the trial process would result. In the case of a jury trial, the jury would be held indefinitely, or a new jury would have to be selected after each appeal. If

the trial is allowed to proceed to final judgment, it is quite possible that the defendant will not be convicted, making an appeal unnecessary even if the trial court committed error. Moreover, there may be issues in the case resolved by the trial court which are not affected by the error raised on appeal. If a trial were interruped every time error was alleged, and a new trial ordered, then issues previously resolved without error would have to be resolved again. Further, there is always the possibility that if the trial is allowed to proceed, the trial judge himself will recognize the error and either disregard the illegal evidence or, in the case of a jury trial, order a new trial. Again, appeal would be unnecessary. Even if an appeal is deemed necessary, if the trial has gone to final judgment, an appellate court may be able to "salvage" that part of the trials court's judgment that is not affected by the error and thus prevent the retrial of undisputed or properly resolved issues.

Assuming a final judgment has been entered, then what issues may be raised on appeal? The general rule is that an appellate court will consider only errors of law. In other words, an appellate court is not a trial court; it does not "retry the case." Therefore, an appellate court does not listen to the witnesses and determine factual matters. Instead, an appellate court has before it the written record of what transpired at the trial. If, upon reviewing that record, the appellate court determines that the factual findings of the trial court or the jury are supported by "substantial evidence", meaning evidence

which a reasonable person could believe, then these findings are accepted as being the truth regardless whether the judges on the appellate court might have made different findings if they had been the trial court or the jury. The only thing approaching an exception to this rule is a situation in which the appellate court reviews the record and concludes there is virtually no evidence to support the findings of the trial court, that is, no evidence that a reasonable person could believe. In such a case, the appellate court will not make its own findings; rather, it either will disregard the erroneous findings and reverse the trial court's judgment or, if necessary, it will send the case back ("remand") to the trial court for the entry of findings consistent with the evidence.

The "errors of law" which an appellate court ordinarily reviews range from procedural matters which affect the basic fairness of the trial, such as questions of improper jury selection, to substantive matters "on the merits", such as whether or not the trial court properly interpreted a section of the tribal law and order code. In the next section, we will see that a basic question which is likely to confront an Indian appellate court is whether or not the judgment of the trial court is consistent with the Indian Civil Rights Act of 1968. The remedies which are available to an appellate court once it has determined that an error of law has been made are the subject of Section 7.

D. The Role of Attorneys on Appeal

Many tribal law and order codes still prohibit the appearance

of professional attorneys in tribal courts. At the trial level, the absence of professional attorneys puts a considerable burden on the tribal judge. He has the parties and the evidence before him and must somehow determine the truth. Essentially, to do this, the tribal judge must conduct the cross-examination of witnesses that might otherwise be done by attorneys. Nevertheless, even though the parties often are not represented by counsel, it is likely that tribal judges have maintained a relatively high standard of justice in making factual determinations.

A somewhat different situation exists on the appellate level. On appeal, the question is whether or not the trial court has committed an error of law. Although lawyers have no monopoly on knowledge of what the law is, the fact remains that many litigants are totally ignorant of what legal issues might be raised on their behalf on appeal. Again, in the absence of professional attorneys, the burden weighs heavily on the Indian judge to see that a person's appeal is fairly presented; however, to a greater extent than on the trial level, it is anticipated that as more Indian tribes establish appellate courts, the more frequent appearance of professional attorneys in those courts can be expected. The job of attorneys on appeal is to present as clearly as possible the legal arguments which may be made on behalf of the respective parties to the appeal. Through legal briefs (see Section 5) and oral argument (see Section 6), appellate attorneys should do all they can to assist the appellate court in making its decision.

A continuing problem is the high cost of hiring legal counsel. Because legal advice is so expensive, many Indian litigants will not have lawyers. This makes it all the more important that the tribal judge advise the parties at trial that they have a right to appeal, and to encourage them to exercise that right if they believe they have been treated unfairly. Similarly, of those who do appeal, few will be represented by lawyers in an Indian appellate court. It is obvious that the quality of the Indian appellate judge is a crucial factor in the success of an Indian appeal.

E. The Role of the Indian Appellate Judge

It is easier to understand the role of an appellate judge if one considers what the duties of a trial judge are, as previously discussed. The trial judge has the parties and all of the witnesses before him. Evidence of all kinds is offered for his consideration. As the testimony is presented, the trial judge constantly must sort out, at least in his own mind, the relevant and the irrelevant, the legally admissible and the inadmissible, and, at the same time, determine the law applicable to the dispute. Regardless of whether the parties are represented by attorneys, the trial judge will be called upon to make on-the-spot decisions about the legality of evidence or the propriety of a particular line of questioning. If the parties are not represented by attorneys, it is up to the trial judge alone to prevent error from being made at the trial. In short, the pressure of time is great upon the trial judge and under such circumstances error is not uncommon.

When error is alleged by one of the parties after the trial judge has rendered his final judgment, the entire proceeding is reviewed by the appellate judge. The appellate court can often see error that the trial court missed. This is true not because the appellate judge is necessarily more intelligent than the trial judge, but rather because the appellate judge has one great asset that was unavailable to the trial judge: time.

The appellate judge has the time to review the record carefully. He has time to research the law. Often, he has another judge with whom he may work to decide a difficult case. The primary responsibility of an appellate judge is to consider the parties' case in the absence of the press of time to insure a just result. Of course, this does not mean that an appellate court should unnecessarily delay or extend its consideration of an appeal. It means only that an appellate court should take full advantage of the time it has to do a thorough job.

An Indian appellate judge, just as a state or federal appellate judge, is also a policy maker. For example, he has the authority to determine how a provision of the tribal law and order code should be interpreted by Indian trial judges. Moreover, if the tribal code fails to provide a solution to a particular dispute, an appellate judge may make the choice among reasonable solutions and, if the decisions of the appellate court are published, that choice will do much to determine how similar disputes will be resolved in the future. The appellate judge, quite literally, "makes law."

Finally, an Indian appellate judge, to a much greater extent than is true of his non-Indian state and federal counterparts, must be the advocate for both of the parties before him. As we have noted previously, few Indians are represented by lawyers in Indian courts, either at trial or on appeal. The practical result of this is that the Indian appellate judge is left with the heavy responsibility of urging the correctness of the position of each of the parties before him, and then choosing between them. In the remaining sections, we shall consider the process by which the Indian appellate judge makes this choice.

Section 2. Indian Appellate Court Function and the Indian Civil Rights Act

A. Introduction

Let us assume that an Indian appellate court has been created. What is its nature? That is, what are its distinguishing characteristics? For one thing, an Indian appellate court is essentially an agency of the Indian tribe it serves and, as such, it is a distinct feature of tribal self-government. This means that an Indian appellate court exercises a significant portion of the sovereign power of Indian tribes to "make their own laws and be ruled by them." Williams v. Lee, 358 U.S. 217 (1959). Thus, in the first part of this section, we shall consider why it is important for Indian judges, specifically Indian appellate judges, to be independent of other tribal governmental units. Directly related to the concept of an independent appellate court is the method of selection of judges, and therefore this process is also discussed.

The major part of our concern in this section, however, is the Indian Civil Rights Act of 1968. This legislation has been hailed as a guarantor of the rights of individual Indians in relation to their tribal governments and damned as a major and damaging intrusion of "white man's law" into the exercise of the Indian right of tribal self-government. In any event, it is federal legislation which is binding upon tribal courts in general and therefore it is a prime factor to consider in defining the nature of an Indian appellate court. Indeed, as we shall see, under one view of this federal legislation, Indian tribes which have not previously had appellate courts may find it necessary to create them to assure the continued existence of their tribal court system and its independence from the non-Indian courts.

B. Toward an Independent Indian Judiciary

In the Research Document published by NAICJA in support of the Criminal Court Procedures Manual, the following finding based upon field visitations to various Indian tribes in western United States appears at page 153:

> Great problems exist in the area of the lack of independence of the judiciary, insofar as being free from tribal council influence . . . Interference by the tribal councils appears in such areas as disposition of particular cases and the tenure of judges.

At page 156 of the same document, the following related finding appears:

> On some reservations, the relationship between the police and the judge is too close--in fact, almost incestuous. The courthouse is a minor adjunct of the police station; the court's personnel may be working only part of the time there, with their primary job with the police; occasionally, court is held in police facilities; sometimes, the judges act under instructions, and on the legal advice of, Bureau police. The general picture, then, on some reservations, is of the judge as an adjunct of the police department rather than an independent decision-maker.

Finally, consider this statement which appears as a finding on page 165 of the Research Document:

> Political interference with the court system is a problem on most reservations, although it is one which is decreasing in some places as tribal political figures begin to recognize the value of an independent judiciary. The interference arises in the form of off-the-record appeals in individual cases and occasional decisions to fire sitting judges over an accumulation of grievances; the interference is most obvious, and the situation most awkward, when members of the tribal council are themselves defendants in court. It is necessary that judges resist any suggestions of political influence on their decisions, that tribal officials be convinced of the need not to interfere, and that all parties make extra efforts to avoid the taint of political interference, since a general feeling among tribal members that this interference exists can do as much harm to public confidence in the system as the interference itself.

The point that emerges from the quoted findings is one of urging Indian tribes to consider moving toward or maintaining an independent judiciary. It is apparent that an Indian judiciary should be independent of political or other less subtle influences because any other situation will result in a continuing decline of confidence on the part of the tribal community in the tribal court system. In other words, if an Indian tribal court is dominated by the influence of the tribal police or of the tribal council, it will cease to be a "court" in the sense of an independent and impartial agency where a member of the tribe can get a fair hearing. This is particularly true in cases involving criminal defendants where the tribe itself is the prosecuting authority. The necessity for

the independence of the tribal court judge has already been greatly developed in Section 2 of Chapter I of this book.

The very word "judge" suggests impartiality, and implies that one who is called "judge" will make a fair, honest, and objective choice in resolving the issues before him, regardless whether the choice is one of deciding who is right or wrong in a civil action, or of deciding whether a person is innocent or guilty in a criminal case. If a tribal judge knows that a councilman who is a defendant in his court is guilty, but finds him innocent, the judge has obviously not made an impartial and honest choice. Similarly, if a tribal judge finds a person guilty solely because the police say he is guilty, no impartial and honest trial and weighing of the evidence has taken place. If the tribal community believes that the tribal council or the police are influencing the decisions in tribal courts, then there will, in effect, be no "judges" and the effectiveness of the tribal court system will decline.

Another threat to the continued existence of any tribal court which is not kept free of outside influences comes in the form of the Indian Civil Rights Act of 1968. For example, if a tribal court appears dominated by tribal police or tribal council influence, that court runs the risk of having its actions reversed as violating the "equal protection" and "due process" clauses of that federal legislation. As we will see later in this section, if a defendant is denied "equal protection" or "due process" in tribal court, then he can successfully get his conviction set aside in federal court under the

habeas corpus provision of the act. Indian appellate courts can guard against and correct such violations of the Indian Civil Rights Act of 1968, and thereby minimize the necessity for federal review. Thus, the maintenance of an independent Indian judiciary can do much to enhance the Indian right of tribal self-government.

Most Indian courts are tribal courts, as opposed to traditional courts and courts of Indian offenses, and ordinarily the tribal law and order code will include formal provisions governing the appointment and removal of tribal judges, as previously discussed in Section 1 of Chapter I. The actual selection process varies from tribe to tribe, but the majority of tribal judges are appointed by their tribal councils. Some are elected, and may be removed, by vote of the majority of the tribal membership. Indian trial judges are often designated to be appellate judges, and consequently the same selection procedures apply to both levels of the Indian judiciary; however, the practice varies on some reservations. For example, some law and order codes provide that the tribal council, or elected members thereof, will serve as the appeals court when necessary.

Regardless of the manner in which a tribal judge is selected, it is important, for reasons indicated in the last section, that the selection process be consistent with an independent Indian judiciary. In that regard, tribal councils should provide that tribal judges will serve definite terms, and not sit merely at the will of the council. Moreover,

an Indian judge's independence should be further assured by prohibiting his summary removal by the tribal council except for good cause. At the same time, public and impartial procedures should be maintained for the removal of a judge if it should become necessary. Grounds or "cause" for removal should be limited to proof that a judge is guilty of a crime, or of some other behavior which would undermine the confidence of tribal members in that judge's ability to make fair and impartial decisions. It is very important that the judges selected be properly qualified, meaning persons who have a judicial temperment, who have the confidence of the tribal community and who are willing to do the job. Formal legal education is not a necessary qualification for an Indian judge because of the procedural informality of Indian courts and the heavy emphasis in such courts upon traditional and customary law.

C. Tribal Courts and the Indian Civil Rights Act

i. Background of the Indian Civil Rights Act

The generally stated purpose of the Indian Civil Rights Act of 1968 was to extend to Indians, in their relationship to their tribal governments, most of the same rights which are guaranteed to non-Indian citizens of the United States, in relation to the federal government, by the first ten amendments to the United States Constitution (known as the Bill of Rights). The Indian Civil Rights Act had the practical effect of ending debate about whether or not these federal rights could be asserted by Indians against their tribal governments.

In the only early United States Supreme Court case on the subject, Talton v. Mayes, 163 U.S. 376 (1896), it was held that the Fifth Amendment guarantee of due process of law was inapplicable to protect a Cherokee Indian convicted of murder in a tribal court. The Supreme Court reasoned that, inasmuch as "the powers of local self-government enjoyed by the Cherokee nation existed prior to the Constitution, they are not operated on by the Fifth Amendment, which, as we have said, had for its sole object to control the powers conferred by the Constitution on the National Government." This concept was based upon the idea that the Tribes were separate sovereigns which existed before the passage of the Constitution, and thus never subsequently consented to come under the Constitution's control.

Similarly, in Native American Church v. Navajo Tribal Council, 272 F. 2d 131 (10th Cir. 1959), the issue was whether or not the First Amendment guarantee of freedom of religion prohibited the Navajo Tribal Council from enforcing an ordinance prohibiting the use of Peyote, a substance long used by the church in religious ceremonies. The court held that the First Amendment did not apply to Tribal Council actions:

> The First Amendment applies only to Congress. It limits the powers of Congress to interfere with religious freedom or religious worship. It is made applicable to the States only by the Fourteenth Amendment. Thus construed, the First Amendment places limitations upon the action of Congress and of the States. But as declared in the decisions hereinbefore discussed, Indian tribes are not states. They have a status higher than that of states. They are subordinate and dependent nations possessed of all powers as such only to the extent that they have expressly been required to surrender them by the superior sovereign, the United States. The Constitution is, of course, the supreme law of the land, but it is nonetheless a part of the laws of the United States.

> Under the philosophy of the decisions, it, as any other law, is binding upon Indian nations only where it expressly binds them, or is made binding by treaty or some act of Congress. No provision in the Constitution makes the First Amendment applicable to Indian nations nor is there any law of Congress doing so. It follows that neither, under the Constitution or the laws of Congress, do the Federal courts have jurisdiction of tribal laws or regulations, even though they may have an impact to some extent on forms of religious worship.

As recently as 1974, in the Ninth Circuit case of Settler v. Lameer, 507 F.2d 239 (9th Cir. 1974), the court held that the Tribes were not bound by the Fifth and Sixth Amendments of the United States Constitution.

It was against this historical background that the United States Congress enacted the Indian Civil Rights Act of 1968. Because the federal courts had consistently held that tribes were not bound by various provisions of the United States Constitution, as in Talton, Native American Church, and Settler, Congress decided to remedy what it felt to be an injustice in denying Indians the basic Bill of Rights protections given non-Indians. After lengthy debate, the Indian Civil Rights Act was passed in response to complaints of abuse by Tribal governments. The Act contains most of the provisions of the federal Bill of Rights, with a few modifications to accomodate the special needs of Indian Tribes, and some other parts of the Constitution. In addition, the act specifically provides that it may be enforced in the federal courts, upon appeal from the tribal court, through the writ of habeus corpus. As will be discussed later, the writ of habeus corpus is now considered the exclusive means of enforcing and protecting the rights guaranteed by the Indian Civil Rights Act, and this is a

somewhat limited remedy.

ii. The Provisions of the Indian Civil Rights Act

The Act is codified at 25 U.S.C. §§ 1301-1303 and basically prohibits tribal governments from abridging the freedoms of religion (with one exception), speech, press, or assembly; conducting unreasonable searches and seizures; subjecting criminal defendants to double jeopardy or self-incrimination; taking private property without just compensation; denying a criminal defendant the right to a speedy and public trial, or the right to counsel at the expense of the defendant; requiring excessive bail or fines or imposing cruel and unusual punishment (maximum punishment in an Indian Court is limited to $500 fine and six months imprisonment); denying equal protection and due process of law; passing bills of attainder or ex post facto laws; denying the right of a jury trial of not less than six people. The text of the Act is presented here followed by a brief explanation of each provision:

> § 1301. Definitions
>
> For purposes of this subchapter, the term--
> (1) "Indian tribe" means any tribe, band, or other group of Indians subject to the jurisdiction of the United States and recognized as possessing powers of self-government;
> (2) "powers of self-government" means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses; and
> (3) "Indian court" means any Indian tribal court or court of Indian offense.

Section 1301 is a definitional section which needs little explanation. The provisions of § 1302 lists specific rights which are not to be violated by Indian tribal governments and

courts:

§ 1302. Constitutional rights

No Indian tribe in exercising powers of self-government shall--

(1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;

(2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;

(3) subject any person for the same offense to be twice put in jeopardy;

(4) compel any person in any criminal case to be a witness against himself;

(5) take any private property for a public use without just compensation;

(6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;

(7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of six months or a fine of $500, or both;

(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

(9) pass any bill of attainder or ex post facto law; or

(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

Sub-section (1) protects the right of anyone to exercise her religion as she sees fit, but the establishment of a religion is still subject to tribal control. The tribe cannot enact legislation to hinder one's exercise of religion unless there is a legitimate governmental interest. For example, one's religion may say that polygamy is accepted but the tribe may still outlaw it. The tribe also cannot punish or make laws

against freedom of speech or the press. Laws can, however, be passed against obscenity or speech which presents a clear and present danger of inciting violence. The test is really a balancing test. Freedom of assembly is protected and thus government cannot interfere with legitimate political groups or arbitrarily interfere with questionable ones. Peaceful demonstrations are protected by this right but the tribe can regulate the place and time of these demonstrations.

Sub-section (2) says that people have a right to be secure from unreasonable searchs and seizures. This right will be further developed in Chapter VII concerning warrants, but basically requires that established procedures must be followed before a policeman or official can enter one's home in search of anything.

The statement in sub-section (3) means that a person who has committed a criminal act can be subjected to only one prosecution and punishment for that act. Once an acquittal or conviction is reached, any further prosecution or punishment by the same jurisdiction is barred. However, if the State or Federal Government refuses to prosecute, the Tribe could prosecute for the offense if it was a violation of the Tribal Code.

Sub-section (4) means that a defendant in a criminal case can refuse to testify at all. This is his privilege against self-incrimination. He can waive the right if he wants to. A prosecutor or the Court cannot comment at all on the defendant's refusal to take the stand for to do so would penalize the accused for asserting his right and force him to take the

stand to avoid comment. This right extends only to testimony. A defendant may still be compelled to stand for identification or to give a handwriting analysis. The right goes to testimonial compulsion (giving testimony under oath).

Sub-section (5) refers to the power of eminent domain. No tribe can take for tribal purposes any private property without paying the owner of the property a just and fair price. Since most Indians hold land through the tribe in a use-right system, this area may present problems unless the terms are spelled out clearly. However, any taking of property will be held to the standard of paragraph (8) which would prevent the tribe from extinguishing use-rights in an arbitrary manner.

Sub-section (6) holds that a defendant has a right to a speedy trial. The purpose of this is to relieve the defendant from anxiety, harassment, and lengthy imprisonment prior to trial and to protect his ability to refute the charges against him. The burden of proving delay is on the defendant and he must show prejudice. The defendant has a right to a public trial with spectators present. This is to prevent secret trials and to insure fairness. A judge, however, can exclude people if there is good cause such as disorder. Another example is that spectators may be excluded when the details of a rape must be related by the victim. However, under most circumstances the friends and relatives of the defendant cannot be excluded. He has the right to know what offense he is charged with committing. A defendant has the right to cross-examine witness and have the court subpoena witnesses on his behalf.

The accused also has the right to have his own lawyer. This does not mean free counsel will be provided for him.

Sub-section (7) states that a defendant shall not have bail set any higher than an amount reasonably calculated to assure that he will appear to stand trial. Excessive fines shall not be imposed nor shall cruel and unusual punishment be inflicted. The problem here may be difficult if traditional forms of punishment are used. The punishment given must reasonably fit the seriousness of the crime. The terms set at $500 and/or six months' imprisonment are the maximum sentence that can be given.

Sub-section (8) presents the two very important concepts of due process of law and equal protection. Due process has two aspects which must be fulfilled: (1) procedural, and (2) substantive. Substantive due process is founded on the notion that states cannot arbitrarily deprive persons of life, liberty or property. To deprive one of such rights the end must be legitimate and the means appropriate. A legitimate end means that the tribe can regulate it; appropriate means are those which are reasonably calculated or reasonably necessary and proper for achieving that end. Procedural due process in civil cases concerns notice; in criminal cases it concerns the procedure which protects the rights of a defendant in a criminal trial. Laws which are so vague that one cannot ascertain a standard of conduct can violate procedural due process. Equal protection of the laws means that equal application of the law to all members of the same class of persons or activities

regulated is required. The test is the reasonableness of the classification as to the equal treatment of the class sought to be regulated. The concepts of due process and equal protection will be greatly expanded in the following section.

Sub-section (9) says that no law shall be passed or enforced by a tribe which inflicts punishment without a trial. A tribe cannot prosecute a person for something that was not a crime at the time he did the act; neither can it increase punishment for an act previously performed.

Sub-section (10) requires that a jury trial of not less than six persons be given if a defendant so requests it. This right can be waived, and under the rules of the Tribal Court a verdict can be reached by majority vote.

Section 1303, Habeas Corpus, is important because it presents the only means of federal court review of tribal government and tribal court actions affecting the rights guaranteed by the Indian Civil Rights Act:

> § 1303. Habeas corpus
>
> The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.

The landmark case of Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978), limiting federal court review of tribal actions which possibly violate the Indian Civil Rights Act to a writ of habeas corpus available only to people "in detention," will be developed to a much greater extent in sub-section iv., concerning appellate review and the Indian Civil Rights Act. But a brief definition of the writ will suffice here.

The writ of habeas corpus is a speedy remedy to release a person unlawfully imprisoned or restrained of his liberty and will issue to inquire into the cause of such imprisonment or restraint. The writ not only releases a person from a restraint which is wholly unlawful, but also relieves a person lawfully in custody of restraint from an element or degree of restraint which is unlawful. Literally, "habeas corpus" means to have possession of one's own body or person. Habeas corpus is available to one who feels he is held wrongfully by an Indian court. The writ issues on jurisdictional grounds, but it includes every type of possible error in criminal procedure. These would include: illegal arrest, refusal of bail, excessive bail, or violation of any other enumerated rights. [See the sample "Petition for Writ of Habeas Corpus" in the Appendix to this Chapter.]

iii. Due Process of Law and Equal Protection in Indian Courts

(a) Due Process of Law

Due process of law did not come to the American Indian residing on the reservation under Tribal Government until the Civil Rights Act of 1968 was passed. Prior to that time, federal courts had ruled that tribal jurisdiction over Indians on the reservation was not subject to the control and guidance of the Constitution of the United States, the federal government or state government. Due process of law is a broad concept and involves many aspects of the rights of individuals to life, liberty and property. A person may not be deprived of his life, liberty, or property without due process of law, that is, without proper exercise of authority by tribal councils

in the making of the law or Indian courts in the enforcing of the law. In subsection (7) of the Indian Civil Rights Act, Indian courts are given control over an individual's right to liberty and property to the extent of six months in prison and $500 in fines or both. Indian court decisions affecting a person's liberty and property cannot be arbitrary, but must be made under tribal authority in view of tribal law and the Indian Civil Rights Act.

Basic to this exercise of power by the judges is that of due process of law. It is the duty of the Indian court judge to protect the rights and privileges of all persons appearing in his court no matter what the nature of the crime. The Indian court judge must make sure each person's rights are safeguarded; he must guarantee that due process of law is given.

A quick, easy, and simple method to understand due process of law is not possible. To understand the concept of due process is to work with it and to apply it in actual circumstances and cases. Following are general statements as to what due process of law is and examples of fundamental private rights of all persons to receive equal treatment and protection of rights in law.

Due process of law is the administration of law in its legal course according to the form of procedure suitable and proper to the nature of the case. It must be conformable to fundamental rules of right and affecting all persons alike. Due process of law requires that tribal law must be administered in the regular course according to the rules and forms which have been established for the protection of individual private

rights. Due process requires that tribal laws be fairly and orderly administered. It requires that the authority for making and enforcing the law be exercised by the proper and duly elected or appointed bodies, and that the enforcement of tribal laws not be oppressive or unjust. Due process of law requires that all steps (procedures) essential to the taking away of a person's right to liberty (right legally to go and come as one wants and in the manner one wants) and property must be followed and applied equally to all and must be free from arbitrary action. It further requires that a person's immunities, privileges and fundamental freedoms under law not be infringed upon (taken away, deprived, lessened) without following proper legal proceedings intended to challenge an individual's right to those immunities, privileges and freedoms. It also requires that a denial of liberty and property cannot be effected except by standard practices, methods and procedures as established by tribal councils, tribal courts and tribal laws.

The following are examples of rights, immunities, and privileges which are fundamental freedoms guaranteed to everyone. Each is a due process requirement. To deny them to any individual or to prevent the person from exercising these rights is a denial of due process of law.

An accused must have notice that the act he committed is punishable under law. Any arrest, warrant for arrest or summons to appear in court must be made for probable cause. The charges must be clear and the cause for bringing them must be

presented to the accused. The accused has a right to bail. He has a right to a trial: speedy, public, and fair. He has a right to trial by jury, to a jury selected by fair means, to counsel at his own expense, to defend himself, to be confronted by witnesses against him and to have compulsory process served on witnesses in his favor. He has the right to be tried before a fair, impartial and nonprejudicial judge and he has the right to have a non-arbitrary and fair sentence imposed upon him if found guilty.

The first due process requirements to be discussed are (1) the accused must have notice of the law he violated, (2) the accused must be given a trial and (3) deprivation of liberty or property must be resolved in a manner consistent with essential fairness in light of the circumstances of the accused's act(s).

If the individual is not given notice that the act is prohibited, notice either actual or constructive, then the person is not being afforded due process of law. Every individual has the right to know that the act contemplated or done is prohibited by law. Actual notice may be given by written notice while constructive notice may be given by the very nature of the act itself.

In addition to notice that the act is prohibited, once the person does the act he must be given notice that he has allegedly committed and been charged with a violation of the law and is to be held accountable. The nature of the criminal act may put the accused on constructive notice that he may be held accountable for his act. For example, if a member of the tribe

assaults another tribal member he is considered to have notice that he has violated the law and can be held accountable for his act, but he still must be given notice that the charge has been made and when and where he must appear to answer the charges against him.

Finally, notice that is given must be sufficient, reasonable and adequate so that the accused may know the exact charges against him, and the cause that brought those charges against him so that he may adequately prepare his defense.

Once the accused has notice that he has been accused and must appear in court, he must be given a trial before an impartial judge where he may deny the claim against him on the law and facts presented and show that the accusation (claim) is unfounded, or he may enter a guilty plea.

The trial must be in accordance with settled procedures of the tribal court and must be conducted in accordance with the rights, privileges, and immunities contained in the Indian Civil Rights Act.

Due process requires that the accused know the charges, evidence and witnesses to be used against him. He must be given the right to confront and cross-examine them and introduce his own evidence, witnesses, and testimony in order to defend himself against the charges. In defending himself against the charges, the accused has the right to have his own counsel to defend him at his own expense. He also has the right to be tried by a jury of not less than six people. The

trial must be fair and impartial, it must be a formal proceeding which is customarily given to a person so accused and the court must be legally constituted to hear such a case.

If the accused is found to be guilty of the charge or charges against him, the punishment given him must be fair and reasonable in view of the act committed. Due process requires that a person receive that punishment which is normally given for the same or similar type offense.

Lastly, whether the accused is found innocent or guilty of the charges, he may not be tried again for the same offense. Due process of law requires that he be tried once and only once for the same offense.

(b) Equal Protection and the Indian Court

Equal protection of the law was first provided for in the 14th Amendment of the United States Constitution in 1868. The amendment says that no state shall deny to any person within its jurisdiction the equal protection of the laws. This right was also provided for by Congress in the Indian Civil Rights Act of 1968. This act said, "No Indian Tribe in exercising powers of self government shall deny to any person within its jurisdiction the equal protection of its laws. . . ." This says exactly what the 14th Amendment says, except that state jurisdiction has been changed to tribal jurisdiction. This means that no one under the tribe's jurisdiction can be denied equal protection of the law. This similarity between the Indian Civil Rights Act and the original Bill of Rights in the Constitution has reinforced the equal protection concept.

As the 14th Amendment and the Indian Civil Rights Act say, no person within the jurisdiction shall be denied equal protection of the law. This is designed to prevent any person or class from being singled out and being the object of unfair or discriminatory laws. This forbids law makers to impose discriminations not cast upon others in the same circumstances. In order for a person to claim the law is discriminatory he must show he himself is of the class the law is discriminatory against. He cannot complain on behalf of others whom he feels are in worse circumstances than himself. Each person or class must bring their own lawsuit or argue their own motion in their criminal case. A person cannot bring suit in behalf of someone else.

But, the phrase "equal protection of the laws" cannot be exactly and completely defined. There is no one rule that will cover every case that might arise. The concept of equal protection is a constantly changing thing as new issues and cases arise and come within the boundaries of equal protection. This will be further developed in the following discussion of the Martinez case. There are guidelines, however, which explain as well as possible what equal protection is and how it works.

Equal protection means that all people subject to certain laws shall be treated alike when they are in the same circumstances and conditions. This applies to privileges, rights, or things they can do and in restrictions on them. Just as a state is strictly forbidden to deny equal protection of the laws, so is the tribe forbidden to deny equal protection to

those under its law. Everyone has a right to demand equal protection.

No person or class of persons shall be denied the same protection of the laws which is enjoyed by other perso or classes in the same circumstances, in their lives, liberty, property and in pursuit of happiness. To be an equal law, it must affect or impose equal penalties and equal burdens and protect everyone that comes under the law in the same way. It has to impose the same rights, protections or penalties on all who are governed by the law. This, of course, is not to say one defendant for assault cannot get a jail sentence and another a fine. Equal protection is satisfied if both could have gotten either the fine or the jail sentence.

As stressed above, the law must act equally on persons or classes in like circumstances. It is stressed that this refers to things or classes that are alike. All things, people, and classes of people are not alike however, and the law allows for these differences. The equal protection clause does not forbid discrimination with respect to things that are different. The guarantee of equal protection of the laws is not one of equal application of laws upon all citizens of the jurisdiction, because there are differences in citizens such as age, state of health and many more things that may require different application of law or different laws. The laws need not affect every man, woman and child exactly the same. This is what we mean when we refer to classes of people, that for some valid reason a law only applies to them or a law applies to them

differently than to others. It should be pointed out that any classification can be challenged as denying equal protection. The classification will likely be valid and good if it includes all persons, and only those persons, who are in like circumstances in regards to the purpose of a specific law. An example of classification is where automobile drivers have laws that are only enforced against them, because a law was made for a purpose concerning automobile operation.

The classifications must be reasonable, not arbitrary or capricious. It must be based upon a difference having a fair and substantial connection to the object or purpose of the law, so that all persons of like circumstances will be treated alike under the law. Classification has to be made on a distinct difference. Another example of laws affecting classes differently might be the law that says it is illegal to sell liquor to persons under 21 years of age, but not to those over 21 years old.

The following are examples of denial of equal protection or where laws are unequal and therefore not allowed because it is unconstitutional as denial of equal protection.

(1.) Discrimination because of race, color, religion or condition is a denial of equal protection of the laws. To treat people in like circumstances differently because of race, color, religion or condition is a denial of equal protection.

Since only Indians are subject to most tribal court jurisdiction, probably the main way a race issue might face a tribal

court is if the person accused is not of pure Indian ancestry. Some tribes define who is a member of one tribe and who is allowed to vote in tribal elections. Congressional records show that this is allowed in order to keep the basis of the tribe of Indian ancestry. Since the purpose is to preserve the tribe, it is not held as denying equal protection. However, the question arises as to the offspring of unions between tribal members and non-members. It is possible that these offspring will not meet the minimum ancestry requirement. When the tribe has allowed a complete outsider or an offspring as described to live all or most of his life with the tribe, it may very well not be allowed to exclude such person inheriting private or personal property because of low Indian ancestry. It may not be allowed as necessary to preserve the tribe; to treat such a person differently because of race might be denial of equal protection. Indeed, the landmark case of Santa Clara Pueblo v. Martinez, discussed in the following section, addressed this very issue.

(2.) If the person is denied the right to counsel at his own expense, it is a denial of equal protection. According to the Indian Bill of Rights the court does not have to provide free counsel if the person cannot afford to pay. The person must pay his own counsel or do without.

(3.) A defendant has the right to talk to his counsel before trial, and in privacy. Also he can talk to counsel during trial. This right to talk to counsel applies at all stages of prosecution. To deny this is to deny equal protection.

(4.) You cannot make an act done by one person punishable, yet impose no penalty upon another for the same act done if all circumstances are alike.

(5.) The judgment of a tribal court can be appealled to an appellate court of several judges or as specified in the tribal code. It can also be appealled to the federal district court in certain circumstances, as will be shown by the following discussion of the Martinez case. To deny such appeal is to deny equal protection. To not allow appeal documents to be sent until it is too l. e is denial of equal protection.

(6.) A court must furnish a defendant a transcript of the proceedings if it is needed for the appeal. To deny it is to deny equal protection.

(7.) There is no equal protection of the law if the type of trial a man gets depends on the amount of money he has. Rich and poor have the same equal rights.

(8.) Laxity in enforcement of laws is not a denial of equal protection. A person guilty of violating a law cannot defend by showing that others equally guilty have not been prosecuted.

iv. Santa Clara Pueblo v. Martinez: Appellate Review, Equal Protection and the Indian Civil Rights Act

Prior to the United States Supreme Court decision of Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978), the federal courts had held that the Indian Civil Rights Act waived tribal sovereign immunity and that a tribe could be enjoined in federal court from violating the provisions of the Act. But, in the

landmark Martinez decision, the court held that habeas corpus was the exclusive basis for federal court jurisdiction to test tribal violations of the Act. This remedy is traditionally available only when the plaintiff is in custody. Thus, while the Act limits tribal government action, a person complaining of a violation of the act will generally have recourse only to the tribal court or the tribal government, unless habeas corpus is available. Access to federal courts generally cannot be obtained, for example, for issues involving denial of enrollment in the tribe, voting rights, taxation, or zoning. Thus, only a very small number of cases heard by tribal courts will present the opportunity for appeal to a federal court.

The court in Martinez further held that the Indian Civil Rights Act requires that tribal courts afford to all persons appearing before them rights of due process and the equal protection of their laws. We saw in the preceding section that due process concerns fairness in terms of the general legal process, including notice and trial procedure. Equal protection requires that persons equally situated before the law be treated equally. The intent of Congress in enacting the Indian Civil Rights Act was to guarantee individual rights with a minimum infringement on tribal self-determination. Courts interpreting the ICRA equal protection clause are faced with the problem of developing a standard of review that properly balances tribal and individual interests. The Supreme Court has not provided any definitive answer to this question. It's most substantial comment appears in Martinez when the

court said, "Given the often vast gulf between tribal traditions and those with which federal courts are more intimately familiar, the judiciary should not rush to create causes of action that would intrude on these delicate matters," referring to the right of a tribe to define its own membership. The Court was reluctant to "substantially interfere with a tribe's ability to maintain itself as a culturally and politically distinct entity." (436 U.S. at 71-72)

In the absence of a conclusive answer, the lower federal court decisions have varied considerably. However, they have generally accorded considerable weight to Indian cultural autonomy and traditional values and have given considerable deference to the judgment of tribal governments. A careful and complete treatment of this issue is contained in the opinion of the Court of Appeals for the Tenth Circuit in Martinez v. Santa Clara Pueblo, 540 F.2d 1039 (10th Cir. 1976). Although this decision was subsequently reversed by the Supreme Court on other grounds, the Supreme Court still confirmed the Indian Civil Rights Act equal protection analysis of the lower federal courts. This tenth circuit opinion reveals the standards that will likely be applied in due process and equal protection appeals. But it must be remembered that the Supreme Court also limited the protection of these two standards to writs of habeas corpus. This means that the right to these protections exist, but that the means of enforcing this right are very limited.

In Martinez, the Tenth Circuit ruled that a tribal membership

ordinance was invalid because it granted membership status to children born of marriages to male members and female non-members, while denying it to children born of marriages of female members to male non-members. The tribe argued that the restriction of the Pueblo's ability to determine tribal membership would threaten its culture because the male-female distinction was rooted in the Pueblo's patrilineal and patrilocal tradition.

In disagreeing, the court concluded that Congress intended to temper the normal application of equal protection principles where the cultural antonomy and integrity of the tribe would be weakened. The court then adopted a balancing approach of the individual right to fair treatment against the tribal interest to be taken into account. Applying this approach, the court held the ordinance denied female members of the tribe "fundamental rights" that were extended to men based on the arbitrariness of sex. But what is important here is the special weight given to tribal culture and autonomy, by the court, which was asserted by the tribe to justify the discrimination. This is a departure from normal equal protection analysis.

The tenth circuit noted that tribes need not meet all of the due process and equal protection guarantees of non-Indian courts. Valid tribal cultural factors may be considered in the application of tribal laws, if the tribe's interest in the cultural factor is compelling. For example, the amount of tribal blood may be a consideration in membership decisions,

because some justification exists "in terms of ancestral lines and in maintaining the integrity of the membership." The general rule is that, "where the tribal tradition is deep-seated and the individual injury is relatively insignificant, courts should be and have been reluctant to order the tribal authority to give way."

In sum, the Martinez case made fundamental changes in Indian law, both in terms of equal protection and the Indian Civil Rights Act, and in terms of federal appellate review and the writ of habeas corpus. The Assistant Secretary of Indian Affairs, U.S. Department of the Interior, recently highlighted the significance of the Martinez decision in a memo to the Commissioner of Indian Affairs:

> The Martinez decision has clearly placed the responsibility and the authority for enforcement of the Indian Civil Rights Act on tribal governments. In its discussion of the decision the Court said, "In addition to its objectives of strengthening the position of individual tribal members vis-a-vis the tribe, Congress also intended to promote the well established Federal policy of furthering Indian self-government." Therefore, the Martinez decision has had the practical effect of reinforcing the authority of Indian tribes to truly self-govern. By doing so, it has provided them with both the opportunity and the responsibility to strengthen their tribal governments and create an atmosphere of respect for those tribal forums charged with protecting individual rights.

Section 3. How an Appellate Court Operates

A. Introduction

In this section, we will consider how an appellate court operates. The first part of the section concerns what one would find upon entering an appellate courtroom. It covers the physical layout of the courtroom, the method for keeping records of the proceedings, and the description of the people who participate in the proceedings. The second part deals with the power of an appellate court to establish rules governing appellate proceedings, and includes examples of some typical appellate rules. Although rules are invisible (except as they appear in writing) their effects can be seen in everything that occurs in an appellate courtroom and in everything that an appellate court does.

B. Physical Aspects of Appellate Proceedings

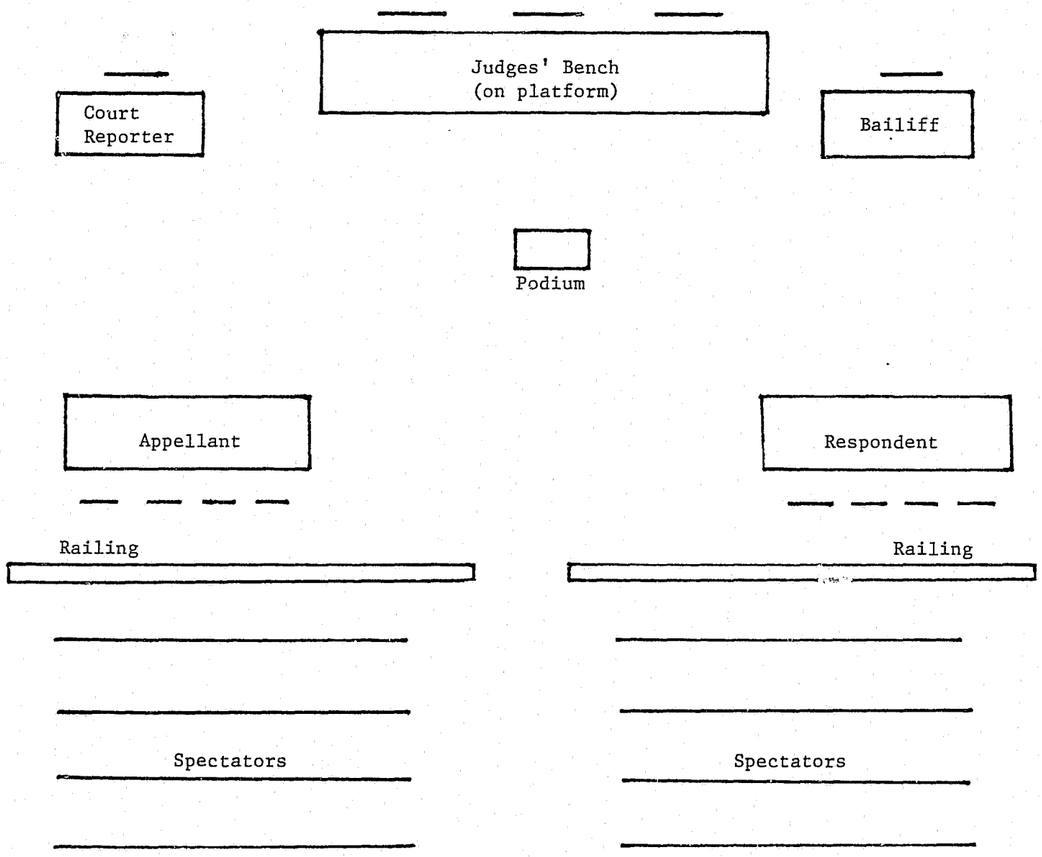
The physical appearance of an appellate courtroom, is, of course, dictated in large part by the basic design of the room selected for this purpose. There is nothing magical about a particular physical layout, and the location of courtroom furniture and of the participants should be aimed at creating a business-like and dignified but not overbearing atmosphere. The room should be designed to make it easy for appellate arguments to be conducted. Because Indian litigants will appear in the room, it should be designed in a manner consistent with the tradition of the tribe that the court serves. It should be comfortable and appealing to Indian litigants.

The physical appearance of an appellate courtroom reflects

what goes on there. There are no juries or witnesses in appellate courts--such courts do not hear witnesses or otherwise engage in fact-finding. What they do is listen to the arguments of the parties to the appeal. These parties appear either in person or through lawyers or other representatives. In non-Indian courts, such representatives must be professional attorneys but this need not be true in Indian appellate courts, and the practice may vary from tribe to tribe. In any event, the courtroom should provide a place for the judge or judges, and for the parties or their representatives. In addition, the judges may want to have a bailiff present to call the court to order and assist the judges in maintaining order in the courtroom. The bailiff may also serve as court reporter, but it may be desirable for another person to serve in that capacity. The court reporter keeps a record of the proceedings, either by taking shorthand notes or operating a tape recorder or other recording device. Appropriate chairs and tables must be provided for the bailiff and court reporter. Finally, there must be seats for the general public or other interested spectators to witness what takes place in the courtroom.

As is illustrated by the accompanying sketch, the basic design of a typical appellate courtroom includes a judges' desk or "bench" on a platform raised above the floor at one end of the rectangular-shaped room. On one or both sides of the bench, or directly in front of the bench, at floor level, a desk and chair is provided for the court reporter and/or bailiff. A podium is usually located a comfortable distance

SKETCH ILLUSTRATING BASIC APPELLATE COURTROOM LAYOUT



(at least six to ten feet) away from and centered in front of the judges' bench. The arguments are presented from this podium. In addition, on either side of the podium, there are desks or tables and chairs for the parties to the appeal. The party appealling and urging that the appellate court reverse the trial court (called the "appellant") sits on one side, and the party responding to the appeal and urging that the trial court be affirmed (called the "respondent") sits on the other side. Chairs or benches for spectators are located behind the desks provided for the appellant and respondent, and the spectators are usually separated either by space or a physical railing of some sort, from the area of the courtroom where the parties' desks are located.

An Indian appellate court should adopt the physical layout that best meets the needs of the tribe it serves. All, part, or none of the physical layout just outlined may be adopted by each tribe; however, a few general considerations might be taken into account by a tribe that is contemplating setting up an appellate court. First, even if an appellate procedure is established, it may be some time before many appeals are actually taken. At present, the great majority (approaching 95 percent in some areas) of Indian criminal cases are disposed of by a guilty plea, and similarly, few civil cases get past the trial stage. Thus, at the outset, the tribe should consider the possibility of having appellate arguments take place in the same courtroom that is used for trials. If the courtroom furniture is movable, it could be rearranged for the

CONTINUED

3 OF 5

appellate arguments; if the tribal courtroom has immovable fixtures, such as a permanently fixed jury or witness box, then they could simply go unused when an appeal is being heard.

The importance of keeping some kind of accurate record of appellate court proceedings also should be kept in mind. In the absence of a clear record of what transpired in an Indian appellate court, a federal court will be more likely to grant habeas corpus review of the Indian court's action under the Civil Rights Act of 1968. As previously indicated, such records may be kept in the shorthand notes of a court reporter, or on a tape recorder or other recording device. At a minimum, the appellate court might want to keep careful notes and prepare a summary of all that took place during the appellate proceeding. For such a summary to be completely effective, however, all parties should attest to its accuracy.

C. The Establishment of Rules for Appeal

Indian appellate courts, unless otherwise limited by the tribal law and order code or federal law, have the power to establish rules by which appeals will be heard. There are basically two categories of rules which such courts may establish. In the first category are "housekeeping" rules: i.e., rules governing the manner in which court will be conducted; how arguments will be presented to the court; the length of time each side may have for oral argument; and the order in which arguments are presented. A typical rule would allow each side thirty minutes for oral argument, giving the appellant the right to reserve a portion of his time for

rebuttal. Under such a rule the appellant presents his argument first, reserving, at his discretion, a portion of his thirty minutes to rebut the respondent's argument. Then the respondent may use his thirty minutes to (1) answer the appellant's arguments and (2) present arguments in his own behalf. Following the respondent's presentation, the appellant is allowed to use his remaining time, if any was reserved, to answer the respondent's argument.

The court also has the power to establish other "housekeeping" rules. Thus, a court rule may provide a bailiff who will have power to assist the court in maintaining order in the courtroom. Additional rules could define the bailiff's duties. For example, a rule might require the bailiff to convene the court in the following words: "All rise. The tribal appellate court of the _____ tribe is now in session, the Honorable _____, Chief Judge, presiding." Court rules may also govern the manner in which records of the proceedings will be kept. Included in such rules might be one authorizing the hiring of a court reporter and outlining his duties. In short, "housekeeping" rules set forth how the appellate court will operate on a day-to-day basis.

The second category of rules with which we are concerned may be called "substantive" rules. They are "substantive" because they determine whether or not a party will have his appeal heard, i.e., failure to comply with them will mean that the appeal will not be considered. Included in the category of "substantive" rules are rules governing the manner in which

written briefs must be written, and setting time limits within which such briefs must be filed with the court and made available to the opposing side. Failure to comply with such rules can result in the court's refusal to consider the brief and, indeed, under some circumstances will cause the court to dismiss the appeal.

Perhaps the most important "substantive" court rules which may be formulated are those governing the very right to appeal itself--rules which must be complied with if the appeal is going to proceed at all. For example, one such rule might provide:

> Any party who believes that a final judgment or order of the trial court has been erroneously or unjustly entered shall have that judgment reviewed by appeal, provided that he files notice of his intention to appeal with the trial court within thirty days of entry of the judgment of order.

Under this rule, any party who failed to file a timely notice of appeal with the tribal trial court--that is, notice within the thirty-day limit referred to in the rule--would be barred from having the appeal considered by the appellate court, unless the appellate court decided to waive the operation of the rule in a given case to hear the appeal anyway. What is the purpose of such a rule? The primary purpose is to provide a point in time after which a party who has been successful in trial court may consider the trial court's judgment to be final and, accordingly, reap its benefits. Such finality provides the parties to a lawsuit with a certain decision, and discourages unnecessary delay in litigation.

D. Questions

Consider the following rules which might be adopted by a tribal appellate court. These rules are not the only rules which such courts may establish, and are intended to be illustrative only. What is the purpose of each rule? Should it be adopted by your tribe's appellate court?

(1.) Appeals may be taken only from final judgments or final orders of the trial court.

(2.) The appellate court will not consider appeals which involve allegations of error by the trial court which, even if proven, would constitute harmless error in the sense that such error did not affect the judgment of the trial court and would not change the result.

(3.) The appellate court will not consider evidence which was not presented to the trial court, except that a new trial will be ordered if it can be shown that such evidence could not have been presented to the trial court even if the parties had exercised due diligence.

(4.) In a nonjury case, the findings of fact made by the trial court will be accepted as the established facts in the case so long as they are supported by substantial evidence.

(5.) Jury instructions which are challenged as erroneous must be set out in full in the brief of the appellant, even if only a part of them is alleged to be wrong; otherwise, the claim of error will not be considered by the appellate court.

(6.) Only persons who were parties to the trial court action and who are aggrieved by that action may appeal to the appellate court.

(7.) In civil actions, if a party aggrieved by a final order or judgment files notice of appeal, but dies before that appeal is prosecuted, then the heirs of such deceased party may prosecute the appeal.

(8.) If, following notice of appeal and prior to oral argument in the appellate court, the parties to the action stipulate that they agree to a dismissal of the appeal, the appellate court may order the appeal dismissed.

(9.) The appellate court must decide each case it hears by written opinion, giving reasons for its decision.

(10.) The appellate court must decide and publish its written opinion in each case within 60 days of the date the oral arguments were heard.

Section 4. Preparing the Record for Appeal

A. Introduction

There are basically four steps involved in getting a trial court decision reviewed in an appellate court. First, as indicated in the preceding section, a court rule may require that notice of appeal be filed within a certain period of time, such as thirty days from entry of the final order or judgment of the trial court. The second step, which is the subject matter of this lesson, concerns the preparation of a record of the trial court proceeding to be filed with the appellate court for purposes of its review. The third and fourth steps are the writing and submission of written arguments or "briefs", and the presentation of oral arguments, to the appellate court. These last two steps are discussed in Sections 5 and 6.

The preparation of a record of the trial is most important. An appellate court cannot consider any matters not presented or argued to the trial court. Moreover, what makes the preparation of the record absolutely crucial is that the appellate court can consider only those matters which are reflected in that record; it cannot go out and gather facts that do not appear in that record no matter how relevant they may be to the issues raised on appeal. In the next few pages, we will consider the mechanics of preparing a good record for appeal, and what should be included in it.

B. Who Prepares the Record?

Rules of the appellate court determine who prepares the

record, what form it should take, and what should be in it. As a matter of fairness, appellate court rules generally require that the appealing party be responsible for the initial preparation of the record. Thus, the usual procedure is that the appellant prepares a proposed record and serves it upon the opposing party in much the same manner as a Complaint to start a lawsuit would be served. The appellant prepares the proposed record by getting a copy of all or part of the court reporter's record of what took place at the trial. If the court reporter's record consists of shorthand notes or a tape recording, the appellant should select as much of this record as he believes is necessary for purposes of the appeal and have it "transcribed," that is, reduced to writing. An appellate court rule will usually require that the record be typewritten. If there was no court reporter at the trial, the appellant should obtain a summary of what took place from the trial judge. In addition, the appellant should get copies of any papers filed with the trial court that he considers important to a complete consideration of his appeal.

Usually the appellant is required to file a copy of his proposed record with the trial court within a certain period of time, say ninety days, after entry of the final order of judgment appealed from. If for some good reason the filing deadline cannot be met, the appellate court has the discretion to grant the appellant additional time. Sometimes court rules will limit the amount of additional time that the court may allow.

The appellant alone does not decide what goes into the record. The opposing party, i.e., the respondent, generally is allowed a certain period of time in which to propose amendments or the addition of other materials to the record. If the parties are unable to agree on the content of the record, the trial court determines what it will be. In any event, the rules usually require either the trial judge and/or the clerk of the trial court to certify by sworn statement that the record as prepared by the parties is accurate.

C. What Goes Into The Record?

There are basically two sources of materials which may be included in the record on appeal:

(1) Legal documents filed in the trial court such as the summons and complaint, motions, judgment, memorandum opinion, findings of fact and conclusions of law.

(2) Records of oral proceedings, usually consisting of recordings or shorthand notes which must be reduced to a typewritten transcript for purposes of appellate review.

In preparing a proposed record for appeal, the appellant may want to include from the first source such things as the initial pleadings of the parties, written orders by the court, written motions by the parties, and exhibits (such as documents, charts, maps and photographs). With reference to exhibits, if the appellant is assigning error to the failure of the trial court to admit a particular exhibit into evidence, then that exhibit may be included in the record accompanied by appropriate arguments urging its admission. From the second source, the appellant may want to include transcripts of all oral proceedings, including the testimony of witnesses and arguments of

counsel at pretrial hearings or at trial, the voir dire examination of jurors, oral arguments, oral decisions and rulings of the trial court, and oral objections or motions made by the parties. An index or table of contents of a typical appellate record in a criminal case might look like this:

IN THE TRIBAL COURT OF THE _____ INDIAN TRIBE

_____ INDIAN TRIBE, Plaintiff Respondent

vs.

GEORGE BLACKBIRD, Defendant Appellant

Cause No. _____

INDEX TO RECORD ON APPEAL

The sample index page reproduced here is intended to be illustrative only; an acutal record might have a separate index for the transcript of the proceedings at trial, with page number references to the testimony of witnesses, and notations indicating whether the testimony was given on direct or cross-examination. Moreover, many exhibits are bulky or are not documentary in nature and therefore would be made available to the appellate court separately from the written record. Nevertheless, the written record should include a list of all exhibits by number with page number references to the transcript of the proceedings to indicate when each exhibit was introduced and admitted into evidence.

The process of assembling the record involves typing and xeroxing where necessary, but despite these clerical aspects, it is a very responsible job that is crucial to the scope of review which may be exercised by an appellate court. The decision to proceed on appeal with less than the complete record can be hazardous. If something is omitted from the record, the appellate court cannot consider it, although the appellate court does have discretion to reopen the record for the purpose of allowing additions or amendments to the record in appropriate cases. In any event, the appellate court can consider only what was presented to the trial court.

It should be noted, however, that not everything that took place at trial or that was before the trial court must be included in the record on appeal. There are some cases where it is not necessary to include absolutely everything in the

appellate record. One reason for holding the size of the record to a minimum is financial; the rules usually provide that the cost of preparing a record will be borne by the appellant, although the appellate court might assess costs against the respondent in the event the appeal is successful. Parties should be encouraged to submit only so much of the record as is relevant to the appeal so that the burden of review placed upon the appellate court will be no greater than necessary. In addition, when irrelevant matters are not brought before the appellate court, the court more readily can focus its attention on the critical issues raised by the appeal.

D. Certification of the Record

Appellate court rules may require the trial court or the clerk of the trial court to certify that the record which has been submitted by the parties is an accurate and complete record of the trial court proceedings, or at least of those proceedings relevant to the appeal. This requirement assures the appellate court that the record before it is authentic. Customarily, appellate rules provide that transcripts of oral proceedings are certified by the trial judge, while legal documents filed in the trial court are certified by the court clerk.

A trial judge's certification could consist of the following statement:

> I, _____, Judge of the _____ Tribal Court, hereby certify that the matters and proceedings embodied in the attached transcript in the above entitled cause are a complete and accurate record of the proceedings had in that cause to date, or of such part of said proceedings deemed by the parties to be material.
>
> In testimony whereof, I have herunto set my hand this

_____ day of _____, 19 ____.

_____

JUDGE

Similarly, certification by the tribal court clerk could be made in the following form:

> I, _____, Clerk of the _____ Tribal Court, do hereby certify that the foregoing is a full, true, and correct transcript of so much of the record and files in the above entitled cause as I have been directed by _____ to transmit to the _____ Tribal Appellate Court.
>
> In testimony whereof, I have hereunto set my hand and the seal of said _____ Tribal Court this _____ day of _____, 19 ____.

_____

Clerk

E. Questions

(1.) Describe the steps involved in bringing a trial record before an appellate court.

(2.) What may be included in a record on appeal? For example, can an appellate record include testimony that was not presented to the trial court?

(3.) What is a "transcript"?

(4.) Who pays the cost of preparing a record on appeal?

(5.) How can an appellate court be sure that the record brought before it is authentic?

Section 5. Briefs on Appeal

A. Introduction

Written legal arguments are presented to an appellate court in "briefs", which are submitted by both parties to the appeal. After these briefs have been filed the appellate court schedules a hearing time for oral arguments so the parties can explain their arguments directly to the court and answer any questions raised by the court. Oral arguments play an important role in the appellate process; they are covered in the next section.

Although oral arguments are important, the written briefs coupled with the court's own research provide the principal basis on which the appeal is decided. The appellate court may establish rules setting deadlines for the submission of briefs and governing the form and content of briefs. Such rules are the subject of this lesson.

B. Should Written Briefs Be Required?

The purpose of appeal briefs is to advise the appellate court of the arguments being presented by each party to the lawsuit on appeal. The appellant's brief contains arguments indicating that some error was made by the trial court, and urging that the trial court be reversed. The respondent's brief presents arguments answering the appellant and in support of the trial court's judgment, urging that the trial court be affirmed; however, if the respondent is not completely satisfied with the trial court's judgment, he may also urge partial reversal or modification of that judgment in a cross-appeal.

Appellate courts generally require that written briefs be

filed setting out the specific "assignments of error" relied upon by the appellant or cross-appellant. Any error not assigned and argued in the briefs will not be considered by the appellate court. Also, an appellate court rule will usually require that if a "finding of fact" made by a judge in a non-jury trial is assigned as error, then the complete finding in question must be set out verbatim in the brief. Another rule that an appellate court should establish is that if error is assigned to a jury instruction, not only must that instruction be set out verbatim in the brief, but also all the instructions given by the judge must be set forth. The reason for this rule is that the other instructions may qualify or explain the one that is challenged and the appellate court will want to consider the instructions as a whole.

As we said earlier, an argument not raised in the briefs is generally not considered by the appellate court. But there is one exception to this rule; it concerns the jurisdiction of the court to act. Thus, the objection that the trial court did not have jurisdiction to decide the case, or that the appellate court does not have jurisdiction to hear the appeal, may be raised at any time. Similarly, a party may object at any time that the original indictment or plaintiff's complaint was defective or did not state sufficient facts to constitute a cause of action. In other words, if the indictment or complaint does not on its face allege facts sufficient to establish grounds for the charge, or the claim, then the case should be dismissed.

C. Procedural Aspects of Appeal Briefs

The appellate court may adopt rules establishing deadlines for filing briefs. Failure to meet such a deadline may result in the appeal being dismissed or decided adversely. Thus, an appellate court might provide that the appellant's "opening" brief must be filed with the court and served on the opposing party within thirty days after the proposed record has been filed and served on the opposing party. The appellant's brief, as previously noted, must specify the errors he relies upon for reversal. Appellate rules might provide that the opposing party, the respondent, has thirty days in which to file his "answering" brief with the court and serve it on the appellant.

An appellate court rule also may provide that the appellant may be given ten days after receipt of the respondent's brief in which to file a "reply brief", if he desires to answer arguments raised by respondent. An appellant may not use this reply brief to raise any new arguments; he may only reiterate the arguments he presented in his opening brief and answer new arguments posed by respondent. Finally, in recognition of the fact that the law sometimes changes rapidly or new authorities appear unexpectedly, the appellate court might provide that either party may submit written statements of such new or additional authority up until twenty-four hours before the oral arguments.

D. What If No Brief Is Filed?

Appellate courts have the power to enforce their rules. Briefs are the primary medium through which appeals are

prosecuted, and therefore the failure of either party to file a brief on time would delay the appellate process. It may also work to the disadvantage of the other party. Accordingly, most appellate courts rule that if the appellant fails to submit a brief, then the appellate court will dismiss the appeal and order the trial court decision affirmed; if the appellant does not care enough to pursue his appeal, the appellate court should not do it for him.

Similarly, if the respondent fails to file an answering brief, then the appellate court may consider the case on its merits without the advantage of the respondent's defense. Indeed, the general rule is that a respondent who has not filed a brief waives his right to present oral argument, although the court has discretion to allow the respondent to make oral argument even though he has not submitted an answering brief. These rules do not mean that the appellate court will rule automatically for appellant, but do mean that the respondent will have little or no opportunity to explain his position to the appellate court.

The appellate court should, however, temper the administration and enforcement of its rules with a sense of fairness. It has the power to make its rules, but it may also exercise its discretion to waive the requirements of those rules if neither party will be prejudiced. Thus, the appellate court may, for good cause shown, extend the periods of time during which parties must file their briefs and otherwise perfect their appeals. Of, with the permission of the appellate court,

the parties may agree to such extensions.

E. Style Requirements for Appeal Briefs

The appellate court may establish rules requiring all briefs to conform to a similar style. Such rules make the briefs easier to read and allow arguments to be presented in an orderly and understandable fashion. Thus, the appellate court rules might provide:

(1.) That briefs be printed or typed on a particular kind of paper, e.g., white, heavyweight bond paper.

(2.) That briefs be of a standard size, e.g., 8 1/2 by 11 inches.

(3.) That typewritten briefs be double-spaced.

(4.) That printed briefs use only type of a particular size.

(5.) That briefs be typed or printed in black ink.

(6.) That different colored covers be used on briefs to distinguish appellant's opening brief from respondent's answering brief, and to distinguish appellant's reply brief from his opening brief.

(7.) That quotations be set forth in briefs in a certain style, such as indented single-space type.

(8.) That citations to authorities be made in some uniform manner, which could also be specified in the rules.

(9.) That abbreviations be used to indicate page number references to the record, e.g., "Tr." for reference to the transcript or oral proceedings at trial, and "Ex." to indicate reference to an exhibit.

(10.) That briefs be limited to a certain length, e.g., 50 pages for opening and answering briefs, and ten pages for reply briefs.

It would be easy to establish too many detailed rules for appeal briefs. The Indian appellate courts should be cautious in establishing style rules so that they are practical and easy to follow. They should be designed to serve the interests of fairness to all parties and the convenience of the appellate court.

F. Contents of Appeal Briefs

Appellate courts may also adopt rules about the organization of appeal briefs. Most jurisdictions require that the contents of a brief be arranged in a manner similar to the following: An Index and Table of Authority must be provided at the beginning of a brief. The Index is essentially a Table of Contents; sometimes headings and subheadings with page number references are used to outline the argument that is contained in the brief. The Table of Authority lists all authorities cited in the brief, with references to the pages upon which each appears; the rule may provide that the Table of Authority must be subdivided under the following self-explanatory titles: "Table of Cases"; "Constitutional Provisions"; "Statutes"; "Tribal Ordinances"; "Tests"; and "Other Authority".

Following the Table of Authority, the appellant's brief must set forth a Statement of the Case. As the heading, "Statement of the Case", might indicate, this section of the brief

sets forth a short outline of what the case is about; a summary of the various pleadings and proceedings which resulted in the trial court decision from which the appeal is being taken; a statement of precisely what order or judgment is being appealed; and a clear summary of the facts the appellant deems necessary to an understanding of the controversy, with page number references to the record. If the respondent accepts the appellant's Statement of the Case, he should so indicate in his answering brief. If he disagrees with the appellant's Statement of the Case, or believes it to be incomplete for purposes of the appeal, then the respondent should include his own statement of the case in his brief under the heading, "Counter-statement of the Case."

After setting forth the Statement of the Case, the appellant's brief should indicate what errors the appellant is replying upon for reversal of the trial court under the heading "Assignments of Error". Each error should be clearly pointed out and discussed under appropriate headings; if several of the errors alleged present the same general questions, then such errors may be discussed together. Of course, any rules requiring the setting forth verbatim of findings or instructions to which error is assigned must be observed in the "Assignments of Error" section of the brief.

Finally, the argument of the appellant must be set forth in the appellant's brief under the heading "Argument for Appellant", and this argument may be divided into subsections if appropriate, and these subdivisions should be reflected in

the Index. In the case of respondent, the heading would be "Argument for Respondent", with the initial subdivision into two sections, the first title "Argument in Support of Judgment", and the second titled "Argument in Answer to Appellant". In addition, both appellant and respondent should summarize their position and the relief they request in a "Conclusion" at the end of their respective briefs.

By way of summary, here are two "checklists" of what could be required for inclusion in the briefs of appellant and respondent respectively:

Appellant's Opening Brief

1. Index

2. Table of Authority
   (a) Table of Cases
   (b) Constitutional Provisions
   (c) Statutes or Tribal Ordinances
   (d) Texts
   (e) Other Authority

3. Statement of the Case
   (a) Nature of the Case
   (b) Resume of Pleadings and Proceedings
   (c) Nature of the Judgment
   (d) Statement of Facts

4. Assignments of Error
   (Discussed under separate headings where appropriate)

5. Argument of Counsel (Appellant)

6. Conclusion

Respondent's Answering Brief

1. Index

2. Table of Authority
   (a) Table of Cases
   (b) Constitutional Provisions
   (c) Statutes or Tribal Ordinances

   (d) Texts
   (e) Other Authority

3. Counter-statement of the case (if necessary; otherwise indicate appellant's statement is accepted)

4. Argument of Counsel (Respondent)
   (a) Argument in Support of Judgment
   (b) Argument in Answer to Appellant

5. Conclusion

G. An Illustrative Brief

Based upon the rules discussed so far in this section, we have reproduced on the following pages a copy of an appellant's brief in a criminal case. It is, of course, designed only for illustrative purposes to indicate a possible format for an appeal brief, without presenting extended legal argument or citation of authority. An actual brief would contain detailed legal argument, and would run in length anywhere from five or ten pages to the maximum allowed by court rule, such as fifty pages, or any other length with permission of the appellate court.

CHAPTER III

Cause No. 10745

IN THE TRIBAL APPELLATE COURT OF THE

FICTITIOUS INDIAN TRIBE

GEORGE ALIBI,

Appellant,

v.

FICTITIOUS INDIAN TRIBE,

Respondent

APPEAL FROM THE FICTITIOUS INDIAN TRIBAL COURT

The Honorable Moren Laufel, Judge

OPENING BRIEF OF APPELLANT

Office Address:

Main Street Building
Imaginary City, Washington 00000
Telephone: 111-0000

VINCENT J. WHITNEY, III
Attorney for Appellant

INDEX

TABLE OF AUTHORITY

IN THE TRIBAL APPELLATE COURT OF THE

FICTITIOUS INDIAN TRIBE

George Alibi, Appellant, v. Fictitious Indian Tribe, Respondent) Cause No. 10745

APPEAL FROM THE FICTITIOUS INDIAN TRIBAL COURT

The Honorable Moren Laufel, Judge

OPENING BRIEF OF APPELLANT

STATEMENT OF THE CASE

1. Nature of the Case

Appellant George Alibi appeals from a conviction and sentence on charges of rape in the Fictitious Indian Tribal Court.

2. Resume of Pleadings and Proceedings

Appellant was arrested on January 1, 1973, for the crime of forcible rape, and was held without bail pending trial.

Arraignment was held January 2, 1973. At that time, appellant requested that he be permitted to hire an attorney to represent him at trail, but this request was denied.

Trial was held on February 17, 1973 before the Honorable Moren Laufel, Judge of the Fictitious Indian Tribal Court. The jury returned a verdict of Guilty. On February 23, 1973, Judge Laufel entered judgment

against the appellant.

Pursuant to the rules, timely notice of appeal was filed on March 1, 1973.

3. Nature of the Judgment

The judgment herein, entered on February 23, 1973, indicated that appellant was found guilty by jury trial of the crime of forcible rape, and imposed a maximum sentence of twenty years in the tribal jail.

4. Statement of Facts

At approximately 2:30 a.m. on January 1, 1973, the appellant herein, George Alibi, was arrested by the Fictitious Tribal Police who had observed appellant driving his car erratically on Highway 97 which crosses the Fictitious Indian Reservation. (Tr. 10) Appellant, who said he had been attending a New Year's Eve Party (Tr. 39), was held in the Fictitious Tribal Jail on the charge of driving while intoxicated. (Tr. 19)

Shortly after appellant's arrest, tribal police received an emergency telephone call from one Suzie Greentree, daughter of Vernon Greentree, a member of the Fictitious Tribal Council. (Tr. 52) When tribal police arrived at Miss Greentree's home at approximately 2:30 a.m. (Tr. 52), they found that she had been badly beaten and raped "by some guy who was drunk out of his mind". (Tr. 64) Tribal police testified that Miss Greentree was hysterical. (Tr. 55) She was taken to the police station, where she was shown a mug shot (Ex. 1) of the appellant which had just been taken as part of the normal booking procedure for a DWI case. (Tr. 56) She immediately identified appellant as the man who had attacked her. (Tr. 57) Appellant was immediately charged with rape.

At the trial, Miss Greentree made an in-court identification of appellant. (Tr. 91) On cross-examination, she stated she was "sure that George Alibi is the man I recognized in the mug shot" on the night of her attack. (Tr. 99)

Several witnesses testified on behalf of the appellant. They indicated that appellant had been at the New Year's Eve Party and that he had left sometime after midnight, either "around one o'clock" and "maybe closer to two in the morning". (Tr 108, 111, 121) Appellant testified in his own behalf. He admitted that he had been driving under the influence of alcohol (Tr. 152), but emphatically denied he had attacked or raped Miss Greentree. (Tr. 152, 154-55, 160)

ASSIGNMENTS OF ERROR

1. The trial court erred in assuming jurisdiction over the criminal prosecution of this case.
2. The trial court erred in denying appellant's request to retain counsel at trial.
3. The trial court erred in allowing testimony indicating that the victim identified the appellant as her assailant.

ARGUMENT FOR APPELLANT

I. THE TRIBAL COURT HAD NO JURISDICTION IN THIS CAUSE.

In this section, appellant argues that the trial court erred in assuming jurisdiction over the criminal prosecution of this case. (Assignment of Error No. 1)

1. The tribal court has no jurisdiction over non-Indians, and appellant is a non-Indian.

The Fictitious Tribal Law and Order Code, Section 1.1, provides, in relevant part:

> The Fictitious Tribal Court shall have jurisdiction over. . . all offenses. . . committed by an Indian on all territory within the outer boundaries of the Fictitious Indian Reservation. (Emphasis added.)

Clearly, the tribal court has jurisdiction only over criminal offenses committed by Indians. There is overwhelming uncontradicted evidence in the record that the appellant in this case, George Alibi, is not an Indian, but rather a non-Indian resident of Imaginary City, Washington. Therefore, inasmuch as the appellant is not an Indian, the tribal court had no jurisdiction over him in this case. See Tribe v. Jones, 1 Fict. T. Rpts. 306 (1972).

2. Even if appellant were an Indian, he could not be prosecuted in tribal court because he is charged with an offense, i.e., rape, which is within the exclusive jurisdiction of the federal courts.

The federal Major Crimes Act, specifically 18 U.S.C.§ 1153, lists thirteen crimes which, even if committed by an Indian, may not be prosecuted in an Indian tribal court. These thirteen "major crimes" when committed by an Indian may be prosecuted only in federal courts, which have exclusive jurisdiction. See generally, Office of the Solicitor, Federal Indian Law (1958). Among these thirteen crimes is the

crime of rape, which is the offense for which appellant was prosecuted in this case. In short, even if appellant were an Indian, he could not be prosecuted in tribal court because that court has no jurisdiction over rape prosecutions. The tribal court erred in assuming such jurisdiction in this case.

II. EVEN IF THE TRIBAL COURT DID HAVE JURISDICTION, APPELLANT WAS DENIED A FAIR TRIAL AND THEREFORE HIS CONVICTION MUST BE REVERSED.

It is inconceivable to appellant that this appellate court will hold that the tribal court properly exercised jurisdiction in this case; however, if this court does so hold, appellant submits that his conviction must nevertheless be reversed based upon his Assignments of Error 2 and 3 which are argued in this section. The fact that these errors occurred clearly shows appellant was denied a fair trial.

1. Appellant was unlawfully denied the right to retain hired counsel at trial.

At the time of his arraignment of January 2, 1973, the appellant specifically requested that he be granted permission to hire an attorney to represent him at trial. Incredibly, this request was denied, and the appellant, in fact, had no attorney at trial. This was a clear violation of the Sixth Amendment to the United States Constitution and of the Indian Civil Rights Act of 1968. See N.A.I.C.J.A. Research Document at page 115. 25 U.S.C. § 1302 provides, in part:

> No Indian tribe in exercising powers of self-government shall--
> ***
> (6) deny to any person in a criminal proceeding the right. . . at his own expense to have the assistance of counsel for his defense.

Thus, the trial court unlawfully denied appellant the right to hire a lawyer. This must be deemed to be reversible error, not only because

it is a matter of federal law, but also because the appellant was clearly prejudiced by the fact he was without representation. Tribe v. Smith, 1. Fict. T. Rpts. 17 (1972). For example, it is submitted that the trial court's error is assuming jurisdiction in this case would never have occurred if the appellant had been allowed to hire counsel.

2. The trial court erred in allowing the jury to consider testimony that the victim identified the appellant as her assailant because the photographic identification procedure used by the tribal police was impermissibly and illegally suggestive.

It is undisputed that the victim, Suzie Greentree, was shown a mug shot photograph of the appellant at a time shortly after her attack when her condition could be described as hysterical. Although she immediately identified the mug shot as being a picture of the man who attacked her, appellant urges that the circumstances under which this photographic identification occurred were so impermissibly suggestive that the probability of mistaken identification was very great. See Simmons v. United States, 390 U.S. 377, 19 L. Ed. 2d 1247, 88 S. Ct. 967 (1968). In the Simmons case the Supreme Court stated the standard to be used in judging the validity of photographic identification procedures in the following language at page 384:

> Despite the hazards of initial identification by photograph, this procedure has been used widely and effectively in criminal law enforcement, from the standpoint both of apprehending offenders and of sparing innocent suspects the ignominy of arrest by allowing eyewitnesses to exonerate them through scrutiny of photographs. The danger that use of the technique may result in convictions based on misidentification may be substantially lessened by a course of cross-examination at trial which exposes to the jury the method's potential for error. We are unwilling to prohibit its employment, either in the exercise of our supervisory power or, still less, as a matter of constitutional requirement. Instead, we hold that each case must be considered on its own facts, and that convictions based on

> eyewitness identification at trial following a pretrial identification by photography will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. (Emphasis added.)

Appellant argues that there was a very substantial likelihood of irreparable misidentification in this case, and therefore his conviction must be reversed. No amount of cross-examination would cause the victim to waiver from her identification of the appellant, even if it were mistaken, inasmuch as appellant's image was indelibly associated in her mind as a face she saw on the night of her attack. Tribal police were perhaps overzealous in securing identification of appellant inasmuch as the victim was the daughter of a tribal councilman. It is true that in a relatively recent Washington state case, State v. Gefeller, 76 Wn. 2d 449, 458 P. 2d 17 (1969), the court held that showing two witnesses a single photograph of the defendant soon after commission of the crime was not reversible error; however, in that case the crime was burglary, and neither witness was a victim of the crime. Appellant argues that case is distinguishable from the case before this court which involved the highly emotion-connected crime of rape and the identification by a hysterical victim. Accordingly, there is no question that the tribal court erred when it allowed the jury to consider the identification testimony in this case, and this was reversible error.

CONCLUSION

For the reasons stated herein the trial court erred in assuming jurisdiction in this case. Further, even if the court did have jurisdiction, the appellant was denied his right to a fair trial because (1) he was not permitted to retain counsel, and (2) highly prejudicial and very likely mistaken identification testimony was presented to the jury.

Appellant requests this court to vacate the trial court's judgment and dismiss the charge against appellant for want of jurisdiction. In the alternative, appellant requests that his conviction be reversed and a new trial ordered with instructions to the tribal court to exclude all identification testimony and to allow the appellant to retain counsel.

Respectfully submitted,

VINCENT J. WHITNEY, III
Attorney for Appellant

Office address:

Main Street Building
Imaginary City, Washington 00000
Telephone: 111-0000

H. Amicus Curiae Briefs

"Amicus curiae", literally translated, means "friend of the court". An amicus curiae brief is one submitted by a person who is not a party to the appeal, but who, for one reason or another, has a great interest in the result of that appeal. Such briefs are most often submitted to appellate courts in cases involving broad questions of public policy, or which otherwise affect more people than simply those directly involved with the litigation. In such cases, interested persons may apply to the appellate court for permission to file a "friend of the court" brief, setting forth arguments in whichever side the "friend" is interested.

Example: Jim Whitehorse was arrested on charges of letting his livestock go without food and water for five days in violation of a tribal law and order code provision prohibiting cruelty to animals. At his arraignment, Whitehorse indicated that he wanted a lawyer to represent him but stated he could not afford to hire a lawyer; indeed, he noted that his cattle were starving because he could not afford to buy feed for them. He asked the tribal court to provide him counsel at tribal expense, but this request was denied. He was then tried and convicted as charged. On appeal, he submitted a brief arguing that free counsel should have been appointed, and that the failure of the trial court to provide free counsel constituted a denial of due process and equal protection under the Indian Civil Rights Act of 1968. The tribal prosecutor, as respondent, submitted an answering brief pointing out, among other things, that the Indian Civil Rights Act of 1968 by its own terms guarantees a person legal counsel only at his own expense. In addition, the appellate court allowed the tribal council to submit an amicus curiae brief making arguments similar to those presented by the tribal prosecutor and pointing out the considerable expense to the tribe which would result if the appellate court were to decide that defendants such as Whitehorse are entitled to free counsel.

As the foregoing example illustrates, Indian appellate courts may find, on occasion, that amicus curiae arguments are

helpful. If so, the appellate court may require amicus curiae briefs to conform to the same rules of style as are required for any other brief. Usually, however, more liberal time requirements are permitted. Thus, a typical rule would be one providing that amicus curiae briefs may be submitted up until ten days prior to the hearing in the case, and that such briefs must be filed with the court and served on all parties to the litigation.

The appellate court may consider the arguments advanced in an amicus curiae brief just as it would consider any argument advanced by the parties, except that it is usually held that the appellate court will not discuss any issues or points raised solely by the amicus brief; such a rule is consistent with the sense of fairness that should guide all appellate courts.

I. Questions

(1.) Do you think it is a good idea for Indian appellate courts to require written briefs on appeal? Explain.

(2.) Briefly describe the purpose and content of

(a) an appellant's brief:

(b) a respondent's brief:

(3.) What is the primary exception to the rule that arguments not raised in briefs will not be considered by an appellate court?

(4.) What should an appellate court do if

(a) the appellant fails to file a brief?

(b) the respondent fails to file a brief?

(5.) What is the purpose of a "reply brief"?

(6.) What is a "statement of additional authority"?

(7.) What are three style rules governing briefs which you believe are good ones for an appellate court to adopt?

(8.) What is the purpose of a "Counter-statement of the case" in a respondent's brief?

(9.) Consider the illustrative appellant's brief for George Alibi that is included in this lesson. If that brief were submitted to you as an appellate judge, would you be likely to vote to reverse Alibi's conviction on the ground that there was insufficient evidence to go to the jury? Why or why not?

(10.) What is the purpose of an amicus curiae brief? Give two examples of situations in which such a brief might be useful to an appellate court.

Section 6. How Judges Can Use Oral Arguments

A. Introduction

In this section, we take up the fourth basic step in an appeal which is the presentation of oral arguments to the court. The parties to the appeal make oral arguments at a hearing for that purpose, and either appear in person or through attorneys or other representatives authorized by tribal law. Perhaps the most important aspect of the appellate hearing is that it gives the judges an opportunity to ask questions to get a clearer understanding of each party's position, and of the case as a whole.

Our primary concern in this section is to consider how Indian appellate judges can make the best use of oral arguments. The first part of the section deals with the rules that may be established by an appellate court to insure that oral arguments are presented in a clear and efficient manner. The remainder of the section is concerned with the strategy of an oral argument from the point of view of the appellate judge, with emphasis upon how to listen and what to ask.

B. Rules Governing Oral Argument

Litigants, even those appearing without counsel, can sometimes talk indefinitely about their lawsuit. Yet, in any controversy, there is a limit to the amount that can be said about the merits of the position taken by each side to the debate. Accordingly, appellate courts usually set time limits for the length of oral arguments.

The amount of time allowed each party for oral argument

is usually specified in the appellate court rules. Some appellate courts allow one hour per side; others find thirty minutes to be a more efficient limit. As is the case with any court rule, Indian appellate courts may set whatever time limit they believe best serves their needs and the needs of Indian litigants. It is suggested, however, that the time allowed to each side be at least thirty minutes in order to allow sufficient time for questioning by the court. Moreover, to accommodate unusual cases, in which there are novel or numerous issues raised, some provision should be made in the rules allowing the parties to request extra time. Such a rule might require the request for additional time to be made in writing at least ten days prior to the hearing, or within some other time period, so that the appellate court may schedule its hearing accordingly. In fairness to all parties, the time limits imposed upon oral argument should be strictly and equally enforced, although the appellate court retains the power to exercise its discretion in a given case and give parties additional time at the time of the hearing itself.

Appellate rules generally provide that oral arguments will be presented in the same order in which briefs are filed. Thus, the appellant will make the opening argument. He may use all of his time at that time if he desires, or he can reserve a portion of his time to rebut arguments made by the respondent. Following the appellant's argument, the respondent gives his argument. In that argument, he rebuts what the appellant has said and advances arguments on his own behalf.

The procedure reflects the briefs. Thus, the respondent is not permitted to reserve time for rebuttal, whereas the appellant, in a manner analogous to a Reply Brief, may use any time he has reserved to present rebuttal remarks after the respondent has finished. Of course, neither party is required to use all of the time to which he is entitled, and appellate judges should appreciate brevity where it is possible. Indeed, the court rules may provide that in appropriate cases, one or both parties may waive their right to make oral argument.

What is the scope of oral argument? That is, what can the parties talk about at the hearing? Basically, the parties may discuss in oral argument only those issues which they have argued in their briefs, and which in turn were presented to the trial court. Such a rule is consistent with our analogy between oral arguments and written briefs; more importantly, it is consistent with the purpose of the appellate process. Thus, the parties may not discuss matters which are not included in the record because an appellate court cannot consider matters outside of the record. Further, just as the briefs may not raise issues not presented to the trial court, oral arguments may not be used to raise issues not discussed in the briefs.

Such rules do not mean that the parties cannot present or cite new authority or new reasoning to support their arguments; such new material may be orally presented just as the parties may submit a written Statement of Additional Authority following the filing of their briefs. Finally, the parties in an

oral argument may not introduce or use any exhibits which were not part of the trial record but, at the same time, the parties should be encouraged to use any chart, photograph, drawing or other material that was a trial exhibit if it will help the appellate court to understand their arguments. In addition, the court may permit the parties to use a blackboard if it will aid in making a clearer argument.

What happens if one or both parties do not show up on the day of the hearing and thus fail to make oral argument? Again, appellate court rules should provide the answer. The usual rule provides that if a party fails to appear for the hearing, the case will be deemed to have been submitted by that party supported by his written brief or briefs alone. Such a rule usually also provides that the failure of one party to present oral argument will not prevent the opposing party from giving oral argument if he so desires.

C. How To Listen and What To Ask

An appellate judge should prepare himself for oral argument long before the hearing. This process of preparation should really begin at the time the appellate judge reads the briefs submitted by the parties and reviews the record which forms the basis of the appeal.

The actual procedure that a particular judge will follow in preparing for hearing oral arguments will, of course, vary from judge to judge depending upon what works best for the individual. To determine what procedure is best for you as an appellate judge, it may be helpful to consider the purposes to be served

by the hearing. What do you and the parties hope to accomplish?

From the standpoint of the parties, the essential purpose of an oral argument is to have one final opportunity to explain their respective positions to the appellate court. The parties will attempt to clear up any confusion that may exist in their briefs and, at the same time, each will emphasize points and authorities which he believes to be most crucial in persuading the appellate court that his position is right. From the standpoint of the appellate judge, the purpose of the hearing is to give the parties one final opportunity to explain their respective theories of the case.

If the appellate judge is confused about some aspect of the case, or cannot determine from the briefs what a particular party is arguing, then he will ask questions to clarify the situtation. To get the greatest benefit out of oral arguments, the parties and the court alike should determine what aspects of the appeal disturb or raise doubts in the minds of the appellate judges. The oral argument should explain or clarify these matters so that the appellate court has a complete understanding of the case.

Here are a few suggestions which you as an appellate judge might find useful as an aid to your preparation for hearing an appeal. First, as early in each case as possible get a good overview of what the appeal is all about. Begin by giving all of the briefs and the record a quick, general reading. Next, re-read the briefs very carefully. As you read the briefs the second time, jot down in the margins any questions

which come to mind. In addition, if any part of the argument in the brief is particularly persuasive to you, underline it. If a part of the brief is unclear, put a question mark in the margin. This should give you a good feeling for what the case is about, plus a general awareness of what it is that concerns you or puzzles you about the case.

Once you have the case clearly in mind, carefully review the record to determine whether it provides any answer to the questions which occurred to you when you first read the briefs. In this connection, pay particular attention to any oral or written opinion that might have been filed by the trial judge. The questions you have in mind after you have completed your review of the record will define the direction of your own research of the law. You might, of course, want to begin this research by reading the authorities cited in the briefs.

After you have completed your own research of the various issues raised in the appeal, what questions remain in your mind? These are the questions you will want to ask the parties at the oral arguments. To assist you in keeping the case in mind and formulating your questions during the course of argument, you might find it helpful to prepare a "prehearing memorandum", which would simply be a summary of the facts of the case, and of the various arguments of the parties. At the end of the memorandum, you could note possible questions to ask at the hearing. In formulating such questions, look back to the briefs. See if the notes or question marks that you have scribbled in the margins of the briefs suggest

questions which you could ask at the hearing.

To get the most out of the hearing itself, try to avoid immediately asking the appellant a question when he begins his argument. Remember that he has also prepared for the hearing, and in the course of that preparation, he may have anticipated some of the questions that you want to ask. Give him some time to state the facts of the case and develop his argument; if it appears that he is not going to answer the questions you have in mind, do not hesitate to interrupt him. In other words, to the extend that it appears necessary, interrupt the appellant to ask him questions to help him to shape his argument around the issues that seem most important to you. Do not let him talk on and on about things you already know, or understand perfectly, or with which you already agree.

In asking the appellant questions, try to anticipate the rebuttal of the respondent. This will save the respondent time to advance his own argument because he will be assured that the court understands his rebuttal points; at the same time, it will allow the appellant to use his time most effectively because he is not likely to reserve sufficient time to give the kind of rebuttal he would like to give in answer to the respondent.

When the appellant has completed his argument, allow the respondent the same opportunity as you allowed the appellant to present his version of the facts and to anticipate your questions. Then proceed to ask questions in much the same

manner as you did in the case of the appellant. Keep in mind, however, that the respondent will be on his feet only once. Therefore, perhaps to an even greater extend than you did in the corresponding case of the appellant, attempt to anticipate the rebuttal which the respondent might want to answer. Further, if any of the arguments advanced by the appellant were particularly persuasive to you, be sure to ask the respondent to comment on them. Ask him to justify his own position and to explain why he believes the appellant is wrong.

Finally, when the respondent begins to run short of time, try to keep your questioning to a minimum. By that time, you should have had ample opportunity to ask any questions that occurred to you prior to the hearing, and the respondent should be given the opportunity to make his concluding remarks and generally be assured that he has had the opportunity to make his case. Similarly, when the appellant stands up to give his rebuttal, if any, try to avoid interrupting him with too many questions. He likely will have very little time left, and further interruption might cause him to forget a point he wanted to make. In short, at the time of oral argument, conduct your questioning in such a way that the parties each get a chance to answer your questions but, at the same time, make sure that each is provided with a fair opportunity to present what he considers to be the important aspects of the case--to have his day in court.

D. Questions

(1.) Oral argument is described in this section as the "fourth basic step in an appeal". As a matter of review, what are the first three steps in an appeal.

(2.) (a) Do you think it is a good idea to limit the amount of time each party has in which to present his oral argument to an appellate court?

(b) What time limit for oral argument would you suggest?

(3.) Describe the limitations which an appellate court should place on the content of oral arguments.

(4.) What should an appellate judge do if one or both parties to an appeal fail to appear for oral argument?

(5.) What is a "prehearing memorandum"?

Section 7. Remedies on Appeal

A. Introduction

In the appellate process, once the parties have filed their briefs and made their oral arguments at a hearing held for that purpose, the case is in the hands of the appellate court. What can the appellate court do with the case? What relief can it give to the appellant, assuming the court determines that some relief is warranted? Basically, a party appeals to an appellate court because he is "aggrieved" with the trial court decision, and wants the situation remedied. In this section, we shall outline the remedies generally available to an appellate court in criminal cases.

The general pattern of appellate remedies is the same in both criminal and civil cases: The appellate court is confronted with a challenge to the correctness of the trial court judgment, but it cannot substitute its view of the facts for that of the trial court, whether the facts were determined by the trial judge himself or by a jury, except to determine whether or not the facts found in the trial court are supported by substantial evidence.

"Substantial evidence" refers to that amount of evidence of a fact which a trial judge or jury reasonably could believe to establish the fact as true. It does not have to be uncontradicted evidence, nor does it have to be evidence which the appellate court believes. The trial judge or jury, as the trier of fact, has the advantage of seeing witnesses in person and therefore is deemed a better judge of witnesses' demeanor

and credibility than an appellate court which sees only the cold, printed pages of the record. The trier of fact has the right to decide what or whom to believe, so long as that belief is "reasonable". Further, if the appellate court decides that additional findings supported by substantial evidence and crucial to the judgment could have been made, then it may "remand" or order the case returned to the trial court for the entry of such findings.

In any event, in terms of the trial court judgment as a whole, the appellate court has essentially three choices: (1) to "affirm" or uphold the trial court judgment; (2) to "reverse" or reject the trial court judgment; and (3) to "modify" the trial court judgment in some way. Each of these three possible dispositions may, if it is necessary in a given case, be accompanied by an order of "remand", which sends the case back to the trial court for further proceedings consistent with the appellate court's opinion. Keeping this general pattern in mind, let us look in greater detail at the remedies available to an appellate court.

B. Affirming the Judgment

When an appellate court affirms a trial court judgment of guilty or not guilty in a criminal case, the effect of an affirmance is to put the parties--the tribe represented by a prosecutor, and the defendant accused of a criminal act--in the same position in which they would have been if no appeal had been taken.

The typical criminal case on appeal will involve a defendant

appealing his judgment and sentence. The tribe has a limited right to appeal in cases where it believes that charges against a defendant were dismissed due to a mistake of law by the trial court, but this situation is rare. For example, the trial court might dismiss the charges against the defendant on the ground that the act for which the defendant was brought to trial did not constitute a crime under tribal law; under such circumstances, the tribe could appeal, and argue to the appellate court that the trial law and order code did make criminal the act that the defendant committed. In such a case, the charges could be reinstated against the defendant and he could be brought to trial.

In most instances, however, a criminal case will reach the appellate court after the defendant has gone through a trial and been convicted. In cases where the trial judge or jury has acquitted the defendant, the tribe has no right of appeal; to allow the tribe to appeal an acquittal and have an appellate court order a new trial would constitute double jeopardy in violation of the Indian Civil Rights Act of 1968.

When the appellate court affirms a judgment in a criminal case, the defendant is either going to have to pay a fine or go to jail, or both, depending upon the trial court order. In this situation, it is likely that the defendant may be free on bail pending the appeal even though convicted and sentenced to jail or fined by the trial court; affirmance of the conviction, of course, has the immediate practical effect of ordering the defendant taken back into custody and jailed, or

compelled to pay his fine. Reversals in criminal cases present more difficult problems which are the subject of the next subsection.

C. Reversing the Judgment

Technically, reversal of a judgment in a criminal case puts the parties in the same situation in which they would have been if no trial had taken place. In criminal cases, however, the defendant was in the custody of tribal authorities prior to the trial which means that a reversal will not necessarily mean the release of the defendant from that custody; the state of being in custody may be the "same situation" in which the defendant would have been if there had been no trial.

Of course, if the charges against a criminal defendant are dismissed in trial court, the trial court will order that defendant released from custody. If an appeal is taken by the tribe, and that appeal is successful, the appellate court, or the trial court on remand carrying out the appellate court mandate, may order the defendant taken back into custody for further proceedings. If the tribe's appeal is unsuccessful, the defendant's continued freedom is assured.

At the same time, if a criminal defendant is convicted in trial court and free on bail pending appeal, a reversal of that conviction does not guarantee the defendant's freedom. He could be ordered back into custody. It all depends upon the grounds upon which the conviction is reversed. In this area, several remedies are available to the appellate court. If the court simply concludes that as a matter of law the

defendant committed no crime, then the court should reverse the conviction and, if the defendant is in jail, order the defendant's immediate release; if the defendant is free on bail, the appellate court should order the bond cancelled and grant the defendant his continued freedom.

An entirely different situation is presented where the appellate court is convinced that the trial judge or jury could find that some crime was committed by the defendant, but is compelled to reverse the defendant's conviction on legal grounds. For example, an appellate court would be compelled to reverse a conviction if the defendant could show that the jury which found him guilty was prejudiced against him by the introduction of evidence which was the result of an unreasonable search and seizure in violation of the Indian Civil Rights Act of 1968. Or, an appellate court might reverse because of some defect in the manner in which the indictment or information was brought against the defendant. In such cases, where the record indicates that in the absence of legal error the defendant could be found guilty of an offense beyond a reasonable doubt, the appellate court should reverse the conviction but couple its order of the reversal with an order of remand directing that a new trial be held using only properly obtained evidence, or based upon a valid information, or correcting any other legal error which made it necessary to reverse the judgment in the first trial. Under such circumstances, the defendant would remain under the custody of the tribal authorities, or free on bail, despite the fact that

his conviction was reversed by the appellate court. Retrial of the defendant in such circumstances does not constitute double jeopardy in violation of the Indian Civil Rights Act of 1968 because the effect of the appellate court's reversal is to void the original trial, and a defendant cannot claim that he was put in jeopardy by a void trial.

D. Modifying the Judgment

In general, no problems are presented with the modification of criminal judgments inasmuch as minor matters are often involved. A troublesome area of judgment modification in criminal cases is the situation where the appellate court affirms the trial court's judgment of conviction but orders a reduction in the defendant's sentence. Sentencing is such a discretionary function and is based upon so many factors, such as the past history and present demeanor of the defendant, that the trial court, more likely than the appellate court, is best equipped to make the proper disposition in a given case. Thus, an appellate court should order sentence reduction only in cases where its "conscience is shocked" by the sentence imposed by the trial court.

E. Questions

(1.) What is "substantial evidence"?

(2.) Suppose an appellate court reviews all of the evidence in a case and concludes the trial judge's findings, although supported by substantial evidence, are wrong. What can the appellate court do?

(3.) What happens if an obviously guilty defendant is acquitted by a trial jury because the tribal prosecutor did a bad job in presenting the evidence? What can an appellate court do in such a case?

(4.) Explain what is meant by "double jeopardy".

Section 8. How to Write an Appellate Court Opinion

A. Introduction

Most appellate courts provide by their own rules that the decisions of the court will be announced in published written opinions, each setting forth a decision and the reasons for it. A rule requiring a written opinion is valuable for a number of reasons. For one thing, a written opinion assures the parties that their arguments were considered and either accepted or rejected by the appellate court. Such assurance builds confidence in the appellate court. Perhaps the most important reasons to publish opinions is to inform judges and potential litigants about the law applied by the appellate court in a given case. Then, when similar cases arise in the future, trial judges may apply that law to reduce the number of appeals that are necessary. Further, members of the public --future litigants--will have some means of determining whether or not it is worthwhile to take a particular dispute to court, although the appellate court remains free to change its mind and rule differently in a future case if the court determines that a particular rule of law should no longer be applied.

In this section, we shall consider techniques which may be used by Indian appellate judges in writing their opinions. We recognize that writing is a rather personal experience; each judge must develop his own style and should write his

opinions in the manner that he believes most clearly conveys the points he is trying to make in a given case. At the same time, we hope that the general outline for appellate opinion writing suggested in this section will assist each Indian judge in developing the style that he or she finds to be most effective.

B. The Opening Sentence

The opening sentence may be the most difficult one to write in the entire opinion. Its main purpose is to state concisely what the particular case is all about. Such a statement helps readers of the opinion who are not familiar with the case to understand its basics immediately. As attorneys or parties in future cases look back over published opinions of the appellate court, a concise opening sentence will help "flag" their attention to an opinion which might have a bearing on their particular case.

Write a concise opening sentence. A general statement of the nature of the case is desirable but it should not be so general that it is useless. For example, an opening sentence which states, "This is a criminal case," is not much more helpful than one which states, "This is an appellate court opinion". Something more descriptive is required. For example:

> This appeal presents the question of whether or not tribal police who have a valid search warrant must knock on the door of the house to be searched before entering to conduct the search.

Such an opening sentence catches the eye of any future party who is considering appealing from a trial court decision

involving a search and seizure issue. Here's another example:

> This appeal presents the question of whether a defendant was denied his right to a jury trial in violation of the Indian Civil Rights Act of 1968 when his attorney specifically informed the trial judge that his client waived that right.

In short, the opening sentence should come to the point quickly and let readers know the subject matter of the opinion.

Some appellate judges make the mistake of treating the opening sentence of their opinion as if it were the lead sentence in a newspaper feature story. For example:

> Little did Joe Blow know on that fateful December evening that his actions would speak louder than his words.

A person reading that opening sentence would have no idea that the case raised the issue of whether a person could cancel an oral contract by his conduct alone in the absence of any more direct communication. Although sentences about the "fateful December evening" might make for interesting reading, they are more appropriate to novels than legal opinions. Such sentences do not quickly tell the reader what the case is about, so he is forced to read further, often through endless dramatic description, before he finds out what's really going on in the case. Such sentences waste time.

Another common mistake is to write an opening sentence which states a conclusion prematurely, or otherwise "gets ahead of itself." For example:

> We hold that the appellant is entitled to damages from the respondent, inasmuch as respondent violated the duty of reasonable care that he owed to appellant.

Again, such an opening sentence simply does not let anyone

know what was the issue in the case. Even the parties to the appeal might be puzzled, and have to read further before understanding what the court did. Further, this kind of opening sentence probably would have to be repeated later in the opinion after its author "backtracked" to state the issue in the case. Opinions should not contain sentences which have to be repeated before they make sense.

C. Stating the Facts

After the opening sentence, the court should state concisely the facts giving rise to the appeal. This statement of the facts should include not only a brief description of what happened in the case, but also a summary of the proceedings at the trial leading up to the appeal. In effect, the opinion writer states, "Here are the facts, and here is what the parties and the trial court have done so far as a result of these facts." For example:

> During the course of an argument on the evening of January 15, 1973, plaintiff Jones called defendant Smith a "dirty Liar" and pushed him against a fireplace whereupon Smith picked up a poker and struck Jones on the left shoulder causing serious injuries. Smith subsequently was arrested on criminal charges of assault and battery. Trial was held February 10, 1973, and the jury returned a verdict of guilty. Defendant Smith appeals.

The basic test for determining whether a particular piece of information should be included in the factual statement by the appellate court is relevance, and common sense is the best guide for the court to follow in determining what is relevant. If the following two questions were asked about a particular fact, one or both of them should be answered "Yes"; otherwise

the fact should not be included in the opinion: (1) Is it relevant to the case on appeal? (2) Is it necessary to an understanding of the court's decision as expressed in its opinion?

The factual statement should answer the questions, Who? What? When? Where? How? and Why? Thus, in an automobile accident case, the appellate opinion should indicate what parties were involved in the accident, where the accident happened, what time of day it happened, what the weather and road conditions were, etc. But remember, the test is relevance. Thus, in an automobile accident case, the facutal statement probably would omit the fact that one of the parties was celebrating his birthday, or was on the way to visit his Aunt Louise, at the time of the accident. Similarly, the color of the cars involved probably would not need to be mentioned unless, for example, it affected the car's visibility. Or, to take another example, the court probably would not discuss in detail the role of persons not involved in the appeal, but again, the determination of what facts are included depends upon what the facts are and, specifically, how they relate to the issues raised in the appeal.

As we have indicated, in addition to a statement of "what happened," the court also should include in its factual statement a summary of prior proceedings that have been had in the particular case. Again, the test for inclusion is relevance. Thus, if the issue on appeal were that the defendant had been denied his right against self-incrimination, then a description

of voir dire would not be relevant. The court likewise could omit mention of pretrial motions not involved on appeal. Basically, all that need be included is who sued whom, and what result was reached in the trial court, and who is appealing.

D. Stating the Issues on Appeal

Following the opening sentence and factual statements, a logically written appellate court opinion should include a summary of the issues raised on the appeal. This usually is done conveniently by reference to the various opposing arguments raised by the parties. For example:

> Appellant Jones argues that his right to jury trial was illegally denied when his attorney, without Jones' knowledge or authority, told the trial judge that Jones waived the right to trial by jury. Respondent answers this argument by citing authority stating that the actions of an attorney bind his client; consequently, Jones simply waived his right to a jury and cannot be heard to complain about it on appeal.

If more than one issue is raised on the appeal, the appellate judge writing the opinion might find it preferable to resolve each issue one at a time, introducing each issue by following a pattern similar to that illustrated by the sample above. At the same time, if an overview is deemed desirable, a brief summary of all issues first could be set out in one introductory paragraph. Such a summary paragraph might look like this:

> Appellant raises three basic issues in this appeal: (1) Whether appellant's attorney could waive the appellant's right to a jury trial in the absence of a showing that such a waiver was authorized by appellant; (2) Whether there was substantial evidence to support the trial judge's finding that appellant was intoxicated at the time of the accident; (3) Whether the respondent must have made a showing at trial that the accident was caused solely by appellant's alleged intoxication.

In any event, it is important that an appellate court opinion state the issues involved in the appeal in the context of the arguments presented by the parties. This serves the purpose of assuring the parties that the appellate court heard, understood, and considered their various arguments; it further serves the purpose of educating future parties as to arguments deemed persuasive by the appellate court, thereby minimizing and making more efficient future arguments on appeal.

E. Stating the Law

Once the judge has set forth in his opinion the issues on appeal, he should state the general legal principles which are suggested by those issues, and upon which he relies in making his decision. Of course, an Indian appellate judge is bound to follow any relevant federal statutes or court decisions. If there is no applicable federal law, which will often be the case, the judge should look to see if any provision of the tribal law and order code is applicable to the issues on appeal. In many cases, the statement of the law simply will consist of quotation from the tribal code, perhaps coupled with reference to a previous decision of the court in which the particular ordinance was interpreted.

If there is no relevant federal or tribal law, the appellate court may want to look to state decisions for suggestions of rules of law which might be applicable to the case before it; similarly, the court may seek guidance from decisions of appellate courts on other reservations. In the end,

however, the tribal appellate court must state the law it feels most appropriately applicable to the case before it, and which it believes best serves the needs of that tribe.

Here are some examples of how the law might be stated; they are meant to be illustrative only and thus do not necessarily state rules of law acceptable to all Indian courts:

(a)

The Indian Civil Rights Act of 1968 provides, in relevant part:

'No Indian tribe...shall--

'...

'(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.'

In a previous case [give citation], we held that the quoted section of the statute should be interpreted to mean that the accused has an absolute right to a trial by jury unless he expressly waives it.

(b)

The general rule in other jurisdictions, and which we adopt here, is that when two cars are driving down the road, the driver of the following car is liable for damages if his car strikes the leading car from the rear. Two recognized exceptions to this rule are known as the 'emergency' and 'unavoidable accident' exceptions; both exceptions refer to unexpected events which could not have been reasonably anticipated by the driver of the following car.

(c)

The general rule which this court has recognized previously is that contracts which involve the sale of goods valued in excess of $500, or which cannot be performed within one year, must be put into writing; otherwise, they will not be enforced by this court.

F. Applying the Law to the Facts

We turn now to what is perhaps the most critical part of any appellate court opinion, and that is where the court, having identified the issues and the law applicable to the case, presents the reasons for its decision. In other words,

the appellate court applies the law to the facts and decides the case. The decision is usually announced in a generalized form, which can be labelled the "holding" of the court.

Here are simplified illustrations of how this process operates, using examples set forth in the preceding subsection:

(a)

[See statement of law in preceding section, example (a)]

In this case, the defendant's attorney indicated in open court to the trial judge that his client had waived his right to a jury trial. There was, however, no showing by the tribe that the defendant authorized his attorney to make such a waiver. We hold that the Indian Civil Rights Act should be interpreted to mean that the accused has the right to a jury trial unless he expressly waives that right, and he will be deemed not to have waived that right, notwithstanding statements made by his attorney, in the absence of a showing that he personally authorized and directed his attorney to make such a waiver.

(b)

[See statement of law in preceding section, example (b)]

In the case before us, the appellant Jones was driving the car following that of the respondent Henry at a distance of some two hundred feet. Henry's car went over a rise in the highway and disappeared from view where, unknown to Jones, it stopped due to a tree fallen across the road. Jones came over the hill and crashed into the rear of Henry's car. We are not persuaded by Jones' argument that he was confronted with an emergency or unavoidable accident situation such that the 'following car' doctrine would not apply to him. The driver of a car should anticipate an emergency such as the one in this case, namely an obstruction hidden by a rise in the highway. We conclude Jones is liable under the 'following car' doctrine for the injuries suffered in the accident by Henry.

(c)

[See statement of law in preceding section, example (c)]

It is undisputed in the case before us that the contract involved the sale of cigarettes and other inventory for Standing Rock's Smoke Shop, valued in excess of $500.

> Under the rule of law previously indicated, we hold that the contract Standing Rock had with the respondent cigarette distributor is unenforceable because it was never reduced to writing.

G. Stating the Remedy

Following the section in the appellate court's opinion setting forth its application of the law to the facts of the case, which is usually coupled with a statement of the "holding" in the case, the opinion should include a brief statement of the relief granted by the appellate court, if any. Often this statement will consist of a simple closing line such as, "The judgment of the trial court is affirmed", or "The judgment of the trial court is reversed and a new trial is ordered; the cause is remanded to the trial court for further proceedings consistent with this opinion."

Such statements are important because they leave no doubt in anyone's mind as to the manner in which the appellate court has disposed of the appeal, and they often serve the purpose of advising the trial court what it should do next in the event the case has been remanded.

H. A Sample Opinion

The following is an actual opinion given by an appellate court. It is reproduced here for illustrative purposes only, and is not necessarily indicative of the law which might be adopted by an Indian appellate court. Consider the strengths and weaknesses of the opinion in terms of the outline for such opinions suggested in this lesson.

It should be kept in mind that the suggested outline is not intended to be a straitjacket into which every appellate

court opinion must fit. Depending upon the nature of each case, the organization of the written opinion will vary from case to case. Sometimes such variations make an opinion more effective and more understandable than it otherwise might have been, but sometimes the opposite is true. In reading the opinion which follows, consider whether or not the variations it illustrates were successful. Consider whether you would have written the opinion in the same way. The opinion follows:

[No. 36-40963-3. Division Three. December 11, 1969.]

THE STATE OF WASHINGTON, *Respondent*, v. GORDON CORNELL, *Appellant*.

[1] **Constitutional Law—Criminal Law—Self-incrimination—Roadside Sobriety Tests.** The privilege against self-incrimination protects an accused only from compulsion to testify against himself or otherwise provide the state with evidence of a testimonial or communicative nature; compulsion to supply *real* or *physical* evidence, such as by the performance of the physical actions of a roadside test for sobriety, does not violate the privilege.

[See Ann. 164 A.L.R. 967, 25 A.L.R.2d 1407; 7 Am. Jur. 2d, Automobiles and Highway Traffic § 259.]

[2] **Criminal Law—Appeal and Error—Harmless Error—Test.** Error committed during a criminal trial warrants reversal of the conviction only if a complete review of the record shows substantial prejudice to the defendant.

[3] **Appeal and Error—Verdict—Review.** The jury is the sole judge of the evidence and the weight and credibility of the witnesses and the Court of Appeals will not reverse the jury's findings if supported by substantial evidence.

[4] **Criminal Law—Trial—Taking Case From Jury—Sufficiency of Evidence—In General.** A challenge to the sufficiency of the evidence requires that the evidence be interpreted most strongly against the moving party and in the light most favorable to the opposing party.

Appeal from a judgment of the Superior Court for Walla Walla County, No. 56211, Albert N. Bradford, J., entered January 9, 1969. *Affirmed.*

Prosecution for driving while intoxicated. Defendant appeals from a conviction and sentence.

Jerry A. Votendahl, for appellant.

Arthur R. Eggers, Prosecuting Attorney, and *Albert J. Golden, Deputy*, for respondent.

GREEN, J.—Defendant appeals from a jury conviction in superior court, of driving while under the influence of or affected by the use of intoxicating liquor in violation of RCW 46.61.505.

Defendant claims the trial court erred in: (1) allowing the arresting officer to testify as to the results of certain

physical tests given defendant at the scene prior to his arrest; (2) giving and refusing to give certain instructions; (3) refusing to allow defendant to present testimony of his general reputation in the community for sobriety; (4) failing to grant defendant's motion for judgment notwithstanding the verdict or a new trial.

The evidence shows that about 11:40 p.m. on February 18, 1968, while defendant, Gordon Cornell, was driving his Volkswagen in a northerly direction on Route 125 about 2 miles south of Walla Walla, Washington, State Trooper Peter Overdahl stopped defendant. After defendant was advised of his constitutional right to refuse to answer questions, that anything he said could be used against him, and of his right to an attorney, Trooper Overdahl asked defendant to perform three sobriety tests commonly known as the "heel to toe" test (walking a straight line heel to toe), the "finger to nose" test, and the "balance" test. While defendant did not refuse to take these tests, he was "very hesitant" in doing so. When defendant failed to perform these tests satisfactorily, he was arrested. At trial, the state produced other evidence consisting of observations made of the defendant both at the scene of the arrest and later at the Walla Walla County Sheriff's Office. Defendant did not testify in his defense.

First, defendant claims error in the admission of the testimony concerning the three sobriety tests and the conclusions drawn therefrom. He contends his Fifth Amendment privilege against self-incrimination was violated when he was compelled to do physical tests that communicated incriminating knowledge or tended to prove the charge against him. These acts, defendant argues, were within the privilege against self-incrimination.

[1] Although it is doubtful whether the evidence supports defendant's claim of compulsion, it is unnecessary for us to decide this issue. The precise question raised in this case was decided adversely to defendant in *Mercer Island v. Walker*, 76 Wn.2d 607, 458 P.2d 274 (1969). In holding

the three sobriety tests admissible, even though no prior warning of constitutional rights was given, the court said at 612:

> We think appellant's argument is without merit in view of our decision in *State v. West*, 70 Wn.2d 751, 424 P.2d 1014 (1967). Therein, at 752-53, we announced the rule in this state and analyzed *Schmerber*:
>
> The privilege against self-incrimination protects an accused only from being compelled to testify against himself or otherwise provide the state with evidence of a testimonial or communicative nature. That compulsion which makes an accused the source of *real* or *physical* evidence does not violate the privilege. *Schmerber v. California*, 384 U.S. 757, 764, 16 L. Ed. 2d 908, 86 Sup. Ct. 1826 (1966); *State v. Craig*, 67 Wn.2d 77, 406 P.2d 599 (1965).
>
> *Schmerber* concludes that although the idea has been expressed in many different ways, most federal and state courts agree that the privilege against self-incrimination offers no protection against compulsion to submit to "fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to *stand*, to *assume a stance*, to *walk*, or to make a particular gesture." (Italics ours.) As indicated in *State v. Craig, supra*, at 82, the privilege does not apply to "a simple physical act, a bodily action like taking off shoes or rolling up sleeves or writing for identification. These are simply bodily exhibitions."

Second, defendant claims error in the failure to give defendant's proposed instructions No. A, B and C. Error is also claimed to the giving of instructions 6 and 7. A review of the instructions given reveals no error in the failure to give defendant's proposed instructions since they were substantially covered in the instructions given. Furthermore, there was no error in giving instructions 6 and 7.

[2] Third, defendant asserts error in the court's refusal to allow a character witness to testify as to defendant's general reputation for sobriety in the community where he resides. Although such refusal was error, a complete review of the record shows such error to be harmless and not substantially prejudicial to defendant. *State v. Mesaros*, 62

Wn.2d 579, 384 P.2d 372 (1963). It is noted that testimony was admitted to show that defendant's general reputation in the community was good.

[3, 4] Last, it is claimed defendant's motion for judgment n.o.v. or a new trial should have been granted, there being insufficient credible evidence to support the verdict. The jury is the sole and exclusive judge of the evidence and the weight and credibility of the witnesses and we will not reverse if there is substantial evidence to support the jury's findings. *State v. Zorich*, 72 Wn.2d 31, 431 P.2d 584 (1967); *State v. Franks*, 74 Wn.2d 413, 445 P.2d 200 (1968). A challenge to the evidence requires that the evidence be interpreted most strongly against the moving party and in the light most favorable to the opposing party. *State v. Zorich, supra*. A review of the evidence in light of these rules shows substantial evidence in support of the jury's verdict.

In its brief, plaintiff questions the procedure on appeal to the superior court from justice court. As noted by counsel in argument, no cross appeal was filed. Therefore, these questions are not properly before this court and will not be considered.

Judgment is affirmed.

EVANS, C. J., and MUNSON, J., concur.

Petition for rehearing denied January 8, 1970.

[No. 14-40094-3. Division Three. December 12, 1969.]

SHINN IRRIGATION EQUIPMENT, INC., *Respondent*, v. CLIFFORD A. MARCHAND *et al.*, *Appellants*.

[1] Pleading—Answer—Affirmative Defenses. Under CR 8(c), which requires any matter constituting an avoidance or affirmative defense to be affirmatively pleaded, the defendant must specifically plead in his answer to the complaint any matter that does not merely controvert the plaintiff's prima facie case.

[See 41 Am. Jur., Pleadings (1st ed. § 155 *et seq.*).]

CHAPTER III

I. Questions

(1.) In the sample opinion, State v. Cornell, you will notice that notes summarizing the main points in the opinion have been printed ahead of the actual opinion. These are called "headnotes". Do you think they make the opinion more understandable? What other purpose do they serve?

(2.) In opinion writing, what is the purpose of the opening sentence?

(3.) (a) When writing an opinion, should an appellate judge include every fact relevant to the issues on appeal in his factual statement? Explain.

(b) In the factual statement, the appellate judge summarizes what the case is about. What else should be included in the factual statement?

(4.) Why should an appellate judge include in his opinion brief summaries of the arguments raised on appeal? Why shouldn't he just state which argument he believes to be correct, and exclude all of the others?

(5.) How does an appellate judge find out what the "law" is?

(6.) What is a "holding"?

APPENDIX

FEDERAL STATUTES AFFECTING INDIANS

A. Indian Civil Rights Act of 1968, 25 U.S.C. § 1301 et. seq.

§ 1301. Definitions

For purposes of this subchapter, the term -

(1) "Indian tribe" means any tribe, band, or other group of Indians subject to the jurisdiction of the United States and recognized as possessing powers of self-government;

(2) "powers of self-government" means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses; and

(3) "Indian court" means any Indian tribal court or court of Indian offense.

Pub.L. 90-284, Title II, § 201, Apr. 11, 1968, 82 Stat.77.

§ 1302. Constitutional rights

No Indian tribe in exercising powers of self-government shall-

(1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;

(2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;

(3) subject any person for the same offense to be twice put in jeopardy;

(4) compel any person in any criminal case to be a witness against himself;

(5) take any private property for a public use without just compensation;

(6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;

(7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of six months or a fine of $500, or both;

(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property

without due process of law;
(9) pass any bill of attainder or ex post facto law; or
(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.
Pub.L. 90-284, Title II, § 202, Apr. 11, 1968, 82 Stat. 77.

§ 1303. Habeas corpus
The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.
Pub.L. 90-284, Title II, § 203, Apr. 11, 1968, 82 Stat. 78.

§ 1321. Assumption by State of criminal jurisdiction - Consent of United States; force and effect of criminal laws
(a) The consent of the United States is hereby given to any State not having jurisdiction over criminal offenses committed by or against Indians in the areas of Indian country situated within such State to assume, with the consent of the Indian tribe occupying the particular Indian country or part thereof which could be affected by such assumption, such measure of jurisdiction over any or all of such offenses committed within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over any such offense committed elsewhere within the State, and the criminal laws of such State shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State.

§ 1323. Retrocession of jurisdiction by State
(a) The United States is authorized to accept a retrocession by any State of all or any measure of the criminal or civil jurisdiction, or both, acquired by such State pursuant to the provisions of section 1162 of Title 18, section 1360 of Title 28, or section 7 of the Act of August 15, 1953 (67 Stat. 588), as it was in effect prior to its repeal by subsection (b) of this section.
(b) Section 7 of the Act of August 15, 1953 (67 Stat. 588), is hereby repealed, but such repeal shall not affect any cession of jurisdiction made pursuant to such section prior to its repeal.
Pub.L. 90-284, Title IV, § 403, Apr. 11, 1968, 82 Stat. 79.

§ 1326. Special election
State jurisdiction acquired pursuant to this subchapter with respect to criminal offenses or civil causes of action, or with respect to both, shall be applicable in Indian country only where the enrolled Indians within the affected area of such Indian country accept such jurisdiction by a majority vote of the adult Indians voting at a special election held for that purpose. The Secretary of the Interior shall call such special election under such rules and regulations as he may prescribe, when requested to do so by the tribal council or other governing body, or by 20 per centum of such enrolled adults.
Pub.L. 90-284, Title IV, § 406, Apr. 11, 1968, 82 Stat. 80.

B. Federal Jurisdictional Statutes, Title 18 U.S.C.

§ 13. Laws of states adopted for areas within federal jurisdiction
Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title, is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.
June 25, 1948, c. 645, 62 Stat. 686.

§ 1151. Indian country defined
Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same. June 25, 1948, c. 645, 62 Stat. 757; May 24, 1949, c. 139, § 25, 63 Stat. 94.

§ 1152. Laws governing
Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.
This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively. June 25, 1948, c. 645, 62 Stat. 757.

§ 1153. Offenses committed within Indian country
Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnaping, rape, carnal knowledge of any female, not his wife, who has not attained the age of sixteen years, assault with intent to commit rape, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and larceny within the Indian country, shall

be subject to the same laws and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

As used in this section, the offenses of burglary and incest shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.

In addition to the offenses of burglary and incest, any other of the above offenses which are not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense. As amended Nov. 2, 1966, Pub.L. 89-707, § 1, 80 Stat. 1100; Apr. 11, 1968, Pub.L. 90-284, Title V, § 501, 82 Stat. 80; May 29, 1976, Pub.L. 94-297, § 2, 90 Stat. 585.

§ 1162. State jurisdiction over offenses committed by or against Indians in the Indian country

(a) Each of the States or Territories listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:

State or Territory of	Indian country affected
Alaska	All Indian country within the State, except that on Annette Islands, the Metlakatla Indian community may exercise jurisdiction over offenses committed by Indians in the same manner in which such jursidiction may be exercised by Indian tribes in Indian country over which State jurisdiction has not been extended.
California	All Indian country within the State
Minnesota	All Indian country within the State, except the Red Lake Reservation
Nebraska	All Indian country within the State
Oregon	All Indian country within the State, except the Warm Springs Reservation
Wisconsin	All Indian country within the State

(c) The provisions of sections 1152 and 1153 of this chapter shall not be applicable within the areas of Indian country listed in subsection (a) of this section as areas over which the several States have exclusive jurisdiction.
As amended Nov. 25, 1970, Pub.L. 91-523, §§ 1, 2, 84 Stat. 1358.

§ 3242. Indians committing certain offenses; acts on reservations

All Indians committing any offense listed in the first paragraph of and punishable under section 1153 (relating to offenses committed within Indian country) of this title shall be tried in the same courts and in the same manner as are all other persons committing such offense within the exclusive jurisdiction of the United States.
As amended May 29, 1976, Pub.L. 94-297, § 4, 90 Stat. 586.

C. Indian Child Welfare Act of 1978, 25 U.S.C. § 1901 et. seq.

[Please see Chapter VIII for the text of this statute.]

GLOSSARY OF TERMS

admissibility: the quality of evidence being acceptable for presentation to a court as proof of a fact or proposition in the case.

advocate: one who argues in favor of a particular position or point of view; as opposed to one who considers all points of view or all sides of a question; attorneys are advocates for the parties they represent.

alleged: a fact is alleged if it is claimed to be true, but not yet proven.

answer: the document or pleading filed by a defendant in a civil case which explains or denies the charges contained in the complaint.

antogonistic: to be hostile or angry toward a person or an idea offered by someone.

arbiter: a person who listens to both sides of a dispute and tries to find a fair solution to the problem; the judge and the jury are the final arbiters of a law suit.

arraignment: an official court proceeding in which a person accused of a crime is brought to court and told of the charges against him; the accused person must enter a plea of 'guilty' or 'not guilty'. If he pleads 'not guilty' the proceedings end with the setting of a date for trial and the accused may be released or returned to jail to await trial. If he pleads 'guilty' he may be sentenced at that time or a later date may be set for sentencing.

bail: money paid to a court so that a person who has been arrested but not yet tried may be released from custody (jail). The money is given as part of a pledge that the person will return to the court for trial at the proper time.

beyond a reasonable doubt: in criminal cases, this refers to the burden of proof on the prosecution to prove its case to the point where a reasonable, normal person would no longer have any real or substantial doubt about the guilt of the defendant.

burden of going forward with the evidence: the duty of a party in a law suit to either initially present evidence to prove or disprove a fact or proposition, or to carry on with such evidence.

burden of proof: the initial duty of a party, fixed at the outset of a trial, to prove or disprove certain facts or propositions, lest the opposing party prevail in the case.

civil suit: a case in which a person comes to court to have the court require another person to do something for the first person, for example: to pay a bill, to pay the costs resulting from an accident,

to get a divorce or custody of children. Civil suits are all cases which do not involve criminal prosecution.

complaint: in a civil case the document or pleading filed in court by the plaintiff which describes the basis, nature, and amount of the plaintiff's claim against the defendant; in a criminal case, the document or pleading filed in court by the plaintiff (the prosecution) charging the defendant (the accused) with the commission of a criminal offense.

contempt of court: any act which tends to embarrass, hinder, or obstruct the court in its administration of justice, or which tends to lessen the authority or dignity of the court. Such acts are usually punishable by fine or imprisonment.

continuance: a postponement of court action to a later date either on the request of one of the parties or for the convenience of the judge.

credibility: the believability of a witness or of evidence, including its accuracy and truthfulness.

cross-examination: the questioning of a witness which is conducted by the party other than the party which called the witness to testify, and which is usually conducted after direct examination of the witness.

default judgment: a final judgment entered in favor of the plaintiff because the defendant has failed to file an answer, appear in court, or otherwise comply with the rules of the court, having the same effect as does a judgment entered after a full trial.

demeanor: the appearance of a witness as he testifies at trial, such as his tone of voice, gestures, and mannerisms.

demonstrative evidence: a presentation which demonstrates how a particular thing works, or how some event happens, such as a demonstration of how a pulley works, or how fast a car can stop under emergency conditions.

deposition: testimony by a witness, given outside of court, but in pursuance of a order issued by the court to take such testimony, and transcribed into writing and duly authenticated, for intended use at a later trial. Both parties must have had an opportunity to be present during the deposition.

direct evidence: evidence which, if believed to be true, immediately establishes the facts which it is concerned with.

direct examination: the initial questioning of a witness by the party who called the witness to testify.

directed verdict: a decision by the judge that the facts and issues are so clear that the jury could only decide the case in one way, therefore the judge decides the case without submitting it to the jury.

disqualify: the removal of a judge from presiding over a particular case either at the request of a party in the case or at the judge's own suggestion.

dying declaration: a statement made by a person who knows he is on the verge of death, about the cause of his death, and the person responsible for his death, generally used in murder cases.

enjoin: to require a person to do or to not do a certain act; the court may issue an order called an injunction which has the force of law. Failure to obey an injunction may result in civil or criminal contempt.

evidence: any kind of proof which is presented at a trial, by the parties, for the purpose of causing the jury to believe a certain assertion or proposition of fact.

exhibit: an object, document or chart, model or photograph used during a trial to prove a factual assertion of a party or to help the jury and the judge understand the basis for the law suit.

fraud: an intentional misrepresentation of the truth, for the purpose of inducing another person to part with some valuable thing, such as money, property, or a legal right.

general verdict: a decision of the jury concerning the final outcome of the case without any further explanation, for example, "Guilty," or "Not Guilty."

homicide case: a case involving the killing of a human being.

hostile witness: a witness who is antagonistic or uncooperative with the party who called him to testify, such that the party who called the witness may be permitted to ask the witness leading questions.

hypothetical question: a question which states certain facts or circumstances, and asks for an opinion or conclusion based on those facts or circumstances. For example, "If the train was going 50 m.p.h., how far would it take it to stop, applying full braking power?"

impeachment--of evidence, or of a witness: the presentation of proof that certain evidence, or the testimony of a certain witness, is inaccurate, untruthful, or otherwise unworthy of belief.

indirect evidence: evidence which only tends to prove a fact, but does not prove it conclusively.

inference: a conclusion or determination, made on the basis of the presentation of evidence and proof of other facts.

irrebuttable presumption: a presumption which exists and remains, and cannot be disproven or destroyed by the presentation of any evidence to the contrary.

judgment notwithstanding the verdict(judgment n.o.v.): in effect, the reversal of the jury's verdict by the judge; this can only be done in rare cases where the judge is convinced the jury failed to apply the law or was improperly influenced in reaching its decision.

judicial competence: the ability of a judge to properly decide an issue or a law suit brought before him.

judicial ethics: the fundamental principles which govern the conduct of a judge on or off the bench.

judicial immunity: the protection given a judge (or other judicial employees) which frees him from civil liability for mistakes he meakes as a judge.

judicial impropriety: the action of a judge which is prohibited by law or by the rules or canons of judicial ethics.

judicial notice: the act by which a court recognizes the truth of certain well-known, undisputed facts, without requiring further proof of those facts.

jurisdiction: the legal authority or power of a particular court to settle a particular case; whether a particular court has jurisdiction over a case may depend on who the parties are, where the event occurred and the type of case. If the court does not have jurisdiction, the parties are not legally required to appear and are not bound by any judgment of the court.

jury list: the preliminary list of persons selected for possible jury duty within a fixed period of time, usually a year or more.

jury panel: the group of potential jurors chosen from the jury list who will be called on a particular day (or week) for jury service; all jurors needed during this period will be selected from this jury panel.

law: rules made to govern human conduct, including statutes, Tribal codes, rules made by courts or administrative agencies, and rules established by Tribal traditions or customs, to control and guide the members of the Tribe.

liability: being responsible, under the law, for any harm or injury or damage done to a person or his property.

litigants: the various parties in a law suit, the plaintiff(s) and the defendant(s).

litigation: a law suit or group of law suits usually involving two or more parties called litigants.

materiality: that quality of evidence which makes the evidence important and necessary to the case, because the evidence goes to vital issues or facts in the case.

mistrial: an erroneous, invalid trial, which is of no effect, because of some serious fault, such as lack of jurisdiction or extremely improper procedure.

mitigate: to make more mild, or less harsh on the basis of fairness, mercy or justice; to mitigate a sentence is to give a smaller fine or shorter prison term than the largest allowed or that usually is given for the same offense.

motion to strike: a request by one of the parties to have a certain portion of the evidence or testimony removed from the official record of the trial, so that it will not be considered a part of the evidence in the case.

non-prejudicial error: an error made by the court, such as an erroneous ruling on an evidenciary objection, which is not important enough to affect the outcome of the case, or prejudice the case of one of the parties.

order of proof: the sequence in which a party should present his evidence, so that essential authentication, qualification, or other groundwork is presented before other evidence is introduced.

pleading: all documents or papers filed with the clerk of court by the parties in a case, including the complaint, answer and all motions.

preemptory challenge: in the selection of members of a jury either party or their attorneys may challenge a particular juror without giving any reason and the juror is excused; court rules provide how many preemptory challenges can be made by each side. Preemptory challenges should not be confused with challenges for cause. Any party or the judge may exclude any juror who appears unable to judge the case fairly; there is no limit to the number of jurors who can be challenged for cause.

prejudicial error: a mistake made by the court which seriously affects the outcome of the case, and which is usually grounds for the appellate court to remand or reverse the decision of the court.

presumption: a fact or proposition that is assumed to be true, until it is otherwise disproved.

prima facie case: the elements, facts, or propositions which must be proven, as a minimum, if a party is to prevail in a law suit.

rebuttable presumption: a presumption which exists until evidence is presented to disprove it, then it disappears.

release on his own recognizance: to release a defendant from custody on the basis of his own promise to return for trial, or do some-other act required by the court without him having to post a bond.

relevancy: the quality of evidence which makes it applicable to a case, such as its tendency to prove or disprove a fact or proposition in the case.

reversible error: an error in a trial which is so serious that the judgment cannot stand and a new trial will have to be held.

self incrimination: any statement by a person accused of a crime which might prove that he may be guilty of the crime.

sequestration: the separation of the jury from all outsiders during a trial and the deliberations which follow; they must be fed and housed together and are not permitted to go home or visit with friends or relatives during the trial.

special verdict: a procedure whereby the jury instead of rendering a general verdict, answers specific questions given to it by the judge; after receiving the answers from the jury the judge then decides which party wins the law suit.

suppressed evidence: evidence which was obtained improperly; such evidence cannot be considered in deciding the innocence or guilt of the person being tried. Also called inadmissible evidence.

subpoena duces tecum: an order by the court, usually at the request of one of the parties in a case, for a person to bring a particular document to the court at a specific time and date, for use in the trial.

sufficiency of the evidence: the degree to which the evidence carries the burden of proof of a party in the case, such as the prosecution's burden of proving his case beyond a reasonable doubt.

testimony: evidence given orally by a witness, under oath, as opposed to such evidence as documents and real evidence.

trier of fact: the person or persons who decide what the facts are in a particular case. This might be the judge or the jury.

vacate a judgment: to set the judgment aside; to cancel the judgment.

voir dire: the questioning of the potential members of the jury, either by the parties or their attorneys or by the judge to determine if any are unfit to decide the case.

waive: to voluntarily give up a legal right or privilege. For example, to waive the right of trial by jury and agree to have one's case heard by a judge without a jury.

waiver: the act of waiving a legal right or privilege.

warrant of arrest or search warrant: a written order, issued by a judge or other judicial officer stating that a police officer has the authority to arrest a specific person or search a specific place for certain things. Evidence obtained without a valid warrant may not be allowed in court; such evidence may be inadmissible or suppressed (see suppressed evidence).

IN THE TRIBAL COURT OF THE _____ INDIAN NATION

_____ INDIAN NATION,)
Plaintiff,)
)
v.)
)
_____,)
_____Defendant,)

NO.

ORDER TO SHOW CAUSE FOR FAILURE TO APPEAR

The Defendant, _____, is hereby ordered to appear before the _____ Tribal Court in (city, state), on _____, 19____, at _____.M. and to show cause why he/she should not be held in Contempt of Court for failure to appear in this Court on _____ _____, 19____, at _____.M. for the offense (s) of _____ _____.

Failure to obey this order may subject you to arrest and prosecution.

Date_____

_____
Chief Judge
_____ Tribal Court

IN THE TRIBAL COURT OF THE _____ INDIAN NATION

_____ INDIAN NATION, Plaintiff,
v.
_____, Defendant,

NO._____

ORDER TO SHOW CAUSE FOR FAILURE TO PAY FINE

The defendant, _____, is hereby ordered to appear before the _____ Tribal Court in (city, state), on _____, 19____, at _____ a.m. p.m., and to show cause why he/she should not be held in contempt of Court for failure to pay $_____ of the $_____ fine imposed on him/her by this Court on _____, 19____, for conviction of the offense(s) of _____.

Failure to obey this order may subject you to arrest and prosecution.

Date _____

_____
Chief Judge
_____ Tribal Court

_____ INDIAN NATION)ss.

I certify that I served the above ORDER to the named Defendant on the _____ day of _____, 19 ____, at _____.M., (or) I was unable to serve Defendant because: _____.

BY: _____
Officer

IN THE TRIBAL COURT OF THE _____ INDIAN NATION

_____ INDIAN RESERVATION

_____ INDIAN NATION, Plaintiff.
v.
_____, Defendant

NO.

ORDER-INDIRECT CONTEMPT

This cause being heard on the ____ day of _____, 19 ____, on the rule to show cause heretofore entered against _____, defendant herein, to show cause, if any ____he has, why ____he should not be held in contempt of this court for (refusing to comply with the order of this court heretofore entered on the _____ day of _____ 19 ____.)

And defendant, _____, having on the ____ day of _____, 19 ____, appeared in person (having waived his/her right to counsel) (and by h_____ counsel, _____) and the court having jurisdiction of this cause and the parties hereto and having heard the testimony herein and having heard the arguments of the defendant does find

(1) That the defendant has failed and willfully refused to comply with the order of this court entered on the _____ day of _____ _____, 19 ____;

(2) For this reason, the court finds the defendant in contempt in violation of tribal code ordinance _____ and imposes the following punishment: _____.

Date _____

_____
Chief Judge
_____ Tribal Court

IN THE TRIBAL COURT OF THE _____ INDIAN NATION

_____ INDIAN NATION,
Plaintiff.
v.
_____,
Defendant.
_____
_____ INDIAN NATION)ss.

NO.

CRIMINAL SUMMONS

You are hereby notified that a Criminal Complaint, attached hereto, has been filed in the _____ Tribal Court, charging that on or about the _____ day of _____, 19____, within the jurisdiction of the _____ Indian Nation, you did commit the criminal offense(s) of

Therefore, in the name of the _____ Indian Nation, you are hereby commanded to be and appear before the above Court at the Court House in (City, State) on the _____ day of _____, 19____, at _____ M., for arraignment and further proceedings in this matter.

If you fail to appear as above commanded, without good cause, you shall be considered to be in Contempt of Court and a Bench Warrant for your arrest may be issued by the Court.

DATED this _____ day of _____, 19____.

_____
Clerk of the _____ Tribal Court

* Courtesy of the Quinault Tribal Court

_____ INDIAN RESERVATION
TRIBAL COURT OF _____ TRIBE

_____ Tribe)
)
v.)
)
)
_____)
(Name of Accused))

SUMMONS

Case No. _____

YOU ARE HEREBY SUMMONED to appear before Judge _____ of the Tribal Court of the _____ Tribe at _____ (location of court) on _____ (date), 19 ____, at _____ (time) A.M. to answer to a complaint charging you with _____ (description of charge) on or about _____ (date), 19 ____, at _____ (location of offense) in violation of Section _____ of the Code of Law and Order of the _____ Tribe.

Date: _____

_____
(Signature of Tribal Court Clerk or other person authorized by Judge)

This Summons was received by me on _____, 19 ____.

_____
(Signature of Accused)

IN THE TRIBAL COURT OF THE _____ INDIAN NATION

Plaintiff,)
)
)
v.)
)
Defendant,)
)
_____)
_____ Indian Nation)
_____ Indiar Reservation) ss.

No.

AFFIDAVIT OF SERVICE

I, _____, do hereby certify that I received the annexed _____ on _____, 19 ____, for service upon _____, named therein; that I served said documents on _____, 19 ____, (within) (outside) the exterior boundaries of the _____ Indian Reservation, as follows:

PERSONAL: By delivering to and leaving with _____ personally, on _____, 19 ____.

SUBSTITUTE: After deligent search and inquiry, was unable to locate _____; I served by delivering to and leaving with _____, personally, he being a person of suitable age and discretion, resident therein at the house and usual abode of said person(s), on _____, 19 ____.

CORPORATION: On said _____, by delivering to and leaving with _____, the _____ of said corporation, on _____, 19 ____.

BY MAIL: By mailing to _____, by Certified Mail, return receipt requested, on _____, 19 ____.

SUBSCRIBED AND SWORN to before me this _____ day of _____, 19 ____.

NOTARY PUBLIC in and for the State of _____ residing at _____

* Courtesy of the Quinault Tribal Court

IN THE TRIBAL COURT OF THE _____ INDIAN NATION

_____ INDIAN NATION)
) ss.
_____ INDIAN RESERVATION)

AFFIDAVIT OF COMPLAINING WITNESS

DEFENDANT:

Name:_____ Name:_____
Address:_____ Address:_____
_____ _____
Phone:_____ Bus._____ Phone:_____ Bus._____

WITNESSES:

Name:_____ Name:_____
Address:_____ Address:_____
_____ _____
Phone:_____ Bus._____ Phone:_____ Bus._____
Name:_____ Name:_____
Address:_____ Address:_____
_____ _____
Phone:_____ Bus._____ Phone:_____ Bus._____

I, the undersigned complainant, understand that the following are some but not all of the consequences of my signing a criminal complaint: (1) the defendant may be arrested and placed in custody; (2) the arrest if proved false may result in a lawsuit against me; (3) if I have sworn falsely I may be prosecuted for perjury; (4) this charge will be prosecuted even though I might later change my mind; (5) witnesses and complainant will be required to appear in court on the trial date regardless of inconvenience, school, job, etc.

Following is a true statement of the events that led to filing this charge.

On the _____day of _____, 19 ____, at _____
(location)

_____
SIGNATURE

SUBSCRIBED AND SWORN to before me this _____ day of _____, 19____.

_____
Court Clerk, Judge, Notary Public
or Tribal Secretary

*Courtesy of the Quinault Tribal Court

IN THE TRIBAL COURT OF THE _____ INDIAN NATION

_____ INDIAN NATION)
Plaintiff,)
)
V.)
)
_____)
Defendant.)

NO.

CRIMINAL COMPLAINT

I, _____, by this Complaint do accuse _____, an Indian, of the offense of _____, committed as follows:

That the defendant, within the exterior boundaries of the _____ Indian Reservation, on or about _____, 19 _____ did

Contrary to _____ Tribal Code Ordinance Section _____, and against the peace and dignity of the _____ Indian Nation.

_____ (Signature of Complainant)

_____ (Address)

_____ (type or print name of Complainant)

_____ (Telephone)

Witnesses for Tribe:

_____ Judge

DATE: _____

* Courtesy of the Quinault Tribal Court

IN THE _____ TRIBAL COURT

_____ Plaintiff

v. Criminal Cause No.

_____ Defendant

RECOGNIZANCE BOND

I, _____, as defendant understand that I have been released from jail under the following conditions:

1. I have been released without having to post a money bond or furnishing other security.
2. I agree to appear in _____ Tribal Court whenever required until final decision in this case.
3. I agree to follow the orders of the Court in this case.
4. I will not leave _____ Indian Reservation or Washington State for any period of time or for any purpose without a court order.
5. I can be reached by regular mail addressed to:

_____

6. _____

Witnesses:

_____ Defendant

_____

_____

Date _____

*Courtesy of the Quinault Tribal Court

_____ INDIAN RESERVATION

TRIBAL COURT OF THE _____ TRIBE

_____ Tribe)
)
V.) APPEARANCE BOND
)
_____) Case No. _____
(Name of Accused))

The defendant, PROMISES AND AGREES:

That if the defendant fails to appear personally before the Tribal Court of _____ Tribe at _____ A.M. on _____, 19 ___, (time) P.M. (date) and there to answer to a complaint filed against him or her, and to appear at such other times as may be ordered by the Court until final disposition of this case, then the defendant shall pay a fine of $_____ or shall forfeit $_____ deposited as a personal bond. If the defendant does appear at all times so required then this bond shall be void.

Signed this _____ day of _____, 19____.

_____
(Signature and address of defendant)

Signed and acknowledged before me on _____, 19____.

_____
(Signature of Tribal Court Clerk)

IN THE TRIBAL COURT OF THE _____ INDIAN NATION

_____ INDIAN NATION)
Plaintiff,)
)
v.) NO.
)
_____) ORDER FOR RELEASE OF DEFENDANT
)
_____)
)
_____ Defendant.)

TO: _____ Tribal Police Chief

You are ordered to release the defendant from custody for the following reasons:

- ☐ Found not guilty
- ☐ Sentence deferred or suspended
- ☐ Released on own recognizance
- ☐ Probation granted
- ☐ Case dismissed
- ☐ Bail posted (_____ Bond) (_____ Cash)
- ☐ Fine paid
- ☐ Other _____

_____

Instruct defendant to appear on _____, 19____ at _____ m., before the _____ Tribal Court at (City, State).

Dated _____

(Seal)

_____
Judge

_____
Clerk (To be signed by Clerk only when bail posted or fine paid)

*Courtesy of the Quinault Tribal Court

IN THE TRIBAL COURT OF THE

_____ INDIAN NATION

_____ INDIAN NATION,
Plaintiff.

V.

_____,
Defendant,

No.

NOTICE OF RESCHEDULED ARRAIGNMENT

TO: _____

_____

_____

_____

You are hereby notified that your appearance before the _____ Tribal Court for arraignment in the above entitled matter, originally set for _____, 19 ____, at _____ a.m./p.m. has been rescheduled for _____, 19 ____, at _____ a.m./p.m.

_____
DATE

_____
CLERK OF THE COURT

_____ INDIAN COURT

_____ Tribe Case # _____

v.

_____, Defendant Advice of Rights

The undersigned defendant was present in the _____ Court, Judge _____ presiding, on _____, _____. The defendant was charged with a violation of $ _____ of the _____ Tribal/Law and Order Code, _____, _____ (Name of Crime), and was arraigned on the above date. The following rights were explained to the defendant at his arraignment:

1. The right to obtain counsel at defendant's own expense.
2. The right to consult with counsel prior to proceedings in Court.
3. The right to be informed of the charges against him.
4. The right to a public and speedy trial by jury.
5. The right to be confronted by witnesses against him and to cross-examine witnesses against him.
6. The right to call witnesses in his own behalf.
7. The privilege against self-incrimination.
8. The right to testify at trial or to remain silent with no inference of guilt being drawn from a decision to remain silent.
9. The right to appeal upon a finding of guilt.
10. The right to be released on bail or under conditions determined by the Court prior to a trial on the charges.
11. The maximum and minimum penalties for the crime(s) charged are:

Code Violation	Name of Crime	Max./Min. Penalties
_____	_____	_____
_____	_____	_____
_____	_____	_____

The defendant in this case, after advice of his rights under the Indian Civil Rights Act, pleaded _____.

_____
Defendant

_____
Judge

APPENDIX TO CHAPTER 2

Arraignment

(Outline of points to be covered)

1. Inform defendant:
   a. of the complaint against him and of any affidavit filed with the complaint.
   b. of his right to employ counsel or to have someone else assist him.
   c. that he is not required to make any statement; that if he has made a statement, he need say no more; that if he starts to make a statement, ha may stop at any time [Miranda v. Arizona, 384 U.S. 436 (1966)]; and that any statement made by him may be used against him.
   d. that he is presumed innocent;
   e. that he has a right to a speedy and public trial by the court or by a jury.
   f. that he has a right to subpoena (obtain) witnesses on his own behalf and to cross-examine witnesses appearing for the prosecution.
   g. that the tribe must prove him guilty beyond a reasonable doubt.
   h. that if convicted, he would be entitled to an appeal (without cost to him if indigent).

2. Allow defendant a reasonable opportunity to obtain and consult with counsel.
3. Ask defendant:
   a. his name;
   b. his age;
   c. the extent of his education and schooling;
   d. if he is currently, or if he has recently been under the care of a physician or a psychiatrist, or if he has been hospitalized or treated for narcotic addiction; how does he feel physically today;
   e. if he has an attorney or does he need more time to find one;
   f. if he has received a copy of the complaint and if he understands the nature of the charges against him;
   g. if he has had time to consult with his attorney if he has one;
4. Read complaint and translate if necessary unless defendant clearly understands it and unmistakably waives its reading.
   a. Inform defendant of maximum penalty for offense(s).
5. Ask defendant:
   a. if he is ready to plead;
   b. what is his plea.
6. If defendant's plea is not guilty:
   a. set date for next hearing or trial; and
   b. continue or reset bail.

CONTINUED

4 OF 5

7. If defendant's plea is guilty:

a. before accepting plea:

(1) make sure the defendant:

(a) is acting voluntarily;

(b) fully understands his rights;

(c) fully understands the consequences of his plea and the maximum penalty which could be imposed;

(d) is in fact guilty;

(2) explain and ask defendant if he understands:

(a) that the court will not accept his plea unless satisfied of defendant's guilt and that defendant fully understands his rights;

(b) that if he pleads not guilty he would be entitled to a speedy and public trial by a judge or jury;

(c) that at such trial the Tribe would have to confront him with the witnesses and he would have the right to cross-examine these witnesses;

(d) that at such trial he would be presumed innocent until such time, if ever, as the Tribe established his guilt beyond a reasonable doubt;

(e) that at such a trial he would be entitled to a court order to get witnesses that he wants;

(f) the nature and essential elements of the charge to which he is pleading;

(g) the range of penalties to which he is subjecting himself by his plea including the maximum sentence;

(3) ask defendant:

(a) if any threats or promises have been made to induce him to plead guilty;

(b) if he has been told what sentence he will receive;

(c) if he committed the offense;

(d) just what he did (obtain admission of necessary acts, knowledge, and intent);

(e) if he still wishes to plead guilty;

(f) any additional questions required by the circumstances.

(4) ask defense counsel if he knows any reason why defendant should not plead guilty;

(5) ask prosecutor or tribal police office if they know any reason why the plea should not be accepted.

b. accept or reject plea;

c. if plea is rejected, or if defendant refuses to plead, enter a plea of not guilty and set date for trial;

d. if plea is accepted, sign an order to that effect finding that the plea is knowledgeable, voluntary and has a basis in fact; and, either sentence the defendant immediately or, set a future date for sentencing and inform defendant when he is to appear in court again; continue or reset bail.

_____ INDIAN COURT

_____ Tribe Case # _____

v.

_____, Defendant Acceptance of Plea of Guilty

1. Name of Defendant_____.
2. The defendant is _____/is not _____ represented by an attorney. (Name of attorney if defendant is represented _____).
3. If defendant is represented by an attorney:
   Defendant has:
   a) Discussed the case with his attorney;
   b) Had enough time to discuss the case fully with his attorney;
4. Defendant is accused in Complaint No. _____ of committing the crime(s) of _____ on or about _____, _____.
   a) A copy of the complaint has been read to defendant and a copy handed to him.
   b) Defendant understands the charges contained in the complaint against him.
   c) Defendant expressed a correct understanding of the charge(s) against him.
5. The maximum and minimum punishments which the defendant can receive for each crime charged are:

Code Violation	Name of Crime	Max./Min. Penalties

6. Defendant has been informed that he has the right to enter a plea of
   a) not guilty
   b) no contest
   c) guilty
7. Defendant has been informed that if he pleads not guilty of the crime(s) charged, he has the following rights under the Indian Civil Rights Act:
   a) The right to a speedy and public trial by jury;
   b) The right to see, hear and question all witnesses against him;
   c) The right to present evidence in his favor at trial;
   d) The right either to testify at the trial or to remain silent;
   e) The right to appeal upon a finding of guilt;
   f) The right to be released on bail or under conditions determined by the Court prior to a trial on the charges.
8. Defendant has been told and understands that if he enters a plea of guilty to the crime(s) charged, he gives up all of the rights mentioned above as

to that crime(s).

9. Defendant has been told and understands that if he enters a plea of guilty to the crime(s) charged, he could be sentenced the same as if he were found guilty at a trial.
10. Defendant has stated that he was not threatened or coerced into entering a plea of guilty and that he was not promised a lighter sentence or any other favor for pleading guilty. Defendant stated that he pleaded guilty of his own free will.
11. Defendant enters the following plea(s) for the crime(s) charged:

Complaint No.	Name of Crime	Defendant's Plea

12. Defendant stated that on or about _____, _____ he did commit the following act(s) which constitutes the crime(s) of _____ as charged:
    _____
    _____
    _____
    _____

ORDER

Having ascertained in open court that (1) the defendant fully understands his constitutional rights, the nature of the crime(s) charged in the Complaint, and the consequences of his guilty plea(s), and (2) the defendant understandingly and voluntarily pleads and waives his rights,

IT IS ORDERED that the defendant's plea(s) of guilty and waiver of rights be accepted and entered in the minutes of this Court.

DONE IN OPEN COURT this _____, _____.

_____
Judge

_____ INDIAN COURT

_____ Tribe Case # _____

V.

_____, Defendant Accepting Waiver of Jury Trial

1. Defendant was present in the _____ Indian Court on _____ _____, _____. At that time defendant, or through defense counsel if he was represented by an attorney, indicated that he wished to waive his right to a trial by jury and requested a trial by the Court.

2. The defendant was informed that he had the right, under the Indian Civil Rights Act, to a trial by jury of six (6) persons. He was informed that this was a personal right which he alone could waive.

3. Defendant indicated that he personally waived and gave up his right to a trial by jury.

4. Counsel (prosecution and defense) joined in the waiver of a trial by jury in this case.

ORDER

Judge _____, of the _____

Indian Court accepts the defendant's waiver of trial by jury in the above case. The case will be tried by the court without a jury.

_____
Judge

_____
Defendant

IN THE TRIBAL COURT OF THE _____ INDIAN NATION

Plaintiff(s),
V.
Defendant(s).

NO.

JURY SUMMONS

_____ INDIAN RESERVATION) ss.
_____)

TO: _____

You are hereby summoned to appear on _____, 19____, at _____m., in the _____ Tribal Court to serve as a juror in the above entitled action.

Failure to answer this summons and appear may subject you to punishment for Disobedience of Lawful Order of Court and Confinement for a period not to exceed three (3) months and/or a fine of not more than $300.00, with costs. (12.24 _____ Tribal Code of Law)

_____
Judge

The above summons was received by me on _____, 19____.

_____

*Courtesy of Quinault Tribal Court

IN THE TRIBAL COURT OF THE _____ INDIAN NATION

Date Qualified _____

JURY QUESTIONNAIRE

1. Name _____
(First) (Middle) (Last) (Maiden/or Nickname)
2. Home Address: _____
3. Home Phone: _____
4. Date of Birth: _____ Place of Birth: _____
5. Years of residence: Present address _____ years.
_____ Indian Reservation _____ years.
6. How many miles is it from your house to the Courthouse in (city)?
_____ miles
7. Have you ever served as a juror in any Court? Yes _____ No _____
if yes:
Civil: When _____ Where _____
Criminal: When _____ Where _____
8. Have you or any member of your immediate family been convicted of any offense (other than speeding) in tribal court within the last five (5) years? Yes _____ No _____
9. Are there any such charges pending against you?
Yes _____ No _____
10. Do you have any physical or mental infirmity impairing your capacity to serve as a Juror? Yes _____ No _____
11. Are you related to or close friends with the Defendant?
Yes _____ No _____
12. Do you know of any other valid and legal reason for your disqualification for jury service or why you could not serve as a fair and impartial juror?
Yes _____ No _____
If yes, please explain fully: _____

_____

_____

_____

_____

I affirm under penalties for perjury, that the foregoing is true to the best of my information and belief.

Date: _____

_____
Signature

*Courtesy of Quinault Tribal Court

IN THE TRIBAL COURT OF THE _____ INDIAN NATION
_____ INDIAN RESERVATION
(CITY), IN THE STATE OF _____

Plaintiff,
V. No.
Defendant,

ORDER FOR PRETRIAL HEARING

The _____ Indian Nation and defendant are hereby directed to appear in person or lay counsel on _____, 19____, at _____.M. for a pretrial hearing for the purpose of:

1. Ruling on any motions or other requests then pending and finding out whether any additional motions or requests will be made before trial;
2. Making any other orders appropriate under the circumstances to expedite pretrial proceedings and trial;
3. Simplification of the issues;
4. Obtaining admissions of fact and of documents which will avoid unnecessary proof;
5. Exchanging the names and addresses of prospective witnesses;
6. Examinations and identification of proposed exhibits.
7.

SO ORDERED this _____ day of _____, 19____.

_____
Judge

*Courtesy of Quinault Tribal Court

IN THE TRIBAL COURT OF THE _____ INDIAN NATION
_____ INDIAN NATION
(CITY), IN THE STATE OF _____

plaintiff(s)
v.
defendant(s)

STIPULATION TO EVIDENCE - NETS

The following facts are stipulated to between the parties:*

(a) That the defendant, _____ is the legal owner of the net seized as evidence by fisheries officers in connection with, and on the date of the incident, referred to in the complaint.

DATED:

_____
Defendant

_____
Tribal Prosecutor

_____
Attorney for the Defendant

(b) That the defendant, _____, was the last person to set the net in the place from which it was seized as evidence by fisheries officers in connection with the incident referred to in the complaint prior to that seizure.

DATED:

_____
Defendant

_____
Tribal Prosecutor

_____
Attorney for the Defendant

*(Only those statements endorsed by the defendant are stipulated to and need not be proven in Court).

IN THE TRIBAL COURT OF THE _____ INDIAN NATION

_____
_____
Plaintiffs,
v.
_____
_____
Defendants.

NO.

ORDER ON MOTION BY PLAINTIFF FOR DISCOVERY

MOTION BY PLAINTIFF

The plaintiff asks the Court to require the defendant to describe the material and information checked off below that is within h___ possession or control:

____ 1. The general nature of any defenses, either procedural or substantive, the defendant intends to make at a hearing or trial.

____ 2. Whether or not the defendant will rely on an alibi and, if so, to furnish a list of the alibi witnesses and their addresses. Granted___ Denied___

____ 3. The names and addresses of persons whom the defendant may call as witnesses along with a summary of their testimony and record of prior Criminal Convictions.

____ 4. Any books, papers, documents, photographs, or tangible objects which are intended to be used at a hearing or trial.

____ 5. Results of any medical or scientific tests or reports relating to defendant or defendant's evidence which may be used at a hearing or trial and the names of persons who conducted them.

____ 6. To compel the defendant to appear in a lineup.

____ 7. To compel the defendant to speak for voice identification by witnesses.

____ 8. To compel the defendant to be fingerprinted.

____ 9. To compel the defendant to pose for photographs (not involving a re-enactment of the offense.)

____10. To compel the defendant to try on articles of clothing.

____11. To compel the defendant to permit taking samples of blood, hair and other materials of his body which involve no unreasonable intrusion thereof.

____12. To compel the defendant to submit to a physical external inspection of his body.

____13. To compel the defendant to provide samples of h____ handwriting.

____14. To state whether there is any claim of incompetency to stand trial.

DATED: _____

_____
Tribal Prosecutor

(c) That the defendant, _____, was fishing with the net seized by fisheries officers at the time of its seizure as alleged in the complaint.

DATED:

_____
Defendant

_____
Tribal Prosecutor

_____
Attorney for the Defendant

(d) That the defendant, _____, admit that the mesh size of the net seized as evidence in connection with, and on the date of the incident, referred to in the complaint is as follows:_____
_____.

DATED:

_____
Defendant

_____
Tribal Prosecutor

_____
Attorney for the Defendant

*Courtesy of Quinault Tribal Court

DISCOVERY ORDER

The defendant or h____ counsel shall describe to the defense the above requested material and information within h____ possession or control on or before the _____ day of _____, 19____.

Discovery is a continuing Order through trial. Failure of the prosecution to comply with this order within five days before trial may result in exclusion of evidence at trial or other appropriate sanction.

The defendant or h____ counsel may perform these obligations in any manner mutually agreeable to itself and the defendant or h____ counsel or by notifying the defendant or h____ counsel that material and information described in general terms, may be inspected, obtained, tested, copied, or photographed, at specified reasonable times and places.

Disclosure is not required of legal research or of records, correspondence, reports or memoranda to the extent that they contain the opinions, theories, or conclusions of the defendant or h____ counsel.

SO ORDERED this _____ day of _____, 19____.

_____
JUDGE

IN THE TRIBAL COURT OF THE _____ INDIAN NATION

_____ INDIAN NATION, Plaintiff, v. _____, _____, Defendant(s).)

NO.

ORDER DEFERRING PROSECUTION

On _____, 19____, the defendant _____, appeared in person and having waived the right to be represented by counsel and the _____ Indian Nation being represented by _____, (Tribal Prosecutor) (_____ Tribal Police), and the defendant having entered a plea of not guilty to, _____

_____

_____

on _____, 19____, as charged in the (citation)(complaint) and the court being fully informed of the record of the case and the agreement of the parties,

IT IS HEREBY ORDERED; that prosecution be deferred until the _____ day of _____, 19____, at which time the charge(s) shall be dismissed if the defendant has complied with the following conditions in the intervening time:

DONE IN OPEN COURT this _____ day of _____, 19____.

_____
Judge

IN THE TRIBAL COURT OF THE _____ INDIAN NATION

_____, Plaintiff. v. _____, Defendant.)

NO.

ORDER FOR TRIAL CONTINUANCE

THIS MATTER having come before this Court on its own motion for a continuance of the trial date set herein for _____, 19____, at _____.M., and the Court having determined that a continuance would be appropriate, now, therefore, it is hereby

ORDERED that the Clerk of this Court shall reschedule the trial in this matter for _____, 19____ at _____.M., at the _____ Tribal Court House, (city, state).

DATED: This _____ day of _____, 19____.

_____
Judge

IN THE TRIBAL COURT OF THE _____ INDIAN NATION

_____ INDIAN NATION,)
Plaintiff,)
)
v.) NO.
)
_____)
) WAIVER OF RIGHT TO A SPEEDY TRIAL
_____)
Defendant.)

I, _____, the defendant in the above-entitled action understand that I have the right to be tried within thirty (30) days from arraignment but do hereby knowingly and voluntarily waive my right to a speedy trial.

_____ _____
Date (Defendant's signature)

_____ _____
Date Judge
_____ Tribal Court

*Courtesy of the Quinault Tribal Court

IN THE _____ TRIBAL COURT

_____ INDIAN NATION,)
Plaintiff,)
)
v.) NO.
)
_____,) NOTICE AND ORDER OF TRIAL
)
_____)
Defendant.)

TO: _____

_____

_____

You have been charged with a violation of the _____ Tribal Code of Laws, as specified in (citation((complaint) NO._____. At your arraignment on _____, you entered a plea of
(date)
NOT GUILTY to the charge(s).

YOU ARE HEREBY ORDERED to appear before the _____ Tribal Court at the following date and time in order that the merits of your case may be tried.

DATE:_____ Time:_____

There will be no continuances granted via telephone; any continuances that may be granted, will be granted only after submission of written motions together with affidavits supporting same.

You must appear by the time Court convenes. Failure to comply with this ORDER is an offense under § 12.24 of the _____ Tribal Code of Laws the maximum penalty for violation of which is confinement for 3 months and/or fine of $300.00.

_____ _____
Date Judge _____ Tribal Court

*Courtesy of the Quinault Tribal Court

IN THE TRIBAL COURT OF THE _____ INDIAN NATION
_____ INDIAN RESERVATION
(city), IN THE STATE OF _____

Plaintiff,)
)
)
v.)
)
)
Defendant,)
_____)

No.

REQUEST FOR SUBPOENA'S

TO: THE CLERK OF THE ABOVE ENTITLED COURT

Issue subpoenas (DUCES TECUM) to the following witnesses in the above entitled case

Witness

_____

Address

_____

Witness

_____

Address

_____

(and require the specified witness to bring the items on the attached list)

_____
Date

_____
Signature and title of person requesting subpoena

_____ INDIAN RESERVATION

TRIBAL COURT OF THE _____ TRIBE

_____ Tribe)
)
V.)
)
)
_____)
(Name of Accused)

SUBPOENA

Case No. _____

TO_____:
(Name of Subpoenaed Witness)

YOU ARE HEREBY COMMANDED to appear in the Tribal Court of _____

Tribe at _____ A.M. on _____, 19____, at _____
(time) P.M. (date)

_____ to testify in the case of _____
(location of the Court)

Tribe v. _____.
(Name of Accused)

This Subpoena is issued upon the request of _____ _____

_____.
(Specify either the Tribe or the Defendant)

Failure to obey this Subpoena makes you liable for prosecution for contempt of Court.

Date:_____

_____
(Signature of Tribal Court Clerk)

IN THE TRIBAL COURT OF THE _____ INDIAN NATION

_____ INDIAN NATION)
Plaintiff,)
) NO.
V.)
)
_____) ORDER FOR RELEASE OF DEFENDANT
)
_____)
Defendant.)

TO: _____ Tribal Police Chief

You are ordered to release the defendant from custody for the following reasons:

- ☐ Found not guilty
- ☐ Sentence deferred or suspended
- ☐ Released on own recognizance
- ☐ Probation granted
- ☐ Case dismissed
- ☐ Bail posted (_____ Bond) (_____ Cash)
- ☐ Fine paid
- ☐ Other _____

_____

Instruct defendant to appear on _____, 19____, at _____.m., before the _____ Tribal Court at _____.
(city)

Dated_____

(Seal)

_____ _____
Judge Clerk (To be signed by Clerk only when bail posted or fine paid)

*Courtesy of the Quinault Tribal Court

IN THE TRIBAL COURT OF THE _____ INDIAN NATION

_____ INDIAN NATION,)
)
PLAINTIFF.)
)
V.) NO.
)
_____,) VERDICT
)
Defendant.)
)

We, the jury, find the defendant _____,

_____ of the crime of _____
(write in not guilty or guilty)

_____

as charged in the complaint.

_____
FOREMAN

IN THE TRIBAL COURT OF THE _____ INDIAN NATION

_____)
_____)
Plaintiff(s))
)
v.) NO.
)
_____)
_____) ORDER FOR PRESENTENCE DIAGNOSTIC
_____) INVESTIGATION
Defendant(s))
_____)

The Court, (having accepted a plea of guilty) (upon entering judgment on a verdict of guilty), now directs the defendant to submit to an investigation and pyschological evaluation by the Indian Health Service. Defendant is directed to contact th mental health consultant at the _____ Indian Health Clinic by 5 p.m. today to make an appointment for no later than one week from today, and to then report to the health clinic for that appointment on time. The _____ Indian Health Clinic is ordered to file a diagnostic report in this Court on or before the _____ day of _____, 19____. This cause is now continued to the _____ day of _____, 19____, for sentencing. (Bond heretofore set shall remain in full force and effect.)

SO ORDERED this _____ day of _____, 19____.

_____
Judge

*Courtesy of the Quinault Tribal Court

IN THE TRIBAL COURT OF THE _____ INDIAN NATION

_____)
_____)
Plaintiff(s))
)
v.) NO.
)
_____)
_____) ORDER FOR PRESENTENCE INVESTIGATION -
_____) ALCOHOLISM PROGRAM
Defendant(s))
_____)

The Court, (having accepted a plea of guilty) (upon entering judgment on a verdict of guilty), to the offense of _____ committed while intoxicated, now directs the defendant to appear immediately before a counselor with the _____ Indian Alcoholism program there to submit to a background investigation. The _____ Indian Alcoholism Program is ordered to conduct a Presentence Investigation as to the background of the defendant said Presentence Report along with a sentencing recommendation to be submitted to the Court in writing on or before the _____ day of _____, 19____. This cause is continued to the _____ day of _____, 19____, for sentencing. (Bond heretofore set shall remain in full force and effect.)

SO ORDERED this _____ day of _____, 19____.

_____
Judge

*Courtesy of the Quinault Tribal Court

IN THE TRIBAL COURT OF THE _____ INDIAN NATION

_____ INDIAN NATION,)
Plaintiff,)
)
V.) NO.
)
) ORDER DEFERRING SENTENCE
_____,)
Defendant.)

On_____, 19____, the defendant, _____, appeared in person and having waived the right to be represented by counsel and the _____ Indian Nation being represented by _____, (Tribal Prosecutor) (_____ Tribal Police), and the defendant having entered a plea of guilty to, _____ _____ on _____, 19____, as charged in the (citation) (complaint) and the court having accepted the plea(s) of guilty to the aforementioned charge(s) now finds the defendant, _____, guilty as charged, and having heard the circumstances of the case and being fully advised in the premises, now therefore,

It is HEREBY ORDERED, that sentence be deferred, and the defendant placed on probation, until _____, 19____ at_____.m., at which time the defendant, _____, is ordered to appear before the _____ Tribal Court and there to make a showing that he has complied with the following terms and conditions of (his)(her) probation: _____ _____ _____ _____

If the defendant violates any of the terms or conditions of his probation within any period of probation, or if the defendant is convicted of committing a new (traffic violation)(criminal offense) committed within any period of probation, the Court may pronounce any sentence which might originally have been imposed.

If the defendant complies with the terms of probation and is not convicted of committing a new (traffic violation)(criminal offense) committed within any period of probation, the Court shall at the termination of probation discharge the defendant, set aside the finding of guilt and the judgment of conviction, and dismiss the proceedings against defendant.

So ORDERED this _____ day of _____, 19____.

_____
Judge
_____ Tribal Court

*Courtesy of the Quinault Tribal Court

IN THE TRIBAL COURT OF THE _____ INDIAN NATION
_____ INDIAN NATION
(city), IN THE STATE OF _____

plaintiff,)
)
V.) NOTICE OF SENTENCING HEARING
)
defendant,)

Notice:

Whereas you have failed to comply with the conditions of the order to defer sentence entered on the _____ day of _____, 19____, following a (plea of guilty) (finding of guilt) to the offense(s) of _____ _____ _____ as charged in the complaint.

You are HEREBY ORDERED to appear for sentencing on the above entitled action at _____.m. on the _____ day of _____, 19___, at the _____ Tribal Courthouse. (city, state).

DATED_____

_____
_____ Tribal Judge

*Courtesy of the Quinault Tribal Court

IN THE TRIBAL COURT OF THE _____ INDIAN NATION

_____ INDIAN NATION,
Plaintiff,

v.

_____,
Defendant,

PRONOUNCEMENT OF SENTENCE

It is the judgment of this Court that the punishment for the crime of _____, to which the defendant in the above entitled action has been found guilty, the defendant shall be:

_____ confined in the _____ Jail for a term of _____.

_____ required to pay a fine of $_____.

_____ confined in the _____ Jail for a term of _____ and required to pay a fine of $_____.

_____ other punishment _____.

Plus court costs of ten dollars ($10.00).

SO ORDERED:

_____
Date

_____
Chief Judge
_____ Tribal Court

*Courtesy of the Quinault Tribal Court

RULES OF CONDUCT FOR WORK-RELEASE PRISONERS
_____ TRIBAL POLICE DEPARTMENT

The following rules of conduct shall apply to all work-release prisoners. As a condition of participating in the work-release program, each work-releasee must agree to abide by these rules and acknowledge notice of the rules by his signature.

1. You are being released from jail for the purpose of work and any time that your work ends prior to normal quitting time you are to immediately return to the jail. If for any reason you become unemployed you shall report this fact immediately to the jailor on duty.

2. While on work-release you shall not drink any alcoholic beverage, nor go to the taverns, lounges or other places where alcoholic beverages are sold. When requested by a jailor, you must submit to a breathalyzer examination to determine whether you have consumed an alcoholic beverage.

3. You are subject to a search of your person and possessions prior to leaving or returning to the jail.

4. You must receive permission from the court to change your work hours or place of employment. The jailor cannot approve any changes, nor authorize overtime work. You should contact your attorney to obtain any changes.

5. You may not take anything out or bring anything into the jail for any other person.

6. You will be assessed $8.00 each day worked that you participate in the work-release program, including weekends or other non-working days, which assessment shall be paid at least weekly.

I have read or have had read to me the foregoing work-release rules. I agree to comply with all of these rules and I understand that violation of these rules may lead to immediate termination of my work-release status, or a revocation of probation. Further, I understand that if I fail to return to jail immediately after my work ends for whatever reason, I may be prosecuted for the crime of ESCAPE.

_____
Witness

_____
Work Releasee

_____
Place

_____
Date

*Courtesy of the Quinault Tribal Court

_____ INDIAN COURT

_____ Tribe Case # _____

v.

_____,Defendant Order Granting Probation

The defendant having been convicted of a violation of section _____ of the _____ Code, and the defendant being present in court:

(1) It is ordered that the defendant be imprisoned in the _____ Jail for _____ days. However, the execution of such sentence is suspended for _____ months,

(Or)

(2) It is ordered that the imposition of sentence is hereby suspended for the period of _____ months, and the defendant is hereby placed on probation for said period and shall report to the _____ _____.
Probation Officer/Court

This probation is subject to the following terms and conditions (indicated by a check in the box to the left of the numbered conditions) as follows:

☐ 1. Report to the _____
Probation Officer/Court
every _____ month.

☐ 2. Be of good conduct and obey all laws of the community in which you reside.

☐ 3. Seek and maintain steady employment. Do not change employment without consulting the _____.
Probation Officer/Court

☐ 4. Report any change of address.

☐ 5. Make restitution in the amount of $_____ through the Probation Officer at the rate of $_____ per _____, or in such amount or installments as the Probation Officer shall direct.

☐ 6. Pay a fine in the amount of $_ _ _ _ _ (including assessment) through the Probation Officer, at the rate of $_____ per _____.

☐ 7. Serve the first _____ days in the _____ Jail as a condition hereof.

☐ 8. Support your family and pay $_____ per _____ for support through the Probation Officer.

☐ 9. _____.

Failure to fulfill any of the above conditions of probation will constitute a violation of said probation, and a warrant for arrest will issue.

Defendant is herewith advised that upon satisfactory completion of this term of probation, he may apply to the Court to have his conviction set aside under the provisions of section _____ Code.

DATED:_____

_____
Judge

I have received and read a copy of this order.

IN THE TRIBAL COURT OF THE _____ INDIAN NATION
_____ INDIAN RESERVATION
(City), IN THE STATE OF _____

_____, Petitioner, v. _____, Respondent.	PETITION FOR WRIT OF HABEAS CORPUS

TO THE HONORABLE _____, Judge of the _____ Tribal Court:

Your petitioner is (the guardian of _____ _____,) (the parent of _____) now actually, unlawfully, imprisoned and restrained of his/her liberty under color of authority of the _____ Indian Nation in the _____ _____ Tribal jail, in (city)_____, within the _____ Indian Reservation, in the custody of _____, respondent and _____ of said jail. The _____ Tribal jail is under the jurisdiction of and operated by the Bureau of Indian Affairs. (Your petitioner has been authorized by the prisoner to make this petition for a writ of habeas corpus.)

The aforementioned imprisonment is unlawful in that

_____

_____.

The petitioner has exhausted all other remedies before filing this petition.

Wherefore, petitioner prays that a writ of habeas corpus, directed to _____, by whom _____ is detained, issue commanding respondent forthwith to bring him/her before the court together with the casue of his/her detention and to abide the further order of the court herein.

_____
Petitioner

_____ INDIAN NATION)
) ss.
_____ INDIAN RESERVATION)

_____, being first duly sworn, deposes and says: That he/she is the petitioner above named. That he/she has read the foregoing petition and knows the contents thereof. That the same is true to his/her own knowledge, except as to any matters therein stated to be alleged on information and belief, and as to those matters, he/she believes it to be true.

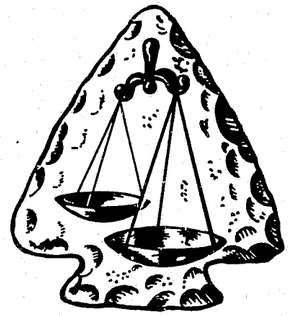
SUBSCRIBED and SWORN to before me this _____ day of _____, 19 ____.

(Seal)

_____
Judge, Clerk of the Court, Tribal Secretary, Notary Public in and for the State of _____, residing at _____.

INSTRUCTORS MANUAL
for

CRIMINAL PROCEDURE FOR INDIAN COURTS
and
CRIMINAL LAW FOR INDIAN COURTS



National American Indian Court Judges Association
1000 Connecticut Avenue, NW
Washington, DC 20036

1981

John W. Milne
Ralph W. Johnson

National American Indian Court Judges Association, Inc.

The fact that the Law Enforcement Assistance Administration of the Department of Justice furnished financial support for this material does not necessarily indicate the concurrence of either the LEAA or the Department of Justice in the statements or conclusions contained herein.

TABLE OF CONTENTS

PART I

Criminal Law For Indian Courts

PART II

Criminal Procedure for Indian Courts

Introduction

This Instructors Manual is designed for use with NAICJA's Criminal Law for Indian Courts and Criminal Procedure for Indian Courts. The purpose of this manual is to provide instructions on the proper use of these two textbooks for NAICJA training program instructors. In addition, this manual will assist Indian Court Judges in directing their study of criminal law and criminal procedure as they participate in NAICJA's Judges Training Program.

The textbook Criminal Law for Indian Courts addresses the substantive criminal law of jurisdiction, evidence, the warrant process, juvenile justice, and the elements of a crime. The textbook Criminal Procedure for Indian Courts addresses the procedural aspects of criminal law at the trial court and appellate court levels.

This manual presents the major points developed in each chapter of these two NAICJA textbooks which should be discussed by NAICJA training seminars. These points are presented section by section and a set of questions duplicated from the textbooks appear at the end of each chapter. These questions are designed to test the understanding of the instructors and judges of the material presented in each chapter.

To facilitate the use of this manual, we have used the same subject headings and order of presentation which appear in the textbooks. We have included in parentheses next to each section heading the page numbers where this material can be found in the textbook.

As you consider the questions during your review of this manual, we suggest that you write your answers directly into the space provided after each question. If you need more space or want to make detailed notes, blank pages at the end of the manual are provided. Because the textbooks are intended to serve as a permanent reference book for Indian Court Judges, as well as the basis for training programs, it is anticipated that each judge will become familiar with their material. Moreover, in using the textbooks as a reference after the training sessions are completed, a review of the questions and your responses in this manual will be helpful to insure the future understanding and application of this material in the courtroom.

John W. Milne

Ralph W. Johnson

PART I

Criminal Law For Indian Courts

CHAPTER I. Criminal Jurisdiction in Indian Country

Section 1. Introduction (1-5)

The major points to be discussed in this section are:

1) the general concepts of jurisdiction; and

2) the general principles affecting Indian court criminal jurisdiction.

Section 2. Federal Criminal Jurisdiction in Indian Country (6-11)

The major points to be discussed in this section are:

1) the definition of "Indian Country" and who is an "Indian";

2) the general federal statutory framework regulating criminal jurisdiction in Indian country; and

3) the exceptions to this federal statutory framework.

Section 3. Tribal Criminal Jurisdiction in Indian Country (12-16)

The major points to be discussed in this section are:

1) the types of tribal courts;

2) tribal court jurisdiction under the federal statutory framework; and

3) tribal court jurisdiction and the Indian Civil Rights Act.

Section 4. State Criminal Jurisdiction in Indian Country (17-20)

the major points to be discussed in this section are:

1) the general principle that state law does not normally apply on the reservation; and

2) the federal statutory framework and common law extending State jurisdiction to Indian country.

Section 5. An Analytical Approach to Jurisdiction (21).

The series of questions presenting an analysis to the determination of tribal court criminal jurisdiction should be discussed.

Section 6. Jurisdictional Summary (21-22, 25)

The jurisdictional chart allocating criminal jurisdiction in Indian country should be discussed.

Section 7. Recommendations (22)

The jurisdictional recommendation of the Report of the NAICJA long range planning project, Indian Courts and the Future (1978), should be discussed.

Section 8. Questions (23-24).

State whether the following questions are true, false, or unsettled, and indicate briefly the reason for your answer if possible.

(1) The United States Congress does not have the power to limit tribal court jurisdiction within the reservation.

(2) The United States Congress may make state law applicable on the reservation.

(3) The term "Indian Country" as defined in 18 United States Code Section 1151 includes public highways.

(4) A Tribal Court would probably have jurisdiction over an offense committed by an Indian at an off-reservation treaty protected fishing site.

(5) The McBratney rule states that federal criminal law applies to a crime committed by a Non-Indian against a Non-Indian on the reservation.

(6) Tribal courts retain concurrent jurisdiction over crimes covered by the Major Crimes Act.

(7) A Tribal court can exercise jurisdiction over any crime identified in federal or state law, whether or not it is covered by the tribal code.

(8) Under the Assimilative Crimes Act, 18 U.S.C.A., Section 1152, federal law applies to a Non-Indian committing a crime against an Indian in Indian Country.

(9) The Oliphant case held that a Tribal court does not have jurisdiction to try a Non-Indian for a crime under a tribal code.

(10) A Tribal court has jurisdiction to try a non-member for a crime against the tribal code.

(11) Under the Martinez case the Indian Civil Rights Act no longer applies to Tribal Courts.

(12) Under the Indian Civil Rights Act of 1968, a tribe must consent before state jurisdiction may be imposed on the reservation.

(13) Indian Tribes retain concurrent jurisdiction even if a state has jurisdiction over the Reservation P.L. 280.

(14) CFR courts are bound by Federal law, but Tribal Courts are not. Tribal Courts are bound only by Tribal Constitutions and laws.

CHAPTER II. The Law of Evidence

Section 1. Introduction (26-28)

The definition of evidence and the law of evidence should be discussed.

Section 2. The Types and Forms of Evidence (29-30).

Section 3. Burden of Proof (31-36)

The major points to be discussed in this section are:

1) the definition of burden of proof; and
2) the differences between civil law and criminal law burden of proof.

Section 4. Presumptions and Inferences (36-45)

The major points to be discussed in this section are:

1) the differences between presumptions and inferences; and
2) the examples of presumptions.

Section 5. Relevancy and Exceptions (45-51).

The definition of relevant evidence and the exceptions to the rule that all relevant evidence should be admissible should be discussed.

Section 6. The Hearsay Rule and Exceptions (52-60)

The definition of hearsay, the hearsay rule, and the exceptions to the hearsay rule should be discussed.

Section 7. Character Evidence (61-68)

The major points to be discussed in this section are:

1) the definition of character evidence;
2) the admissibility of character evidence; and

3) the proof of character.

Section 8. Privileges (69-71)

The definition of privilege and examples of privileged communications should be discussed.

Section 9. Evidence and the Right of the Accused to Remain Silent (71-76)

The right against self-incrimination and the Miranda warnings should be discussed.

Section 10. Weighing the Evidence (76-78)

Section 11. Questions.

(1) Why is it important that the rules of evidence are followed in an Indian tribal court? Why should tradition and custom always be considered in applying the rules of evidence?

(2) Standing Elk testified that he saw the defendant running from the scene of the theft. What type of evidence is this testimony?

(3) Does the prosecutor have to show that a defendant committed a crime by a "preponderance of the evidence", or some other measure of proof?

(4) During trial, the judge ruled that the defendant was presumed guilty unless she met her burden of going forward with the evidence to prove her innocence. What were the two errors the judge made in his ruling?

(5) The witness testified that he had heard that the defendant, who was being prosecuted for reckless use of a firearm, had once hunted wild boar in Africa. The prosecutor objected to this testimony on the grounds that it lacked "relevance" and was "hearsay". What do these terms mean? Should the motion to exclude the evidence have been granted?

(6) If an officer who was testifying in a burglary prosecution could not recall from memory the factual situation and description of the alleged burglar, would it be permissible for him to consult his notebook?

CHAPTER III. Substantive Criminal Law

Section 1. Introduction (79-81)

The major points to be discussed in this section are:

1) the structure of criminal law; and

2) the burden of proof in criminal law.

Section 2. Elements of a Crime (81-85)

The major points to be discussed in this section are:

1) the two elements necessary in the definition of most crimes - acts and mental states; and

2) the definition of strict liability crimes.

Section 3. Attempting the Commission of a Crime (85-86)

Section 4. Specific Crimes (86-94)

The definition of the following specific crimes should be discussed:

1) assault and battery;

2) theft; and

3) driving while under the influence of intoxicating liquor or drugs.

Section 5. Questions (94-95)

(1) To be convicted of a criminal offense, a person must usually be shown to have committed an act while having a certain mental state.

(2) Which of the following is not a mental state relevant to criminal law?

a. knowledge
b. negligence
c. recklessness
d. boredom

(3) Which side normally has the burden of proof in criminal law? Why?

a. the prosecution
b. the defense

(4) Joe swung at Bill while yelling, "I'll knock you on your queester!" but missed. Was a crime committed, and, if so, which one?

(5) A Tribal ordinance provides that: "An Indian who knowingly buys stolen property from another Indian shall be guilty of the offense of receiving stolen property." In a trial for this offense, what are the elements of the crime that the prosecution must prove?

(6) Assume the ordinance in question (5) is in force. A calls B, his cousin, and tells him he bought a new TV and would like to sell his old one. B comes and looks at the old TV, and then buys it. While carrying it home in his truck B is arrested by tribal police who recognize the TV as one that was recently stolen. If you were B's lawyer, what would you argue at trial?

CHAPTER IV. Arrest and Search Warrants

Section 1. Introduction (96-98)

The warrant requirement of the Indian Civil Rights Act and the definition of probable cause should be discussed.

Section 2. Arrest Warrants (98-104)

The major points to be discussed in this section are:

1) the circumstances for arrest with a warrant;

2) the circumstances for arrest without a warrant; and

3) the summoning and arrest process.

Section 3. Search Warrants (104-107)

The major points to be discussed in this section are:

1) the issuance of the search warrant;

2) the execution of the search warrant;

3) the exceptions to the rule requiring a warrant for searches; and

4) the effect of an illegal search and seizure - the exclusionary rule.

Section 4. Questions (107)

(1) How would you define the crucial requirement of "probable" cause" in the warrant process? If an officer reported to you that if a person who had a bad reputation in the community had been seen in a gas station the day before it was burglarized, would this be sufficient probable cause to issue an arrest warrant?

(2) While patrolling a neighborhood, Officer White saw what he believed to be a motorcycle which had been reported stolen in He-Who-Run's back yard. Does Officer White need a warrant to seize the bike?

(3) Officer White seized the motorcycle without securing a warrant, and He-Who-Run's neighbor filed a motion in court objecting to the seizure because he doesn't like the tribal police on the neighborhood premises without permission. Can he do this?

(4) The tribal police obtain a warrant based on probable cause to search an apartment for narcotics. They proceeded to the apartment and, without more, burst through the door interrupting a family dinner. What did they do wrong?

(5) The tribal police searched X's house under a warrant which was later held to be invalid because the police had lied to the judge regarding the circumstances supporting the finding of probable cause. During the illegal search, the police found narcotics belonging to Y, who did not live at the residence. Can this evidence be used against Y or is it also subject to exclusion as the fruit of the illegal search?

CHAPTER V. Juvenile Justice and the Indian Child Welfare Act

Section 1. Introduction (108-109)

Section 2. Juvenile Courts (109-124)

The major points to be discussed in this section are:

1) juvenile court function;

2) juvenile court jurisdiction; and

3) juvenile court procedure.

Section 3. The Indian Child Welfare Act of 1978 (124-150)

The major points to be discussed in this section are:

1) the background and purpose of the Act;

2) a presentation and explanation of the Act's statutory provisions; and

3) the procedural flow charts illustrating the Act.

CHAPTER VI. A Special Note About Alcoholism (150-151)

The problem of alcoholism and the critical lack of alcoholism treatment facilities on reservations should be discussed.

PART II

Criminal Procedure for Indian Courts

CHAPTER I. The Duties and Responsibilities of Tribal Judges

Section 1. The Role of the Judge (1-19)

The major points to be discussed in this section are:

1) the importance of the function of the judge;

2) the judge's relation to the community and the legal system; and

3) judicial selection, tenure, removal and discipline.

[Section 1] Questions (19)

(1) The law provides for a maximum fine of $100 for speeding violations and makes no provision for multiple offenses. Kim Maxwell has been convicted for speeding on five occasions. The judge wants to fine him $250 this time to teach him a lesson. Can he do it? Why or why not?

(2) Judge Thomas has a case before him involving an interpretation of the tribal law of disturbing the peace. Two years ago, before he became judge, the former judge had a case involving substantially the same facts and decided that the law did not apply. Should Judge Thomas follow that former decision? Why or why not?

(3) Judge Yellowtail decided a case some time ago requiring that the defendant pay the plaintiff $250 which was owed on a bad debt. The judge now discovers that none of the money has been paid. What are the judge's obligations on the case? Is it a judge's duty to find out if his judgments are being satisfied?

(4) Judge Williams has a case before his court which involves a section of the criminal code recently adopted by the tribal council. Some of the language can be interpreted two ways: one that would result inthe defendant's conviction, the other in his release. What should the judge do to properly interpret this law?

(5) In another jurisdiction they are having trouble selecting their judges. Over the years the judges have been appointed by the tribal council, but now the people object saying that the appointees have been relatives or friends of the council members and have not been competent judges. A citizens committee has asked your advice on methods of selection which might prove more effective. What would you suggest?

(6) When the new criminal code was adopted last year, Judge Jackson objected to a provision requiring a mandatory jail sentence for certain offenses. He contends that probation can be more effective in some cases. A defendant has been convicted of one of those offenses in Judge Jackson's court. Can the judge place him on probation?

(7) Two years ago Judge Bear interpreted a section of the criminal code in one way and convicted the defendant. He is convinced that he was wrong in his interpretation. Must he convict another defendant under the same circumstances or can he rule differently in this case.

Section 2. The Independence of the Judge (20-37)

The major points to be discussed in this section are:

1) the necessity for judicial independence;

2) recommendations to avoid conflicts of interest;

3) disqualification; and

4) relationships with parties and their attorneys.

[Section 2] Questions (37)

(1) Judge Jones has been asked by Joe Green, an old and trusted friend, to support his candidacy for Tribal Council. How much "support" can Judge Jones give to his old friend?

(2) Judge Smith used to be half owner of the Ford dealership in his local community, but he sold his interest when he became judge. Now Mr. Ray is suing the Ford dealership in the judge's court. Must the judge disqualify himself?

(3) Mr. Norbert is an old friend of Judge Smith. He has never been in trouble and has no business dealings. Can the judge accept a Christmas present from Mr. Norbert?

(4) Mr. Norbert has been sued by Mrs. Williams because she fell on his sidewalk and broke her arm. The case has been assigned to Judge Smith. Can the judge accept the Christmas present from Mr. Norbert?

(5) There are two judges in local court. The first cousin of one of the judges is being tried for drunk driving. Should the judge hear the case?

(6) The local chapter of the American Cancer Society has asked Judge Williams to be chairman of the annual fund drive in his community. Can he accept? Can he use court stationary to solicit donations?

(7) Judge Defoe wants to run for Council chairman, but doesn't think he will win. Can he continue to serve as judge until the election is over?

(8) Judge Lone Wolf wants to buy a ranch. He knows that Bill Smith is thinking about selling his ranch, but Smith is being sued in the judge's court. Can the judge still offer to buy the ranch?

Section 3. The Personal Qualities of the Judge (38-48)

The major points to be discussed in this section are:

1) judicial qualifications and competence;
2) judicial conduct;
3) courtesy in the courtroom;
4) impartiality; and
5) judicial courage.

[Section 3] Questions (48)

(1) A nearby tribal council is revising its procedures for the selection of judges. Because of your experience as a judge, they have asked you to help them by drawing up a list of qualifications which they can use in their selection process. What qualifications do you think are most important?

(2) James Bailey has just been selected as tribal judge for a local tribal court. While he finished two years of college, he has had no formal legal training. He has come to you for advice as to how he should prepare himself for judicial duty. What will you tell him?

(3) After retiring from the bench, Judge Bartlett was offered a job as assistant manager in the local supermarket. The judge had once been in the grocery business before assuming duties as judge. During the ten years that the judge was on the bench, the supermarket had been involved in court action to collect debts at least once every month. What should the judge consider in making his decision about accepting the job?

(4) The local banker has been charged with reckless driving in Judge Eagle's court. Before the trial the judge's wife becomes seriously sick and has to have an operation which will cost the judge a great deal of money. Can the judge go to the banker to get a loan? What problems might arise if he does?

(5) Your court budget includes expenses for such things as books, instructional magazines, and travel to Judge's meetings. Several members of the tribal council are interested in cutting down on expenditures. They feel that all a judge has to do is to listen to both sides of a case and make a decision. They do not like the idea of a judge studying on their money. What would you say in response to them?

Section 4. The Judge and the Court (49-59)

The major points to be discussed in this section are:

1) the facilities and stall for the court;
2) court rules;
3) judicial opinions; and
4) the concept of judicial immunity.

[Section 4] Questions (60)

(1) The court clerk in Judge Boudreau's court is the local gossip in town. The judge discovers that the clerk has been talking about cases which have not yet been decided and are still confidential to the court. What should he do?

(2) What are the reasons for having a set of rules of procedure for the court?

(3) Judge Bear has just decided a complicated case involving an automobile accident. He wants to give the reasons for his decision. What should he include in his opinion?

(4) Al Petri is a defendant in Judge Bross' court. The judge has disliked Al since he was a small boy and set fire to some papers in the judge's garage. The judge has a very strong feeling of revenge. Should he hear the case or disqualify himself?

(5) Judge Williams is a juvenile judge, but he issues an order requiring a defendant to pay a plaintiff some money. It turns out that the money was not due. Can the defendant sue the judge for taking his property?

(6) A tribal judge convicts and sentences a non-Indian when he knows of the case law that tribal courts do not have jurisdiction over non-Indians. Can he be sued for damages for false imprisonment?

Section 5. The Judge and Trial Proceedings (60-74)

The major points to be discussed in this section are:

1) the necessity for maintaining control and order in the court; and

2) the nature and function of the contempt power.

[Section 5] Questions (73-74)

(1) C. J. Brown is a young attorney who is representing a defendant charged with malicious destruction of property. He feels that the complaining witness is trying to frame his client. During cross examination of the witness, he continually brings up the witness's personal problems which have nothing to do with the case. The judge has repeatedly warned him not to mention these irrelevant matters, but he persists. What should the judge do?

(2) Robert Fishback has been charged with petty theft, and has plead not guilty. He is not represented by counsel. During his trial he becomes outraged at the testimony against him. Finally he jumps up and calls the policeman who is testifying against him a liar. What measures should the judge take? What should be done if the conduct persists?

(3) The trial of Alice Lame Deer has received a great deal of attention in the community, and the courtroom is filled as the trial begins. During several parts of the trial the noise level is so high that the jury has a difficult time hearing some of the witnesses. There is no particular group causing the disturbance. What can the judge do?

(4) The judge has told the young reporter from the radio station that no tape recorders are allowed in the courtroom during a trial. Following a trial at which the reporter was present, the judge turned on his radio and heard exerpts of the actual testimony from the trial that day. What should the judge do?

(5) The judge recently sentenced a juvenile for an extended term. The editor of the local paper wrote an editorial severely criticizing the judge and his sentencing practices. Can the judge charge the editor with contempt of court?

(6) During the course of a trial the mother of the defendant jumped from her seat in the gallery and shouted that the police were trying to frame her son. She then broke down sobbing. What should the judge do?

(7) After a trial the judge discovers that the father of the defendant tried unsuccessfully to bribe a juror. Should the father be charged with contempt of court? Suppose he is a non-Indian?

(8) Before the trial of a leading citizen charged with drunken driving, the judge received a telephone call from one of the members of the tribal council. The councilman tells the judge that if he wants to keep his job he had better find the defendant not guilty. Can the judge charge the councilman with contempt?

CHAPTER II - Trial Court Procedure

Section 1. General Principles (75-92)

The major points to be discussed in this section are:

1) courtroom arrangement;
2) a suggested law library;
3) Indian courts as "courts of record"; and
4) attorney and lay advocate admission requirements.

Section 2. The Duties of the Judge Before Trial (93-165)

The major points to be discussed in this section are:

1) the summoning, bail and arraignment procedures;
2) jury selection, control and responsibilities; and
3) the pretrial conference.

[Section 2] Questions - Arraignment Procedure (131-132)

(1) What is the nature and purpose of an arraignment?

(2) Why should a judge explain the effect of a guilty plea to a defendant?

(3) Does the Civil Rights Act of 1968 apply to arraignments or only to trials?

(4) Is a defendant entitled to an attorney at an arraignment? What if he cannot afford to pay for one?

(5) What action should the judge take if a defendant does not show up for arraignment? Would it make a difference if the judge saw the defendant that morning leaving on a fishing trip?

(6) Suppose the defendant pleads guilty and then appears to be lying when he tells the court about the circumstances of the offense. Can the tribal court call on additional witnesses to clarify the circumstances of the offense to aid the judge in imposing sentence?

(7) Tom White has just been charged with possession of stolen property, a watch that was found in a search of his car. He pleads guilty to the charge, but the judge thinks he is covering up for someone else. Does the judge have to accept Tom's plea?

[Section 2] Questions - The Judge and the Jury (162)

(1) The procedure in Judge Brown's court requires him to select the jury. In a trial for drunken driving the defense counsel has asked the judge to question whether the prospective jurors have ever received a traffic ticket. Should the judge include that with his question?

(2) The defendant is being tried for assault in a widely publicized and controversial trial. It is now time for lunch. Should the judge release the jury members to go to their homes for lunch? What other alternatives are open to him?

(3) The defendant's attorney has challenged a prospective juror for cause. He says that the juror has traded in the plaintiff's store and that he would therefore be prejudiced for the plaintiff. The case involves a bad debt. The plaintiff is owner of a large grocery store where over 60% of the community does its shopping. Should the judge remove the juror?

(4) During the course of the trial three of the jurors have been taking notes. When it comes time for the jury to retire to decide the case the prosecution objects to the jurors taking their notes to the jury room. How should the judge rule on the objection?

(5) During a trial for disorderly conduct Judge Franks permitted jurors to ask questions of the defendant. Without telling the judge in advance what the questions would be, they asked a total of 43 questions. The defense attorney objected to some of the questions but after receiving scowls from the jurors when his objections were sustained, he quit objecting. He now requests a new trial. How would you rule on his motion?

Section 3. The Duties of the Judge At Trial (166-195)

The major points to be discussed in this section are:

1) opening statement by the court and counsel;

2) the presentation of the prosecution case;

3) the presentation of the defense case;

4) the motion to dismiss; and

5) rebuttal and closing argument.

[Section 3] Questions (195)

(1) What basic information would a judge want to give the jury in introductory remarks at the beginning of the trial?

(2) What is the purpose of the opening statement?

(3) Why does the defendant's attorney often decline to make an opening statement prior to the prosecution's case, and reserve the opportunity to make such a statement at the beginning of defendant's case?

(4) What does it mean when the judge instructs the jury that their task is to find the facts and that they should ignore the arguments of counsel about questions of law?

(5) In the questioning of a witness, the prosecutor pointed to a map exhibit and commented about where the events of the alleged crime occurred. The defendant's attorney objected to the form of question asked by the prosecutor. The judge granted the defendant's objection and told the prosecutor to rephrase the question. State the question asked and tell why it was objectionable.

(6) When a witness was describing the defendant's actions he said that "she was drunk". The defendant's attorney objected to this testimony and the judge granted the objection and told the jury to ignore the statement. Why?

(7) On cross examination is it appropriate for an attorney to ask leading questions?

(8) Why would the defendant's attorney make a motion to dismiss the prosecution's case?

(9) The judge overruled the prosecutor's objection to testimony regarding the health of the defendant in saying that the testimony was "subject to connection" later. What did he mean by this?

(10) During closing argument the prosecutor (1) expresses his personal opinion that the defendant was lying and (2) says that the judge has clearly been prejudiced against the prosecution. The defense counsel objects to each of these statements. If you were the judge, how would you rule on the objection?

Section 4. The Duties of the Judge After Trial (196-210)

The major points to be discussed in this section are:

1) non-jury trial and jury trial verdicts;
2) sentencing procedure and sentencing alternatives; and
3) post-trial proceedings such as the right to appeal.

[Section 4] Questions (209-210)

(1) Why should the jurors be told not to discuss a verdict until it is announced in court where the verdict was reached late at night, written and sealed, and given to the foreman to open and read in court?

(2) Why should each member of the jury be polled by the court after the verdict has been delivered?

(3) In a criminal trial the judge becomes convinced that the jury did not follow an instruction on the law. Their verdict of guilty could only have been rendered by disregarding the judge's instructions. What should he do?

(4) The day after the trial in a criminal case two members of the jury approach the judge saying that they want to change their votes. They explain that they did not understand the instructions at the time they were given, but that they do now and therefore want to change their views. With the changed votes, the convicted defendant would be found innocent. What should the judge do?

(5) The defendant was acquitted of a charge of assault by a vote of 4-2. Two of the jurors later tell the judge that they were afraid of what the defendant might do to them if they found him guilty so they voted to acquit him even though they were sure he was guilty. They are not willing to change their votes. What should the judge do to the defendant? to the jurors?

(6) What are the purposes of sentencing?

(7) What is the purpose of the presentence investigation? Why should the judge not examine the presentence investigation until after a finding or plea of guilty?

(8) Why should the defendant be given an opportunity to explain his prior conduct or background presented in the presentence report?

(9) When might a judge want to defer sentencing and place a defendant on probation?

(10) What factors should a judge consider in imposing a fine on a defendant as punishment?

Section 5. Practice Non-Jury Trial (211-217)

Section 6. Practice Jury Trial (218-223)

CHAPTER III. Appellate Court Procedure and the Indian Civil Rights Act of 1968

Section 1. An Overview of Appellate Court Procedure (224-239)

The major points to be discussed in this section are:

1) the basic nature of and necessity for Indian appellate courts;

2) what can be appealed; and

3) the role of the court and counsel on appeal.

Section 2. Indian Appellate Court Function and the Indian Civil Rights Act (239-267)

The major points to be discussed in this section are:

1) the background and provisions of the Act; and

2) the landmark Santa Clara Pueblo v. Martinez case affecting equal protection and appellate review in Indian courts.

Section 3. How an Appellate Court Operates (268-275)

The physical setting and rules for appeal for the appellate court should be discussed.

[Section 3] Questions (275)

Consider the following rules which might be adopted by a tribal appellate court. These rules are not the only rules which such courts may establish, and are intended to be illustrative only. What is the purpose of each rule? Should it be adopted by your tribe/s appellate court?

(1) Appeals may be taken only from final judgments or final orders of the trial court.

(2) The appellate court will not consider appeals which involve allegations of error by the trial court which, even if proven, would constitute harmless error in the sense that such error did not affect the judgment of the trial court and would not change the result.

(3) The appellate court will not consider evidence which was not presented to the trial court, except that a new trial will be ordered if it can be shown that such evidence could not have been presented to the trial court even if the parties had exercised due diligence.

(4) In a nonjury case, the findings of fact made by the trial court will be accepted as the established facts in the case so long as they are supported by substantial evidence.

(5) Jury instructions which are challenged as erroneous must be set out in full in the brief of the appellant, even if only a part of them is alleged to be wrong; otherwise, the claim of error will not be considered by the appellate court.

(6) Only persons who were parties to the trial court action and who are aggrieved by that action may appeal to the appellate court.

(7) In civil actions, if a party aggrieved by a final order or judgment files notice of appeal, but dies before that appeal is prosecuted, then the heirs of such deceased party may prosecute the appeal.

(8) If, following notice of appeal and prior to oral argument in the appellate court, the parties to the action stipulate that they agree to a dismissal of the appeal, the appellate court may order the appeal dismissed.

(9) The appellate court must decide each case it hears by written opinion, giving reasons for its decision.

(10) The appellate court must decide and publish its written opinion in each case within 60 days of the date the oral arguments were heard.

Section 4. Preparing the Record for Appeal (276-282)

The preparation, substance, and certification of the record should be discussed.

[Section 4] Questions (282)

(1) Describe the steps involved in bringing a trial record before an appellate court.

(2) What may be included in a record on appeal? For example, can an appellate record include testimony that was not presented to the trial court?

(3) What is a "transcript"?

(4) Who pays the cost of preparing a record on appeal?

(5) How can an appellate court be sure that the record brought before it is authentic?

Section 5. Briefs on Appeal (283-307)

The nature and substance of an appellate brief should be discussed and the illustrative brief examined.

[Section 5] Questions (304 - 305)

(1) Do you think it is a good idea for Indian appellate courts to require written briefs on appeal? Explain.

(2) Briefly describe the purpose and content of
(a) an appellant's brief;

(b) a respondent's brief.

(3) What is the primary exception to the rule that arguments not raised in briefs will not be considered by an appellate court?

(4) What should an appellate court do if
(a) the appellant fails to file a brief:

(b) the respondent fails to file a brief?

(5) What is the purpose of a "reply brief"?

(6) What is a "statement of additional authority"?

Section 6. How Judges Can Use Oral Argument (308 - 316)

The nature and format of oral argument should be discussed.

[Section 6] Questions (316)

(1) Oral argument is described in this section as the "fourth basic step in an appeal". As a matter of review, what are the first three steps in an appeal.

(2) (a) Do you think is it a good idea to limit the amount of time each party has in which to present his oral argument to an appellate court?

(b) What time limit for oral argument would you suggest?

(3) Describe the limitations which an appellate court should place on the content of oral arguments.

(4) What should an appellate judge do if one or both parties to an appeal fail to appear for oral argument?

(5) What is a "prehearing memorandum"?

Section 7. Remedies on Appeal (317 - 322)

The basis remedies on appeal of affirming, reversing, or modifying the judgment should be discussed.

[Section 7] Questions (322)

(1) What is "substantial evidence"?

(2) Suppose an appellate court reviews all of the evidence in a case and concludes the trial judge's findings, although supported by substantial evidence, are wrong. What can the appellate court do?

(3) What happens if an obviously guilty defendant is acquitted by a trial jury because the tribal prosecutor did a bad job in presenting the evidence? What can an appellate court do in such a case?

(4) Explain what is meant by "double jeopardy".

Section 8. How to Write an Appellate Court Opinion

The process of writing an appellate court opinion should be discussed and the sample opinion should be examined.

[Section 8] Questions (338)

(1) In the sample opinion, State v. Cornell, you will notice that notes summarizing the main points in the opinion have been printed ahead of the actual opinion. These are called "headnotes". Do you think they make the opinion more understandable? What other purpose do they serve?

(2) In opinion writing, what is the purpose of the opening sentence?

(3) (a) When writing an opinion, should an appellate judge include every fact relevant to the issues on appeal in his factual statement? Explain.

(b) In the factual statement, the appellate judge summarizes what the case is about. What else should be included in the factual statement?

(4) Why should an appellate judge include in his opinion brief summaries of the arguments raised on appeal? Why shouldn't he just state which argument he believes to be correct, and exclude all of the others?

(5) How does an appellate judge find out what the "law" is?

(6) What is a "holding"?

END