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## 6 Tips For Litigating In Native American Tribal Courts

By Andrew Westney

Law360, New York (April 17, 2015, 4:43 PM EDT) -- With hundreds of federally recognized Native American tribes, each with its own dispute resolution process, navigating tribal courts can be a tricky business for the unwary or the overly confident, experts say.

Tribal legal proceedings take on myriad forms, ranging from intricate processes that resemble the workings of federal and state courts to more informal reviews before a tribe's governing council.

"The first thing you need to know is you don't know anything," said Shannon Keller O'Loughlin, a Lewis Brisbois Bisgaard & Smith LLP partner. "And don't assume because you worked in one tribal court that you know how another tribal court will operate."

Any successful approach to litigating in a tribal court will start with a healthy respect for the individual tribe's perspective, practices and principles, attorneys say. Here are six more tips for lawyers litigating in tribal court:

### Know Each Court's Law

Every tribe as a sovereign nation will have its own law, and getting a grip on a tribe's decisions and statutes is the first major challenge to be addressed, lawyers say.

"Anybody arguing in tribal court will want to know what the tribe's highest court has said in the matter," Holland & Knight LLP partner James T. Meggesto said. "And by the same token, depending on how their tribal code might be published, the code, ordinances and legislative body of law needs to get reviewed."

Some tribal systems draw heavily on federal and state law, while others have tried to streamline their process, particularly in terms of procedures to make filing litigation less of a daunting task. Unfamiliar procedural rules can be as likely to trip up an attorney as the tribe's substantive law, Meggesto said.

But not everything a lawyer needs to study may be readily available, so tribal court staff, attorneys with experience in a particular tribe's court, and online resources like the Native American Rights Fund's Tribal Law Gateway can prove valuable resources, lawyers say.

When it comes to gaining familiarity with a tribal court's ways, there may be no substitute for the hands-on approach, O'Loughlin said.

"Oftentimes the best way to understand what is required out of a certain tribal court or adjudicatory body is to be on the ground, talk to people who have the experience and

"There are some cases so harmful for Indian Country that you don't want to give them more power than they already have if you have an Indian client," O'Loughlin said.

### **Slow Your Roll ...**

Attorneys may have to adjust their expectations, such as by recognizing that a big reputation in other forums might not cut much ice in tribal court.

"If you're a high-dollar practitioner, don't go in there throwing your weight around," Ortego said. "The court's not going to be impressed, and neither will anybody else."

Many attorneys accustomed to federal and state courts make the mistake of believing that a constitutionally based system with a strict separation of powers is the best or the only way to conduct a court system, Durocher said.

"That's a recipe for disaster," Durocher said. "You shouldn't go in with those presumptions. Each tribe is a sovereign nation and can set things up any darned way they want."

A tribal council may also serve as the supreme appellate body for a given tribe, which could go against an attorney's notion of fairness if a tribal ordinance is brought into court, Durocher said.

However differently the court may operate, it's important to treat it with respect, he said.

"The tribal system in place has been vetted with the tribe, with the people. It's how they've chosen to govern themselves," Durocher said.

### **... But Prepare For Speed**

Tribal court judges will often be more actively engaged than attorneys are used to judges being, especially at the trial level, Meggesto said.

"For the most part, the benches are going to be hot," Meggesto said. "In a tribal court system, they're going to be more active, know the nuances of a decision. They're not necessarily in session every day. They get prepped to hear a case, and they're going to want to explore the nuances of the litigants' positions."

And tribal courts tend to turn decisions around much more speedily than federal and state courts — a selling point tribes can use with non-Indian companies, which may be leery of entering tribal courts, Meggesto said.

"One of the things they have done a great job of in recent years as they've gotten more sophisticated in business dealings is explaining that it's a bargain choice of forum in contracts and other sophisticated transactions," Meggesto said.

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expertise of working with that body," O'Loughlin said.

### **Make Sure You Get In**

Requirements to be admitted to court vary from tribe to tribe, so it isn't safe to take the authorization to appear for granted, lawyers said.

"Some tribes will let you get waived in pro hac vice or because you're a member of the bar from a particular state or other tribal court, but certainly nobody should assume because they are a barred attorney in that state that they can nonetheless practice in a tribe's courts in that state," Meggesto said.

The barrier to admission can be as taxing to traverse as taking a tribal bar exam or much more simple, depending on the tribe, Dorsey & Whitney LLP partner Skip Durocher said.

"There are some tribes where you basically say, 'I've read the rules, and here's your 25 bucks,' and there are tribes that require you to disclose why you want to be admitted," Durocher said.

### **Seek the Advice of Elders**

Lawyers coming to tribal court may not realize that for many tribes, their customs and traditions constitute the superior law of the tribe. That means the foremost authorities on a tribal court may not be attorneys, lawyers said.

"You want to make sure you have some elders or tribal spiritual leaders who can advise you as to what the customs and traditions are and maybe even be willing to testify," said Peter Ortego, general counsel for Ute Mountain Tribe. "I think tribes would like to see that more often, and practitioners don't even think about it."

In many cases, customs and traditions aren't written down, so elders may not just be the best, but potentially the only, authority, Ortego said.

Elders may also serve as tribal court judges, and while they may or may not have legal training, they've been chosen for their ability to resolve disputes, Durocher said.

"You want to make sure you're discussing legal issues at a level that makes sense to them, but at the same time you don't want to talk down to them, and you want to see things from their perspective, a tribal perspective," Durocher said.

### **Watch What You Cite**

Principles often predominate with tribes, and care should be taken during litigation not to refer to a case in order to score a quick point that otherwise is seen as a bad ruling for Native Americans, lawyers say.

"You never know what particular case might cut a little deeply for that particular tribe," Meggesto said. "There might be a case on point that might help your client, but citing it might otherwise be offensive."

For example, a tribe arguing for sovereign immunity against another tribe might be damaging its own sovereignty, O'Loughlin said.

The broader implications of certain cases make them essentially off-limits, O'Loughlin said, pointing as an example to the U.S. Supreme Court's 2005 decision in *City of Sherrill v. Oneida Indian Nation*, which held that the nation couldn't regain sovereignty over its ancient lands by repurchasing them on the open market.

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