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## A Streamlined Model of Tribal Appellate Court Rules for Lay Advocates and Pro Se Litigants

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# A Streamlined Model of Tribal Appellate Court Rules for Lay Advocates and Pro Se Litigants

## **Cover Page Footnote**

Gregory D. Smith, [J.D., Cumberland School of Law, 1988; B.S., Middle Tennessee State University, 1985; Special Courts Certification, National Judicial College, 2014], is a Justice on the Pawnee Nation Supreme Court in Oklahoma and the Alternate Judge on the Gila River Indian Community Court of Appeals in Arizona. Each court is the highest appellate court in their respective tribal nations. Both positions are part-time judgeships. Mr. Smith also has a law practice in Clarksville, Tennessee and is the part-time municipal judge for Pleasant View, Tennessee. Judge Smith has presented between 650–700 appeals for courts all over the United States. He is a former president of the Tennessee Municipal Judges Association and served on the Tennessee Court of the Judiciary from 2004–2009. In 2013, he wrote the Tennessee Municipal Judges Benchbook for the Tennessee Administrative Office of Courts. In 2012, Judge Smith compiled and edited the Tennessee Judicial Ethics Opinions Handbook for the Tennessee Judiciary. Judge Smith has also acted as a special adjunct professor at the Cumberland School of Law at Samford University in Birmingham, Alabama and as an adjunct professor in the field of law at Austin Peay State University in Clarksville, Tennessee. In March 2015, he was inducted into the National Trial Lawyers’ “Top 100” Attorneys for the field of Criminal Law and is regularly included in Who’s Who in American Law. The proposals made in this article reflect the author’s own personal opinions and do not speak as official positions for any of the above named courts.

A STREAMLINED MODEL OF TRIBAL APPELLATE COURT  
RULES FOR LAY ADVOCATES AND *PRO SE* LITIGANTS

Gregory D. Smith\*

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INTRODUCTION

Native Americans, called “Indians” in the United States Code,<sup>1</sup> are a proud people that often carry a burden filled with economic disadvantages, limited access to advanced education, and a justifiable distrust of governmental entities such as courts. From

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<sup>1</sup> See, e.g., 25 U.S.C. §§ 479, 1603(c) (2015).

my experience as an Indian tribal appellate judge, I see Indian litigants struggle with the appellate process where the language is foreign, the court is aloof, and the procedure is intimidating.<sup>2</sup> This is the reason that simple rules for appellate procedure are needed. Tribal courts regularly see *pro se* litigants or lay advocates (non-lawyers representing litigants). Lack of funding, limited access to law-trained counsel, and a perception of “litigation by incantation” demand a modification of appellate rules for non-lawyer litigants. This Article addresses some of these problems by proposing rules, giving examples of how an appeal brief should look, and defining key terms the non-lawyer will encounter during the tribal court appeals process.

As of October 14, 2015, there are 566 federally recognized Indian tribes in the United States.<sup>3</sup> Approximately 300 of these tribes have some version of a tribal court system.<sup>4</sup> Federal law does not require the implementation of a formal tribal appellate court, but many tribes are embracing this idea.<sup>5</sup> Currently, over 150 Indian tribes have formal appellate courts.<sup>6</sup> Tribal courts face challenges similar to most governmental bodies such as inadequate funding.<sup>7</sup> Other challenges are unique to tribal courts such as cases

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<sup>2</sup> I have presided over the trial level of Indian litigation and encountered similar Due Process concerns. While the effort to effectively present cases clearly exists with lay advocates and *pro se* litigants, issues such as evidentiary rules hamper tribal courts where a non-lawyer prosecutor is presenting a case. *Cf.*, *Northwest Collections v. Pichette*, No. AP-93-077-CV, 1995 Mont. Salish & Kootenai Tribe LEXIS 4, at \*10 (Confederated Salish & Kootenai Tribes Ct. App. Feb. 3, 1995) (discussing *pro se* litigants generally); *Baker v. Spirit Mountain Casino*, No. C-00-03-003, 2000 Grand Ronde Trib. LEXIS 10, at \*6 (Confederated Tribes of the Grand Ronde Community of Or. Tribal Ct. Sept. 28, 2000).

<sup>3</sup> Indian Entities Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs, 80 Fed. Reg. 9, 1943 (Jan. 14, 2015), <http://www.bia.gov/cs/groups/webteam/documents/document/idc1-029026.pdf>, (last visited October 23, 2015).

<sup>4</sup> Eugene R. Fidell, *An American Indian Supreme Court*, 2 AM. INDIAN L.J. 1, 2 (Fall 2013).

<sup>5</sup> WILLIAM C. CANBY, JR., *AMERICAN INDIAN LAW IN A NUTSHELL* 71–71 (5th ed. 2009). *See also*, STEPHEN L. PEVAR, *THE RIGHTS OF INDIANS AND TRIBES* 90 (2012).

<sup>6</sup> *See Tribal Courts and the Administration of Justice in Indian Country: Hearing on S. 110-576 Before the S. comm. On Indian Affairs*, 110th Cong., 1 (2008), available at <https://www.gpo.gov/fdsys/pkg/CHRG-110shrg45126/html/CHRG-110shrg45126.htm>.

<sup>7</sup> U.S. COMM’N ON CIVIL RIGHTS, *A QUIET CRISIS: FEDERAL FUNDING AND UNMET NEEDS IN INDIAN COUNTRY* (July 2003), <http://www.usccr.gov/pubs/na0703/na0204.pdf>.

regularly argued by either *pro se* or lay advocates who represent litigants without the benefit of formal law school training. Simple rules of appellate procedure for *pro se* litigants and lay advocates can make the “wheels of justice” turn smoothly. This Article proposes a streamlined model of tribal court appellate rules for *pro se* litigants and lay advocates. Simple rules protect the limited economic resources of the litigant and the court, and ensure access to justice for a client population that may not be able to afford a lawyer or fully understand the appellate process. As noted by the U.S. Supreme Court, the government “wins its point whenever justice is done its citizens in the courts.”<sup>8</sup> These proposed rules are a step towards offering justice to all litigants coming before a tribal appellate court.

The most glaring difference between the tribal court system and the state and federal court systems is that tribal courts often have lay advocates and/or a higher percentage of *pro se* litigation.<sup>9</sup> Lay advocates did the bulk of criminal defense work in tribal courts prior to the Tribal Law and Order Act (TLOA). TLOA mandates licensed attorneys provide criminal defense to indigents if sentences are enhanced to felony status.<sup>10</sup> However, TLOA, a recent amendment to the Indian Civil Rights Act (ICRA), does not promise appointed legal counsel in civil cases or petty level criminal matters.<sup>11</sup> It only promises the right of a litigant to retain legal counsel in those scenarios.<sup>12</sup> As the National Judicial College’s National Tribal Judicial Center recently declared:

While there are many ways tribal courts may differ  
from their state counterparts, one truly unique

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<sup>8</sup> *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

<sup>9</sup> *See, e.g., In re Elias L.*, 767 N.W.2d 98, 103–04 (Neb. 2009).

<sup>10</sup> Thais-Lyn Trayer, *Elementary Unfairness: Federal Recidivism Statutes and the Gap in Indigent American Indian Defendants Sixth Amendment Right to Counsel*, 63 AM. U.L. REV. 219, 244–45 (Oct. 2013); *accord*, *Crow Tribe v. Bull Tail*, NO. 00-479, 00-480, 00-481, 2000 Mont. Crow Tribe LEXIS 6, at \*20 (Crow Ct. App. Oct. 12, 2000) (single lay advocate handling an average of 100 new criminal cases per month).

<sup>11</sup> *Id.*

<sup>12</sup> *See, e.g., United States v. Mitchell*, 502 F.3d 931, 960 n.3 (9th Cir. 2007).

aspect of tribal justice systems is the use of lay advocates.<sup>13</sup>

This Article proposes a streamlined model of tribal appellate court rules for lay advocates and *pro se* litigants. The proposed rules are intended as a supplement to pre-existing formal appellate rules that apply a “level playing field” to all litigants, irrespective of whether or not an attorney is involved. Small or new tribal appeals courts can also use these model rules. Jurisdictions using formal appellate rules with terms designed to instruct lawyers often confuse *pro se* litigants. Therefore, a simplified format is easier for the non-lawyer to apply when presenting an appeal.

Part I provides a general background to tribal courts. Part II expands on the information provided in Part I and discusses the tribal appellate court system. Part III discusses how *pro se* litigants and lay advocates engage with the tribal court system. Finally, Part IV argues the need for simplified forms of rules to ensure that litigants and advocates provide adequate legal assistance. The model rules are attached to the end of this article as Example 1, which includes forms and a model brief. Attached Example 2 is a model resolution establishing a tribal supreme court.<sup>14</sup>

## I. BACKGROUND

The U.S. Constitution is not automatically controlling in tribal courts, unlike federal and state courts, since tribes are generally controlled by their own constitution<sup>15</sup> Federally recognized tribes are quasi-independent nations existing inside the geographic

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<sup>13</sup> 2015 *Courses for Lay Advocates and Non-Attorney Prosecutors*, CASE IN POINT 2014-15, 33 (2015), available at [http://issuu.com/njcmag/docs/case\\_in\\_point\\_2014-2015](http://issuu.com/njcmag/docs/case_in_point_2014-2015).

<sup>14</sup> These Examples can be modified or expanded as a tribe’s experience dictates once several *pro se* appeals are completed and after the new rules are implemented. Unnecessary or inapplicable portions of the proposed rules can be simply discarded as different tribes mold the rules to each tribe’s unique circumstances.

<sup>15</sup> *Hester v. Redwood County*, 885 F. Supp. 2d 934, 939 (D. Minn. 2012). See also *Wasson v. Pyramid Lake Paiute Tribe*, 782 F. Supp. 2d 1144, 1147 (D. Nev. 2011) (citing *Worcester v. Georgia*, 31 U.S. 515, 559 (1832)); *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831); *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903).

boundaries of the United States.<sup>16</sup> That being said, “most tribal law and order codes contain provisions that provide that if the tribal code does not address a matter, the court is to look to federal law guidance and then to the tribe’s customs and traditions.”<sup>17</sup> Interestingly, much, but not all, of the U.S. Constitution’s Bill of Rights applies to tribal courts.<sup>18</sup> The Due Process responsibility of tribal judges assures that tribal courts offer fundamental fairness to all litigants,<sup>19</sup> which requires that litigants actually understand the rules of appellate procedure that they are expected to follow when presenting an appeal. Plato said “[t]o do injustice is more disgraceful than to suffer it.”<sup>20</sup> To expect a litigant to follow a set of rules the litigant does not understand is both illogical and unfair. These proposed rules of tribal appellate procedure attempt to offer the rules in simple terms.

American courts usually consider tribal appellate court decisions related to the tribe’s own constitution as conclusive, just like state supreme court rulings are generally conclusive on the interpretation of a state constitution.<sup>21</sup> Likewise, a tribal court’s determination of its own laws receives deference from American federal courts, but a tribal court’s opinions related to interpreting

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<sup>16</sup> Ronald EagleEye Johnny, *Practicing Tribal and Indian Law Along Highway 50*, 5 NEV. LAW. 15, 17 (Jun., 1997) (citing *Talton v. Mayes*, 163 U.S. 376, 383–85 (1896) (holding that Native Americans are considered semi-independent nations that are both Native American as well as U.S. citizens)) *accord* *Plains Commerce Bank v. Long Family Land and Cattle, Co.*, 554 U.S. 316, 337 (2008).

<sup>17</sup> Bill Kockenmeister, *Tribal Courts in Nevada Alive and Well*, 19 NEV. LAW. 26, 28 (Aug. 2011); *accord* *Walker v. Hualapai Tribe*, No. 2005-AP-009, 2007 Hualapai App. LEXIS 1, at \*2 (Hualapai Nation Ct. App. July 23, 2007).

<sup>18</sup> *Id.* (citing the Indian Civil Rights Act, 25 U.S.C. §§ 1301–1341 (2010)); *accord* CANBY, *supra* note 5, at 405–06 (pointing out that the ICRA applies to both Indian and non-Indian litigants in tribal courts).

<sup>19</sup> *Powless v. McLester*, No. 96-EP-0005, 1996 Oneida App. LEXIS 42, at \*8 (Oneida Appeals Comm’n App. Ct. Aug. 27, 1996); *see also* Gordon K. Wright, *Recognition of Tribal Decision in State Courts*, 37 STAN. L. REV. 1397, 1423 (May 1985).

<sup>20</sup> *Quotable Quotes*, READER’S DIGEST (May 1992).

<sup>21</sup> *Prescott v. Little Six, Inc.*, 387 F.3d 753, 756 (8th Cir. 2004); *see also In re Marriage of Limpy*, 636 P.2d 266, 269 (Mont. 1981), *rev’d* on other grounds; *Colombe v. Redbud Sioux Tribe*, 835 F. Supp. 736, 752 (D. S.D. 2012). *Cf.* *Miller v. State*, 584 S.W.2d 758, 760 (Tenn. 1979) (ruling that state supreme courts are final arbiters of state constitutions).

U.S. federal law is reviewed *de novo*.<sup>22</sup> The general rule of thumb is that tribal law/ordinance matters should be determined by tribal courts and those decisions normally enjoy full faith and credit from state and federal courts.<sup>23</sup> A litigant's distrust of a tribal court's honesty or their doubt regarding a tribal judge's competency is not a valid reason to discount the authority of a tribal court.<sup>24</sup>

Unless a tribal court lacks subject matter jurisdiction, the tribal court's decision normally cannot be re-litigated in non-tribal courts.<sup>25</sup> This point is important because collateral attacks on a judgment, such as a post-conviction ineffective assistance of counsel claim, do not generally apply to *pro se* litigants.<sup>26</sup> Further, the theory of *res judicata* applies to tribal court decisions that become final irrespective of whether an attorney represented a party in the lawsuit.<sup>27</sup> These proposed rules discussed in this Article include: A) term definitions; B) briefing formats; and C) general information that can guide *pro se* litigants and lay advocates through the appellate maze. These rules follow the common trend in courts to forego legal jargon and "trial by incantation" for plain English rules that can be easily understood by a participant in a trial or appeal.<sup>28</sup>

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<sup>22</sup> *Duncan Energy v. Three Affiliated Tribes*, 27 F.3d 1294, 1300 (8th Cir. 1994); *see also Prescott*, 387 F.3d at 756.

<sup>23</sup> *Nevada v. Hicks*, 533 U.S. 353, 362 (2001); *Glover v. United States*, 219 F. Supp. 19, 22 (D. Mont. 1963). This is sometimes referred to as the Indian-abstention doctrine. *See, e.g., Aliza Organick & Tonya Kowalski, From Conflict to Cooperation: State and Tribal Court Relations in the Era of Self-Determination*, 45 CT. REV. 48, 50 (2009); *accord In re Tsosie*, No. CH-CV-205-81, 1981 Navajo Dist. LEXIS 2, at \*8-11 (Navajo Nation Dist. Ct. Nov. 19, 1981).

<sup>24</sup> *Smith v. Babbitt*, 875 F. Supp. 1353, 1367 n.13 (D. Minn. 1995). In many respects, Native Americans were ahead of Caucasians in many legal aspects such as civil rights. *See, e.g., Quintard Taylor, African American Men in the American West, 1528-1990*, 569 *Annals* 102, 107 (May 2000) (discussing Chief Justice Jesse Franklin, an adopted African-American freeman, who was elected Chief Justice of the Creek Nation Supreme Court in 1876).

<sup>25</sup> *In re J.M.*, 718 P.2d 150, 154 n.3 (Alaska 1986).

<sup>26</sup> *Faretta v. California*, 422 U.S. 806, 834 n.46 (1975).

<sup>27</sup> *Miller v. Wright*, 705 F.3d 919, 928 (9th Cir. 2013).

<sup>28</sup> *See, Harmon v. Stale*, No. A-10828, 5839, 2012 Alas. App. LEXIS 78, at \*19-22 (Alaska Ct. App. May 2, 2012) (Mannheimer, J., concurring) (mem.).

## II. TRIBAL APPELLATE COURTS

Tribal courts vary greatly in jurisdiction, focus and authority.<sup>29</sup> One tribal judge described the diversity of tribal courts as follows:

The old adage “If you’ve seen one you’ve seen them all” certainly does not pertain to tribal courts. . . . Some courtrooms are set up to look like a courtroom in state court; other tribes hold court in small rooms in the tribal headquarters. Some tribal courts are in session on a daily basis, some weekly or bi-weekly, some monthly, and some on an intermittent basis. A few tribal courts employ licensed attorneys as full-time prosecutors and provide for the appointment of counsel for indigents . . . . These tribal courts are very much like state courts. Other tribal courts employ prosecutors and advocates with minimal legal training. Some courts do not provide advocates in any matters.<sup>30</sup>

The appellate division of the Native American tribal court system is just as varied.

Tribal appellate courts are usually called supreme courts or courts of appeal. They are usually courts of last resort for their respective tribal nations.<sup>31</sup> Tribal appellate courts usually have three,<sup>32</sup> five,<sup>33</sup> or seven justices.<sup>34</sup> The age of tribal supreme courts

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<sup>29</sup> See generally, Patty D. Cafferata, *A Quick Guide to Nevada’s Tribal Courts*, 19 NEV. LAW. 8 (Aug. 2011). Nevada tribal courts offer an example of just how diverse tribal courts are in America. Nevada tribal courts range from inactive, to traffic, to very sophisticated. Some tribal courts have elected law-trained judges while other tribal courts conduct business with non-lawyer judges and no prosecutors. Before one automatically discounts a non-lawyer judge as unworthy of a robe, one should remember that forty-seven (47) of 112 U.S. Supreme Court Justices had no formal law school training. See, HENRY JULIAN ABRAHAM, JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF THE U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO BUSH II 49 (5th ed. 2007).

<sup>30</sup> Kockenmeister, *supra* note 17.

<sup>31</sup> See, e.g., Navajo Nation DOJ v. Begay, No. SC-CV-26-10, 2010 Navajo Sup. LEXIS 13, at \*1–2 (Navajo Nation Sup. Ct. June 17, 2010); Chitimacha Housing Auth. v. Lightell, No. CV-93-0005, 1994 Chitimacha App. LEXIS 1, at \*26 (Chitimacha Indian Tribal Ct. App. Sept. 01, 1994); Colville Tribal Enter. Crop. v. Orr, No. AP98-008, 1998 Colville App. LEXIS 11, at \*1–2 n.1 (Colville Confederated Tribes Ct. App. Dec. 04, 1998).

<sup>32</sup> See, e.g., POARCH BAND OF CREEK INDIANS CODE § 3-4-1.

<sup>33</sup> See, e.g., Cherokee Nation CONST. art. VIII § 1; Pawnee Nation of Oklahoma CONST. art. IX § 1.

range from nearly two centuries old, like the Cherokee Supreme Court,<sup>35</sup> to tribal supreme courts that are barely two years old, like the Mashpee Wampanoag Supreme Court.<sup>36</sup> Probably the most complex and evolved tribal court system in North America belongs to the Navajo tribe, which addresses 45,000 cases per year on the trial level, has a published multi-volume code, and a formal published appellate reporter service.<sup>37</sup> Some tribes enter into inter-tribe appellate brokerage panel agreements that handle appeals from multiple tribes such as the Southwest Intertribal Court of Appeals<sup>38</sup> or the Inter-Tribal Council of Nevada.<sup>39</sup> There is little guidance for lay advocates or *pro se* litigants who present tribal appeals. The fact that most tribal court systems are underfunded and access to affordable legal representation is often impossible, mandates that the appellate process be made as simple as possible for *pro se* litigants and lay advocates. The rules proposed in this Article offer a solution.

### III. PRO SE AND LAY ADVOCATE APPEALS

A *pro se* appeal is an appeal being presented by the litigant herself, without the guidance of a lawyer. A lay advocate is a non-lawyer who does not have a law license, but is allowed in the tribal court system to represent clients. *Pro se* litigation is often

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<sup>34</sup> See, e.g., MUSCOGEE (CREEK) NATION, <http://creeksupremecourt.com>, (last visited October 23, 2015).

<sup>35</sup> J. Matthew Martin, *The Nature and Extent of the Exercise of Criminal Jurisdiction by the Cherokee Supreme Court: 1823-1835*, 32 N.C. CENT. L. REV. 27, 50–51 (2009).

<sup>36</sup> George Brennan, *Historic Ruling for Mashpee Wampanoag Tribal Court*, CAPE COD TIMES (Sept. 9, 2013), [www.mwtribejudicial.com/content/pages/4/Historic-ruling-for-Mashpee-Wampanoag-tribal-court.pdf](http://www.mwtribejudicial.com/content/pages/4/Historic-ruling-for-Mashpee-Wampanoag-tribal-court.pdf). The Mashpee Wampanoag tribe is an example of a long-term state recognized Native American tribe that was not recognized federally by the Bureau of Indian Affairs (BIA) until 2007. The state, but not the BIA recognizes other tribes, such as the Southern Cherokee Nation of Kentucky. See, *History and Stories*, CHEROKEE NATION OF KENTUCKY, <http://www.southerncherokeenationky.com/historystories> (last visited October 23, 2015). Other tribes that have a tribal court system in place are not federally or state recognized. See, e.g., INDIAN CREEK TRIBE CHIKAMUAGA CHEROKEE, <http://www.chickamaugacherokee.org>.

<sup>37</sup> See PEVAR, *supra* note 5, at 89.

<sup>38</sup> See Christine Zuni, *The Southwest Intertribal Court of Appeals*, 24 N.M. L. REV. 309, 312 (Sept. 1994).

<sup>39</sup> INTER-TRIBAL COUNCIL OF NEVADA, [www.itcnca.org](http://www.itcnca.org). (last visited October 23, 2015).

cumbersome on the court and baffling to the *pro se* litigant. There is very little literature available to guide the inexperienced *pro se* presenter through the appellate maze. Probably the best-known *pro se* appeal in American history is Clarence Earl Gideon. Gideon, who had an eighth grade education, wrote a letter to the U.S. Supreme Court in 1961 that eventually led to the Court accepting his case, and future U.S. Supreme Court Justice Abe Fortas presented Gideon's appeal.<sup>40</sup> Clarence Earl Gideon represented himself at his jury trial and Florida state appeal.<sup>41</sup> This case eventually made U.S. Supreme Court history by a finding that indigents in state criminal trials have a Sixth Amendment of the U.S. Constitution right to appointed counsel.<sup>42</sup> The U.S. Supreme Court reversed Gideon's conviction and ordered a retrial.<sup>43</sup> After counsel was appointed, Clarence Earl Gideon was acquitted of all charges on retrial.<sup>44</sup>

Unfortunately, few indigents enjoy the appointment of a future U.S. Supreme Court justice to take over their indigent *pro se* appeal. More often, the tribal member who wishes to appeal a tribal court ruling must act alone or through a lay advocate. Lay advocates usually have limited education, perhaps only a high school diploma or an on-line paralegal degree.<sup>45</sup> This causes Due Process and fundamental fairness concerns because *pro se* and lay advocates are held to the same legal presentation standards in tribal courts as are expected of attorneys.<sup>46</sup> Some *pro se* or lay advocate

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<sup>40</sup> David J. Shestokas, *Gideon v. Wainwright, 50 Years Later, Did Clarence Gideon Write His Own Appeal? Part 1*, SHESTOKAS, (Feb. 6, 2013), <http://www.shestokas.com/constitution-and-its-people/gideon-v-wainwright-50-years-later-did-clarence-gideon-write-his-appeal-part-1/> (last visited October 23, 2015).

<sup>41</sup> *Gideon v. Wainwright*, 372 U.S. 335, 336–38 (1963).

<sup>42</sup> *Id.* at 344–45.

<sup>43</sup> *Id.* at 345.

<sup>44</sup> Shestokas, *supra* note 42.

<sup>45</sup> Frank Pommersheim, *Looking Forward and Looking Back: The Promise and Potential of a Sioux Nation Judicial Support Center and Sioux Nation Supreme Court*, 34 ARIZ. ST. L.J. 269, 294 (Spring 2002). Likewise, many tribal court judges are/were non-lawyers. See Matthew L.M. Fletcher, *Indian Courts and Fundamental Fairness: Indian Courts and the Future Revisited*, 84 U. COLO. L. REV. 59, 66 n.27 (Winter 2013); See also *In re* CLB 0201, No. 02-01, 2002 Mont. Crown Tribe LEXIS 3, at \*6–7 (Crow Ct. App. Mar. 05, 2002).

<sup>46</sup> *Henderson v. Navajo Bd. of Election Supervisors*, No. SC-CV-67-98, 1998 Navajo Sup. LEXIS 13, at \*5 (Navajo Nation Sup. Ct. Oct. 22, 1998). *But see* *Red Boy v. Fort Peck Tribes*, No. 285, 1999 Mont. Fort Peck Tribe LEXIS 6, at

appeal presentations are strong, but a majority of presentations by litigants are weak, rambling, and guarantee failure on appeal because appellate rules are not followed.

This Article is focused on tribal court litigants receiving a fair trial, whether a litigant is acting *pro se*, represented by a licensed attorney, or proceeding with a lay advocate. As the U.S. Commission on Civil Rights explained “lay advocates are usually tribal members who represent other members in tribal court for a small fee.”<sup>47</sup> Some lay advocates are very good at their jobs, degree or no degree, while other lay advocates have not even graduated from high school and their representation may be well-intentioned, but lack quality.<sup>48</sup> While “lay advocates play a critical role in ensuring that tribal members have access to the tribal justice system,”<sup>49</sup> the issue at hand is a defendant’s Due Process right to a fair trial.<sup>50</sup> Concern exists over the fact that lay advocates may not be able to meet Due Process muster under the Indian Civil Rights Act because ineffective assistance of counsel does not apply to lay advocates.<sup>51</sup> Therefore, even though over half of the Native American tribal courts allow for the appointment of counsel, or a lay advocate, to indigents facing criminal charges, that offer does not necessarily guarantee Due Process and fundamental fairness to

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\*16–17 (Fort Peck Tribe Ct. App. July 19, 1999) (DeCosteau, J., dissenting); *Cottrell v. Oneida Human Res. Dep’t*, No. 98-EP-0001, 1998 Oneida App. LEXIS 45, at \*2–3 (Oneida Appeals Comm’n App. Ct. Apr. 08, 1998).

<sup>47</sup> Barbara Ann Atwood, *Tribal Jurisprudence and Cultural Meanings of the Family*, 79 NEB. L. REV. 577, 593 n.73 (2000).

<sup>48</sup> Seth J. Fortin, *The Two-Tiered Program of the Tribal Law and Order Act*, 61 UCLA L. REV. 88, 100 (2013). *See, e.g., In re Sekayumptewa*, No. 00AP000005, 2000 Hopi App. LEXIS 5 (Hopi App. Ct. Nov. 06, 2000).

<sup>49</sup> Samantha A. Moppett, *Acknowledging America’s First Sovereign: Incorporating Tribal Justice Systems into the Legal Research and Writing Curriculum*, 35 OKLA. CITY U. L. REV. 267, 305–06 (Summer 2010). In some jurisdictions, good lay advocates become good tribal judges. *See, e.g., In re CLB 0201*.

<sup>50</sup> *See generally In re Reum*, No. 061, 1988 Mont. Fort Peck Tribe LEXIS 2 (Fort Peck Tribe Ct. App. Jan. 15, 1989); *Fort Peck Tribes v. Clark*, No. 036, 1987 Mont. Fort Peck Tribe LEXIS 14, at \*16–22 (Fort Peck Tribe Ct. App. Sept. 24, 1987).

<sup>51</sup> *Jackson v. Tracy*, 549 F. App’x. 643, 644 (9th Cir. 2013); *see also Oneida Bingo & Casino v. Palm*, No. 02-AC-018, 2002 Oneida App. LEXIS 49, at \*2 (Oneida Appeals Comm’n App. Ct. Sept. 09, 2002).

tribal court defendants.<sup>52</sup> For this reason, the TLOA requires that appointed counsel for indigent defendants must be licensed.<sup>53</sup> This same protection is not offered in civil cases and the ICRA only promises a litigant a right to retain counsel, not appointment of counsel.<sup>54</sup> This is the reason a simple and clear set of appellate procedure rules is vital to *pro se* litigants and lay advocates who are presenting an appeal to a tribal supreme court.

#### IV. SIMPLE RULES NEEDED

Many tribal court systems are underestimated by their state and federal judiciary counterparts, but in reality:

“on the ground” activities of tribal courts strongly suggest that they operate with at least the same level of fairness, thought, and balance as other American courts and they are succeeding in the difficult task of functioning for those whose cases are before them under the types of stresses no other court system faces.<sup>55</sup>

Two of the “stresses” on the tribal court system are the incorrect presumption by non-Indians that tribal courts are biased against outsiders or that the judge in a tribal case is incompetent.<sup>56</sup> These perceptions are simply wrong.<sup>57</sup>

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<sup>52</sup> JANE M. SMITH, CONG. RESEARCH SERV., R43324, TRIBAL JURISDICTION OVER NONMEMBERS: A LEGAL OVERVIEW 1–2 (2013), available at <https://www.fas.org/sgp/crs/misc/R43324.pdf>.

<sup>53</sup> Fortin, *supra* note 50; Trayer *supra* note 10.

<sup>54</sup> 25 U.S.C. § 1302 (2010); United States v. Mitchell, 502 F.3d 931, 960 n.3 (9th Cir. 2007); *see also* Bighorn v. Spang, No. 279, 2002 Mont. Fort Peck Tribe LEXIS 9, at \*1–2 (Fort Peck Tribe Ct. App. Mar. 23, 2002); Buckles v. Smith, No. 190, 1994 Mont. Fort Peck Tribe LEXIS 2, at \*1 (Fort Peck Tribe Ct. App. Aug. 01, 1994).

<sup>55</sup> Kieth Richotte, Jr., *The Third Branch of the Third Sovereign: A Brief History of Tribal Courts and Their Perception in the Supreme Court*, 49 CT. REVIEW 6, 12 (2013).

<sup>56</sup> Frank Pommersheim, *Amicus Briefs in Indian Law: The Case of Plains Commerce Bank v. Long Family Land and Cattle, Co.*, 56 S.D.L. REV. 86, 102 (2011).

<sup>57</sup> Many outstanding judges serve in the tribal judiciary system. By way of example, the Honorable Diane Humetewa, a U.S. District Court Judge from Arizona who teaches at the National Judicial College, served as an appellate judge for the Hopi Court of Appeals from 2002–07. Levi Rickert, *Hopi Citizen Diane Humetewa Nominated by President to be Federal District Court Judge*, NATIVE NEWS NETWORK (Sept. 20, 2013),

The real problem tribal courts face is a lack of resources, which can range from limited court operation funds, to little guidance/training for staff, such as law clerks, to no access to physical or electronic legal research tools.<sup>58</sup> Part of the problem stemming from lack of resources is that uncounseled or lay advocate tribal court actions, no matter how well intentioned, can adversely affect later trials.<sup>59</sup> In their search for necessary resources, some tribal appellate courts have accessed federal funding to support their quest for justice.<sup>60</sup> This lack of resources and training by tribal trial courts may cause confusion for reviewing courts;<sup>61</sup> the lack of training can likewise be fatal to pleadings due to misunderstood statutes and missed limitation of actions deadlines.<sup>62</sup> The Honorable Jill Greiner, a Justice with the Nevada Inter-Tribal Court of Appeals, explains how the

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<https://web.archive.org/web/20131104052959/http://www.nativenewsnetwork.com/hopi-citizen-diane-humetewa-nominated-by-president-to-be-federal-district-court-judge.html>. The Honorable Matthew L.M. Fletcher, a professor at the Michigan State University School of Law, sits on seven (7) tribal appellate courts and is the Chief Justice of the Poarch Band of Creek Indians Supreme Court. *See, Matthew L.M. Fletcher*, MICHIGAN STATE UNIVERSITY, [http://www.law.msu.edu/faculty\\_staff/profile.php?prof=494](http://www.law.msu.edu/faculty_staff/profile.php?prof=494) (last visited Dec. 14, 2015). The Honorable Frank Pommersheim, a professor at the University of South Dakota School of Law, is the Chief Justice of the Cheyenne River Sioux Tribe Court of Appeals. *See Pommersheim supra* note 58.

<sup>58</sup> Matthew L.M. Fletcher, *supra* note 47, at 71–73; *see also* EXC, Inc. v. Kayenta Dist. Court, No. SC-CV-07-10, 2010 Navajo Sup. LEXIS 4, at \*32 (Navajo Nation Sup. Ct. Sept. 15, 2010).

<sup>59</sup> *See, e.g.*, James Park Taylor, *Bespeaking Justice: A History of Indigent Defense in Montana*, 68 MONT. L. REV. 363, 409 (Summer 2007) (also discussing funding problems and differences in format of Montana’s seven (7) tribal court systems); *accord* Sisseton-Wahpeton Sioux Tribe v. Simon, CR 03-03-01, 2002 Northern Plains App. LEXIS 15, at \*2–3 (Northern Plains Intertribal Ct. App. Jan. 07, 2002); *Wero v. Werito*, No. A-CV-01-77, 1977 Navajo App. LEXIS 4, at \*1 (Navajo Nation Ct. App. Jan. 28, 1977).

<sup>60</sup> *See*, Steven J. Gunn, *Enforcing the Judgments of Tribal Courts: Compacts, Confederacies, and Comity: Intertribal Enforcement of Tribal Court Orders*, 34 N.M.L. REV. 297, 327–28 (Spring 2004).

<sup>61</sup> *See, e.g.*, *United States v. Whitefeather*, No. 05-388, 2006 U.S. Dist. LEXIS 17239, at \*5 n.4 (D. Minn. Jan. 17, 2006) (reviewing federal court could not determine if a defendant’s tribal court advocate was a licensed attorney or a lay advocate because of a skimpy trial record).

<sup>62</sup> *See e.g.*, *Gardner v. Arrowichis*, No. 13-4122, 543 Fed. App’x. 891, at \*891–92 (10th Cir. Nov. 26, 2013) (mem.) (two lay advocates suing a tribe for “disbarring” them from practicing before tribal courts). Not only did the plaintiffs misapply the law, when told to re-petition the court using a correct form of pleading, they allowed the statute of limitations to run out. *Id.*

resource/training of lay advocates problem hampers tribal appeal cases as follows:

In many respects, the ITCA (Inter-Tribal Court of Appeals) is similar to the state and federal appellate courts, both procedurally and substantively. . . . In other respects, however, the tribal court system is worlds away from the formalities of the state and federal court systems. For example, the ITCA often reviews tribal court decisions that do not include specific findings of fact, legal standards, or jurisdictional rulings . . . one of the court’s biggest challenges is reviewing trial court cases without a complete record. . . . Some tribes do not have the resources to transcribe a hearing, or the audiotape of the proceeding gets misplaced, or the transcript is incomplete. Without a complete record . . . this court is often left with no other option but to remand the case back to the trial court for a new trial and/or sentencing hearing.<sup>63</sup>

Judge Greiner, while noting that the Nevada ITCA is streamlining their appellate rules to make them more user friendly, said “[i]f the ITCA was a stickler for following the procedural rules, many of the cases would be dismissed before consideration on the merits based on the failure to comply with even the most basic court procedural rules, (*i.e.* the timely filing of briefs . . . )”<sup>64</sup> The proposal asserted herein is an attempt to streamline the appellate rules for tribal court appeals pursued by lay advocates and/or *pro se* litigants.

## CONCLUSION

The attached proposed model rules of appellate procedure for tribal supreme courts,<sup>65</sup> the model enabling ordinance,<sup>66</sup> and the

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<sup>63</sup> Jill Greiner, *Appellate Law in Nevada Indian Country: The Inter-Tribal Court of Appeals*, 19 NEV. LAW. 16, 17 (Aug. 2011).

<sup>64</sup> *Id.* at 18 (parenthetical in original text); *accord*, L.M. v. Tulalip Eceap, No. TUL-CV-ET-2011-0239, 2012 Tulalip App. LEXIS 1, at \*3 (Tulalip Tribal Ct. App. Mar. 08, 2012). *But see* Couture v. Tribes, No. AP-CV-004-93, 1993 Mont. Salish & Kootenai Tribe LEXIS 2, at \*2 (Confederated Salish & Kootenai Ct. App. May 18, 1993).

<sup>65</sup> *See infra* Example 1.

model Guide for *Pro Se* Litigants or Lay Advocates Filing an Appeal to the Tribal Supreme Court<sup>67</sup> are a starting point for tailoring appellate rules for individual tribal courts throughout North America. *Pro se* litigation and lay advocate representation is a common occurrence in tribal courts. The need for clear procedural rules that accommodate these two groups of appellate participants mandates simple rules on how to present appeals. This Article offers a suggested format for briefs; definition of key terms; and a peek at the expected path an appeal takes from the end of trial to an appellate decision. As the U.S. Supreme Court noted in *Powell v. Alabama*

Even the intelligent and educated layman has small and sometimes no skill in the science of law . . . if that be true of men of intelligence, how much more true is it of the ignorant and illiterate.<sup>68</sup>

Simple rules will not eliminate, but can reduce, the disadvantages a *pro se* litigant faces in a tribal appellate court. While no model will answer every question, which a court must address, this proposal allows tribal courts a basic blueprint for improved tribal appeals by lay advocates and *pro se* litigants.

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<sup>66</sup> See *infra* Example 2.

<sup>67</sup> Gregory D. Smith, *Guide for Pro Se Litigants or Lay Advocates Filing an Appeal to the Tribal Supreme Court*, 4 AM. INDIAN L.J. (forthcoming May 2016).

<sup>68</sup> *Powell v. Alabama*, 287 U.S. 45, 69 (1932).

**EXAMPLE 1 = Model Rules of Appellate Procedure  
For *Pro Se* Litigants and Lay Advocates**

*{TRIBE'S NAME}* SUPREME COURT RULES OF APPELLATE PROCEDURE  
FOR *PRO SE* LITIGANTS AND LAY ADVOCATES

These rules shall set out the guidelines for appealing decisions of the *{Tribe's Name}* Tribal Courts to the *{Tribe's Name}* Supreme Court. These rules may be cited as "*{Tribe's Initials}* Rules App." with a citation to a specific rule number. [E.g., P.N. Rules App. 1(b) = name of the appellate division of the Pawnee Nation Tribal Court].

SECTION I: NAME OF COURTS

**1(a) *{Tribe's Name}* Tribal Court.** The trial level of the *{Tribe's Name}* Tribal Court shall be called the "*{Tribe's Name}* Tribal Court." For the purposes of these rules, the *{Tribe's Name}* Tribal Court shall include all trial courts of the *{Tribe's Name}* Nation to include, but not limited to, Tribal Courts, Peacemaker Courts, Administrative Boards, or any other point of origination for litigation within the *{Tribe's Name}* Nation judicial system.

**1(b) *{Tribe's Name}* Supreme Court.** The appellate level of the *{Tribe's Name}* Tribal Court shall be called the "*{Tribe's Name}* Supreme Court" or the "Supreme Court of the *{Tribe's Name}* Nation."

SECTION II: APPEALABLE DECISIONS

**2(a) Final Decisions.** Final Decisions are decisions which resolve all issues pending before the *{Tribe's Name}* Tribal Court. Any Final Decision of the *{Tribe's Name}* Tribal Court is appealable as of right to the *{Tribe's Name}* Supreme Court.

**2(b) Interlocutory Appeals.** Interlocutory Appeals are appeals of issues requiring appellate review prior to a decision becoming a Final Decision. Interlocutory Appeals are extraordinary appeals which are disfavored by the *{Tribe's Name}* Supreme Court, but an Interlocutory Appeal may be considered by the *{Tribe's Name}* Supreme Court via application or petition in the sole discretion of the *{Tribe's Name}* Supreme Court.

**2(c) Advisory Opinions.** If, but only if, the *{Tribe's Name}* Constitution or the *{Tribe's Name}* Ordinances specifically allow for Advisory Opinions from the *{Tribe's Name}* Supreme Court, then a request for an Advisory Opinion shall be considered an appealable decision for the purposes of these rules. If specific authorization allowing for Advisory Opinions does not appear in either the *{Tribe's Name}* Constitution or the *{Tribe's Name}* Ordinances, then the *{Tribe's Name}* Supreme Court may only rule on actual controversies pending before said court.

**2(d) *{Tribe's Name}* Supreme Court Rulings Non-Appealable.** The *{Tribe's Name}* Supreme Court is the court of last resort for any tribal, administrative, civil, or criminal decision originating in the *{Tribe's Name}* Tribal Court. Decisions of the *{Tribe's Name}* Supreme Court are final and non-appealable except by application for writ of *certiorari* to the U.S. Supreme Court if a question of U.S. federal law exists in the pending case.<sup>69</sup>

### SECTION III: JURISDICTION OF *{Tribe's Name}* SUPREME COURT

**3(a) Error Correction.** The *{Tribe's Name}* Supreme Court is an error correction court and not a policy making court. The *{Tribe's Name}* may declare an ordinance of the *{Tribe's Name}* Nation unconstitutional if said ordinance violates either the *{Tribe's Name}* Constitution or applicable parts of the Indian Civil Rights Act.<sup>70</sup> The *{Tribe's Name}* Supreme Court may interpret or apply tribal ordinances, but the writing of tribal ordinances, via judicial fiat, is not authorized.

**3(b) Internal Rule Making Authority.** The *{Tribe's Name}* Supreme Court may modify the *{Tribe's Initials}* Rules App. by a majority vote of the justices of the *{Tribe's Name}* Supreme Court.

**3(c) Precedent Making Authority.** *{Tribe's Name}* Supreme Court decisions which are decided by a panel of at least three (3) justices may be used as binding judicial precedent for future cases in both the *{Tribe's Name}* Tribal Court and the *{Tribe's Name}* Supreme Court.

### SECTION IV: JUSTICES OF THE *{Tribe's Name}* SUPREME COURT

**4(a) Membership.** The *{Tribe's Name}* Supreme Court shall include a Chief Justice and at least two (2) other justices. The number of justices, length of contracts, and compensation of said justices shall be set by the *{Tribe's Name}* Tribal Council. The *{Tribe's Name}* Supreme Court may include either full-time, part-time, *pro tem*, or contract justices at the *{Tribe's Name}* Council's ordinance making discretion. All justices of the *{Tribe's Name}* Supreme Court shall have a law degree and automatically be considered a member of the *{Tribe's Name}* Bar Association. All justices of the *{Tribe's Name}* Supreme Court shall also be licensed members, in good standing, of a state bar in the United States unless specifically stated otherwise by the *{Tribe's Name}* Constitution or *{Tribe's Name}* Tribal Ordinances.<sup>71</sup> The Chief Justice shall be initially

<sup>69</sup> While beyond the scope of this article, some criminal cases are reviewed in federal court via the writ of *Habeas Corpus*. See e.g., *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 66 (1978); *Alvarez v. Tracy*, 773 F.3d 1011, 1013 (9th Cir. 2014).

<sup>70</sup> Indian Civil Rights Act, 25 U.S.C. §§ 1301–1341 (2010).

<sup>71</sup> Many tribal courts will include a community member on their appellate court that may not have a law license so that the appellate court does not lose the traditions and insight of the residents of the reservation. This can be extremely helpful to a court and is the format used by the Gila River Indian Community Court of Appeals. See GILA RIVER INDIAN COMMUNITY CODE § 4.503(C)(2). Preference hiring of Native Americans is common in selecting judges in tribal courts and this procedure, according to the U.S. Supreme

selected by the *{Tribe's Name}* Tribal Council. After the first Chief Justice is appointed, the Chief Justice position shall rotate yearly amongst the justices from June 1 to May 31 based on seniority of the members of the *{Tribe's Name}* Supreme Court. [E.g., If there are five (5) members of the court and two (2) have already served as Chief Justice, the third member of the Court in seniority shall be Chief Justice in year three until all justices have served as Chief Justice and then the rotation begins anew].

**4(b) Panels of the *{Tribe's Name}* Supreme Court.** For criminal cases involving a felony, any potential sentence of one (1) year or more, or any decision stemming from a criminal jury verdict, a panel of at least three (3) justices must hear said appeal. Likewise, any civil decision involving a requested judgment amount of over \$25,000.00 or any decision stemming from a civil jury verdict, child custody/adoption, tribal membership standing, constitutional question, or tribal election shall be considered by a panel of at least three (3) justices.

**4(c) Certified Questions of Law.** The *{Tribe's Name}* Supreme Court may address questions of tribal law certified to it by state or federal appellate courts.<sup>72</sup>

**4(d) Single Justice Decisions.** Any decision originating from a criminal case involving only bench trial misdemeanors (potential judgment of less than one (1) year and a fine below \$2,500.00) or bench trial civil matter judgments with a potential liability amount below \$25,000.00, may be heard by a single justice if so ordered by the Chief Justice. While a decision by a single justice may be persuasive authority, said decision shall not be considered binding precedential authority in either the *{Tribe's Name}* Tribal Court or the *{Tribe's Name}* Supreme Court.

**4(e) *En Banc* Review.** At the discretion of the majority of all of the justices of the *{Tribe's Name}* Supreme Court, any pending appeal may be considered by the entire membership of the *{Tribe's Name}* Supreme Court. This procedure will be used to resolve important questions of law or resolve apparently conflicting opinions of differing panels of the *{Tribe's Name}* Supreme Court. Any party dissatisfied with the decision of a panel or a single justice decision may petition the *{Tribe's Name}* Supreme Court for *en banc* review. *En banc* review shall be decided by a majority vote of the *{Tribe's Name}* Supreme Court and the grant or denial of *en banc* review is in the sole discretion of the *{Tribe's Name}* Supreme Court.

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Court, is totally constitutional as a political status, not race, preference. *Morton v. Mancari*, 417 U.S. 535, 554–55 (1974); BRUCE M. DUTHU, *AMERICAN INDIANS AND THE LAW* 139 (2008); accord GILA RIVER INDIAN COMMUNITY CODE § 4.503 (C)(3).

<sup>72</sup> Several tribal appellate courts already allow for the consideration of certified questions from other courts. See e.g., Alex M. Hagen, *From Formal Separation to Functional Equivalence: Tribal-Federal Dual Sovereignty and the Sixth Amendment Right to Counsel*, 54 S.D. L. REV. 129, 172 (2009). Likewise, state and federal courts sometimes receive certified questions from tribal courts. See e.g., *Miller v. Ford Motor Co.*, 740 N.W.2d 206, 235 (Mich. 2007) (Weaver, J., dissenting).

**4(f) Petitions to Rehear.** Petitions to rehear, other than *en banc* review, are discouraged, but shall be decided in the sole discretion of the panel of the *{Tribe's Name}* Supreme Court that heard the original appeal. Petitions to rehear must be filed within ten (10) days of a panel's decision being rendered.

**4(g) Sitting by Interchange.** In the event of a conflict of interest or disability, a justice of the *{Tribe's Name}* Supreme Court may sit as a trial judge of the *{Tribe's Name}* Tribal Court by interchange so long as said justice does not hear the appeal of the case he or she presided over in the *{Tribe's Name}* Tribal Court.

**4(h) Recusal/Pro Tem Justice.** In the event that a justice of the *{Tribe's Name}* Supreme Court must recuse himself or herself from a pending appeal, the Chief Justice may designate another justice to sit, order the appeal to be heard by only two (2) justices, or appoint a licensed attorney to sit on a *pro tem* basis.

#### SECTION V: MANNER OF SEEKING APPEAL

**5(a) Felony Appeals.** Felony notices of appeal must be filed with the Clerk of the *{Tribe's Name}* Tribal Court within thirty (30) calendar days of the *{Tribe's Name}* Tribal Court's decision becoming final. A decision becomes final upon sentencing being entered or a motion for new trial, which was filed within thirty (30) days of sentencing, being denied. In the event that the thirty (30) day period expires when the *{Tribe's Name}* Tribal Court is closed, the notice of appeal may be filed on the next date that the *{Tribe's Name}* Tribal Court is open.

**5(b) Misdemeanor Appeals.** Misdemeanor appeals shall be filed within ten (10) calendar days of the judgment of the *{Tribe's Name}* Tribal Court becoming a final. A decision becomes final upon sentencing being entered or a motion for new trial, which was filed within ten (10) days of sentencing, being denied. In the event that the ten (10) day period expires when the *{Tribe's Name}* Tribal Court is closed, the notice of appeal may be filed on the next date that the *{Tribe's Name}* Tribal Court is open. In the event that a case is originally a felony charge, but the conviction results in a misdemeanor, the appeal proceeds pursuant to Rule 5(a) and the notice of appeal must be filed within thirty (30) days of a final judgment of conviction.

**5(c) Civil Appeals.** All civil appeals, including tribal administrative matters that may be heard before the *{Tribe's Name}* Tribal Court, shall be filed within thirty (30) calendar days of the judgment of the *{Tribe's Name}* Tribal Court becoming final. A decision becomes final upon a monetary judgment or other ruling being entered in a civil or administrative matter or a motion for new trial, which was filed within thirty (30) days of the court's decision, being denied. In the event that the thirty (30) days expire when the *{Tribe's Name}* Tribal Court is closed, the notice of appeal may be filed on the next date that the *{Tribe's Name}* Tribal Court is open.

**5(d) Notice of Appeal Form.** If a party seeks to appeal a decision of the *{Tribe's Name}* Tribal Court, a notice of appeal shall be filed with the *{Tribe's Name}* Tribal Court Clerk or Court Administrator. A form notice of appeal is attached as “Appendix A” to these rules.

## SECTION VI: RECORD ON APPEAL

**6(a) Testimony.** Testimony presented at the *{Tribe's Name}* Tribal Court may be preserved for appellate review by any manner approved by the Chief Judge of the *{Tribe's Name}* Tribal Court to include, but not limited to: formal transcript, audio recording, video recording, or court-approved statement of the evidence.<sup>73</sup>

**6(b) Technical Record.** The technical record shall include all pleadings of record, relevant motions and orders, judgments, and any other part of the trial record which is necessary in the discretion of the *{Tribe's Name}* Tribal Court Clerk or Court Administrator, to convey a fair and accurate record of what occurred at trial. Any dispute as to the contents of the technical record shall be brought to the Tribal Court’s attention by motion and the Tribal Court judge that heard the case shall be the final arbitrator of what items are included in the Technical Record—absent blatant abuse of discretion.

**6(c) Other Items Includable in Appellate Record.** Any party can request any item that was actually presented or filed with the *{Tribe's Name}* Tribal Court to be included in the record on appeal unless said item was struck from the record by the *{Tribe's Name}* Tribal Court judge that presided over the trial in question.

**6(d) Time to Complete Appellate Record.** The appellate record shall be completed within ninety (90) days from the filing of the notice of appeal. For good cause shown, this time period can be reduced or expanded at the discretion of the *{Tribe's Name}* Tribal Court.

## SECTION VII: BRIEFS

**7(a) Briefs Generally.** All briefs to the *{Tribe's Name}* Supreme Court shall be on 8½” by 11½” white paper, stapled at the top left-hand corner of said paper, and including the following: 1) the caption of the case detailing the name of parties and case number; 2) the type of brief (*e.g.* Appellant’s brief); 3) relevant facts; 4) issues; 5) argument; 6) conclusion; and 7) a certificate of service to all parties in the appeal. While technical formalities are relaxed, all briefs shall confine themselves to pleadings and facts actually presented to the *{Tribe's Name}* Tribal Court. References to legal arguments shall give complete statute or case citations. Initial briefs of an appellant or appellee shall not exceed twenty-five (25) pages in length absent leave of court. Reply briefs shall not

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<sup>73</sup> Many courts will not consider facts on appeal that were not presented to the trial court. *See, e.g., Fort Peck Tribes v. Lavendure*, No. AP-002, 1986 Mont. Fort Peck Tribe LEXIS 3, at \*4 (Fort Peck Tribe Ct. App. Oct. 17, 1986).

exceed ten (10) pages in length absent leave of court. Briefs shall be typed in 14 point size and double spaced using standard fonts such as Times New Roman. Block quotes of over 50 words shall be single spaced and indented. An example brief is attached as “Appendix B” to these rules.

**7(b) Appellant’s Brief.** The Appellant shall file the Appellant’s brief within thirty (30) days of the appellate record being completed and notice of said completion of appellate record sent to all parties of record in the appeal by the Tribal Court Clerk and/or Court Administrator. The appellant’s brief shall *specifically* state how Appellant believes the {Tribe’s Name} Tribal Court erred and how said error, if found, would not be considered “harmless error.” Appellant, unless filing the brief electronically, shall file an original and three (3) exact copies of the Appellant’s brief with the {Tribe’s Name} Tribal Court Clerk and/or Court Administrator. Filing a brief may alternatively be accomplished by electronically e-filing a single copy of the brief to the Tribal Court Clerk. Appellant’s briefs shall not exceed twenty-five (25) pages in length absent leave of court. An exact copy of the Appellant’s brief shall be mailed, postage prepaid in the U.S. Mail, or e-mailed, to all other parties of record in the appeal.

**7(c) Appellee’s Brief.** Appellee shall file the Appellee’s brief within thirty (30) days of appellant filing the Appellant’s brief. Appellee, unless filing the brief electronically, shall file an original and three (3) copies to the Appellee’s brief with the {Tribe’s Name} Tribal Court Clerk and/or Court Administrator. Filing of a brief may alternatively be accomplished by electronically e-filing a single copy of the brief to the Tribal Court Clerk. Appellee’s briefs shall not exceed twenty-five (25) pages in length absent leave of court. An exact copy of the appellee’s brief shall be mailed, postage prepaid in the U.S. Mail, or e-mailed to all other parties of record in the appeal.

**7(d) Appellant’s Reply Brief.** Appellant may, but is not required to, present a reply brief to the arguments set out in the Appellee’s brief. If a reply brief is to be filed, it shall be done within fourteen (14) days of the Appellee’s brief being filed. An original and three (3) copies of said reply brief shall be filed with the {Tribe’s Name} Tribal Court Clerk and/or Court Administrator unless the brief is being filed electronically. Filing of a brief may alternatively be accomplished by electronically e-mailing a single copy of the brief to the Tribal Court Clerk. An Appellant’s reply brief shall not exceed ten (10) pages in length absent leave of court and shall only address points set out in the Appellee’s brief, not advance new arguments. An exact copy of the reply brief shall be mailed, postage prepaid in the U.S. Mail, or e-mailed to all parties of record in the appeal. Absent leave of court, Appellees will not be permitted to file reply arguments to the Appellant’s reply brief.

**7(e) Amicus Briefs.** *Amicus* briefs (“Friend of the Court briefs”) may be allowed through motion by leave of the Court and shall be filed, at latest, within fourteen (14) days after the Appellee files a brief. *Amicus* briefs shall not exceed ten (10) pages in length absent specific permission from the Court.

**7(f) Brief Filing Time Cut-Off.** In the event, for whatever reason, that the final date to file a brief with the *{Tribe's Name}* Supreme Court falls on a date where the *{Tribe's Name}* Tribal Court is closed, the brief may be filed on the next date in which the *{Tribe's Name}* Tribal Court is open. For filing purposes, any pleading that has a postal time/date stamp, electronic e-mail stamp, or the functional equivalent that indicates the brief was mailed prior to the filing time cut-off, the brief shall then be considered timely filed. If an appellant fails to timely file a brief, the *{Tribe's Name}* Supreme Court may, in the Court's discretion, dismiss the appeal. If an Appellee fails to timely file a brief, the *{Tribe's Name}* Supreme Court shall review the matter solely on the Technical Record and the Appellant's brief.

#### SECTION VIII: ORAL ARGUMENTS<sup>74</sup>

**8(a) Requesting Oral Arguments.** If any party to an appeal requests oral arguments, each party is entitled to argue live before the *{Tribe's Name}* Supreme Court for up to twenty (20) minutes per side. To request oral arguments, a party shall state in the caption of the initial brief "Oral Arguments Requested." Oral arguments may be conducted A) in person; B) via telephone; C) via Skype/Facetime or similar device; or D) by any other means that the *{Tribe's Name}* Supreme Court, in its discretion, dictates. The time, manner, and place of oral arguments shall be set on a case-by-case basis by the *{Tribe's Name}* Supreme Court.

**8(b) Waiving Oral Arguments.** If neither party specifically requests oral arguments in the caption of their brief, oral arguments will be deemed waived and the appeal shall be decided on the briefs and record on appeal without further argument.

#### SECTION IX: INDIGENTS

**9(a) Indigent Criminal Appeals.** If a defendant was found indigent in a criminal matter by the *{Tribe's Name}* Tribal Court, then said defendant shall be deemed indigent for appeal purposes and court costs do not have to be prepaid and may be waived, paid in installments, or assessed against the Nation of *{Tribe's Name}* at the discretion of the *{Tribe's Name}* Supreme Court.

**9(b) Indigent Civil Appeals.** Upon petition to either the *{Tribe's Name}* Tribal Court or the *{Tribe's Name}* Supreme Court, an appealing party in a civil or tribal administrative matter may request to proceed *in forma pauperis* without prepayment of costs. After an appeal is completed, the party previously declared indigent may petition to waive costs and the Chief Justice, or senior justice of the panel that decided said case if the Chief Justice is not on the hearing panel, shall decide if costs shall be waived.

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<sup>74</sup> Some tribal appellate courts in the past had some unusual rules, such as not allowing *pro se* litigants to present oral arguments for appeals. *See id.*

SECTION X: OPINIONS OF *{Tribe's Name}* SUPREME COURT

**10(a) Opinions of the *{Tribe's Name}* Supreme Court.** Opinions of the *{Tribe's Name}* Supreme Court shall be in writing and normally handed down within ninety (90) days after an appeal presents oral arguments or the appeal that is not seeking oral arguments has been submitted to the justices of the *{Tribe's Name}* Supreme Court for decision.

**10(b) Opinions of the *{Tribe's Name}* Supreme Court are Final Decisions.** The *{Tribe's Name}* Supreme Court is the court of last resort of any decision originating in the *{Tribe's Name}* Tribal Court. Opinions of the *{Tribe's Name}* Supreme Court relating to civil, tribal administrative, or criminal matters originating in the *{Tribe's Name}* Tribal Court are final and non-appealable except by writ of *certiorari* to the U.S. Supreme Court if a question of U.S. federal law is involved in the case.

**10(c) Publication of Opinions.** All opinions of the *{Tribe's Name}* Supreme Court shall be published by or made available through the *{Tribe's Name}* Tribal Court Clerk and/or Court Administrator. Said opinions shall have case numbers showing first the year (e.g., 2015) and then the decision number for that year (e.g., 2014-5 = the fifth decision of the *{Tribe's Name}* Supreme Court for the year 2014). Decisions of a panel of the *{Tribe's Name}* Supreme Court that have at least three (3) justices shall be considered controlling precedent for later cases coming before the *{Tribe's Name}* Supreme Court or *{Tribe's Name}* Tribal Court. All other opinions of the *{Tribe's Name}* Supreme Court, (e.g. single justice opinions), shall be considered persuasive authority for future cases coming before the *{Tribe's Name}* Supreme Court or *{Tribe's Name}* Tribal Court.

These rules take effect on the \_\_\_ day of \_\_\_\_\_, 20\_\_\_ and continue until modified or revoked by a majority vote of the *{Tribe's Name}* Supreme Court.

Entered this \_\_\_ day of \_\_\_\_\_, 20\_\_\_.

\_\_\_\_\_  
Chief Justice  
*{Tribe's Name}* Supreme Court

\_\_\_\_\_  
Justice  
*{Tribe's Name}* Supreme Court

\_\_\_\_\_  
Justice  
*{Tribe's Name}* Supreme Court

**APPENDIX A = Form/Example Notice of Appeal**

**IN THE *{Tribe's Name}* TRIBAL COURT  
AT *{City}*, *{State}***

<i>{Tribe's Name}</i> NATION	)	Case No.: _____
Appellee	)	Tribal Judge _____
	)	
vs.	)	
	)	
<i>(YOUR NAME)</i> _____	)	
Defendant/Appellant	)	

**NOTICE OF APPEAL**

Comes now the Defendant, *(your name)*, pursuant to *{Tribe's Initial's}* Rules App. 5, and puts the Court and the *{Tribe's Name}* Nation on notice that Defendant is appealing the decision of the *{Tribe's Name}* Tribal Court dated the \_\_\_\_ (*day*) day of \_\_\_\_ (*month*), 20\_\_\_\_, to the *{Tribe's Name}* Supreme Court. This is the \_\_\_\_ (*day*) day of \_\_\_\_ (*month*), 20\_\_\_\_.

Respectfully Submitted:

\_\_\_\_\_  
*Your Name*  
Defendant/Appellant  
*Address*  
*{City}*, *{State}* *Zip Code*  
Phone: (\_\_\_\_) \_\_\_\_ - \_\_\_\_\_

**CERTIFICATE OF SERVICE**

I, \_\_\_\_ (*your name*), hereby certify that a true and accurate copy of the foregoing has been mailed, adequate postage prepaid, to the following on this the \_\_\_\_ (*day*) day of \_\_\_\_ (*month*), 20\_\_\_\_.

\_\_\_\_\_  
*Your Name*

1. Prosecutor for the *{Tribe's Name}* Nation  
P.O. Box \_\_\_\_\_  
*{City}*, *{State}* *Zip Code*

**APPENDIX B = Form/Example Appellate Brief**

**IN THE *{Tribe's Name}* SUPREME COURT  
AT *(City), {State}***

<i>{Tribe's Name}</i> NATION	)	Case No.: 20__ - _____
Appellee	)	Trial No.: _____
	)	ORAL ARGUMENTS REQUESTED
vs.	)	Tribal Judge _____
	)	
<i>(YOUR NAME)</i>	)	
Defendant/Appellant	)	

**BRIEF OF DEFENDANT/APPELLANT**

COMES NOW, the Defendant/Appellant, *(your name)*, pursuant to *{Tribe's Initials}*. Rules App. 7, and presents the following Appellant's brief. Appellant would show unto the Court the following:

**I. FACTS**

**1.1)** The trial in this case took place on the \_\_\_ day of *(month)*, 20\_\_\_. A notice of appeal was filed with the trial court clerk on the \_\_\_ day of *(month)*, 20\_\_\_. The judge presiding over the trial was \_\_\_\_\_ *(Judge's name)* \_\_\_\_\_. The trial was / was not heard by a jury. Appellant did / did not have an attorney at trial. If represented by a lay advocate, the name of my lay advocate at trial was \_\_\_\_\_ *(name)* \_\_\_\_\_. If represented by an attorney, the name of my attorney at trial was \_\_\_\_\_ *(name)* \_\_\_\_\_.

**1.2)** *(Set out the facts of your case as shown to the *{Tribe's Name}* Tribal Court. Only discuss facts and testimony actually presented to the *{Tribe's Name}* Tribal Court).*

**II. ISSUES**

**2.1)** The Tribal Court erred in finding Appellant guilty of *(your convicted crime)* because the evidence of record was insufficient, as a matter of law, to support a finding of guilt beyond a reasonable doubt as discussed in *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

**2.2)** *(Set out any other issues you have with a new number for each separate issue).*

**III. RELEVANT LAW**

**3.1)** *{Tribe's Name}* Tribal Code sec. \_\_\_\_\_.

**3.2)** *(Other case law or statutes you wish the Court to consider with a separate number for each separate case or statute).*

**IV. ARGUMENTS**

**4.1)** *(Discuss why you believe the {Tribe's Name} Tribal Court incorrectly ruled on your case and how any error the {Tribe's Name} Tribal Court made adversely affected the outcome of your trial. Use a separate number for each separate issue or argument).*

**V. CONCLUSION**

**5.1)** THEREFORE, Defendant/Appellant, (your name), respectfully requests the *{Tribe's Name}* Supreme Court to modify or overturn the *{Tribe's Name}* Tribal Court in the following manner, *(state what you are requesting the {Tribe's Name} Supreme Court to do such as overturning the verdict and ordering a new trial or dismissing the case).*

This is the (day) day of (month), 20\_\_.

Respectfully Submitted:

\_\_\_\_\_  
*Your Name*  
Defendant/Appellant  
*Address*  
*{City}, {State} Zip Code*  
Phone: (\_\_\_\_) \_\_\_\_ - \_\_\_\_\_

**CERTIFICATE OF SERVICE**

I, (your name), hereby certify that a true and accurate copy of the foregoing has been mailed, adequate postage prepaid, to the following on this the (day) day of (month), 20\_\_.

\_\_\_\_\_  
*Your Name*

1. Prosecutor for the *{Tribe's Name}* Nation  
P.O. Box \_\_\_\_\_  
*{City}, {State} Zip Code*

**EXAMPLE 2 = Form/Example Resolution Establishing  
Pro Se Litigant/Lay Advocate Tribal Supreme Court Rules**

RESOLUTION ESTABLISHING *PRO SE* LITIGANT AND LAY ADVOCATE APPELLATE BRIEFING  
RULES FOR THE *{TRIBE'S NAME}* SUPREME COURT

**WHEREAS:** The *{Tribe's Name}* Tribal Court hears trial matters relating to the just adjudication of legal controversies originating in the *{Tribe's Name}* Tribal Nation and many litigants either proceed before the *{Tribe's Name}* Tribal Court *pro se* or via a lay advocate; and

**WHEREAS:** An appellate system needs to be established for the *{Tribe's Name}* Tribal Nation that addresses the needs of *pro se* litigants and litigants represented by lay advocates; and

**WHEREAS:** There is currently no formal appellate procedure for judicial review of decisions of the *{Tribe's Name}* Tribal Court by *pro se* litigants or lay advocates coming before the *{Tribe's Name}* Supreme Court, but Due Process suggests that a standardized appeals process for decisions of the *{Tribe's Name}* Tribal Court is in the best interest of all members and visitors to the *{Tribe's Name}* Tribal Nation; and

**WHEREAS:** The *{Tribe's Name}* Tribal Council has a vested interest in protecting the Due Process rights of all persons coming into contact with the *{Tribe's Name}* Nation and a user friendly set of appellate rules for *pro se* litigants and lay advocates coming before the *{Tribe's Name}* Supreme Court promotes Due Process;

**NOW, THEREFORE,**

**BE IT RESOLVED** that the *{Tribe's Name}* Supreme Court is hereby established as the court of last resort to hear appeals from the *{Tribe's Name}* Tribal Court.

**IT IS FURTHER RESOLVED** that the *{Tribe's Name}* Supreme Court shall establish *pro se* Litigant/Lay Advocate appellate briefing procedures to protect the Due Process rights of all persons that may have contact with the *{Tribe's Name}* legal system and/or the *{Tribe's Name}* Tribal Nation.

Approved this \_\_\_ day of \_\_\_\_\_, 20\_\_.

\_\_\_\_\_  
President of *{Tribe's Name}* Tribal Council

\_\_\_\_\_  
Secretary of *{Tribe's Name}* Tribal Council