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Ho-Chunk Nation Tribal Law Profile

Daniel B. Snyder*

PART I – INTRODUCTION

Prior to the 1830s, the Ho-Chunk Nation had control over the southwestern quadrant of the land in the State of Wisconsin, from Lake Winnebago, branching out on the Rock and Fox rivers, and stretching west to the Mississippi river.¹ The membership rolls suffered through 150 years of wavering federal oversight, but in 2009, the Ho-Chunk Nation had the fifth largest population among Wisconsin tribes at 6,908 members.²

There are three points worth noting at the outset that might affect any legal representation or practice of law undertaken in the Ho-Chunk Tribal Courts or in any proceedings in state or federal court involving the Tribe, a tribal member or tribal land. First, until 1993, the United States government recognized what is now known as the Ho-Chunk Nation as the Winnebago Tribe or Wisconsin Winnebago Tribe.³ Knowing this will help practitioners as they conduct legal and cultural research. Second, nearly all of the Ho-Chunk trust and privately owned land is scattered throughout central and southern Wisconsin as a result of early 19th century treaties. These treaties involved the cession of all Ho-Chunk land, several removals to reservation lands in Iowa, Minnesota, South Dakota, and Nebraska, and then a return to Wisconsin during an allotment period in the late 19th century.⁴ Finally, Wisconsin is a Public Law 280 State, which will complicate the issues of forum selection and jurisdiction.⁵ There is extensive federal case law interpreting Public Law 280. It is recommended that practitioners review this body of law when encountering state laws and enforcement of those laws against Ho-Chunk members and their land.

For the purposes of this Tribal Profile, Part II will provide an introduction to the traditional law and practices of the Ho-Chunk Nation, including a history of the Ho-Chunk clans, traditional legal responsibilities, and an overview of the present day Traditional Court. Part III will present a structural overview of the Ho-Chunk's modern government and will also explore the Judicial Branch. Part IV will explain how the Legislative Branch operates and uses its powers to preserve traditional law and customs. Part V will discuss the preservation of case law and how the Judiciary strives to be accessible to the public through its use of the Ho-Chunk Nation website and issuing newsletters. Finally, Part VI will provide a brief overview of the Ho-Chunk Nation's recent efforts in criminal law enforcement.

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¹ Todd Matha, C.J. & Amanda Rockman, J., Ho-Chunk Tribal Court, Wisconsin Tribal Courts: Asked & Answered, Address at the Wisconsin Judicial Conference 6 (Nov. 5, 2009), *available at* [http://www.ho-chunknation.com/UserFiles/Tribal%20Courts%20Asked%20and%20Answered\(1\).pdf](http://www.ho-chunknation.com/UserFiles/Tribal%20Courts%20Asked%20and%20Answered(1).pdf).

² *Id.* at 20.

³ *An Abstract View of Ho-Chunk History*, OFFICIAL HO-CHUNK NATION WEBSITE, <http://www.ho-chunknation.com/AboutUs.aspx> (last visited May 9, 2012).

⁴ *Id.*

⁵ Congress delegated exclusive criminal jurisdiction and limited jurisdiction to litigate civil claims involving Indian Tribes and its members to six states: Wisconsin, Oregon, California, Minnesota, Alaska and Nebraska, Pub. L. No. 83-280, 67 Stat. 588 (1953) (codified as amended at 18 U.S.C. § 1162 (2010), and 28 U.S.C. § 1360 (1984)).

This paper will conclude with some final comments regarding the preservation of traditional law and practitioner's responsibilities to their clients and the Ho-Chunk Nation courts.

PART II – TRADITIONAL LAW

The following sections discuss the traditional governance of the Ho-Chunk and how the modern system of governance incorporates these traditions. The traditional system of governance revolved around a clan system and the modern system uses some of the same traditions in a modern setting.

A. Historical View of the Ho-Chunk Clans and Traditional Legal Responsibilities

Ho-Chunk's traditional law originates from its customs and traditions. The tribal customs derive from folkways and mores.⁶ Folkways are customs or ways of life that are expected but not demanded.⁷ Mores are the moral norms that guide every member through life and are expected to be known and followed.⁸ The folkways and mores are the traditional law Ho-Chunk people used as a foundation for the governance of their tribe and members.

In addition to the folkways and mores, Ho-Chunk tribal members were guided by clan responsibilities. The Ho-Chunk people were comprised of twelve clans and further distinguished in two groups as clans belonging to "those who are above" and "those who are on earth."⁹ The clans above were the Thunderbird, Warrior (sometimes referred to as the Hawk clan), Eagle, and Pigeon.¹⁰ The clans on earth were listed as the Bear, Wolf, Water Spirit, Deer, Elk, Buffalo, Fish and Snake clans.¹¹ Many of the Ho-Chunk Clans remain today.

The clan system of governance provided responsibilities to each of the twelve Ho-Chunk Clans.¹² The following is a brief description of each clans' responsibilities to the governance of the tribe:

The Thunder Clan supplied the civil leaders of the tribe. The Hawk [Warrior] Clan were soldiers, authorized to decree life-and-death decisions when captives were taken in war. The Eagle and Pigeon Clans supplied soldiers for warfare and hunting. The Bear Clan were the police officers and the Wolf Clan performed social welfare roles, administering public health and safety. The Water-Spirit Clan protected the water supply. The Deer Clan's

⁶ Preston Thompson, *Hidden History*, HOCĄK WORAK NEWSPAPER (Black River Falls, Wisconsin), Oct. 12, 2007, at 2, available at http://www.ho-chunknation.com/UserFiles/File/2007_Issues/issue%2019.pdf.

⁷ *Id.*

⁸ *Id.*

⁹ PAUL RADIN, *THE WINNEBAGO TRIBE* 142-43 (Univ. of Neb. Press 1990) (1923). See also *Ho-Chunk Culture*, MILWAUKEE PUBLIC MUSEUM, <http://www.mpm.edu/wirp/icw-52.html> (last visited May 9, 2012).

¹⁰ RADIN, *supra* note 9, at 142.

¹¹ *Id.* at 142-43.

¹² DAVID LEE SMITH, *FOLKLORE OF THE WINNEBAGO TRIBE* 9 (Univ. of Okla. Press 1997).

responsibilities concerned the environment and weather. The Elk Clan's functions were related to the distribution of fire through the village, the hunt, and on the warpath. The Buffalo Clan were town criers to the chief. The Fish Clan supplied soldiers for warfare and helped take care of the village. The Snake Clan dealt with sanitation and kept watch as listeners for intruders. In warfare, the Snake and Fish Clans formed the first line of defense.¹³

While clan elders might be thought of as the legislators traditionally, it is important to note that prior to a western-style government, all tribal members had responsibilities to tribal governance under the traditional clan system. It was through the exercise of these responsibilities, that all tribal members had a voice within the tribe. A brief description follows of the clans most involved with the historical traditional governance of the tribe.

The two clans that were involved in the historical traditional governance of the tribe were the Thunderbird Clan and the Bear Clan. These two clans carried out the traditional clan roles in peacemaking and discipline. The Thunderbird Clan was viewed as the most influential and important based on their leadership role within the tribe.¹⁴ This clan's prominence among the other clans can be attributed to the fact that the chief of the Ho-Chunk was always a member of the Thunderbird Clan.¹⁵ The chief was responsible for keeping peace among the clans and members and with outsiders.¹⁶ The chief's lodge was usually kept at the center or southern edge of the camp and was typically used to house offenders seeking protection from acts of vengeance by victims and their family members.¹⁷ In the chief's peacekeeping role, he would always attempt reconciliation, even in the case where a clansman was murdered.¹⁸

Traditionally, the Bear Clan was responsible for the police and disciplinary functions.¹⁹ The Bear Clan patrolled much like a present day police force, rotating between on and off-duty shifts.²⁰ Tribal offenders who disobeyed an order of a Bear Clan soldier were punished immediately.²¹ Punishment for disobeying orders ranged from destruction of belongings, to whippings, to being killed if attempting to fight back with a firearm.²² After an offender was convicted of a crime in the chief's lodge, the Bear Clan administered the punishment.²³ Rapists and adulterers were disciplined with whippings, and murderers were allowed to be killed by the victim's family at their discretion.²⁴ These traditional clan roles in peacemaking and discipline have been modified dramatically in the modern-day Ho-Chunk Traditional Court.

¹³ *Id.*

¹⁴ RADIN, *supra* note 9, at 159.

¹⁵ *Id.* at 161.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 152.

²⁰ RADIN, *supra* note 9, at 178-79.

²¹ *Id.*

²² *Id.*

²³ *Id.* at 179.

²⁴ *Id.*

B. Modern-Day Traditional Court

The Ho-Chunk Traditional Court is a revival of traditional dispute resolution for conflicts among members or members and tribal entities. Article VII of the Ho-Chunk Constitution allows for a special court for traditional dispute resolution.²⁵ The Traditional Court was established in 1995 through the Nation's passage of the Judiciary Act.²⁶ This court renews the tradition of referring disputes to clan elders for resolution.²⁷ All elders on the Traditional Court are male and provide a cross-representation of the different Ho-Chunk Clans.²⁸ However, not all clans are represented and there is no set number of elders allowed to serve at one time.²⁹ The Traditional Court elders are not elected or appointed; tribal members believe that this role is preordained.³⁰ This pre-ordained role becomes an elder's responsibility when he has become a leader within his clan based on traditional clan customs and evidenced by his particular wisdom concerning traditional clan customs.³¹

Parties must meet two prerequisites to appear before the Traditional Court. First, all parties must provide written voluntary consent to appear and acknowledgement that the written voluntary consent waives his or her right to litigate or appeal the matter in Ho-Chunk Trial Court.³² Second, all parties appearing before the Traditional Court are expected to speak the traditional Hocak language; if a member is not fluent, they should request an elder male accompany them to the appearance.³³ The language requirement presents some difficulty because fluent members are rare. According to Ho-Chunk's Department of Heritage Preservation, only 200 members, or 4% of all enrolled members are fluent in the Hocak Language.³⁴ The Traditional Court members are increasingly concerned that a continued loss of language will cause the people to lose their way of life and sacred ceremonies.³⁵

Decisions by the Traditional Court are final and respected by tribal members. Similar to the historic traditional dispute resolution process, the decision rendered by the elders in present day Traditional Court is final and cannot be appealed.³⁶ Members rarely violate the decision of the Traditional Court because of the great amount of respect given to community elders.³⁷ Historically, elders had the power to banish anyone who disobeyed their orders or to order such penalties as

²⁵ HCN CONST. art. VII, § 1, available at <http://www.ho-chunknation.com/?PageId=180>.

²⁶ *Ho-Chunk Nation: Judiciary*, OFFICIAL HO-CHUNK NATION WEBSITE, <http://www.ho-chunknation.com/?PageId=28> (last visited May 9, 2012).

²⁷ Matha & Rockman, *supra* note 1, at 32-33.

²⁸ V.V. Goodthunder, *Men of Loyalty Ho-Chunk Traditional Court*, HOCÁK WORAK NEWSPAPER (Black River Falls, Wisconsin), October 9, 2002, at 2.

²⁹ *Id.*

³⁰ Telephone Interview with Todd Matha, Chief Trial Court Judge, Ho-Chunk Nation Judiciary (Nov. 23, 2010).

³¹ *Id.*

³² V.V. Goodthunder, *supra* note 28. See also HCN R. Civ. P. 8.

³³ V.V. Goodthunder, *supra* note 28.

³⁴ *Ho-Chunk Nation: Language*, OFFICIAL HO-CHUNK NATION WEBSITE (2005), <http://www.ho-chunknation.com/?PageId=54> (last visited May 9, 2012).

³⁵ Thompson, *supra* note 6.

³⁶ Matha & Rockman, *supra* note 1, at 32. See also V.V. Goodthunder, *supra* note 29.

³⁷ Matha & Rockman, *supra* note 1, at 32.

the payment of restitution or fasting,³⁸ Today, the Traditional Court remedies consist of anything “arising under the customs, traditions, and laws of the Ho-Chunk Nation pursuant to the [Constitution].”³⁹

The structure and procedure of the Traditional Court closely resemble traditional law and custom. For instance, in accordance with how disputes were resolved in the past, the court today mimics the traditional law setting by conducting dispute resolution proceedings in front of a panel of elders around a central fireplace.⁴⁰ Discussion around a central fireplace ensures all parties participate in a “truthful discussion” because the open flame represents a portal to the Great Spirit and tribal members are unable to lie in the presence of the Great Spirit.⁴¹ After discussion is complete, the elders confer and come to consensus of how the dispute is to be resolved.⁴²

The elder members also have many responsibilities outside of the lodge. At the request of the Ho-Chunk Trial and Supreme Courts, elders provide formal pronouncements of the applicable oral tradition and common law.⁴³ Tribal members may also request appearance for general advice on personal matters that do not involve a dispute claim.⁴⁴ When drafting laws, orders, and ordinances, the other branches of government frequently seek the elders’ advice and traditional knowledge.⁴⁵ The traditional laws and customs of the Ho-Chunk people continue through the advocacy and advice of Traditional Court elders.

The Ho-Chunk Traditional Court strives to keep its traditional law at the center of conflict resolution. Representation from across the clans means each community has a leader in the lodge. Traditional Law remains a vital source of law for the Ho-Chunk Nation and as the following sections discuss this law is important to the functioning of every branch of government.

PART III – LAW OF GOVERNANCE

The current government continues to mature and grow in its ability to function in Ho-Chunk’s modern society. The Wisconsin Winnebago adopted their first Constitution in 1963, and operated under that name and Constitution for the next 31 years.⁴⁶ On November 1, 1994, with the approval of the Secretary of Interior, the Wisconsin Winnebago Tribe changed their name to Ho-Chunk Nation and adopted a new Constitution.⁴⁷ Under the new Constitution, four branches of government were established with the Legislative, Executive, and Judicial branches all forming underneath the General Council.⁴⁸

³⁸ *Id.*

³⁹ V.V. Goodthunder, *supra* note 28.

⁴⁰ Matha & Rockman, *supra* note 1, at 32-33.

⁴¹ Telephone Interview with Todd Matha, *supra* note 30. *See also* Matha & Rockman, *supra* note 1, at 33.

⁴² *Id.* at 32.

⁴³ Matha & Rockman, *supra* note 1, at 33.

⁴⁴ V.V. Goodthunder, *supra* note 28.

⁴⁵ *Id.*

⁴⁶ *An Abstract View of Ho-Chunk History*, *supra* note 3.

⁴⁷ HCN CONST. art. XVI.

⁴⁸ HCN CONST. art. III, § 2.

A. Overview of the General Council

The members of the tribe sit atop the government hierarchy via membership in the General Council. The General Council represents the interests of the entire tribe and all members eligible to vote can participate in General Council.⁴⁹ The Legislative, Judicial, and Executive branches receive their authority from the General Council.⁵⁰ The General Council's authority modifies the typical western style government structure, enabling all Ho-Chunk members to have an influential voice.

The General Council's authority is visible through its veto power. The veto power allows the General Council to strike down legislative actions as well as judicial decisions that interpret legislative actions (but not judicial decisions that interpret the Ho-Chunk Constitution).⁵¹ Although this veto power has never been invoked to reverse a judicial decision, it has been used to revoke legislative actions.⁵² The fact that all eligible voting members can participate in General Council resembles how the each member in a clan system had responsibilities in the governance of the tribe.

B. Overview of the Executive and Legislative Branches

The Executive Branch is granted authority under Article VI of the Ho-Chunk Nation Constitution.⁵³ An elected President leads this branch.⁵⁴ Article VI, Section 2 enumerates twelve executive powers including the authority to enforce laws, propose legislation and an annual budget, administer all legislatively established departments, preside over legislative meetings, cast the deciding vote in case of a tie among the legislature, call and preside over General Council meetings and represent the tribe in matters concerning its interests and welfare.⁵⁵

The Legislative Branch is granted authority under Article V of the Ho-Chunk Nation Constitution.⁵⁶ There are currently thirteen legislator positions representing four districts in Ho-Chunk Nation territory in Wisconsin and one district for out-of-state territory.⁵⁷ These districts are reapportioned every five years to ensure a "one-person/one-vote representation."⁵⁸ Article V, Section 2 enumerates twenty-four legislative powers to include the authority to make laws, collect taxes, raise revenue, set budgets for all branches of government, purchase land, and negotiate treaties, contracts, and agreements between Ho-Chunk Nation and other governments or organizations.⁵⁹

In 2001, the legislature enacted the Legislative Organization Act that sets out the rules and procedures for legislators and collective actions of the governing

⁴⁹ HCN CONST. art. IV, § 1.

⁵⁰ HCN CONST. art. IV, § 2.

⁵¹ HCN CONST. art. IV, § 3.

⁵² Telephone Interview with Todd Matha, *supra* note 30.

⁵³ HCN CONST. art. VI.

⁵⁴ HCN CONST. art. VI, § 1.

⁵⁵ HCN CONST. art. VI, § 2.

⁵⁶ HCN CONST. art. V.

⁵⁷ HCN CONST. art. V, § 1(b).

⁵⁸ HCN CONST. art. V, § 4.

⁵⁹ HCN CONST. art. V, § 2.

body.⁶⁰ This code is a valuable resource as it describes in detail the legislative process for enacting law, the legislative procedures to be followed, establishment and procedures for legislative committees, statute citation rules, and procedures for continuity of government in emergency situations.⁶¹ This Act also established the Ho-Chunk Nation Code and its organization into ten distinct titles: Title 1 - Establishment Acts; Title 2 - Government Code; Title 3 - Health and Safety Code; Title 4 - Children, Family, and Elder Welfare Code; Title 5 - Business and Finance Code; Title 6 – Personnel, Employment and Labor Code; Title 7 - Cultural and Natural Resources Code; Title 8 - Housing, Real Estate, and Property Code; Title 9 – Criminal Code; Title 10 - Rules, Manuals, and Procedures.⁶² Specific examples of law and legislative action will be discussed more in Section IV - Enacted Law.

C. Overview of the Judicial Branch and Western-Style Court System

The modern court system was established after legislative enactment of the Judiciary Act of 1995.⁶³ The Act created the Ho-Chunk Supreme Court for appellate review, a Trial Court, and the previously mentioned Traditional Court.⁶⁴ The Supreme Court and Trial Court are each led by a Chief Judge, and are staffed by Associate Justices.⁶⁵ Supreme Court Justices are elected while the Trial Court Judges are appointed by the Legislature.⁶⁶ All three courts have the authority to enforce the Constitution, laws, and customs and traditions of the tribe.⁶⁷

Like many state supreme courts, the Ho-Chunk Supreme Court has the exclusive power to establish written rules and procedures for use in its courts.⁶⁸ Ho-Chunk's procedural rules have been created by the Supreme Court or adopted from Wisconsin, or Federal rules. The Federal Rules of Evidence were adopted in their entirety by the Ho-Chunk Supreme Court.⁶⁹ Civil, criminal, and appellate rules of procedure have been written and adopted by the Ho-Chunk Supreme Court.⁷⁰

At first glance, the civil rules of procedure seem analogous to the Federal Rules. Practitioners must pay particular attention to the Ho-Chunk Rules of Civil Procedure because there are some differences in rule numbers and language. For example, Disclosure rules are governed under Rule 26 in the Federal Rules, but in the Ho-Chunk rules, Disclosure is incorporated into the Discovery rules section under Rule 31.⁷¹ Practitioners should make themselves familiar with Ho-Chunk rules prior to representing a party in court.

An area of interest for practitioners is the provisions governing the ability to practice before the Ho-Chunk courts. The Supreme Court adopted rules for

⁶⁰ See Legislative Organization Act of 2001, 2 HCC § 11 (2010).

⁶¹ See *Id.*

⁶² *Id.* § 11(29). See also *Ho-Chunk Nation: Ho-Chunk Nation Laws*, OFFICIAL HO-CHUNK NATION WEBSITE, <http://www.ho-chunknation.com/?PageId=254> (last visited May 9, 2012).

⁶³ 1 HCC § 1 (2005).

⁶⁴ *Id.* § 1(3).

⁶⁵ *Id.*

⁶⁶ HCN CONST. art. VII, § 10-11.

⁶⁷ 1 HCC § 1(4) (2005).

⁶⁸ 1 HCC § 1(5)(d) (2005).

⁶⁹ *Ho-Chunk Nation: Judicial Rules*, OFFICIAL HO-CHUNK NATION WEBSITE, <http://www.ho-chunknation.com/?PageId=123> (last visited May 9, 2012).

⁷⁰ *Id.*

⁷¹ See FED. R. CIV. P. 26. See HCN R. CIV. P. 31.

admission to practice in 1996.⁷² Lawyers, trained lay advocates, may select tribal members to appear before the court in a limited capacity; but only concerning the current matter before the court. Interestingly, law students may also gain admission to practice in Ho-Chunk courts.⁷³ Besides competency requirements, advocates must be 18 years of age, meet character and fitness requirements, and take an oath administered by a member of the Ho-Chunk Judiciary.⁷⁴ The Judiciary sponsors a lay advocate training program upon sufficient demand and an annual guardian ad litem training.⁷⁵ All practitioners and advocates are expected to follow the Ho-Chunk Nation Rules of Professional Conduct. Ho-Chunk's professional conduct rules were adopted wholesale from the Wisconsin Rules of Professional Conduct and also include the rule comments from the American Bar Association Rules of Professional Conduct.⁷⁶

All Ho-Chunk Courts have the authority to enforce traditions and customs of the Ho-Chunk Nation.⁷⁷ The Ho-Chunk Rules of Civil Procedure provide that "judges of the Trial Court may look to Ho-Chunk customs and traditions for guidance in applying justice and promoting fairness to parties and witnesses."⁷⁸ Additionally, the Ho-Chunk Appellate Rules of Procedure provide an identical provision for the Supreme Court to apply Ho-Chunk custom and tradition.⁷⁹

Based on the code, the Ho-Chunk Judiciary has the authority and also an obligation to consider traditional law and customs as a part of their judicial responsibilities. The Ho-Chunk Nation Rules of Judicial Ethics is strewn with references to a Judge's responsibility and authority to consider Ho-Chunk customs.⁸⁰ For example, the Standard of Conduct for the judiciary in rule 2-1 states that "[a] tribal court judge or justice should help create and maintain such a judiciary, in accordance with Ho-Chunk Nation customs and traditions and should observe high standards of conduct toward achieving this goal."⁸¹ Practitioners should expect the Ho-Chunk Judiciary to consider traditions and customs.

Advocates must be cognizant of Ho-Chunk traditions and customs applicable to an issue or case. Besides knowing the Ho-Chunk Rules and Procedures, knowledge of traditional law and custom could be considered a requirement for competent representation under the Ho-Chunk Nation Rules of Professional Conduct. Knowing applicable customs or traditions could help a

⁷² RULES FOR ADMISSION TO PRACTICE IN THE COURTS OF HO-CHUNK NATION (1996), available at <http://www.ho-chunknation.com/UserFiles/Admission.pdf>.

⁷³ *Id.* at Rule II.

⁷⁴ *Id.* at Rule I.

⁷⁵ See *Ho-Chunk Nation: Lay Advocacy*, OFFICIAL HO-CHUNK NATION WEBSITE, <http://www.ho-chunknation.com/?PageId=555> (last visited May 9, 2012); *Ho-Chunk Nation: Guardian ad litem*, OFFICIAL HO-CHUNK NATION WEBSITE, <http://ho-chunknation.com/?PageId=481> (last visited May 9, 2012).

⁷⁶ See *Ho-Chunk Nation: Bar Membership*, OFFICIAL HO-CHUNK NATION WEBSITE, <http://www.ho-chunknation.com/?PageId=377> (last visited May 9, 2012). See also HO-CHUNK NATION RULES OF PROFESSIONAL CONDUCT FOR ATTORNEYS, Part I & II, available at <http://www.ho-chunknation.com/?PageId=377>.

⁷⁷ HCN CONST. art. VII, § 5; 1 HCC § 1(4) (2005).

⁷⁸ HCN R. CIV. P. 1.

⁷⁹ HCN R. APP. P. 1(a).

⁸⁰ HCN RULES OF JUDICIAL ETHICS (2000), available at <http://www.ho-chunknation.com/UserFiles/Judicial%20Ethics.pdf>.

⁸¹ *Id.* R. 2-1.

practitioner present a more persuasive argument for their client while also respecting the traditions and customs of the tribe.

PART IV – ENACTED LAW

The legislature is a governing body that not only works for the people of Ho-Chunk Nation, furthering its economic, political and societal interests, but also protects the Nation's culture, language and traditions. In fact, the legislature has a mandatory responsibility set forth in the Constitution "[t]o protect and foster Ho-Chunk religious freedom, culture, language, and traditions."⁸² The legislature has enacted various codes in support of their responsibility to protect and foster custom and tradition.

In 2001, the Legislature enacted the Department of Heritage Preservation Establishment and Organization Act.⁸³ This Department is responsible for preserving Ho-Chunk's history, culture, and religious traditions.⁸⁴ For practitioners new to the community or new to representation of tribal members, the Heritage Preservation Department will be an invaluable resource for becoming knowledgeable about Ho-Chunk history, community, and culture. On the other hand, while the Heritage Preservation Department seeks to preserve and protect from within the Nation, the Tribal Research Code also enacted by the Legislature seeks to prevent outsiders from conducting potentially damaging medical, archeological, behavioral, and societal tribal research. By enacting the Tribal Research Code, the legislature seeks to control these types of studies so that the research causes no harm to the Nation and its members, and ensures accepted community participation.⁸⁵ The code also includes a process for obtaining research permits.⁸⁶

The majority of Ho-Chunk traditional law is orally preserved, but the legislature has codified some portions of great importance to the preservation of the tribe's culture. The Elder Protection Act and Domestic Abuse Act are two examples where protection of tribal members demanded codified versions of Ho-Chunk traditional law.⁸⁷ The Elder Protection Act can be linked to a case litigated in Ho-Chunk trial court in 1999, where the court made specific mention of the lack of an elder abuse statute.⁸⁸ In support of its criticism, the court brought in a member of the Traditional Court to provide testimony on the traditional law for respecting elders. A few weeks later in a domestic abuse case, the court based its subject matter jurisdiction on traditional law instead of a statute.⁸⁹ Following this

⁸² HCN CONST. art. V, § 2(r).

⁸³ See Department of Heritage Preservation Establishment and Organization Act of 2001, 1 HCC § 6 (2001).

⁸⁴ *Id.* § 6(4)(a).

⁸⁵ See Tribal Research Code, 3 HCC § 3 (2005).

⁸⁶ *Id.* § 3(9).

⁸⁷ Telephone Interview with Todd Matha, *supra* note 30. See also 4 HCC § 1 (2011), and 4 HCC § 5 (2008).

⁸⁸ Telephone Interview with Todd Matha, *supra* note 30. See also Mike v. Mike, CV 99-42 (HCN Tr. Ct. Jul. 23, 1999) (order granting preliminary injunction), available at <http://www.ho-chunknation.com/UserFiles/CV99-42A.BK%20Preliminary%20Injunction.pdf>.

⁸⁹ Whiteagle-Fintak v. Fintak, DV 99-01, (HCN Tr. Ct. Aug. 7, 1999) (order granting emergency protective order), available at <http://www.ho-chunknation.com/UserFiles/DV99-01%20Ex%20Parte%20Emergency%20TRO.pdf>.

litigation, the legislature enacted the Domestic Abuse Act in August, 2000, and the Elder Protection Act in January, 2001.⁹⁰

The Legislature has also enacted laws protecting member employment when member employees have traditional clan responsibilities that take them out of the workplace. The Ho-Chunk Employment Relations Act provides paid leave for tribal members employed by the tribe or its corporations to fulfill traditional clan responsibilities.⁹¹ This policy ensures that tribal member employees can “observe their religion, culture, and tradition, when obligated to, without the threat of losing a job or losing pay.”⁹²

Similar to the Judicial Branch, the Ho-Chunk Legislative Branch seeks transparency in its actions. Visiting the legislature webpage will reveal meeting minutes, the current Ho-Chunk Code, the proposed code for public review, resolutions, information on legislative subcommittees, and a district meeting schedule since all meetings are open to the public.⁹³

If a conclusion could be made about Ho-Chunk’s legislature or enacted law, it is that traditional law is respected and observed in the governance of the tribe. In advocating for or against the Nation’s enacted laws, practitioners should be aware that some of these laws derive from traditional law. To appreciate the full meaning of these types of laws, it is important to understand where they came from, how the law is understood traditionally and its importance to the fabric of the community.

PART V – CASE LAW

As mentioned above in Section II, the elders of the Traditional Court work together with the Trial and Supreme Courts in disputes involving interpretation of tribal customs and traditions. The result of these cooperative efforts creates a body of law similar to the western-style common law system. The Ho-Chunk common law comes from articulations of applicable traditional law and customs by the Traditional Court in matters before the Trial and Supreme courts.⁹⁴ Similar to state and federal courts, the decisions of the Ho-Chunk Trial and Supreme courts represent a living body of law accessible to all people.

Transparency is a goal and requirement of the Ho-Chunk Judiciary and the Ho-Chunk website is the solution.⁹⁵ The website includes a vast amount of information concerning the Judicial Branch including Trial and Supreme Court opinions, judicial rules, case load statistics and program instructions for becoming a lay advocate or guardian ad litem.⁹⁶ Furthermore, the Ho-Chunk Code requires its courts to conduct all proceedings in a public place.⁹⁷ A publicly accessible record

⁹⁰ See Domestic Abuse Act of 2000, 4 HCC § 5 (2008). Elder Protection Act of 2001, 4 HCC § 1 (2011).

⁹¹ See Employment Relations Act of 2004, 6 HCC § 5(21) (2011).

⁹² *Id.* § 5(21)(a).

⁹³ *Ho-Chunk Nation: Legislature*, OFFICIAL HO-CHUNK NATION WEBSITE, <http://www.ho-chunknation.com/?PageId=168> (last visited May 9, 2012).

⁹⁴ Telephone Interview with Todd Matha, *supra* note 30. See also Matha & Rockman, *supra* note 1, at 33.

⁹⁵ Telephone Interview with Todd Matha, *supra* note 30. See also 1 HCC § 1(5) (2005).

⁹⁶ See *Ho-Chunk Nation: Judiciary*, *supra* note 26.

⁹⁷ 1 HCC § 1(5)(a).

must be made of every proceeding and decision.⁹⁸ Additionally, all Ho-Chunk Judicial Rules and Procedures must be written, published and available to the public.⁹⁹

In an effort to reach out to tribal members and practitioners, the Judiciary electronically publishes a monthly Ho-Chunk Nation Court Bulletin. The bulletin includes articles discussing relative points of law impacting the Ho-Chunk Nation, case summaries for recent Supreme Court and Trial Court decisions and filings, relevant updates of law from external jurisdictions, legal citation form, the courts' fee schedules and contact information, and a listing of current members of the Judiciary and their staff.¹⁰⁰ The Ho-Chunk courts and their decisions are accessible to all, and through this accessibility they are able to maintain legitimacy and credibility among Ho-Chunk members and with external courts.

PART VI – DEVELOPING CRIMINAL LAW

The Ho-Chunk Legislature has reserved an entire title of its code (Title 9) for criminal law. In 2008, the Ho-Chunk Legislature passed the Law Enforcement Commission Establishment and Organization Act.¹⁰¹ The Law Enforcement Commission is charged with managing agreements and relations with various Wisconsin county police departments, as well as establishing the first Ho-Chunk Nation Police Department.¹⁰² The Commission achieved a major step towards protecting its members and preserving tribal sovereignty on September 29, 2010, when it established the Ho-Chunk Law Enforcement Agency and appointed their first ever Chief of Police.¹⁰³ Practitioners should be aware of the developing efforts of Ho-Chunk Nation to police its members and territory and the development of a Ho-Chunk Criminal Code. The code will be developed in consideration of the Nation's traditional laws, customs, and varying interests to protect its members and territories.¹⁰⁴

PART VIII – FINAL COMMENTS

In time, if the Ho-Chunk Nation continues to incorporate traditional law at every stage, the Nation and its members should see a revival in its language and traditional self-governance. It is this commitment to traditional notions of peacekeeping and dispute resolution that will strengthen the community. Members of the legal community should always strive to understand the applicable tribal customs that will impact their representation of a Ho-Chunk member, business, or the tribe as a whole.¹⁰⁵ In order to gain an understanding of current tribal custom

⁹⁸ *Id.* § 1(5)(b).

⁹⁹ *Id.* § 1(5)(d).

¹⁰⁰ See *Ho-Chunk Nation: Court Bulletins*, OFFICIAL HO-CHUNK NATION WEBSITE, <http://www.ho-chunknation.com/?PageId=91> (last visited May 9, 2012).

¹⁰¹ Law Enforcement Commission Establishment and Organization Act, 1 HCC § 14 (2008).

¹⁰² *Id.* § 14(6).

¹⁰³ John Kozłowicz, *The Nation Celebrates a Historic Event: Daniel Libke becomes the Nation's first Chief of Police*, HOČAK WORAK NEWSPAPER (Black River Falls, Wisconsin), Oct. 8, 2010, at 7, available at http://www.ho-chunknation.com/UserFiles/File/2010_Issues/Issue_19.pdf.

¹⁰⁴ See *Id.*

¹⁰⁵ See Christine Zuni Cruz, *[On The] Road Back In: Community Lawyering in Indigenous Communities*, 24 AM. INDIAN L. REV. 229, 247 (2000).

and culture a practitioner should be knowledgeable of the community, and with the permission of the represented party, should talk to an elder or family member to gain insight into any applicable tribal customs.¹⁰⁶

This profile provides an overview of the Ho-Chunk Nation's traditional and modern laws and the modern governmental structure and operations. Practitioners should use this profile only as a starting point in researching Ho-Chunk traditional and modern law.

¹⁰⁶ *Id.* at 247-250.