I. INTRODUCTION

A. “The Legal Captivity Narrative of Legal Representation of Tribal Governments” is a summary of the conditions of operation and representation of tribal legal departments in Indian Country. Like the historical trope of the captivity narrative—a non-Indian, typically a settler woman or child, is captured by an Indian tribe and thrown into the Indian world and required to make sense of an alien savage Indian world. The captivity narrative is a report from the front lines where Indians and non-Indians meet to negotiate and force their respective legal and cultural differences on one and other. Some captivity narratives are positive — John Tanner’s capture by Michigan Odawa — but most settler captivity narratives are negative and some are tragic in their consequences — Cynthia Ann Parker (Quanah Parker’s non-Indian mother) captured in Texas by the Comanche and then forced to return to colonial society and dying as a result of grief at the loss of her Indian family.

In the context of Tribal Government, we (tribal attorneys) all bring a captivity narrative with us when we go to work for tribal governments. If we are non-Indian, then our captivity narrative is the traditional story of either supporting tribal governments—the numerous non-Indian attorneys that have worked for tribes and support tribes (Indian Legal Services, NARF, American Indian Law Center — and developing local centers such as this the Indigenous Law and Policy Center — or our captivity narrative is to oppose tribes — the racial and political Indians that oppose tribes --- e.g., recent anti-ICWA litigation.

If we are Indian and go to work for our tribe — our “captivity narrative” is the reverse and converse of the white captivity narrative. Here, we are Indians captured by non-Indian law and we bring back legal captivity narratives to our communities about our captivity and try to determine, based on our captivity, how to best structure our narrative, and ultimately our representation and recommendations, to our client communities, so that representation or recommendations support our communities and do not have a tragic consequence for our communities — sort of reverse Cynthia Ann Parker. Indeed, the goal of Tribes is to get out of
white captivity and reassert tribal governments — in effect, the doctrine of discovery is morphed into the doctrine of recovery for Indian tribes. This is a recovery of not only land, but also all things Indian in this world in this time and for the future.

Despite this laudable goal, the more fundamental problem is that the legal narrative to Indian Tribes about non-Indians is so long and complex — one of those Tolstoy, Karl Ove Knausgaard or Robert Musil novels that go on for thousands of pages — and typically the tribal attorney or general counsel is the only narrator of the non-Indian legal world and her narrative is at best just a short story — to follow the metaphor.

B. The Tribal Legal Office:

1. Often it’s one person as in-house attorney with a legal secretary (often not trained as one)

2. Sometimes, it’s his/her first job out of law school

3. You are “it”—every legal issue (or issue that looks remotely like a legal issue) is your responsibility
   a) Does OSHA, FMLA, ERSA, apply to us?
   b) Wanna take a look at this contract?
   c) Oh, we got sued in tribal court last week…you need to get the case thrown out
   d) We are meeting with the Governor’s office next week and need a memo on our gaming compact
   e) Have you ever written a grant?
   f) We have an economic development project going south…
   g) Do you know Self-Governance, NAHASDA, IHS, IGRA, IRA (Land into Trust), Hearth Leasing, ICWA, etc.

4. Sound familiar?

5. This outline (in 15 minutes of speaking) will examine the role of the Tribal in-house counsel in today’s world

II. SOME HISTORY ABOUT TRIBAL IN-HOUSE ATTORNEYS

A. Evolution of the tribal in-house attorney

1. This is not an exhaustive history
a. Others (e.g. Kristen Carpenter has covered this in detail in her Denver Law School article, Claudeen Bates Arthur is realistic and has enormous experience Az. Law Review Article, any number of former legal services attorneys that work for Indian tribes now)

b. Important, however, to set this out because it informs the discussion of today’s in-house attorney

2. In the beginning, tribes were represented by U.S., then law firms, mostly Indian Claims Commission attorneys

   a. See book about Wilkinson Cragun and Barker firm

   b. Ed Lazarus book about Sioux land claims

   c. Many conflicts, much paternalism involved

3. In the 1970s Tribes — largely through Indian Legal Services, moved away from that and used specialized Indian law firms

   a. Tribal members became attorneys (PLSA a big help)

   b. NARF was established

   c. “Indian law firms” were started-fell-apart-restarted and reconfigured, MN, AZ, NM

   d. Big Law Firms-FB in MN; DC Sonosky, Hobbs, HK, WA

   e. “Boutique” firms: Greene; Kanji and Katzen

4. Eventually Tribes decided to have their own in-house attorneys (Fees of outside Counsel are high because no outside counsel wants to make a mistake based on mal-practice with consequences to the firms)

5. Today there is a wide spectrum of “In-House Attorneys”

   a. The one attorney office (Do everything, take the risk of mistakes because the Tribe is paying for the mal-practice by default) (dangerous but necessary job)

   b. The part time in-house (attorney from law firm spends a couple of days a week at tribal office) (barely works in the best of times—client wants unlimited access and attorney wants known scope of work)

   c. the “Legal Department”
i. Two attorneys and a legal secretary (Poor resource or poor market Tribes)

ii. A mid-size staff (Mid-West Tribes)

iii. A large department with different specialties (Western Tribes and High Resource or High Market tribes)

iv. Large Tribe low resources; market isolation (extremely limited staff given the need)

6. Formalities of the Office — Tribes have used different processes for creating their legal departments
   
   a. No ordinance or other authorizing document
   
   b. Ordinance establishing duties
   
   c. Tribal Constitution requirements
   
   d. Rules and regulations governing the tribal legal department

7. Formation Tribal In-House Counsel Association
   
   a. Fairly new entity
   
   b. Much needed organization given the growth of in-house attorneys

III. CHALLENGES FOR TODAY’S TRIBAL IN-HOUSE COUNSEL

A. In our experience (Petoskey and White) as in-house tribal attorneys — a combined 40 or so years; we have encountered and observed certain challenges in the position. The three main ones:

   1. Relationship with tribal client
   
   2. Workload and ability to handle all matters
   
   3. Managing Outside Counsel

B. This outline will discuss each and in offers ways to deal with and possibly overcome them.

C. Relationship with “client”

   1. This challenge is critical—and involves very basic issues
      
      a. Who is client? Membership? Tribal Council? Chairperson?
      
      b. Is there effective communication?
c. What if there are disputes over tribal leadership?

D. Workload and ability to handle

1. This is a very practical matter—in-house attorneys are by nature generalists; they are often given lots of legal work and some of it is complex and specialized matters they have never handled before. There, but for the grace of law gods, are treacherous crevices of malpractice waiting for the uninformed to leap, be pushed or avoid.

   a. Of course, this depends on experience and training or attorney(ies)

   b. Basic and general duties should not be a problem

   c. Unless attorney has experience in an area (e.g. bankruptcy) probably not capable of handling that on his/her own, complex entity financing, compliance with federal financial statutes—IRS entity reporting, management of grants,

   d. Often attorney is overwhelmed with work and underwhelmed with pay. Doing it for the cause or, in more recent cases, cannot find anything better.

   e. Also have issue of tribal members seeking individual representation

E. Managing outside counsel

1. This is a very frequent challenge

   a. There are many law firms out there that practice “Indian law”

      i) Big firms, small firms, in between firms, even “non-profit” firms (like NARF)

      ii) They offer a full line of legal services to tribes (the will handle all of the work if you let them and break the budget in the process)

      iii) Tempting to give them work—sometimes pay offs, nothing like an aggressive attorney to secure all the damages a tribe entitled.

      iv) Problem is the cost—they bill at hourly rates and can be very expensive; also percentage lawyers have a unique history in Indian law all the way from ICC to the more recent Cobell case, and the Contract Support Case of 2015 ($90,000,000 dollars for approximately 4 or 5 attorneys) (take solace in the fact that those 4 or 5 attorneys will probably tie each other up in litigation over their respective shares).
v.) Outside counsel paid by the tribe through management contracts for gaming by large publicly held companies (Stations, Full House, Lakes Gaming) (really a separate subject)

vi.) Plus, they don’t know the situation on the ground like you do

b. Challenge is to effectively manage use of outside counsel

i) Limit their work to matters you cannot handle

ii) Control costs and billing

iii) Control selection of outside counsel

iv) Effectively work with outside counsel

IV. SOLUTIONS TO IN-HOUSE COUNSEL CHALLENGES

A. There are things that in-house counsel can do to deal with the above challenges

1. In-house attorneys have been in existence for many years (for corporations, institutions, etc.

2. They deal with these same issues in a non-tribal context

3. Section of ABA for in-house, a national organization, blogs

4. Lots of articles written on the subject

B. Client Relationship

1. Important to identify, document your role as in-house counsel

   a. Tribal Ordinance, resolution

   b. Personnel contract

   c. Document chain of command

   d. When you need to get approval from client; when you can make decisions yourself

2. Need good communication with client

   a. Regular, weekly reports in person

   b. Make sure you are involved in key meetings, trips, decisions
c. Need to communicate with all tribal departments and schedule meeting with them

d. Prepare annual report

e. Get evaluation from Council or Chairperson

f. Do not take a position on political issues but present all alternatives and act only after the Council or whatever mechanism is in place has taken the governmental position

C. Workload

1. Know your limits

2. Know when to delegate

3. Get good at time management

4. Get good legal secretary, assistant, paralegal

5. Assign to outside counsel when you need to

6. Hire the best staff your budget can manage, and lobby for a greater budget to improve staff

7. Have a formal or informal statement or understanding on the career path and aspirations of staff

8. Look for results, not compliance with a regimented HR schedule

9. Set up software system for records—digitize and index; case management system; statutory management system; memo management (opinion system); administrative opinion systems; transaction system and files of all transactions

10. Establish an official tribal government records and archives

D. Management of outside counsel

1. Do an audit of your outside counsel contracts

2. Do not delegate to outside counsel work that you can perform

3. Go through firms’ monthly billings with a fine toothed comb

4. Do not be afraid to reject billings that are not approved or that are excessive (once was charged by Big City Firm for 3 hours for a brief conversation at the Fed Bar Barbecue).
5. Make sure your outside firm is on your side—Law Firms have a tendency to slice and dice the Model Code so that a conflict is not related because it is an unrelated matter or the mythical “Chinese Wall” is present. (Not the “Great Wall” but more like “additional legal freight wall”)

6. Shop around for outside counsel and ask for hourly rates and alternative billing rates.

CONCLUSION

Tribal Governments are all things to all tribal members. Tribal governments are much more involved in the day-to-day life of tribal members. The principal formal, and primary informal, method of structuring the relationship between members and their governments is through the nonIndian law.

The Tribal In-House Lawyer acts as the principal interpreter of the foreign non-Indian legal narrative; she is the modern-day Indian legal captivity narrative — explaining the foreign legal landscape to the tribal audience. The problem though with the present Indian legal captivity narrative is that the non-Indian legal landscape is large and complex, and not all Indian recipients of the Tribal attorney’s legal narrative particularly trust the Indian legal captive as a reliable informant, nor in some instances, is the Indian legal captive aware that her narrative is suspect based on a limited degree of self-knowledge that she is in fact a captive (to a greater or less degree we are all captives in the seamless web) to a foreign narrative. This problem is compounded by large and complex legal landscape, and the converse expectation of the tribal client that the legal captive knows the total landscape. Because of these inherent problems, the above is at best simply one attempt to structure the relationship between the in-house tribal attorney and the tribal client to reach the ends and needs of the tribal client and to bring a degree of Indian Legal Captivity self-knowledge to the difficulty process of representing Indian tribes.