

**ROSEBUD SIOUX TRIBE
DEPARTMENT OF JUSTICE**

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Attorney General Opinion 19-01

Separation of Powers

Pursuant a Motion duly made and approved at a meeting of the Rosebud Sioux Tribal Council on or about September 3, 2019, the Attorney General's Office was directed to issue a slip opinion regarding the separation of powers as it relates to the relationship between the Administration, the Tribal Council, and the Courts. This directive falls within the scope of the Attorney General Ordinance whereby Section VII (E) of Ordinance 88-01 states:

- E) Responsibility for overall enforcement of Tribal Civil regulatory authority, and other duties as assigned by the Rosebud Sioux Tribal Council. Duties and responsibilities also include ... code drafting, including Constitutional review and amendments, amendments and drafting of revisions to the Rosebud Sioux Tribe Law and Order Code...(Emphasis added.)

INTRODUCTION:

It is important to note that the Rosebud Sioux Tribal Courts are often cited as a model for other courts within Indian Country and outside of Indian Country. Our tribal court system has been one of the most stable court systems due in part to the notion of a separation of powers. This stability is one of the strengths of our justice system as we move toward encouraging investment in our communities and the development of financial resources. We note this because it is imperative that we keep up this reputation. It is hopeful that this opinion will provide some guidance as to how the tribal council can do this for the benefit of the people.

ANALYSIS:

In reviewing our Constitution, our by-laws, ordinances and resolutions, it seems that our leaders of the past have focused on the protection of our judicial officers.

Judicial Officers

It seems fairly straightforward that no attempt be made to exert influence over a judge in a matter that is presently before the court. What many do not realize is that it also covers completed matters as noted in RSTLOC §5-30-8 (discussed in full on the next page). This is

where our analysis begins and it is helpful to begin with the Constitution. Article XI, Section 1 declares as follows:

“The Rosebud Sioux Tribal Court shall be separate and distinct from the legislative and executive branches of tribal government. *No person, including any tribal official or person acting in behalf of a tribal official, shall induce or attempt to induce a favorable decision, or interfere in any manner whatsoever with any decision of any judge of the Tribal or Supreme Court.* The Tribal Council shall pass legislation which shall denote sanctions for the violation of this section.”

This language is consistent with RST Ordinance 2003-01, which we have attached at the end of this opinion in case the reader would like to review the statute. The conduct that this seeks to prohibit includes anyone from interfering with a decision of a judge of either the Tribal or the Supreme Court. The fact that it specifically addresses a tribal official or anyone acting on a tribal official’s behalf. It also directs the Tribal Council to pass legislation which denotes sanctions (penalties) for this section. The Tribal Council has passed several statutes that denote sanctions for would-be violators of RST Const. Art. XI Sec. 1 and RST Ordinance 2003-01.¹ There is also Title 5, Chapter 30 of the Law and Order Code (RSTLOC) entitled “Bribery and Abuse of Public Office” which includes several provisions related to Tribal Council conduct. One such provision is found at RSTLOC §5-30-8. It reads as follows:

5-30-8 Attempting to Influence a Judge

¹ **5-16-11. Threatening or Intimidating a Judicial Officer**

Any person who, directly or indirectly, utters or addresses any threat or intimidation to any juror; referee, arbitrator; judge, hearing officer; umpire, assessor; or Tribal official authorized by law to hear or determine any controversy, with the intent to induce him either to do any act not authorized by law, or to omit or delay the performance of any duty imposed upon him by law, or for having performed any duty imposed upon him by law, is guilty of a **Class A crime**.

5-16-12. Attempting to Influence Juror and Others

Any person who attempts to influence a juror; or any person summoned or drawn as a juror; or chosen as an arbitrator or appointed as a referee or Judge with respect to his verdict or decision in any cause or matter pending before him, or about to be brought before him:

(1) By means of any communication, oral or written, had with him, except in the regular course of proceedings upon the trial of the cause; or

(2) By means of any book, paper; or instrument exhibited otherwise than in the regular course of the proceedings upon the trial of the cause; or

(3) By publishing any statement, argument, or observation relating to the cause;

is guilty of a **Class A crime**.

5-16-13. Agreement to Give a Verdict

Any juror or person drawn or summoned as a juror or referee, arbitrator; judge, hearing officer; or any other person authorized by law to hear or determine a controversy, who makes any promise or agreement to give a verdict for or against any party is guilty of a **Class B crime**.

“Any member of the Rosebud Sioux Tribal Council or the Office of the President or Vice President or any of [their] employees or agents who shall communicate with any Judge of the Rosebud Sioux Tribal Court or the Rosebud Supreme Court, concerning any Court matter, pending or completed is guilty of attempting to influence a judge.

Attempting to Influence a Judge is a **Class A Crime**.

It will be the duty of the Judge to whom such an attempt to influence was made upon to report the attempt to all parties to the case on the official Court record.”

We note that most of these offenses have been deemed as Class A offenses within our Tribal Code. The maximum penalty for a Class A Offense is *currently* one year in jail or a \$5,000 fine or both. The Class A Offense is the most serious class that we have.

Another preventative measure aimed at preventing and discouraging legislative or executive interference is found in **RSTLOC 5-30-9** entitled “**Nullification of Legislative and/or Executive Action Over Judicial Acts.**” It reads as follows:

“No order, judgment, sentence or ruling of the Rosebud Sioux Tribal Court or Rosebud Sioux Supreme Court shall be subject to review, amendment or nullification by the Rosebud Sioux Tribal Council or the Office of the Tribal President or the Vice President or any of their employees or agents. Any legislation, administrative or executive act or order which seeks or purports to modify, vacate or nullify any judicial act or order in violation of this ordinance shall be deemed null and void as a matter of law.” (Emphasis Added.)

This prevents the Rosebud Sioux Tribal Council, the constitutional officers, and any other agency of the tribe acting to render a decision of the tribal court or supreme court powerless. (We have included a helpful example of both the prohibited conduct and the proper conduct in the supplemental materials to this opinion.)

The Role of the Tribal Council When It Comes to the Court:

The Tribal Council has many constitutionally proscribed responsibilities when it comes to the Tribal Court. These are also found at Article XI of the Constitution. The powers that Article XI grants the council are noted, in relevant part, as follows:

- A. **Section 2.** The Tribal Court shall consist of one chief judge and such associate judges and staff as are deemed necessary by the Chief Judge, with the **advice and consent of Tribal Council**. (Emphasis Added.)

It is important to note that Section 2 goes to say the following: *All tribal court personnel shall be subject to the supervision of the Chief Judge.* **The Chief Judge shall establish such staff positions within the Tribal Court as may be necessary for efficient operation. The Chief Judge shall have the authority to establish qualifications for court staff and shall make the final selection of said staff.**

We believe that this section gives the Chief Judge the right to establish the staff positions and that he/she supervises those positions. One of those staff positions is/are the clerk of courts. This section of the constitutional amendment renders RSTLOC §9-1-8 & §9-1-9 moot.

However, there is nothing here to suggest that the staff does not fall under the authority of the employment handbook. The Chief Judge can establish and supervise. He can create the court administrator position and require his subordinates to report to the court administrator. So the staff reports to the court administrator, the court administrator reports to the Chief Judge. If there is an adverse employee decision and the employee follows the chain of command and appeals the court administrator's decision to the Chief Judge. If he/she is dissatisfied with the Chief Judge's decision, then the grievance procedure kicks in.

- B. **Section 4.** The Chief Judge shall promulgate rules of pleading, practice, and procedure applicable to any and all proceedings of the tribal court, consistent with the provisions of this Constitution and requirements of federal law. **In case of failure of the Chief Judge to establish such rules, the Tribal Council shall have the authority to establish them.** (Emphasis Added.)

This is important in that the Constitution only empowers the Tribal Council if/when the Chief Judge fails to establish such rules.

- C. **Section 5.** **The Tribal Council shall set forth qualifications for Tribal Court Chief Judge, Associate Judges, and staff positions by ordinance. The Tribal Council shall appoint a Chief Judge for a term of not less than four years and associates for terms not less than two years.** (Emphasis Added.)

As discussed below, the Tribal Council has set forth these qualifications in RSTLOC §9-1-5, §9-1-6, and §9-1-7.

- D. **Section 6.** **During the tenure of his or her appointment, the Chief Judge, or an Associate Judge may be suspended or dismissed by the Tribal Council** only for cause, as defined by the Judicial Code of Ethics, upon due notice and an opportunity for a hearing open to tribal members. (Emphasis Added.)
- E. **Section 7.** The Supreme Court shall take appeals from the Rosebud Sioux Tribal Court that are deemed meritorious **under rules and standards set by the Rosebud Sioux Tribal Council by ordinance.** (Emphasis Added.)

Title Nine- Administrative Provisions of Tribal Court

It cannot go without saying that there are sections within Title Nine that conflict with Art. XI of the Constitution. Keep in mind that ordinances are enforceable unless and until the Constitution says otherwise.

Title Nine, Chapter One establishes the Courts, Judges and Court Personnel. RSTLOC §9-1-5 begins with the appointment of three (3) appellate Court justices consisting of two (2) or more attorneys licensed to practice before the Federal Courts and may include one (1) lay person. "All Appellate Justices are to be selected by the Tribal Judiciary Committee and approved by the Tribal Council."²

It later provides in paragraph (C):

"All Tribal Court Judges shall be selected by the Judiciary Committee and recommended for Tribal Council for approval. Appointments of Tribal Judges shall be for a probationary period of one (1) year during which time such appointment can be terminated by written notice from the Judiciary Committee or the Tribal Council. Following the one (1) year probationary period, Tribal Judges shall be appointed for a term of two (2) years." (Emphasis added.)³

The judiciary committee has a significant amount of power as it relates to the appointment of judges and magistrates. It can determine which persons are suitable to serve as Magistrates and "can be terminated by written notice from the Judiciary Committee or the Tribal Council."⁴

The salaries and removal of judges also falls within the purview of the Judiciary Committee and Council.⁵

It is worth noting that the Public Defender's Office seemed to have fallen under court staff and are currently not provided for anywhere else in the Code. It is our belief that the Public Defender's Office should not fall under the Chief Judge for the day-to-day activities of the office. The Chief Judge should not be in a position to supervise either office as he/she would routinely be asked to failure adjudicate a matter presently before the court. The Department should be headed

² RSTLOC §9-1-5(1)

³ It is important to point out that this section seems to contradict the Constitution as it discusses a probationary period. Recall that Art. XI Sec. 5 above requires the associates be appointed to terms of not less than two years. There is a limited circumstance where both conditions could be true, but we believe that this issue is being addressed in the law and order code revisions being worked on by our tribal court's legal analyst/coordinator. This issue also exists, at present, in RSTLOC §9-1-6.

⁴ RSTLOC §9-1-7

⁵ See RSTLOC §9-1-10 & §9-1-11

by the Chief Public Defender. The Chief Public Defender could be hired by the Tribal Council. The funding could either come from general funds or funded through 638 contract money. If the 638 contract were the funding source, then there would need to be an MOU with the courts that establishes where the money and the day-to-day supervision would go. Employment issues within the public defender's office would first go to the Chief Public Defender and if the Chief Public Defender could not resolve the issue, then to the Tribal President, and then follow the grievance process.

CONCLUSION

Based on the above discussion, the Attorney General's Office concludes that the separation of powers doctrine only pertains to the judicial process, not personnel matters. The Judiciary Committee, the Rosebud Sioux Tribal Council can direct policies and procedures with how *all tribal employees* are addressed through the RST Human Resources Office, the Personnel Ordinance (Ordinance 82-04), Rosebud Sioux Tribe Personnel Policy and Procedure Manual (Ordinance 2007-09) and others. It appears that we have historically relied on the Chief Judge as well as the Court Administrator to manage the personnel part of the court system. This is consistent with Art. XI Sec. 2 which says specifically that the Chief Judge supervises all court employees. Our Human Resources Office currently maintains all of the employment files for the court personnel.

It is the opinion of this office that the immediate supervisor as it relates to personnel is the Court Administrator. The Court Administrator has been considered a "director" who has attended the Directors' meetings and who has been at Judiciary Committees providing reports. The Court Administrator has been listed and signed as the supervisor on a significant amount of Personnel Actions over the last several years. The Chief Judge has a number of supervisory duties that have been delegated to the Court Administrator. The Chief Judge is the supervisor of the staff and holds the final decision within the courthouse. He/she supervises everyone, including the court administrator. After that, employee issues are addressed by Human Resources and the grievance process.

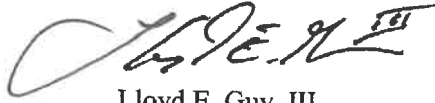
Under no circumstances, should a judge be approached by a councilmember or a constitutional officer as it relates to a specific case, *whether the matter is pending or complete.*⁶ The Judiciary Committee and the Tribal Council need to be careful when they are considering renewing or not renewing a contract, suspending a judge, or removing a judge. In short, the Council should not say "We disagreed with your decision in this case, so we're not renewing your contract."

The Council has historically done well in avoiding discussions regarding active cases. Whenever members of the public bring the issues regarding specific cases to the Judiciary Committee or to the Tribal Council, they do not often realize that there is an appeal process if they do not like how their case turned out. We also need to realize that there are also limitations within our court system. Our judges cannot advise the litigants. Oftentimes, one party has a

⁶ See RSTLOC §5-30-8

lawyer and another party does not. The party not being represented is at a distinct disadvantage. Sometimes our people have no choice.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "L. E. Guy, III". The signature is stylized with a large, sweeping initial "L" and "G".

Lloyd E. Guy, III
Attorney General