

**Tribal Legal Code Resource:**  
**Tribal Laws Implementing TLOA Enhanced  
Sentencing and VAWA Enhanced Jurisdiction**

*Guide for Drafting or Revising  
Tribal Laws to Implement the Tribal Law and Order Act (TLOA)  
Enhanced Sentencing and the Violence Against Women Act  
Reauthorization of 2013 (VAWA 2013)  
Special Domestic Violence Criminal Jurisdiction*

**February 2015**



**California Office:**  
8235 Santa Monica Blvd.  
Suite 211  
West Hollywood, CA 90046  
(323) 650-5467  
Fax: (323) 650-8149

**Minnesota Office:**  
161 Marie Ave. East  
West Saint Paul, MN 55118  
(651) 644-1125  
Fax: (651) 644-1157

**Montana Office:**  
501 N. Sanders St.  
Suite 204  
Helena, MT 59601  
(406) 443-8202  
Fax: (406) 545-2227

**Tribal Court Clearinghouse: [www.tlpi.org](http://www.tlpi.org)**



This project was supported by Grant No. 2012-IC-BX-K001 awarded by the Bureau of Justice Assistance. The Bureau of Justice Assistance is a component of the Office of Justice Programs, which also includes the Bureau of Justice Statistics, the National Institute of Justice, the Office of Juvenile and Delinquency Prevention, the Office for Victims of Crime, and the Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking. Points of view or opinions in this document are those of the author and do not necessarily represent the official position or policies of the U.S. Department of Justice.



Tribal Law & Policy Institute  
8235 Santa Monica Blvd., Suite 211  
West Hollywood, CA 90046  
(323) 650-5467 ~ Fax: (323) 650-8149

### **Primary Authors**

- Maureen L. White Eagle, *Métis*, Tribal Advocacy Legal Specialist, Tribal Law and Policy Institute
- Melissa L. Tatum, Director, Indigenous Peoples Law and Policy Program, the University of Arizona James E. Rogers College of Law
- Chia Halpern Beetso, *Spirit Lake Dakota*, Tribal Court Specialist, Tribal Law and Policy Institute

### **Contributors**

- Jerry Gardner, *Cherokee*, Executive Director, Tribal Law and Policy Institute
- Heather Valdez Singleton, Deputy Director, Tribal Law and Policy Institute
- M. Brent Leonhard, Attorney, Confederated Tribes of the Umatilla Indian Reservation
- Virginia Davis, Senior Policy Advisor, National Congress of American Indians
- Alfred Urbina, *Pascua Yaqui*, Attorney General, Pascua Yaqui Tribe
- Michelle Demmert, *Tlingit*, Reservation Attorney, Tulalip Tribe

### **Administrative Assistant**

- Terrilena Dodson, *Navajo*, Graphics Specialist, Tribal Law and Policy Institute



# TRIBAL LEGAL CODE/POLICY DEVELOPMENT SERIES

The [Tribal Law and Policy Institute](#) (TLPI) has developed many resources to assist tribal governments in creating a comprehensive, community-based, victim-centered response to crime. This series is developed with a philosophy that tribal laws and policy should reflect tribal values. In addition, writing a tribal law usually requires careful consideration of how federal and state laws apply. Each resource is designed to help tribal governments customize laws and policies that fit community values, principles, and capacities. These resources are all freely available for downloading on the [Tribal Court Clearinghouse](#).

## **Tribal Legal Code Resources**

[Tribal Legal Code Resource: Tribal Laws Implementing TLOA and VAWA 2013](#) is designed to be a resource for tribes interested in implementing the Tribal Law and Order Act sentencing enhancement provisions or VAWA 2013's Special Criminal Domestic Violence Jurisdiction. The resource focuses on the tribal code and rule changes that may be needed should a tribe elect to implement the increased tribal authority in either or both statutes. It discusses the concerns and issues that need resolution in implementation and provides examples from tribal codes and tribal court rules. (February 2105)

[Tribal Legal Code Resource: Domestic Violence Laws](#) was developed by TLPI in cooperation with OVW and BJA. This victim-centered approach to domestic violence against Native women resource guide includes exercises, examples, and discussion questions to help tribes customize their laws to meet the needs of their community. This resource was revised and updated in 2012 and in 2015, to include the Tribal Law and Order Act (TLOA) (2010) and the Violence Against Women Act Reauthorization of 2013 (VAWA 2013). (Revised February 2105)

[Sexual Violence and Stalking Laws: Guide for Drafting or Revising Victim-Centered Tribal Laws Against Sexual Assault and Stalking](#) was developed by the TLPI in conjunction with the Southwest Center for Law and Policy and is intended to be a guide for drafting or revising victim-centered tribal criminal laws on sexual assault and stalking. This resource guide includes sample language and discussion questions which are designed to help tribal community members decide on the best laws for their community. This resource was revised and updated July 2012, including changes addressing the 2010 enactment of the Tribal Law and Order Act.

[Tribal Legal Code Resource: Crimes Against Children](#) has been developed by the TLPI under a Children's Justice Act Partnerships for Indian Communities training and technical assistance grant. Specifically, it has been developed to provide assistance to tribes and tribal organizations that have received Children's Justice Act Partnerships for Indian Communities grants. Tribes frequently request assistance in developing and/or updating their laws to address victimization of tribal

children. TLPI developed this resource guide and workbook to meet the identified need. This project was conceived in 2001 under the guidance of an advisory committee of experts in the tribal justice field, those working with Native child abuse and child victimization issues, and those working with tribal child and family services providers. The resource provides illustrative examples, narrative, and discussion questions. The discussion questions direct users through a tailoring process that will assure that the resulting draft statutory provisions reflect the needs and values of the tribal community that the targeted law serves. (August 2008).

## **Violence Against Native Women Resources**

[Tribal Judge's Sexual Assault Bench Book and Bench Card](#) was developed by TLPI in cooperation with the Office on Violence Against Women as a resource for tribal judges who hear sexual assault cases in tribal courts. It provides background information on important sexual assault and tribal jurisdictional issues, as well as providing guidance in handling key issues at various stages of a sexual assault criminal trial. (June 2011).

[Tribal Domestic Violence Case Law: Annotations for Selected Cases](#) was developed by the TLPI in cooperation with the Office on Violence Against Women as a resource for tribal judicial officers in understanding how some tribal governments have handled certain legal issues within the context of domestic violence cases. While a great deal of research has been done on case law in the state systems, little to no analysis has been done on the tribal judicial approach to domestic violence. This compendium, developed as part of an overall code-writing workshop curriculum for tribal governments, will assist tribal legislators as well. Understanding how laws are interpreted by the court systems may impact the development of laws that provide safety to tribal citizens. (June 2011).

[Law Enforcement Protocol Guide: Sexual Assault](#) was developed by the TLPI in conjunction with Southwest Center for Law and Policy as a tool for improving the investigation of sexual assault crimes. Effective investigations increase the likelihood of victim participation and increase the probability of convictions in tribal, state, and/or federal courts. This guide focuses on the development of an internal protocol for law enforcement. A law enforcement protocol can enhance the efforts of all community agencies in addressing sexual violence. Once a tribal government has strong laws in place, this publication will help create policies and protocols for a law enforcement agency to enforce laws. (July 2008).

[Prosecutor Protocol Guide: Sexual Assault](#) was developed by the TLPI in conjunction with Southwest Center for Law and Policy as a tool for improving the prosecution of sexual assault crimes. Holding offenders accountable for their actions is a key part of making a community safe. This publication is designed to help a prosecutor's office ensure consistency and compassion for all survivors. This guide focuses on the development of an internal protocol for tribal prosecution. A prosecutor protocol can enhance the efforts of all community agencies in addressing sexual violence. (July 2008).

[Sexual Assault Response Team \(SART\) Resource](#) was developed by the TLPI in conjunction with Southwest Center for Law and Policy as a guide to creating cohesive policies between tribal agencies. Victims of sexual assault deserve a coordinated, comprehensive response from a variety of community agencies. This SART resource provides a starting point for developing victim-centered SART teams in your community. (September 2008).

[Listen to the Grandmothers Video Discussion Guidebook](#) is designed to assist tribal programs with incorporating cultural traditions into contemporary responses to violence against Native women. The Listen to the Grandmothers video features Native elders speaking to the problem of violence against Native women. The video provides a historical overview of violence against Native women, traditional responses, and an analysis concerning the incorporation of cultural traditions into contemporary responses to violence against women. (2008).

[Sharing Our Stories of Survival: Native Women Surviving Violence](#) is a general introduction to the social and legal issues involved in acts of violence against Native women; this book's contributors are lawyers, advocates, social workers, social scientists, writers, poets, and victims. In the United States, Native women are more likely than women from any other group to suffer violence, from rape and battery to more subtle forms of abuse, and Sharing Our Stories of Survival explores the causes and consequences of such behavior. The stories and case studies presented here are often painful and raw, and the statistics are overwhelmingly grim. But a countervailing theme also runs through this extremely informative volume: many of the women who appear in these pages are survivors, often strengthened by their travails, and the violence examined here is human violence, meaning that it can be changed, if only with much effort and education. The first step is to lay out the truth for all to see, and that is the purpose accomplished by this textbook. (2008)

[Sharing our Stories of Survival Trainer's Manual](#) for Training on Sexual Assault and Domestic Violence Involving Native Women. Primary Authors: Maureen White Eagle and Bonnie Clairmont. The manual is specifically designed to give guidance to advocates in presenting workshops, conference plenary sessions, and staff and community training. It provides the directions and materials for eight interactive workshops/training sessions based on chapters of the text book, Sharing Our Stories of Survival. (June 2013).

[Tribal Protection Order Resources](#) is a website designed to provide tribal and nontribal entities with a clearinghouse of information and resources pertaining to the issuance and enforcement of tribal protection orders.



# TABLE OF CONTENTS

<b>Part I. Background Information</b> .....	1
<b>Chapter 1. Introduction</b> .....	3
<b>Chapter 2. How to Use This Resource Guide</b> .....	7
<b>Chapter 3. A Brief History of TLOA and VAWA 2013</b> .....	9
<b>Chapter 4. Does Your Tribe Want to Exercise Enhanced Powers?</b> .....	19
<b>Chapter 5. Drafting Required Codes and Regulations</b> .....	23
Who Should Write the Laws? .....	23
<b>Part II. Codes, Laws, and Rules</b> .....	27
<b>Chapter 6. Types of Offenses and Defendants</b> .....	29
TLOA Overview.....	29
VAWA 2013 Overview.....	31
Tribal Code Examples.....	34
Tribal Code Commentary.....	42
<b>Chapter 7. Publication of Laws and Rules</b> .....	45
Overview .....	45
Tribal Code Examples.....	46
Tribal Code Commentary.....	49
<b>Part III. Competency and Licensing Standards</b> .....	51
<b>Chapter 8. Defense Counsel</b> .....	53
Overview .....	53
Tribal Code Examples.....	56
Tribal Code Commentary.....	65
<b>Chapter 9. Judges</b> .....	67
Overview .....	67
Tribal Code Examples.....	68
<b>Chapter 10. Establishing a Tribal Bar Association</b> .....	73
Overview .....	73
Tribal Code Examples.....	75
Tribal Code Commentary.....	91
<b>Part IV. Conduct of Proceedings</b> .....	93
<b>Chapter 11. Court of Record</b> .....	95
Tribal Code Examples.....	96
Tribal Code Commentary.....	98
<b>Chapter 12. Jury Trials</b> .....	99

Tribal Code Examples.....	102
Tribal Code Commentary.....	106
<b>Chapter 13. Sentencing Options .....</b>	<b>107</b>
Overview .....	107
Tribal Code Examples.....	109
Tribal Code Commentary.....	116
<b>Chapter 14. Stay of Detention Pending Habeas Review .....</b>	<b>117</b>
Overview .....	117
Tribal Code Examples.....	119
Tribal Code Commentary.....	120
<b>Part V. Helpful Resources .....</b>	<b>123</b>
<b>Appendix.....</b>	<b>125</b>
The Indian Civil Rights Act, as amended by TLOA and VAWA 2013 .....	125
Tribal Domestic Violence Special Jurisdiction Model Code.....	133
Tulalip Tribal Court Rules.....	139
Section 6 Tulalip Tribes Domestic Violence Court Rules.....	169
Tulalip Foundation Request for Applications for Indigent Criminal Conflict Attorney Services .....	173
Tulalip Consultant Contract.....	177
<b>Glossary.....</b>	<b>183</b>
<b>Acronyms .....</b>	<b>187</b>

# PART I. BACKGROUND INFORMATION

With the enactment of the [Tribal Law and Order Act](#) in 2010 (TLOA) and the [Violence Against Women Act Reauthorization of 2013](#) (VAWA 2013), the federal government has reaffirmed some of the criminal jurisdiction and sentencing authority it had previously limited by statute and Supreme Court decisions. Congress specifically affirms and recognizes the inherent jurisdiction of tribes within the wording of the statutes.<sup>1</sup> However, tribes are not required to exercise any of this newly recognized authority. Tribes that do want to take advantage of these powers must comply with certain prerequisites set out in the statutes.

TLOA and VAWA 2013 are very broad statutes covering numerous topics. This resource focuses solely on the sentencing enhancement provisions of TLOA and the special domestic violence jurisdictions sections of VAWA 2013. This resource provides an overview of the enhanced powers recognized by each statute and explores ways that tribes can comply with the requirements of the federal statutes.

Part I: Background Information is divided into five chapters. Chapter 1 provides an introduction to this resource guide, discussing its purpose and its limitations. Chapter 2 explores in more detail the way the resource is structured and how it can be used. Chapter 3 then turns to the TLOA and VAWA 2013, briefly discussing the history and requirements of each statute. Because tribes are not required to exercise any of the powers recognized by either statute, Chapter 4 provides some guidance for tribes to consider in deciding whether they want to make use of the recognized authority of one or both of the statutes. For tribes that wish to exercise those powers, Chapter 5 includes some suggestions about ways to approach drafting the required laws and regulations.

---

<sup>1</sup> Congress and the Supreme Court recognize and affirm the inherent power of tribes. They have restricted and relaxed restrictions on that power. See Indian Civil Rights Act, 25 U.S.C. § 1301(2), §1304(b.1); *Oliphant v. Suquamish Tribe*, 435 U. S. 191 (1978), *U.S. v. Lara*, 541 U.S. 193 (2004).



# CHAPTER 1. INTRODUCTION

This resource guide addresses both the sentencing enhancement provisions of TLOA and special domestic violence jurisdiction provisions of VAWA 2013 because many of the requirements of the two statutes overlap. It is important to keep in mind, however, that a tribe may choose to exercise the authority recognized in one statute but not the other.

The passage of the TLOA increased some of the sentencing authority that had been taken away by the [Indian Civil Rights Act](#) (ICRA). TLOA does, however, impose some requirements on tribes who wish to exercise those recognized powers. It is important to note that TLOA gives tribes a choice about whether the tribe wants to use the enhanced sentencing authority recognized by TLOA. If a tribe does not want to use the enhanced sentencing authority, tribes do not have to comply with the requirements set out in the statute.

VAWA 2013 recognizes certain Special Domestic Violence Criminal Jurisdiction (SDVCJ). As with TLOA, VAWA 2013 places requirements on tribes that wish to exercise the recognized powers. VAWA 2013 became effective March 7, 2015, although three tribes have participated in a pilot project exercising special domestic violence jurisdiction.

## **What This Resource Guide Can Do**

This book is designed to be a resource for tribes interested in implementing TLOA or VAWA 2013. The book focuses on the changes that may be needed should a tribe elect to implement either statute. It raises the concerns and issues that will need resolution in implementation and provides examples from tribal codes and tribal court rules.

We start by providing a general overview of the TLOA and VAWA statutes and the requirements, and then turn to a more detailed examination of each requirement. Each chapter provides a variety of questions that a tribe should attempt to answer in analyzing whether the implementation of these statutes and the expansion of jurisdiction and sentencing power are right for your nation. Additional resources are referenced and provided, particularly information drafted by the three pilot tribes and the National Congress of American Indians (NCAI).

A [Tribal Domestic Violence Special Jurisdiction Model Code](#) is provided in the appendix of this resource. This model code was developed by the pilot tribes. The model code should be helpful in providing you a full picture of how the law might look and how sections of the law work together. It also includes sections that were not discussed in this resource, but are important to include. The tribal codes of the three tribes participating in the pilot project might also serve as model codes. Links to their tribal codes are included in the [Helpful Resources Chapter](#) of this guide. We do not recommend that you adopt any model code, but rather that you review each of the chapters that provide important information on discussions that should take place before deciding on any changes in your code. Then, if you have decided to implement TLOA or VAWA 2013, select sections that fit

your particular legal structure, historical background, cultural values, and resources, using the examples in the chapters and the model code as aids.

In addition the appendix provides a copy of the [Tulalip Tribal Court Rules](#), including rules specific to the [Tulalip Domestic Violence Court](#). Many of the requirements of TLOA and VAWA 2013 can be met by court rule, rather than code revision. We provide short examples throughout the resource, but it may be helpful to see a comprehensive example of Court Rules. [Tulalip Request for Application of Indigent Criminal Conflict Attorney](#) and the [Tulalip Consultant Contract](#) is also provided in the appendix.

## **What This Resource Guide Cannot Do**

Because each tribe currently has unique codes, it is anticipated that each tribe that desires to implement one or both statutes will need to carefully review their current code and then modify their code in such a way that the requirements of TLOA or VAWA 2013 are met. In some cases the constitution of the tribe may need to be amended to ensure that criminal jurisdiction over non-Indians is permitted in the tribal constitution. We do not provide constitutional recommendations, but have chosen instead to focus on the tribal code provisions that are most likely to need amendment. We do pose questions in later chapters regarding your tribal constitution as it may contain restrictions on jurisdiction or rights granted through ICRA.

TLOA and VAWA 2013 are expansive statutes; we do not attempt to address all sections of those laws, but rather focus specifically on sentencing enhancement and special domestic violence jurisdiction.

## **A Few Words of Caution**

Protocol development or development of administrative rules is not covered in this resource and is a necessary part of implementation of TLOA +or VAWA 2013. This resource guide is not a replacement for training. Even the best law in the world is not effective if people do not understand it and support it. Involvement of people in the lawmaking process is helpful in gathering support and providing training helps in promoting understanding.

This resource guide also does not discuss the protection of victim's rights and support needed for victims. Community support and programming for domestic violence victims is important. Protocols and procedures to ensure victims are safe and other public safety concerns should also be reviewed when considering the topics relevant to the TLOA and VAWA 2013. Several of TLPI resources contain information on victims' rights. The [Guide for Drafting and Revising Victim-Center Tribal Laws Against Domestic Violence](#) has a chapter that may be helpful. Other TLPI guides on codes and protocols are described in the beginning of this guide.

This resource guide is not a model code. Your tribal community is the best judge of what language will work best for your people and is consistent with TLOA or VAWA 2013. There are advantages and disadvantages to certain kinds of legal language, and not every tribal government has the same

needs or resources. Most importantly, the sample language in this guide is not necessarily consistent with every tribe's culture, traditional practices, or current criminal code design. The discussion questions are provided to help you design a code that fits your community.

## **How Should We Proceed?**

You should consider different ideas before making a final decision about how to use this resource guide. Some tribes may spend several days in a row working through the questions and issues. Others may hire a facilitator to help organize meetings and community forums. You may want to consider creating a community team to tackle the issue over a longer period of time. There are many ways to develop a code that meets the needs and customs of your tribe. You should develop a plan that is consistent with your needs, goals, and resources.

Keep in mind that this resource guide provides a very broad overview of important points of law. It does not include every detailed legal issue, so you will probably need to do additional research in order to develop more detailed laws.

Writing a tribal code can sometimes be a very long process. Be realistic about the time needed to complete this process. Take the time to do the job right, keeping in mind that you will need to listen to many different opinions.

## **Point of Discussion: How do we create a realistic timeline?**

Consider the resources in your community, including:

- How large is our tribal nation?
- How many people will be involved in writing the code?
- Do we have a budget for training and/or facilitators?

## **A Note on Terminology**

Tribal governments use a variety of terms to describe their laws, including statutes, ordinances, and codes. Generally, the term code refers to an organized listing of all laws for a given subject matter, while a specific subsection may be entitled a statute or ordinance. In this resource guide, the terms will be used interchangeably in order to be relevant to a wide variety of audiences. A [Glossary](#) is included at the end of this resource.



# CHAPTER 2. HOW TO USE THIS RESOURCE GUIDE

This book is divided into five major parts:

- I. Background information;
- II. Requirements relating to codes and laws;
- III. Requirements relating to the competency and licensing of judges and defense counsel;
- IV. Requirements relating to the court proceeding; and
- V. Resources.

Part I provides necessary background and context, including a brief history of TLOA and VAWA 2013, as well as exploring preliminary matters for a tribe to consider. It also explains how best to use this resource guide.

Parts II, III, and IV examine in more detail the requirements tribes must meet in order to exercise the powers recognized by TLOA and VAWA 2013. Each chapter in Parts II, III, and IV contain four main parts:

1. Overview,
2. Tribal Code Examples,
3. Tribal Code Commentary, and
4. Discussion Questions.

The Overview will introduce you to the section and to the statutory requirements. Reading the overview will give you basic background on the issue addressed in the chapter.

The Tribal Code Examples provide language from existing tribal codes and court rules. Whenever possible, we have included laws that other tribes have written to address the TLOA and VAWA 2013 requirements, including the three tribes that piloted VAWA 2013.

After each section of tribal code examples, Tribal Code Commentary is provided. This commentary is designed to help you consider the strengths and weaknesses of the tribal code examples.

The Discussion Questions are an important part of this resource guide. They are designed to help you think about the important issues and to better select words, process, and procedures that fit your community.

Part V provides a brief description of available online resources that may be helpful in further understanding the requirements and purposes of TLOA and VAWA 2013.

The glossary provides definitions of words and acronyms that may be helpful. The appendix provides a [Tribal Domestic Violence Special Jurisdiction Model Code](#) for implementation of VAWA 2013 and ICRA with TLOA and VAWA 2013 amendments highlighted.

# CHAPTER 3. A BRIEF HISTORY OF TLOA AND VAWA 2013

Since 1968, a combination of federal statutes and federal court decisions have created a complex maze of laws and regulations that make it difficult to address crime committed in Indian country and to enforce protection orders. The primary obstacles created by this complex maze include the way in which criminal jurisdiction in Indian country is fractured across federal, tribal, and state governments; the sentencing limitations imposed by the Indian Civil Rights Act (ICRA); and the funding available to support tribal government infrastructure. Many of the limitations imposed by the U.S. Supreme Court have been heavily influenced by the provisions of ICRA that relate to the right to counsel. This chapter briefly reviews each one of these issues and then turns to an overview of the relevant provisions of TLOA and VAWA 2013.

## **Criminal Jurisdiction in Indian Country**

Jurisdiction refers to the authority of a government to regulate conduct and to enforce those regulations through a court system. Generally speaking, jurisdiction is usually tied to territory and the power of a government over its territory. This is particularly true in criminal jurisdiction, at least for the federal and state governments. The federal and state governments possess the ability to prosecute an offender if any significant element of a crime occurred within the territory of that government. This territorial principle is further illustrated by the fact that criminal cases are entitled something along the lines of “the People versus the Defendant” or “the State versus the Defendant”; the government brings the prosecution because the defendant’s conduct is said to violate community norms.

This territorial approach is not, however, the approach used with respect to criminal jurisdiction in Indian country. Instead, a series of statutes and court decisions have declared that a tribal government’s criminal jurisdiction in Indian country is centered primarily on the identity of the people involved in the crime (both the victim and the perpetrator), and not only on the place where the conduct occurred.<sup>2</sup> However, location is also an important factor: whether a crime took place inside or outside of Indian country or on fee or trust land (for example, in Washington’s optional PL 280 Jurisdiction).

---

<sup>2</sup> See General Guide to Criminal Jurisdiction in Indian Country (including chart) at <http://www.tribal-institute.org/lists/jurisdiction.htm> (accessed January 27, 2015).

Thus:

1. Tribal governments possess inherent criminal jurisdiction over all Indians in Indian country.
2. The state government has exclusive jurisdiction over all non-Indian only crimes (non-Indian against another non-Indian or non-Indian victimless), and may have concurrent jurisdiction with the tribe or the federal government over other crimes if a statute (such as PL 280 ) or a settlement act has granted the state special jurisdiction.
3. The federal government possesses criminal jurisdiction over all interracial crimes in Indian country (except in an Indian vs. non-Indian crime not included in the Major Crimes Act and the tribe punishes Indian first) and may have concurrent jurisdiction with the tribe over Indians who commit certain crimes in Indian country.<sup>3</sup> The federal government also possesses the authority to prosecute anyone who violates one of the general federal crimes anywhere in the country, including in Indian country.<sup>4</sup>

This fractured jurisdiction creates a great deal of confusion and requires extensive coordination between police departments, prosecutors' offices, court systems, probation/parole offices, and victim service providers. The complex bureaucracy often has a detrimental impact on the ability of all governments to adequately address crime in Indian country. Because tribal governments are not able to prosecute all persons who commit crimes in their territory, tribes must rely on the federal and state governments to do so, and those governments are not always focused on prosecuting crime that occurs in Indian country.

## **Sentencing Limitations Imposed by ICRA**

Even when a tribe does possess the ability to prosecute a particular defendant, the federal government, through ICRA, has restricted the penalties the tribe can impose. As is discussed more fully in Chapter 13, ICRA limits both the amount of jail time a tribe can impose and the maximum fine, placing a maximum of one year imprisonment and a fine of \$5,000. It is important to note that ICRA does not limit other penalties, such as community service, restitution or exclusion. Nevertheless, ICRA's limitations often made it difficult for tribes to deal with serious offenders, particularly those who commit repeated offenses.

---

<sup>3</sup> See Major Crimes Act, 18 U.S.C. § 1153 and General Crimes Act, 18 U.S.C. § 1152.

<sup>4</sup> A number of federal laws of general applicability directly impact domestic violence in Indian country, i.e., Interstate Domestic Violence, 18 U.S.C. § 2261, Interstate Stalking and Cyber Stalking, 18 U.S.C. §2261(A), Interstate Violation of a Protection Order, 18 U.S.C. § 2262, Domestic Assault by a Habitual Offender, 18 U.S.C. § 117, Firearms Offenses, 18 U.S.C. § 922.

## Funding for Government Infrastructure

Underlying both of the previous problems is the issue of funding for government infrastructure. Operating a police department, a prosecutor's office, and a court system is not cheap and requires a consistent flow of revenue. The federal and state governments rely on taxes to raise the necessary revenue. As a result of federal Indian policy, many tribes lack the necessary tax base and taxation authority to do the same. The result is that the majority of tribal governments are dependent on economic development and on federal funding to finance their criminal justice system. These revenues have not always been consistent or reliable.

## Right to Counsel Provisions Contained in ICRA

The U.S. Supreme Court has issued a series of court decisions limiting tribal criminal jurisdiction. [Oliphant v. Suquamish Indian Tribe](#),<sup>5</sup> restricted tribes inherent criminal jurisdiction over non-Indians, indicating that until Congress acts, tribes had been implicitly divested of their inherent power to try non-Indians. The Supreme Court extended that reasoning beyond non-Indians to prohibit tribal criminal jurisdiction over Indian who are not members of the prosecuting tribe in [Duro v. Reina](#),<sup>6</sup> Congress quickly acted to overturn Duro's holding, in what is commonly called the "Duro fix." The Court in [U.S. v. Lara](#)<sup>7</sup> found the "Duro fix," which "recognized and affirmed" the inherent power of Indian tribes to exercise criminal jurisdiction over all Indians, was a "legitimate exercise of Congress's power to remove restriction on inherent tribal authority."<sup>8</sup>

The decisions restricting tribal jurisdiction include some expression of concern regarding the fact that the U.S. Constitution does not apply to tribes. This concern usually centers on the fact that ICRA does not contain a provision analogous to the Sixth Amendment's right to counsel, which requires states to provide indigent defendants with a court-appointed attorney in certain cases. Instead, ICRA provided only that tribes cannot "deny to any person in a criminal proceeding the right . . . at his own expense to have the assistance of counsel for his defense. . . ."<sup>9</sup>

In making these pronouncements, the U.S. Supreme Court rarely looks beyond the superficial statement that ICRA does not require tribes to provide indigent defendants with an attorney in a criminal case. The reality is much more complex. First, some tribes do provide indigent defense counsel as a matter of tribal law. It should not matter whether an indigent defendant receives an attorney as a result of tribal or federal law. The result is the same: the defendant was represented by an attorney at trial.

---

<sup>5</sup> 435 U.S. 191, 210 (1978.)

<sup>6</sup> 495 U.S. 676, 684 (1990).

<sup>7</sup> 541 U.S. 193 (2004).

<sup>8</sup> U.S. v. Lara, 541 U.S. 193, 207 (2004).

<sup>9</sup> 25 U.S.C. § 1302

Second, the Sixth Amendment does not require states or the federal government to provide every indigent defendant with an attorney in every criminal case. Instead indigent defense is required only if the case would result in a sentence of actual imprisonment. This includes suspended sentences if jail time is ever imposed.<sup>10</sup>

Both TLOA and VAWA 2013 attempt to remedy some of these problems, and we now turn to a brief examination of the provisions of each of those statutes.

## **Tribal Law and Law and Order Act History and Provisions**

Congress passed the TLOA in July 2010 and the president signed it into law on July 29, 2010. TLOA is a comprehensive statute focused on all aspects of investigating and prosecuting crime in Indian country with a primary purpose of reducing crime in Indian country and increasing public safety. Reports such as Amnesty International's [Maze of Injustice, the Failure to Protect Indigenous Women from Sexual Violence in the USA](#),<sup>11</sup> which focuses on the systemic problems that left Indian women vulnerable, ignited public interest in the high rates of violence in Indian country, and motivated systemic changes. TLOA increases federal accountability, increases tribal authority, authorizes (not appropriates) additional funding, and establishes the [Indian Law and Order Commission](#) (ILOC).<sup>12</sup> The statute attempts to systematically address a wide variety of problems from data collection to housing prisoners. A complete discussion of the entire TLOA is beyond the scope of this resource, and we have chosen to focus on the enhanced sentencing authority and what tribes must do to implement that enhanced authority.

Prior to passage of the TLOA, federal law did not permit tribes to impose more than one year of imprisonment or more than a \$5,000 fine. These restrictions were part of ICRA. In setting out these limitations, ICRA did not address the issue of “stacking,” that is, whether a defendant convicted of multiple offenses could be sentenced to consecutive terms. For example, suppose a defendant who robbed a convenience store and beat up the clerk was convicted of robbery and of assault and battery. If the court sentenced the defendant to one year in jail for each offense, could the court order the defendant to serve those sentences consecutively, for a total of two years of imprisonment? Federal courts have been divided about whether tribal courts can “stack” sentences, and if so, under what circumstances.

TLOA provides that if a tribe complies with the prerequisites listed in that statute, the tribe's court system is able to exercise enhanced sentencing authority and can sentence a defendant to three years

---

<sup>10</sup> *Argersinger v. Hamlin*, 407 U.S. 25 (2002), *Alabama v. Shelton*, 535 U.S. 654 (2002).

<sup>11</sup> *Maze of Injustice: Failure to Protect Indigenous Women from Sexual Violence in the USA*, Amnesty International USA, New York (2007). Available at <http://www.amnestyusa.org/pdfs/MazeOfInjustice.pdf> (accessed January 28, 2015).

<sup>12</sup> The ILOC investigated issues related to crime in Indian country, and provided a report to the president and Congress, *A Roadmap for Making Native America Safer*, November 2013. Available at <http://www.aisc.ucla.edu/iloc/report/> (accessed January 28, 2015).

and a \$15,000 fine for a single offense and can stack those sentences up to a cumulative total of nine years. Even if a tribe satisfies the prerequisites, however, this authority does not apply to every defendant convicted in tribal court. Rather, it applies only to defendants who (1) have previously been convicted of the same or a comparable offense by any jurisdiction in the United States, or (2) are being prosecuted for an offense comparable to a felony. (See Chapter 6 for more details.)

A tribe wishing to exercise this enhanced sentencing authority must also comply with the following requirements:

1. It must provide the defendant with an attorney and:
  - a. that attorney must be licensed to practice law by any jurisdiction in the United States that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys; and
  - b. that attorney must provide the defendant with effective assistance of counsel at least equal to that guaranteed by the U.S. Constitution.
2. The judge presiding over the case must have sufficient legal training to preside over a criminal trial and be licensed to practice law by any jurisdiction in the U.S.
3. It must make publicly available the tribe's:
  - a. criminal laws,
  - b. rules of evidence, and
  - c. rules of criminal procedure.
4. The tribal court must also maintain a record of the criminal proceeding, including audio or other recording.

The types of offenses and defendants are explored in [Chapter 6. Types of Offenses and Defendants](#). The standards for defense counsel are discussed in [Chapters 8. Defense Counsel and 10 Establishing a Tribal Bar Association](#), and the standards for judges in [Chapters 9. Judges and 10 Establishing a Tribal Bar Association](#). The requirements for publication of laws and rules are explored in [Chapter 7. Publication of Laws and Rules](#), and [Chapter 11. Court of Record](#) discusses the rules for maintaining a record of the proceedings.

[Chapters 13 Sentencing Options](#) and [14 Stay of Detention Pending Habeas Review](#) examine the remaining aspects of TLOA's requirements. [Chapter 12. Jury Trials](#) relates only to VAWA 2013 and does not apply to TLOA's enhanced sentencing provisions.

## VAWA 2013 History and Provisions

VAWA was first passed in 1994. It provided funding for the investigation and prosecution of violent crimes against women and established the Office on Violence Against Women (OVW) in the Department of Justice (DOJ). The act included automatic expiration dates. It has been reauthorized in 2000, 2005, and 2013. In 2005 the authorizations included a specific tribal title, Title IX. The [Title IX section of VAWA 2013](#) deals with a number of topics, such as grants, coalitions, Alaska-specific issues, tribal protection orders, and tribal jurisdiction. This resource focuses on [Section 904](#), Tribal Jurisdiction over Crimes of Domestic Violence.

The statute required a pilot project that allowed earlier exercising of the jurisdiction by special permission of the attorney general. Three tribes became a part of that pilot project in February 2014: Confederated Tribes of the Umatilla Indian Reservation, Pascua Yaqui Tribe, and the Tulalip Tribes. The three tribes submitted an application to the DOJ, which provided answers to questions and copies of laws and regulations that demonstrated compliance with VAWA 2013 requirements. The applications are helpful to tribes contemplating implementation, so pertinent parts are included in Part V. Helpful Resources.

In addition to the pilot project, tribes interested in implementing VAWA 2013 should join the [Intertribal Technical-Assistance Working Group on Special Domestic Violence Jurisdiction \(ITWG\)](#). Forty-one tribes shared advice and information on how to best implement VAWA 2013, including the three tribes piloting the jurisdiction. Resources were generated by this working group and the pilot tribes, and are available through the [Intertribal Technical-Assistance Working Group on Special Domestic Violence Jurisdiction \(ITWG\)](#) site.

The fractured nature of criminal jurisdiction in Indian country makes it particularly difficult to effectively address domestic violence committed against Native women. A significant portion of that violence is committed by non-Native men.<sup>13</sup> The federal prohibition restricting tribes from prosecuting non-Indians meant that tribes were unable to prosecute non-Indians for domestic violence, even when it occurred on the reservation. States were unable to prosecute (except in PL 280 and similar situated states) because the victim was an Indian, and federal prosecutors were generally uninterested in such cases unless serious injury or death occurred. Even then, federal reports showed that federal prosecutors declined more than half the cases referred to them.<sup>14</sup>

---

<sup>13</sup> According to the Bureau of Justice Statistics, U.S. Department of Justice, Office of Justice Programs at least 70 percent of the violent victimizations experienced by American Indians are committed by persons not of the same race—a substantially higher rate of interracial violence than experienced by white or black victims. Greenfeld, Lawrence, and Steven Smith. *American Indians and Crime*. Bureau of Justice Statistics, U.S. Department of Justice, Office of Justice Programs, February 1999. NCJ 173386. Available at <http://www.bjs.gov/content/pub/pdf/aic.pdf> (accessed January 28, 2015).

<sup>14</sup> In fiscal years 2005 through 2009, U.S. Attorney's Office (USAOs) resolved about 9,000 of the approximately 10,000 Indian country matters referred to their offices by filing for prosecution, declining to prosecute, or administratively

These restrictions also impacted the tribe’s ability to enforce protection orders and prosecute violations of those orders. Most protection orders are issued by civil courts, but are enforced (at least in the states) through the criminal justice process. Again, the federal prohibition restricting tribes from prosecuting non-Indians meant that tribes were limited to imposing civil sanctions on non-Indians who violate protection orders.

Congress enacted VAWA 2013 in part to address this problem. VAWA 2013 recognizes the ability of tribes to prosecute non-Indians who commit domestic violence in Indian country. VAWA 2013 refers to this as “Special Domestic Violence Criminal Jurisdiction,” and sets out a series of requirements tribes must satisfy if they want to exercise this recognized authority. VAWA 2013 establishes a two-year time frame for a pilot project and provides that its provisions take effect two years after the date of enactment. Since VAWA 2013 was signed into law in March 2013, it became fully effective in March 2015. It should be noted that VAWA 2013’s SDVCJ did not apply in Alaska except for Metlakatla, because of an exception provided for in §910 of VAWA 2013. Tribes in Alaska strongly opposed the “Alaska exception,” and it was repealed in 2014.<sup>15</sup>

VAWA 2013 allows tribes to prosecute non-Indians for three categories of crimes—domestic violence, dating violence, and violations of protection orders—provided the tribe satisfies the prerequisites. The statute also requires that at least one of the parties in the case must be Indian and that the defendant must have some connection to the tribe, such as living or working in the tribe’s Indian country, or being involved in a relationship with a member of the tribe or with an Indian who resides in the tribe’s Indian country.

VAWA 2013 requires that tribes wishing to use the extra authority must provide the defendant with all the rights guaranteed by the statute, including (if the defendant may be sentenced to jail time) an attorney under the same conditions as in TLOA (see Chapters 8 and Chapter 10).

The tribe must also provide the defendant with the right to a trial by an impartial jury that is drawn from sources that—

- reflect a fair cross-section of the community; and
- do not systematically exclude any distinctive group in the community, including non-Indians.

---

closing the matter. USAOs declined to prosecute 50 percent of the 9,000 matters. In addition: (1) About 77 percent of the matters received were categorized as violent crimes, and 24 percent as nonviolent crimes. (2) Declination rates tended to be higher for violent crimes, which were declined 52 percent of the time, than for nonviolent crimes, which were declined 40 percent of the time. U.S. Department of Justice Declinations of Indian Country Criminal Matters, GAO-11-167R: Published: December 13, 2010. Publicly Released: December 13, 2010. Available at <http://www.gao.gov/products/GAO-11-167R> (accessed January 28, 2015).

<sup>15</sup> The repeal did nothing to change the fact that the jurisdiction is limited to Indian country and the only Indian country in Alaska at present is Metlakatla.

Finally, the tribe must also provide to defendants “all other rights whose protection is necessary under the Constitution of the United States in order for Congress to recognize and affirm the inherent power of the participating tribe to exercise special domestic violence criminal jurisdiction over the defendant.”<sup>16</sup> ([See Chapter 12](#)). The chart provides a comparison between the due process protections required by the TLOA and VAWA 2013.

---

<sup>16</sup> 25 U.S.C. § 1304(d)(4).

TLOA and VAWA Due Process Requirements	TLOA	VAWA
Defendants are provided with effective assistance of counsel equal to at least that guaranteed in the U.S. Constitution.	X	X
Tribal government provides to an indigent defendant a defense attorney licensed to practice by any jurisdiction in the United States.	X	X
Defense attorney is licensed by a jurisdiction that applies appropriate licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys.	X	X
Judges presiding over criminal proceedings subject to enhanced sentencing/non-Indian defendants have sufficient legal training to preside over criminal trials.	X	X
Any judge presiding over criminal proceedings subject to enhanced sentencing/non-Indian defendants is licensed to practice law by any jurisdiction in the United States.	X	X
The tribe's criminal law, rules of evidence, and rules of criminal procedure are made available to the public prior to charging the defendant.	X	X
Tribal court maintains a record of the criminal proceeding, including an audio or other recording.	X	X
Any defendant sentenced under either act is sentenced to a facility that passes the Bureau of Indian Affairs (BIA) jail standards for enhanced sentencing authority.	X	X
Tribal court provides the defendant the right to a trial by an impartial jury.	X <sup>17</sup>	X
Tribal court ensures that the jury reflects a fair cross-section of the community.		X
Tribal court ensures that juries are drawn from sources that do not systematically exclude any distinctive group in the community, including non-Indians.		X
Tribal court ensures that anyone detained under SDVCJ is "timely notified" of his or her rights and responsibilities. (This may not be limited to SDVCJ.)		X

---

<sup>17</sup> Implicit in 25 U.S.C § 1302(10).

Tribal court ensures that a defendant is notified of his or her right to file “a petition for a writ of habeas corpus in a court of the United States.”		X
Tribal court ensures that “all other rights whose protection is necessary under the Constitution of the United States in order for Congress to recognize and affirm the inherent power of the participating tribe to exercise special domestic violence criminal jurisdiction over the defendant” are provided.		X
Tribal court ensures that “all applicable rights under the special domestic violence criminal jurisdiction provisions” are provided.		X

# CHAPTER 4. DOES YOUR TRIBE WANT TO EXERCISE ENHANCED POWERS?

In both TLOA and VAWA 2013, Congress declared that if a tribal government meets certain prerequisites, the tribe can exercise certain powers that had previously been restricted by the federal government. Neither statute requires tribes to use the recognized powers, so the first step is for a tribe to decide whether it wants to use those powers, and if so, whether complying with the federal requirements is worth the time and expense.

We have put this chapter and these questions in Part I because asking and answering them is part of the process a tribe may want to follow in deciding whether, and if so how, to comply with the requirements of TLOA and VAWA 2013. You may, however, want to skim these questions, read the rest of this resource guide, and then come back to the questions to start answering them. Many of the questions will make more sense after reading the rest of the chapters in this book, and you may be able to give more complete answers.

It is important to note that neither TLOA nor VAWA 2013 requires that tribes opt in within a certain time period. There is no rush for a tribe to make the decision that it wishes to implement the required changes. It is also possible for a tribe to initially decide it does not want to use the powers and then to later change its mind and change its laws to comply with the federal laws.

In making these decisions, a tribe should consider whether the recognized powers are consistent with its culture and traditions and the way it approaches its criminal justice system. TLOA and VAWA 2013 increase the amount of prison time and fines the tribal courts can impose as part of a sentence for a criminal conviction, and VAWA 2013 recognizes criminal jurisdiction over certain non-Indians who commit dating or domestic violence in the tribe's Indian country. But they also require increased procedural complexity and apply only to the criminal justice system.

If no cultural reason exists for declining to make the changes required by TLOA and VAWA 2013, the tribe may also want to consider the following questions. Please note that this is not an exhaustive list; instead, we have tried to provide questions that will get the conversations started and direct attention to what are likely to be the major issues.

## Discussion

Does your tribe use incarceration and/or high fines as criminal sanctions?

Does your tribe use the criminal justice system to handle these matters or does it use civil sanctions?

Are the additional procedural rules consistent with the way your court operates?

## **Does Your Tribe Need These Powers?**

- Would your prosecutors and judges use the enhanced sentencing authority? Are they currently frustrated with the sentencing limitations? Do you have non-Indians who live and work in your Indian country?
- Are serious crimes going unpunished? What is the declination rate for crimes on your reservation?
- How many defendants are charged with crimes in your courts? How many of those are charged with crimes carrying a sentence of a year? How many defendants are repeat offenders, with prior conviction(s) in federal, tribal, or state court?
- How many are likely to be charged if you start exercising the enhanced powers? Will your prosecutor start charging more defendants in tribal court now that increased sentences are available? Would you need more judges? More court staff? More prosecutors?

## **What Changes Would Be Required in Your Criminal Code?**

- What changes would you need to make to your criminal laws? To your rules of procedure? To your rules of evidence? Do you currently make all these documents publicly available? Does your court issue written opinions? Are these publicly available?
- How many tribal crimes carry a potential sentence of one year of imprisonment? How many of those would you want to carry a higher sentence?
- Do you have a constitution? Would it need to be amended? What would be the process for doing so?

## **Defense Counsel**

- Do you have an indigent defender system? If so, would it need to be expanded? If you do not have one, and you want to use the enhanced powers, you will have to create one. How many defendants would qualify for a court-appointed lawyer?
- What are the current requirements for attorneys who wish to practice law in your jurisdiction and appear in your tribal courts? Would those need to be changed? Do you require a licensing system that ensures the competence of attorneys? What ethical standards do you require attorneys to follow? How do you discipline attorneys that do not follow those standards?
- What standards do you currently require of indigent defense counsel? Is that requirement equal to or more protective of defendants' rights than the effective assistance of counsel standards used in the U.S. Constitution?

## **Judges and Courts**

- What are the current qualifications required to serve as a judge in your court system? Would those constitute “sufficient legal training” to preside over criminal cases? If not, what changes would you need to make? Do you currently require your judges to be licensed?
- Is your court a court of record? If not, what changes would you need to make?

## **Sentencing and Incarceration**

- If you sentence defendants to more than one year of imprisonment, you will need a place to incarcerate them. How many defendants are there likely to be? What facilities are available? What (if any) additional capacity would you need?

## **Funding the Changes**

Complying with all of these requirements will be expensive, both in time and in money.

- Who will review and propose changes to your laws and procedures?
- Who will train prosecutors, judges, and defense counsel on the new laws and procedures and how they work?
- What funding will be required to make these changes?
- To pay for any additional prosecutors, judges, defense counsel, and court staff?
- To pay to publish the laws and regulations?
- To process the licensing and educational requirements?
- To implement the jury selection process?
- To pay for incarceration? To pay for medical costs of the incarcerated? Where will these funds come from? Is that source of funding stable and reliable?

## **Additional VAWA 2013 Requirements**

For the most part, all of the preceding questions apply to both TLOA and VAWA 2013. A tribe considering whether it wishes to opt in to VAWA 2013 may also want to ask the following questions:

- How many non-Indians commit domestic or dating violence in your territory? Do any of your laws (constitution, statutes, regulations, court decisions) limit jurisdiction over non-Indians?
- What do your current laws say about dating violence, domestic violence, and enforcing protection orders? Would they need to be amended to apply to non-Indians? To impose criminal sanctions?
- What do your current laws, regulations, and court rules say about the jury selection process? How does the process work in your tribe? Does that process comply with VAWA 2013’s fair cross-section requirement? If not, what changes would be required?

## Possible Alternatives

In considering these questions, a tribe may also want to consider possible alternatives, which may include:

**Making No Changes.** ICRA's restrictions on sentencing and federal limitations on criminal jurisdiction may not be a problem for your tribe. You may have other effective ways of dealing with these problems or you may not be experiencing the type of behavior they are designed to address. In that case, it is probably not worth your time and effort to make the changes. Even if you are experiencing some of these problems, it may not be sufficiently widespread or serious as to be worth the time and money to comply with the federal prerequisites.

**Using Civil Infractions and Alternative Sentencing.** If your tribe does not already make use of alternative sentencing (such as community service) or approach certain matters as civil, rather than criminal, infractions, you may want to consider whether those approaches would be more effective or at least effective enough that it is not worth your time to comply with the federal requirements.

**Can Other Parts of TLOA Address the Problem?** TLOA is a very broad and comprehensive statute, and it addresses a wide variety of obstacles to effective crime control on reservations. Will or could some of these other provisions provide sufficient tools so that it is no longer worth the time and money to comply with the prerequisites to enhanced sentencing and prosecuting non-Indians? For example, would the Special Assistant United States Attorney (SAUSA)<sup>18</sup> provisions be a workable compromise?

Tulalip Tribes found that the use of SAUSA's was an important tool in implementing VAWA 2013, as it provided more options along with the ability to negotiate or chose a forum. It continues to be an important tool after implementation, allowing complex cases to be prosecuted in both/either forums. It also provides a mechanism to provide the victim with a more comprehensive treatment of crimes.

---

<sup>18</sup> The Indian country SAUSA program makes it possible for U.S. Attorneys to appoint appropriately qualified prosecutors to work in the capacity of an Assistant U.S. Attorney for the prosecution of certain Indian country cases. SAUSA's could be appointed before TLOA, but TLOA encouraged the appointments and the number of SAUSA's in Indian country has increased dramatically.

# CHAPTER 5. DRAFTING REQUIRED CODES AND REGULATIONS

## Who Should Write the Laws?

We encourage you to think broadly about the community members who may have information that will help draft good laws. The following is a checklist of people and agencies that may be useful in drafting codes—but each community is different.

- Survivors of domestic violence and their advocates
- Tribal prosecutors
- Tribal attorneys
- Tribal court personnel
- Tribal law enforcement/tribal probation/parole
- Elders
- Family services/social services
- Medical personnel
- Corrections
- Defense attorneys
- Traditional healers/spiritual leaders
- Child protective services/Indian Child Welfare Act (ICWA) workers
- Housing authority
- School system
- Youth council
- Legal aid
- Casino/tribal businesses
- Others

### **Point of Discussion: What are the benefits of using a team approach?**

Understanding various perspectives in writing a law is not the only benefit of working with a multidisciplinary team. Other possibilities include:

- Educating more community members,
- Sharing ownership of the problem and responsibility to solve it, and
- Communicating about tribal values.

## Ten Tips for Working as a Team

Writing or revising a tribal law usually does not happen quickly or easily. Code writing involves a great deal of time, effort, and cooperation. There is not one “right” way to research and draft laws. The following tips come from successful efforts of other tribal nations.

1. **The primary work should be done by a group of “problem solvers.”**

The effort will not succeed if it simply becomes a process of finger pointing and blaming others for weaknesses in the current law. The best laws are developed one step at a time by a group that is committed to brainstorming and reviewing possible solutions to problems.

2. **There should be equal representation from various tribal agencies and advocacy programs.**

Equal representation is important. The code development process is not the “property” of any one agency or group.

3. **The work should be completed in a setting of mutual respect.**

The setting should be a safe environment in which the group can share, learn, and explore. It is okay to acknowledge differences of opinion, but not in a stereotypical or judgmental manner. The safety of women must be respected.

4. **The agenda should be focused upon areas of mutual concern or shared interest.**

Try to focus on areas of common interest instead of differences. A shared vision (such as “a safe community”) can create confidence and trust.

5. **The participants should be willing to examine not just the way things are but also be willing to explore ways to improve the laws.**

All participants must be willing to explore new ways to help make sure that women are safe. However, different people may have different ideas. Listen to and learn from each other.

6. **The participants should be willing to be creative and persistent.**

To be successful, you must be willing to be creative and persistent. The process will undoubtedly have frustrations and difficult times. Think “outside the box.”

7. **The participants should be willing to share the burden.**

The participants must also be willing to share in the burden of the process by sharing resources, training, technical assistance, and limited available funding, and to alternate locations of meetings and focus groups.

8. **All agencies should be allowed input into draft statutes prior to finalization.**

All tribal agencies involved should have a chance to review the draft laws before they are completed. Because each agency will have to follow the law, they need to know what is going to be proposed.

9. **Consider traditional/culturally appropriate strategies.**

In some cultures, it is important to share and provide food for participants. You will be spending a great deal of time together, so make sure everyone is comfortable. (Please note that there are substantial restrictions on the use of federal grant funds for food. The safest practice is to use nongrant funds for food. If you are considering using federal grant funds, be sure to check with your grant manager.)

10. **Expect to spend a great deal of time working together.**

It cannot be stressed enough that this is a lengthy project, but one that is well worth the effort. Your cooperation in creating these new laws will help protect the women and families in your community.

## **Before You Begin . . .**

As you sit down together to begin the process of implementing TLOA and VAWA 2013 for your tribe, keep your main goal in mind.

## **Point of Discussion: What is our goal?**

Consider writing down your ultimate goal and reviewing it at the beginning of each meeting.

Example: Provide greater safety to our community while expanding our jurisdiction.

You should review your constitution and bylaws or other foundational legal documents. Keep track of your legislative history and consider incorporating it into the law. Reviewing and clarifying the roles of law enforcement, the tribal court, and the prosecutor may also be helpful. Additionally, it is important to understand the federal and/or state laws that impact your tribe. Review all the amendments made to ICRA by TLOA and VAWA 2013. Amended ICRA is in [Part V. Helpful Resources](#) of this guide with notations of the amendments made by TLOA or VAWA 2013.

It is also important to evaluate the laws that are already in place in your community. Be sure to analyze the strengths and weaknesses in any current laws. Inserting a Savings Clause in your amended code to ensure that during the time of adoption or following adoption, there is no question as to what happens to the old code cases. An example of a Saving Clause appears in the [Tribal Domestic Violence Special Jurisdiction Model Code](#) at the back of this guide.

If appropriate, you should review your traditions and stories, as well as your customs, regarding healing and justice. This research may be done by interviewing elders within your community. In addition, you can also consult anthropological documentation about your tribe, historical records, or other tribes that share similar cultural or linguistic ties.

## **Point of Discussion: What documents should we review?**

Consider creating a binder for all team members that includes:

- Tribal constitution and/or bylaws;
- Current tribal laws that may be impacted;
- Traditions, customs, and stories (if appropriate);
- Copies of any tribal court opinions your tribe has issued on domestic violence;
- Current law enforcement protocols related to domestic violence; and
- ICRA with amendments highlighted.

Many times, existing tribal laws may have originated in the laws from another tribe or from a city, state, or county. Take the time to go through and review your current laws to:

- Evaluate them for relevance to your particular community and situation,
- Analyze how they have been working,
- Discuss the weaknesses, and
- Determine if they represent how your tribe wants to respond.

Be prepared to remove or edit entire sections as necessary.

# PART II. CODES, LAWS, AND RULES

In Part II of the resource we begin to review the specific requirements of the TLOA and VAWA 2013 that could require changes in your tribal code.

We begin with the basics in Chapter 6 by discussing who could be criminally prosecuted by implementing the enhanced sentencing provisions of the acts and for what crimes they could be prosecuted. TLOA and VAWA 2013 will impact only specific sections of your code. Implementation of the enhancement provision will require examination of specific sections of your code. Possible options for amendments to tribal codes are discussed and examples of tribes who have decided to opt in to one or both laws are provided. Because VAWA 2013 was not fully implemented until March 2015, example codes from the tribes that participated in the pilot project are used. A Tribal Domestic Violence Special Jurisdiction model code is also included in the appendix.

Chapter 7 discusses the requirements of the acts to publish tribal laws, procedures, and rules. It also provides examples of rules and code on recusal of a judge, as recusal is specifically referenced in TLOA.



# CHAPTER 6. TYPES OF OFFENSES AND DEFENDANTS

## TLOA Overview

The TLOA amended ICRA to permit enhanced sentencing when a defendant is a repetitive offender who has previously been convicted of the same or a “comparable offense” in any jurisdiction.<sup>19</sup> “Comparable offense” is not defined in the statute, but its ordinary meaning is having enough like characteristics or qualities to make comparison appropriate.<sup>20</sup> Evidence needs to be submitted to the court supporting the previous convictions and the court needs to review the statute of the other jurisdiction, to determine that the statute is comparable to the offense that the defendant is currently charged with.

The information on criminal offenses from other jurisdiction may be available through the National Crime Information Center (NCIC). According to TLOA, a tribal justice officer, serving a tribe with criminal jurisdiction over Indian country, shall be considered an authorized law enforcement official with access to NCIC. Some tribes have been able to access NCIC, freely entering and accessing information, while other tribes are only able to enter their information. Still others are unable to gain access to the NCIC portals. This is because states provide the NCIC portal to tribes. Some states are cooperative and others are not. Tribes should also check states or tribal jurisdictions they know the defendant to have previously resided.

Additionally, TLOA amended ICRA to allow enhanced sentencing by the tribal court, if the defendant is prosecuted for an offense in tribal court that would be comparable to an offense punishable by more than one year of imprisonment if prosecuted in federal or state court. Generally, in state or federal courts a crime punishable by imprisonment of more than one year is considered a felony and a crime punishable by less than one year is considered a misdemeanor. Felonies such as murder, sexual assault, and so forth, may carry enhanced sentencing. In addition some states may consider some domestic violence

### Discussion

How will your nation categorize those crimes that can be enhanced under the TLOA?

Does your nation want more than one category of crimes with enhanced penalties, like the Hopi code example?

Do you have a section of your code that allows the tribal prosecutor to bring civil actions against non-Indians who violate the criminal code? If so, do you want to increase the civil penalty?

---

<sup>19</sup> 25 U.S.C. § 1302(b)(1).

<sup>20</sup> Webster’s New Third Int’l Dictionary 461 (unabridged ed. 2002).

and stalking crimes felonies, so if they are comparable to the offenses in your nation, these crimes could also carry up to three years and/or a \$15,000 fine.

## **Description of Offenses Covered by TLOA and 2013**

TLOA	VAWA
Defendant must be prosecuted for	Defendant must be prosecuted for
<ol style="list-style-type: none"> <li>1. An offense or comparable offense for which he/she has previously been convicted.</li> <li>2. An offense punishable by more than a year of imprisonment in a state or federal court.</li> </ol>	<ol style="list-style-type: none"> <li>1. Domestic violence,</li> <li>2. Dating violence, or</li> <li>3. Violation of a protection order.</li> </ol>

Offenses covered under both TLOA and VAWA 2013 must occur in Indian country of the participating tribe.

### **Discussion VAWA 2013**

- Who are the non-Indians that live or work in your nation that commit domestic violence against Native women or violate protection orders? Will VAWA 2013 cover them, if you implement it?
- Does your court have the capacity to handle anticipated increases in cases due to implementing this statute?
- Do you have a statute that recognizes and allows enforcement of other jurisdictions' protection orders?
- Does your law enforcement agency have a clear understanding of what your nation's Indian country is? Does the community have a clear understanding of your nation's Indian country?
- Does your constitution or code need to be amended to allow criminal jurisdiction over non-Indians?
- What kind of training will law enforcement agencies, the court, and the community need to implement? Will victims be protected?
- Who will review all domestic violence statutes to ensure the new statute fits into your scheme?
- What support do you have for victims?

## **VAWA 2013 Overview**

VAWA 2013 recognizes tribes' inherent ability to hold non-Indian offenders of Natives accountable and removes some restrictions imposed by Oliphant. Statistics have indicated that non-Indians are the primary perpetrators of crimes against Native women in both domestic violence and sexual assault.

VAWA 2013 also amended ICRA allowing certain domestic violence crimes committed by non-Indians against Natives within Indian country to be prosecuted in tribal court should the tribe decide to exercise the "special domestic violence jurisdiction" over non-Indians. Because perpetrators in domestic violence and sexual assault cases are often non-Native, this "special domestic violence criminal jurisdiction" is a significant tool to help tribes protect Native women and a significant step forward in reestablishing full tribal jurisdiction.

In order for the tribe to exercise the special jurisdiction, the non-Indian must have sufficient connections to the tribe, by either

1. Residing in Indian country of the participating tribe, or
2. Being employed in Indian country of the participating tribe, or
3. Being the spouse, intimate partner, or dating partner of a tribal member, or
4. Being the spouse, intimate partner, or dating partner of an Indian who resides in Indian country of the participating tribe.

If employment is the connection, there is no requirement that it be a tribal business only that the person be employed in Indian country. Non-Indians working for the federal government, schools, or privately owned businesses in Indian country, who commit domestic violence as defined by the statute or violate a protection order, would be subject to tribal criminal jurisdiction. Tribal casinos employ a great deal of non-Indians, and those non-Indian could now be subject to some criminal action in tribal court if they violate a protection order or commit an act of violence against their Native partner at the casino or in other areas of Indian country. The victim must be Indian, but not necessarily a member of the participating tribe. The crime must take place in Indian country of the participating tribe. If a violation of a tribal protection occurs outside of Indian country, the state or county may prosecute.

## Description of Defendants Covered by TLOA and VAWA 2013

TLOA	VAWA
<ol style="list-style-type: none"> <li>1. Repeat offender or</li> <li>2. Defendant charged with felony</li> </ol>	<p>Non-Indian must have sufficient connections to the tribe.</p> <ol style="list-style-type: none"> <li>1. Reside in Indian country of the participating tribe; or</li> <li>2. Be employed in Indian country of the participating tribe; or</li> <li>3. Be the spouse, intimate partner of a tribal member; or</li> <li>4. Be the spouse, intimate partner, or dating partner of an Indian who resides in Indian country of the participating tribe.</li> <li>5. Commits one of the offenses defined by VAWA 2013 in ICRA: dating violence, domestic violence, or violation of a protection order.</li> </ol>

Note: The non-Indian offender under VAWA 2013 could be subject to the enhanced sentencing of TLOA, if the offender meets those requirements.

The definition of Indian country [18 U.S.C. § 1151](#) is:

- (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation,
- (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and
- (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

In applying and interpreting this statute, the U.S. Supreme Court has declared that Indian country is land set aside for the use of Indians under the superintendence of the federal government. The Court has also declared that the statutory definition applies in both civil and criminal cases.

The domestic violence offenses designated by VAWA special domestic violence jurisdiction are defined in the ICRA as follows:

**DATING VIOLENCE**—The term dating violence means violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim, as determined by the length of the relationship, the type of relationship, and the frequency of the interaction between the persons involved in the relationship.<sup>21</sup>

**VIOLATION OF A PROTECTION ORDER**—The term protection order means any temporary or permanent, civil or criminal order issued to prevent violent or threatening acts or to prohibit contact, communication, or physical proximity to the interaction between the persons involved in the relationship.<sup>22</sup>

**DOMESTIC VIOLENCE**—The term domestic violence means violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, or by a person similarly situated to a spouse of the victim under the domestic- or family-violence laws of an Indian tribe that has jurisdiction over the Indian country where the violence occurs.<sup>23</sup> The violation must occur in Indian country of the participating nation.<sup>24</sup>

The definition of dating violence seems to eliminate hookups or casual sexual relationships. Sexual assault and stalking are covered if the activity meets the definition of domestic violence or dating violence. The tribal statute regarding domestic violence may include familial relationships that do not meet the federal definition of domestic violence in VAWA 2013 and tribes may need to create one that meets the federal definition.

---

<sup>21</sup> 25 U.S.C. §1304(a)(1).

<sup>22</sup> 25 U.S.C. §1304(a)(5).

<sup>23</sup> 25 U.S.C. § 1304(a)(2)

<sup>24</sup> 25 U.S.C. § 1304(c)(2)(A).

# Tribal Code Examples

## Examples of TLOA's Enhanced Sentencing

[Hopi Code](#) (Enacted August 28, 2012)

### TITLE III: CRIMINAL CODE

#### Chapter 4. PENALTIES

##### 3.4.1 Imprisonment and Fines.

The Court may impose the following criminal penalties against a person who is convicted for violating this Code:

1. A maximum of three years in custody and/or a fine of up to \$15,000.00 upon conviction for an offense which is defined in this Code as a “dangerous offense”;
2. A maximum of two years in custody and/or a fine of up to \$10,000.00 upon conviction for an offense which is defined in this code as a “serious offense”;
3. A maximum of one year in custody and/or a fine of up to \$5,000.00 upon conviction for an offense which is defined in this Code as an “offense”;
4. A maximum of six months in custody and/or a fine of up to \$2,500.00 upon conviction for an offense which is defined in this Code as a “minor offense”;
5. A maximum of three months in custody and/or a fine of up to \$1,250.00 upon conviction for an offense which is defined in this Code as a “petty offense.”

##### 3.4.2 Repetitive Offenders.

The Court may, at its discretion, sentence a person who has been previously convicted of the same offense, or a comparable offense by any jurisdiction in the United States, to one class higher than the sentence imposed in the previous conviction. Convictions for two or more offenses committed for the same act may be counted as one conviction for the purposes of this section.

##### 3.4.3 Consecutive Terms of Imprisonment.

If multiple crimes are committed, and multiple sentences of imprisonment are imposed on a person at the same time, the Court may, at its discretion, direct the sentences to run consecutively.

##### 3.4.4 Other Criminal Penalties.

In addition to, or in lieu of, the penalties set forth in Section 3.4.1, the Court may order restitution, diversion from criminal prosecution, community service, treatment, probation, parole, or suspension of sentence, unless a provision of this Code provides otherwise with respect to a certain type of offense.

The Court may substitute community service for a fine, upon a showing that the defendant is indigent.

##### 3.4.5 Civil Damages.

- A. Any person subject to the civil jurisdiction of the Hopi Tribe, but not subject to the criminal jurisdiction of the Hopi Tribe, who engages in conduct in the Territory that constitutes a violation of this Code shall be liable to the Hopi Tribe for the following civil damages:
1. Civil damages not to exceed \$15,000.00 upon a finding by the Court that the person engaged in conduct constituting an offense defined in this Code as a “dangerous offense”;
  2. Civil damages not to exceed \$10,000.00 upon a finding by the Court that the person engaged in conduct constituting an offense defined in this Code as a “serious offense”;
  3. Civil damages not to exceed \$5,000.00 upon a finding by the Court that the person engaged in conduct constituting an offense defined in this Code as an “offense”;
  4. Civil damages not to exceed \$2,500.00 upon a finding by the Court that the person engaged in conduct constituting an offense defined in this Code as a “minor offense”;
  5. Civil damages not to exceed \$1,250.00 upon a finding by the Court that the person engaged in conduct constituting an offense defined in this Code as a “petty offense”;
- B. The Tribal Prosecutor is authorized to file civil actions on behalf of the Hopi Tribe against any person who may be liable to the Hopi Tribe for civil damages pursuant to subsection A of this Section.

#### **3.4.6 Hopi Traditions, Customs, and Practices.**

The Court shall consider Hopi traditions, customs, and practices when imposing the penalties set forth in this section.

### **Chapter 6: Offences Against Family**

#### **3.6.7 Domestic Violence.**

A person who commits assault, aggravated assault, endangerment, threatening, kidnapping, sexual assault, or sexual conduct with a minor is guilty of domestic violence, a serious offense, if any the following factors are present:

1. The relationship between the victim and the defendant is one of marriage or former marriage or of persons residing or having resided in the same household.
2. The victim and the defendant have a child in common.
3. The victim is pregnant by the other party.
4. The victim is related to the defendant or the defendant’s spouse by blood, marriage, or court order as a parent, grandparent, child, grandchild, brother, or sister.
5. The victim is a child who resides or has resided in the same household as defendant and is related by blood to a former spouse as the defendant or to a person who resides in the same household as the defendant.
6. The relationship between the victim and the defendant is currently or was previously an intimate

relationship.

### **3.6.8 STALKING.**

- A. A person commits stalking if the person intentionally or knowingly engages in a course of conduct that is directed toward another person and if that conduct either:
  - 1. Would cause a reasonable person to fear for the person's safety or the safety of that person's immediate family member and that person in fact fears for their safety or the safety of that person's immediate family member, which is a serious offense.
  - 2. Would cause a reasonable person to fear death of that person or that person's immediate family member and that person in fact fears death of that person or that person's immediate family member, which is a dangerous offense.

## **Confederate Tribes of the Umatilla Reservation Code**

(Amended March 24, 2014)

### **CRIMINAL CODE AND PROCEDURES**

#### **Chapter 3. CRIMINAL PROCEDURE**

#### **PART VI. SENTENCING**

#### **SECTION 3.26. MISDEMEANORS**

Any offense not defined as a felony shall be subject to a term of imprisonment of not more than 1 year or a fine of \$5,000, or both.

#### **SECTION 3.27. FELONIES**

- A. Any offense expressly defined as a felony shall be subject to a term of imprisonment of not more than 3 years or a fine of \$15,000, or both. A total term of imprisonment for any criminal proceeding shall not exceed 9 years.
- B. A defendant shall not be subject to felony prosecution unless the defendant:
  - 1. has been previously convicted of the same or a comparable offense by any jurisdiction in the United States, including tribes; or
  - 2. is being prosecuted for an offense comparable to an offense that would be punishable by more than 1 year of imprisonment if prosecuted by the United States or any of the states.

### **Chapter 4: CRIMES**

#### **PART IX: GENERAL OFFENCES AGAINST PERSONS**

#### **SECTION 4.74. ASSAULT**

- A. A person commits the crime of assault if the person:

1. Intentionally, knowingly, or recklessly causes physical injury however slight to another;
2. Intentionally places another in reasonable apprehension of being physically injured; or
3. With criminal negligence causes physical injury to another by means of a deadly weapon.

B. Assault is a felony if the person:

1. Has previously been convicted of assaulting the same victim;
2. Has previously been convicted of assault and both assaults involved domestic abuse;
3. The assault involves physical injury however slight and is committed in the immediate presence of, or is seen or directly perceived in any other manner by, the person's or the victim's minor child or stepchild or a minor child residing within the household of the person or victim;
4. Causing physical injury however slight, commits the assault knowing that the victim is pregnant;
5. Recklessly causes serious physical injury to another by means of a deadly or dangerous weapon;

(6. through 18. Omitted)

19. Strangles the victim and the assault involves domestic abuse.

(Sections omitted)

**SECTION 4.84. STALKING.**

A. Omitted

B. A person commits the crime of stalking when:

1. The person knowingly alarms or coerces another person or a member of that person's immediate family or household by engaging in repeated and unwanted contact with the other person;
2. It is objectively reasonable for a person in the victim's situation to have been alarmed or coerced by the contact; and
3. The repeated and unwanted contact causes the victim reasonable apprehension regarding the personal safety of the victim or the victim's immediate family or household.

C. Stalking is a felony.

Salt River Pima-Maricopa Indian Community Code of Ordinances

(Amended March 6, 2013)

Chapter 8. SENTENCING

**Section 8-3. Sentencing Classifications, Restitution or Alternative Compensation, Offense Specific Penalty or Sentence.**

a. Sentencing classifications and terms.

- For a Class A offense, the maximum penalty that may be imposed upon any person convicted of the offense shall be no more than three (3) years of incarceration and/or a fine up to \$15,000. In addition, the minimum sentence that may be imposed upon any person convicted of a Class A offense shall be one (1) year of incarceration and a fine in the amount of \$1,000.00
- For a Class B offense, the maximum penalty that may be imposed upon any person convicted of the offense shall be no more than one year of incarceration and/or a fine up to \$5,000.
- For a Class C offense, the maximum penalty that may be imposed upon any person convicted of the offense shall be no more than six (6) months of incarceration, and or a fine of \$1,000.00.
- For a Class D offense, the maximum penalty that may be imposed upon any person convicted of the offense shall be no more than 30 days of incarceration and or a fine of \$750.00.
- For a Class E offense, the maximum penalty that may be imposed upon any person convicted of the offense shall be a fine up to \$500.00.

b. Restitution or Alternative Compensation.

In addition to any other penalty, the court may require a person convicted of an offense, who has injured a person(s), property of a person(s) and/or entity in that offense, to make restitution or to compensate for the injury through the surrender of property, the payment of money damages, or the performance of any other act for the benefit of the insured, or any combination of such. Such restitution or compensation is wholly separate from any fine imposed.

c. Offense specific penalty or sentence.

In no event shall the court impose a sentence or penalty in excess then what is permitted by the specific offense, or for the class of sentence assigned to the offense. If in any matter in which the sentence permitted by this section for the class of offense is inconsistent with the specific sentencing mandate in a particular criminal offense of tribal code, the specific sentencing term for the tribal offense shall be applied.

**Eastern Band of the Cherokee Indians Tribal Code**

**(Enacted November 5, 2012)**

**Chapter 14. CRIMINAL LAW**

**Article V. SEXUAL ASSAULT**

**Sec. 14-20.10. Punishment.**

Any person subject to the criminal jurisdiction of the Eastern Cherokee Court of Indian Offenses or any successor Cherokee Tribal Court who shall be convicted of any offense defined by this Article shall be punished as follows:

1. For a violation of section 14-20.2 (Aggravated Sexual Abuse), by imprisonment for not less than three years, which term shall not be suspended, staved or otherwise delayed or reduced, and a fine of \$15,000.00;
2. For a violation of section 14-20.3 (Sexual Abuse) or 14-20.4 (sexual abuse of a minor or ward) by imprisonment for not less than three years, all or any part of which may, in the Court's discretion, be suspended, and a fine of up to \$15,000.00.
3. For a violation of section 14-20.8 (Abusive Sexual Contact) by imprisonment for not less than one year nor more than three years, all or any part of which may be suspended in the Court's discretion, and a fine of up to \$15,000.00.

**Examples of Implementation of VAWA 2013 Special Domestic Violence Jurisdiction**

**Tulalip Tribal Code (Current through February 7, 2015)**

**Title IV. YOUTH, ELDERS AND FAMILY**

**Chapter 4.25. Domestic Violence**

**4.25.010 Purpose**

**Article I General Provisions**

The Purpose of this Chapter is to recognize domestic violence and family violence as serious crimes against society, the Tribes, and the family, and to provide the victim of domestic violence or family violence the maximum protection from further violence that the law, and those who enforce the law, can provide. Furthermore, the purpose of this Chapter is to recognize that the strength of the Tribes is founded on healthy families, and that the safety of victims of domestic and family violence, especially children, must be ensured by immediate intervention of law enforcement, prosecution, education, treatment, and other appropriate services.

It is the intent of the Tulalip Tribes that the official response of domestic violence and family violence shall stress the enforcement of the laws to protect the victim and to hold the perpetrator accountable, which will in turn communicate the Tribes' policy that violent behavior against intimate partners or family members is criminal behavior and will not be excused or tolerated. This in turn will promote healing of families and the tribes where possible, and promote cultural teachings and traditional tribal

values so as to nurture nonviolence and respect within families. This chapter shall be interpreted and applied to give it the broadest possible scope to carry out these purposes.

#### **4.25.020 Legislative Findings**

It is the intent of the Tulalip Board of Directors and the tribal community that the official response to domestic violence and family violence shall be that the Tribes will not tolerate or excuse violent behavior under any circumstances. All people, whether they are elders, male, female, or children of our Tribes, or of the entire community residing on the Tulalip Reservation, are to be cherished and treated with respect.

Domestic violence and family violence are not acceptable and are contrary to traditional Tulalip tribal culture and values of honoring the family, and are contrary to the interest of our community and sense of well-being and growth. Domestic violence and family violence will not be tolerated.

The Tribes find that domestic violence and family violence imperils the very subsistence of the tribal community and the residents of the reservation. The Tribes recognize the Department of Justice findings that one in three Native women is sexually assaulted in her lifetime and that 70% of reported assaults are committed by non-Native men against Native women. A community response to domestic and family violence is necessary because domestic and family violence crimes and incidents impact the community as a whole. These crimes redirect tribal resources—whether personnel, financial, public safety or other resources—elsewhere and require an immediate response. As a result of this impact on tribal resources, the Tribes deems it necessary to address domestic violence and family violence to the fullest extent permitted by laws existing now or as may be adopted or amended in the future.

The Tribes further recognizes that there is a distinction between intimate partner domestic violence and family member violence. Domestic violence involves an intimate partner relationship and dynamics of power and control are overwhelmingly present in the action. Family violence is committed against all other family or household members. Both are reprehensible actions that require specialized recognition and enhanced provisions than what might be otherwise available to victims of crimes, or remedies available in civil actions.

#### **4.25.030 General Jurisdiction**

Jurisdiction over domestic and family violence matters shall be in accordance with Chapter 2. In addition, the Tulalip Tribal Court shall retain jurisdiction over members of federally recognized Indian tribes and any violations of Orders of Protection entered pursuant to this Chapter which are alleged to have occurred outside of the boundaries of the Tulalip Indian Reservation where such orders are entitled to recognition outside reservation boundaries as a matter of full faith and credit.

#### **4.25.040 Special Domestic Violence Criminal Jurisdiction**

- (1) The Tulalip Tribes hereby exercises “Special Domestic Violence Criminal Jurisdiction” as a “participating tribe,” as defined within 25 U.S.C. §1304 (2013), subject to applicable exceptions defined therein, in the Tulalip Tribes Domestic Violence Court.

- (2) In all proceedings in which the tribal court is exercising Special Domestic Violence Criminal Jurisdiction as a participating tribe, all rights afforded by TIC 2.25 shall apply and those enumerated in the Indian Civil Rights Act, 25 U.S.C. §1302 to all defendants. Should there be any inconsistency between TIC 2.25 and 25 U.S.C. § 1302, those of 25 U.S.C. § 1302 shall apply.
- (3) Every defendant has the privilege of the writ of habeas corpus to test the legality of his or her detention by order of the Tulalip Tribes and may petition the court to stay further detention pending the habeas proceeding.
  - (a) A court shall grant a stay if the court-
    - (i) finds that there is a substantial likelihood that the habeas corpus petition will be granted; and
    - (ii) after giving each alleged victim in the matter an opportunity to be heard, finds by clear and convincing evidence that under conditions imposed by the court, the petitioner is not likely to flee or pose a danger to any person or the community if released.
- (4) The Tulalip Tribes hereby declares its Special Domestic Violence Criminal Jurisdiction over any person only if he or she:
  - (a) Resides within the jurisdiction of the Tulalip Tribes; or
  - (b) Is employed within the jurisdiction area of the Tulalip Tribes, or;
  - (c) Is a spouse, intimate partner, or dating partner of:
    - (i) A member of the Tulalip Tribes; or,
    - (ii) A member of another Indian Tribe who resides within the jurisdiction of the Tulalip Tribes;

#### **4.25.050 Special Jurisdiction; Criminal Conduct Applicable**

The Tulalip Tribes exercises the special domestic violence criminal jurisdiction of a defendant for criminal conduct that falls into one or more of the following categories:

- (1) **Domestic Violence and Dating Violence:** An act of domestic violence or dating violence that occurs within the jurisdiction of the Tulalip Tribes.
- (2) **Violations of Protection Orders:** An act that occurs within the jurisdiction of the Tulalip Tribes, and:
  - (i) Violates the portion of a protection order that
  - (ii) Prohibits or provides protection against violent or threatening acts of harassment against, sexual violence against, contact or communication with, or physical proximity to, the person protected by the order.
  - (iii) Was issued against the defendant

- (iv) Is enforceable by the Tulalip Tribes, and
- (v) Is consistent with 18 U.S.C. § 2265 (b).

## **Tribal Code Commentary**

The first several examples are designed to meet TLOA's requirements. The last example from Tulalip is an example from a tribe that implemented VAWA 2013 in the pilot project.

### **TLOA Examples**

The Hopi Nation has implemented TLOA by categorizing their criminal offenses into five categories:

1. Dangerous Offense
2. Serious Offense
3. Offense
4. Minor Offense
5. Petty Offense

The Dangerous Offense and the Serious Offense are the two categories that have the possibility of enhanced sentencing under TLOA. The Dangerous Offense has the potential maximum incarceration of three years and a potential fine of up to \$15,000. A Serious Offense carries a maximum incarceration of two years and a potential fine of up to \$10,000. Each offense in the Hopi Criminal Code is categorized in one of the five categories. Examples of the crime of domestic violence and stalking are included to show how the crimes are categorized as Serious Offenses or Dangerous Offenses. Presumably the offenses designated as Serious Offenses or Dangerous Offenses are those that are comparable to felonies in states or federal courts, and subject to incarceration in excess of a year in those jurisdictions.

Section 3.4.2, Repetitive Offenders, allows enhancement of the crime to the next higher category if there is a previous conviction of the same crime in the tribal jurisdiction or of a comparable crime in any other jurisdiction in the United States. It does clarify that the other conviction must be for a different act. Because we have different sovereigns, it is possible that an offender could be charged in federal court or state court for the same activity and the tribal code makes it clear that the previous conviction must be for a different offense.

The Hopi Code also requires that Hopi customs and traditions be considered in sentencing. Additionally the court may look beyond fines and imprisonment. It can order restitution, diversion from criminal prosecution, community service, treatment, probation, parole, or suspension of sentence, unless a provision of the code has mandatory sentencing. The Court may substitute community service for a fine, upon a showing that the defendant is indigent.

Hopi also has a section that allows the tribal prosecutor to bring a civil action against non-Indians who are not subject to tribal criminal jurisdiction, but who violate the criminal laws in Hopi's territory. These individuals would be required to pay fines. The amount of the fines has increased due to the TLOA to a possible high of \$15,000.

The Hopi Domestic Violence definition is much more expansive than the definition implemented by VAWA 2013. Hopi may choose to make a specific domestic violence offense regarding non-Indians rather than modifying their domestic violence statute. There may be one domestic violence law for Indians and another for non-Indians. They would want to ensure that the penalties are the same for both Indian and non-Indians so they may categorize the Special Domestic Violence law as a serious offense or, if a repetitive offender is involved, a dangerous offense subject to the maximum three years of imprisonment and a \$15,000 penalty.

The Umatilla Nation incorporates the TLOA through categorization of their criminal offenses into felonies and misdemeanors. Those crimes that are categorized as felonies are subject to imprisonment of up to three years and a fine of up to \$15,000. The total imprisonment for any proceeding should not exceed nine years. Considered here is the possibility of stacking offenses dealt with in one proceeding, resulting in multiple convictions. The total incarceration is limited to nine years—the limitation in the TLOA.

Examples of the type of offenses that are considered felonies include stalking and assault under specific circumstances. Here the tribe has reviewed comparable offenses in states or federal court where these offenses are considered felonies, subject to incarceration in excess of a year. The Umatilla Code uses the language from the TLOA, stating that a defendant is not subject to a felony prosecution unless previously convicted of the same or comparable offense by any jurisdiction in the United States or is being prosecuted for an offense comparable to an offense punishable by more than one year of imprisonment if prosecuted by the federal or state courts. All defendants in Umatilla have the same rights and are subject to the same potential sentences regardless of citizenship status. In their code the Jurisdiction Section and the Charging Section make distinctions based on citizenship status to meet requirements to participate in SDVCJ.

The Salt River Pima-Maricopa Indian Community has put offenses into five categories. Class A offenses are those offenses that are subject to up to three years of incarceration and/or a \$15,000 fine. The Class A offenses also have a minimum mandatory sentence of one year of imprisonment and a \$1,000 fine. Salt River reviewed all of its offenses to determine the appropriate classification, considering how the offenses were categorized in state and federal courts. There does not appear to be any general section that allows enhancement of punishment for repeat offenders.

The Eastern Cherokee Nation reviewed their criminal code sections and amended those sections that met TLOA criteria and those sections that the Cherokee Nation believed should carry the harsher punishment. The example is the punishment section of their sexual assault offense. The nation has a minimum mandatory sentence of three years for aggravated sexual assault, which cannot be stayed, reduced, or suspended. It also has a mandatory sentence of three years for sexual

abuse and sexual abuse of a minor or ward, but allows a judge to suspend all or part of this sentence. Conviction of the remaining sexual assaults could result in incarceration for up to three years, but there is no mandatory sentence. There doesn't appear to be any requirements to enhance sentencing for repeat offenders.

The Tulalip statute is specifically designed to implement VAWA 2013. It was one of the pilot tribes. The statute closely follows the requirements laid out in VAWA 2013.

# CHAPTER 7. PUBLICATION OF LAWS AND RULES

## Overview

TLOA requires that, prior to charging a defendant, a tribe wishing to use the enhanced sentencing authority must make publicly available the criminal laws (including regulations and interpretative documents), rules of evidence, and rules of criminal procedure (including rules governing the recusal of judges in appropriate circumstances) of the tribal government.

VAWA 2013 incorporates these same requirements.

Given the consequences of a criminal conviction, the U.S. Supreme Court has ruled that it is not fair to hold a defendant responsible for obeying the law if there was no way the defendant could know what the law required. One of the criticisms that has long been leveled against tribal governments and tribal courts is that it is difficult to know what the tribe's laws are and to whom they apply. To some extent, this is an educational gap. The laws of the federal and state governments are available in both law libraries and in online legal databases, and law schools train their students in how to locate those laws. Most law students do not receive equivalent training in how to research tribal law. It is true, however, that (at least until recent years) some tribes did not make their laws available in law libraries and online how cases move through the court system.

Tribes will thus want to ensure that all its laws, rules, regulations, and court opinions that relate to criminal justice and criminal procedure are publicly available. "Interpretive documents" also likely include any commentary or other legislative history. The statute does not define "publicly available."

As a general rule, it is likely sufficient if the tribe's documents are as readily available as comparable state documents. This can mean being published in books available through law libraries, in legal databases, or on the Internet. Most tribes use the Internet to make their criminal laws, rules of evidence, and rules of criminal procedure publicly available.

Some tribes have also placed hard copies in publicly accessible places, such as tribal buildings, tribal agencies, tribal jails, and tribal libraries. Other tribes are providing hard copies to those who request

### Discussion

Does your tribe publish its laws, court rules, and court opinions? If so, where?

Do you have any provisions for judges to recuse themselves or for the parties to ask the judges to recuse himself or herself? Are those publicly available?

Is your nation in a state that through its Supreme Court website links all tribal courts and tribal codes in the state for accessibility purposes?

it. You may also want to place written notices around the courthouse, police, station, and so forth that explain where you can find the documents—online and/or hard copies.

Your tribe has unique financial circumstance that may or may not permit giving out hard copies, or placing hard copies in the community. You will want to take into account your budget when making these decisions. Tribes do not have to make these documents available for free, but they cannot charge a disproportionately large fee for them.

## **Tribal Code Examples**

### **Examples on Provisions for Recusing Judges**

Few tribes have specific laws or rules relating to how they will make their laws and codes publicly available. Those are generally administrative matters. Accordingly, this portion of the chapter focuses on provisions for recusing judges. The commentary section includes information about how tribes are satisfying the “publicly available” requirement.

#### **Eastern Band of the Cherokee Indians Tribal Code**

(Enacted November 5, 2012)

##### **Chapter 14. CRIMINAL LAW**

##### **Article V. SEXUAL ASSAULT**

#### **Sec. 14-20.10. Punishment.**

#### **Sec. 7-9. - Conflict of interest.**

Any Justice or Judge with a direct personal or financial interest in the outcome of any matter shall recuse himself or herself, and failure to recuse shall constitute grounds for impeachment and removal from office.

#### **Gila River Indian Community Rules of Criminal Procedure**

(Amended May 15, 2013)

##### **Chapter 15. Criminal Procedure**

#### **5.1514. Change of Judge.**

- A. **For Cause.** Any party may move the court for a change of judge based on any of the following grounds:
1. That the judge is interested in the action;
  2. That the judge is a kin or related to either party;
  3. That the judge is a material witness to the action; or
  4. That the party making the motion has cause to believe and does believe that on account of

the bias, prejudice, or interest of the judge, he cannot obtain a fair and impartial trial.

- B. A judge, other than the challenged judge, shall hear the motion for change of judge. If the hearing judge determines by a preponderance of the evidence that grounds exist for change of judge for cause, the matter shall be reassigned to another judge.
- C. **Entitlement.** Each party has the right to a change of judge.

## **RULE 10. CHANGE OF JUDGE.**

### **Rule 10.1. Change of Judge.**

- a. **Change of Judge for Cause.** Any party may file a motion verified by affidavit of the moving party alleging the specific grounds for change of judge.
  - 1. The grounds which may be alleged for change of judge shall be subject to the requirements in the GRIC Code § 5.1514.A.
  - 2. Within 10 days after discovery that grounds exist for change of judge, but not after commencement of trial, any party may file a motion verified by affidavit of the moving party alleging the specific ground for change of judge.
  - 3. Except for commencement of trial, no event occurring before discovery of the grounds shall constitute a waiver of rights to change of judge for cause.
  - 4. Allegations of interest or prejudice which prevent a fair and impartial hearing may be preserved for appeal.
  - 5. The court shall set the matter for hearing, which shall be held within 10 days after filing of the motion for change of judge.
  - 6. The Chief Judge shall assign the matter to a judge (“hearing judge”) other than the challenged judge, who shall hear the motion for change of judge and decide the issues by preponderance of the evidence. The hearing judge shall provide his findings to the Chief Judge within five days of the hearing. The Chief Judge will either assign the case back to the original judge if the hearing judge finds by preponderance of the evidence that no grounds exists for change of judge, or will make a new assignment if the hearing judge finds by preponderance of the evidence that grounds exists for change of judge for cause.
- b. **Change of Judge upon Request.** Each side in a criminal case is entitled as a matter of right to a change of judge. Each case, whether single or consolidated, shall be treated as having only two sides; except that when two or more parties on a side have adverse or hostile interests, the Chief Judge may allow additional changes of judge as a matter of right. The right to a change of judge for entitlement does not apply to petitions for postconviction relief or remands for sentencing.
  - 1. A party may exercise his right to change of judge for entitlement by filing a pleading with the court entitled “Notice of Change of Judge,” signed by counsel or advocate, if any, stating the name of the judge to be changed. The Notice of Change of Judge shall include an avowal that the request is made in good faith and not: for the purpose of delay; to obtain a severance; to interfere with the reasonable case management practices of a judge; to remove

a judge for reasons of race, gender, or religious affiliations; for purposes of using the rule against a particular judge in a blank fashion by the prosecutors or defense attorney or advocate; to obtain advantage or avoid disadvantage in connection with a plea bargain or at sentencing, except as allowed under Rule 17.

2. A Notice of Change of Judge shall be filed within 10 days after arraignment. If the party fails to file the notice within 10 days after arraignment or participates in any contested matter in the case before the challenged judge the party loses the right to change of judge under entitlement. The Chief Judge shall reassign the case to a new judge within five days after filing of a Notice of Change of Judge, and the clerk shall provide written notice of the reassignment which names the new judge to the parties within five days of the reassignment.
- c. When a motion or request for change of judge is timely filed under this rule, the challenged judge shall proceed no further in the action, except to make such temporary orders as may be necessary in the interests of justice before the motion or request of change of judge is decided.

---

## Salt River Pima-Maricopa Indian Community Code of Ordinances

(Amended March 6, 2013)

### Rules of Community Court

#### Rule 10. Change of Judge

- (a) **For Cause.** Prior to trial or hearing, the Prosecutor or the defendant shall be entitled to a change of judge if the assigned judge cannot conduct a fair and impartial hearing or trial without prejudice or bias. The party requesting the change of judge must file a motion verified by affidavit of the moving party and must allege specific grounds for the change of judge prior to commencement of the hearing or trial. A party may make an oral request for change of judge with leave of Court. The hearing on the motion for change of judge for cause shall be heard by a judge other than the challenged judge. If the Hearing Judge determines by preponderance of evidence that grounds exist for bias or prejudice, the matter shall be reassigned to another judge.

[Tulalip Tribal Code \(Current through February 7, 2015\)](#)

[Title II. TRIBAL JUSTICE SYSTEM](#)

[Chapter 2.05 Tribal Court](#)

**2.05.060 Disqualification of Judges and Magistrates.**

- (1) **As a Matter of Right.** A defendant, or other party, to any legal proceedings may accomplish one automatic change of assignment of the case from one Judge or Magistrate to another upon filing an affidavit of prejudice with the Court, stating that the Judge assigned to the case is prejudiced against their case. Such affidavit shall be in written form and must be filed with the Court within 10 days of assignment or reassignment of the trial Judge or before any discretionary ruling, whichever comes first. Rulings made at arraignment, the first appearance, or the initial bail hearing shall not be considered discretionary rulings for purposes of this rule.
- (2) **For Cause.** A defendant, or other party, to any legal proceedings may accomplish a second change of assignment of the case from one Judge or Magistrate to another upon filing an affidavit of prejudice with the Court. A Judge shall be disqualified for cause if an affidavit alleging interest or prejudice that would prevent a fair and impartial trial is ruled to be founded by a preponderance of the evidence after review by the Chief Justice of the Tulalip Court of Appeals. If an affidavit alleging interest or prejudice that would prevent a fair and impartial trial is filed against the Chief Justice of the Tulalip Court of Appeals, the Chief Justice shall recuse him- or herself from the matter. Such affidavit shall be in written form and must be filed by the party alleging such interest or prejudice within 10 days of discovery of the facts supporting the affidavit, unless good cause is shown for later filing.
- (3) **Recusal.** A Judge may recuse himself or herself upon grounds that he or she deems sufficient.

## **Tribal Code Commentary**

### **“Publicly Available” Requirement**

The Eastern Band of Cherokee has listed its code (including criminal laws, rules of evidence, and rules of criminal procedure) online through the website [Municode](#). [Municode](#) allows the user to view, print, and e-mail the code for free. The user can also purchase a copy of the code on the website. The tribe also keeps copies of their tribal code (including the criminal laws, rules of evidence, and rules of criminal procedure) at the tribal building in the Cherokee Nation. Copies of the code are also distributed to all of the tribal programs. The code is available to the public in all of these locations.

The Gila River Indian Community Code (including the criminal laws, rules of evidence, and rules of criminal procedure) is available on their community website. The community also plans to have hard copies of the code available at the tribal library, jail, and the seven district service centers throughout the reservation. The district service centers are where tribal members hold district meetings, play basketball, and so forth. GRIC has included the legislative history of the criminal code within its criminal code.

The Hopi Tribe's code (including the criminal laws, rules of evidence, and rules of criminal procedure) is available on the tribe's website. The code is also available in hard copy for inmates in jail. On the tribal website the Hopi Tribal Council Resolution regarding TLOA is also posted.

The Salt River Pima-Maricopa Indian Community code (including the criminal laws, rules of evidence, and rules of criminal procedure) is available on the community's website. The community also provides hard copies of the code upon request.

The Confederated Tribes of the Umatilla Indian Reservation (Umatilla) code (including the criminal laws, Court Code, rules of evidence, and rules of criminal procedure) is available on the tribe's website. The legislative history is included within the codes. Umatilla's recusal provisions are covered in Section 4.03(c) of the Court Code.

## **Recusal Provisions**

A tribe may articulate in either its code or its court rules the circumstances in which a judge should recuse himself or herself from presiding over a case. These will generally involve circumstances in which the judge has a personal or financial stake in the outcome of the case or for other reasons cannot be fair or impartial. The details of the procedures for recusal are not usually contained in the statute but rather are usually found in the court rules or judicial standards of conduct.

The example from Eastern Band of Cherokee illustrates a typical code provision regarding judicial recusal.

The excerpt from the Salt River Pima-Maricopa rules illustrates a typical procedure for handling recusal situations.

The Tulalip Code goes into more detail, providing parties with a right of one automatic change of judge if the party files an affidavit within the specified time stating that the judge assigned to the case is prejudiced. The party may be entitled to a second reassignment of the case if the party is able to demonstrate prejudice. A judge may also choose to recuse "himself or herself upon grounds that he or she deems sufficient."

The excerpt from the Gila River code and rules illustrates more fully the relationship between statutory provisions regarding recusal and rules of procedure implementing those provisions. Note that the rules of procedure provide more detail about the process, including the paperwork that must be filed, the time for filing it, and the hearing on the matter.

# PART III. COMPETENCY AND LICENSING STANDARDS

A tribe wishing to exercise the enhanced sentencing authority under TLOA and the SDVCJ under VAWA 2013 must ensure that the attorney representing the defendant and the judge presiding over the case meet minimum standards of competency.

Chapter 8 explores the standards for defense counsel. Chapter 9 explores the standards for judges. One way to satisfy the licensing portion of the requirements is to establish a tribal bar association, and Chapter 10 explores what would be required of a tribal bar association.



# CHAPTER 8. DEFENSE COUNSEL

## Overview

The TLOA requires that tribes who wish to exercise the enhanced sentencing authority by TLOA must provide attorneys to indigent defendants, that is, to defendants who cannot afford to hire a lawyer.

Those attorneys must:

- 1) be licensed to practice law by any jurisdiction in the United States that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys; and
- 2) provide defendants with the right to effective assistance of counsel at least equal to that guaranteed by the U.S. Constitution.

VAWA 2013 echoes these requirements, declaring that before a tribe can sentence a defendant to jail time, the tribe must satisfy all the standards set forth in ICRA, which includes the standards for defense counsel established by TLOA.

A tribe may already have a system for providing representation to defendants. If so, the tribe should review that system to make sure it fits the standards required by TLOA and VAWA 2013. Tribes should also be aware that these standards are the minimum requirements; tribes are free to provide an attorney to every defendant, if they wish to. The main reason to limit who gets a court-appointed attorney is the expense of paying for an attorney.

Complying with the TLOA and VAWA 2013 requirements regarding defense counsel can become very complicated very quickly. This is due in large part to the complicated legal standards developed by federal courts for ensuring that a court-appointed lawyer does what the lawyer is supposed to do.

Tribes do not need to adopt the same complex standards, but they do need to understand those standards. TLOA and VAWA 2013 require a tribe to provide at least the same level of effective assistance of counsel required by the U.S. Constitution. A tribe can impose higher standards on its defense attorneys.

### Discussion

Does your tribe provide a right to a defense attorney? Does the tribe pay for that attorney when the defendant is indigent?

If your tribe provides attorneys to people accused of crimes, is that through a public defender office? A contract system? Pro bono service requirements?

What are the current requirements to practice law in the tribal court? What is the process for admission?

The three key parts of TLOA and VAWA 2013 to remember with respect to defense counsel are that:

1. The tribe must provide at tribal expense, an attorney to every indigent person charged with a crime;
2. The attorney must be licensed to practice law by a licensing board that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys; and
3. The court must ensure that the attorney provides, at a minimum, effective assistance of counsel equal to that of the U.S. Constitution.

The process for appointing a defense attorney usually begins when the defendant is charged with a crime and first appears in court. At that point, the defendant can request that the court appoint an attorney to represent the defendant. The court reviews the requirements to make sure the defendant qualifies for a free attorney and, if the so, the court appoints an attorney.

The first question for a tribe, then, is to determine how it will define “indigent.” That is, when will a defendant be considered too poor to hire his or her own attorney?

Once a tribe has decided who will qualify for a court-appointed defense attorney, the tribe must decide what system it will use for appointing an attorney. Several types of systems exist. The three most common systems are a public defender office, a contract system, and a pro bono or required service system.

If the tribe has a public defender office, the court will appoint that office to represent the defendant. A public defender system is one in which the tribe establishes a special office and hires attorneys to work as attorneys for defendants who cannot afford their own lawyers. The benefit of a public defender system is that the attorneys are specialized in criminal defense work and the cost of running the office is fairly predictable. There are two disadvantages to a public defender system. First, a tribe needs to be able to accurately predict how many defendants will require a court-appointed lawyer, and that number must be sufficient to require full-time defense attorneys. It must also be a fairly consistent number of defendants. Second, there must be a way to handle what are called “conflicts.” There are times when an attorney will not be able to represent a particular client because to do so would be an ethical conflict. If the attorneys in the public defender office cannot represent a defendant, the tribe must have an alternate means of appointing an attorney.

The usual way to handle conflicts is to have a contract system. A contract system can also be an alternative to having a public defender office at all. A contract system means the tribe has entered into an agreement with an attorney (or attorneys). The agreement provides that the attorney will accept court appointments to serve as defense counsel and sets the fees that the attorney will receive in return for that work. The main advantage to a contract system is that the tribe only has to pay the attorney when the attorney is needed. If a tribe does not require a full-time defense attorney, this can

be a more cost-effective alternative. The disadvantages are that contract attorneys may not be as skilled at criminal defense work and that the costs are not as predictable.

A third type of system is one in which attorneys who are members of the tribal bar association are required to take turns accepting court appointments to serve as defense counsel. This service is usually “pro bono,” which means the attorney donates his or her time. These pro bono or required service systems do not usually work very well because it is difficult to ensure the attorney has the skills required to do criminal defense work and that the attorney has sufficient time to spend on the case.

No matter what system the tribe chooses to use, it must ensure that the attorneys who serve as defense counsel meet the minimum standards required by both TLOA and VAWA 2013. Those standards have two parts: a basic competency standard and a licensing requirement.

Both TLOA and VAWA 2013 require that a tribe provide the defendant with a right to effective assistance of counsel at least equal to that required by the U.S. Constitution. The federal and state courts have developed a large body of law defining what “effective assistance of counsel” means, or as it is more commonly phrased, when a defendant received ineffective assistance of counsel in violation of the constitution. To prove ineffective assistance of counsel, a defendant must show not only that the attorney was deficient, but that those deficiencies prejudiced the defendant.<sup>25</sup>

The first part of the test is to evaluate any alleged deficiencies in counsel’s conduct. As a practical matter, the defendant must point to particular, specific things the attorney did wrong. The defendant must also prove that the errors were so serious that counsel was not functioning as the “counsel” guaranteed by the U.S. Constitution. This is a very difficult standard to meet, particularly as the U.S. Supreme Court directed judges to indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance. The second part of the test requires the defendant to prove that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.

This complicated test has been applied in a very technical way that has produced much debate. For example, in one case, the record showed that the defense attorney fell asleep in court. The appellate court reviewed the transcript and decided the part of the trial the attorney slept through was not sufficiently important that it would have affected the outcome of the case.<sup>26</sup>

A tribe may choose to adopt the standard used by the federal and state courts or to create its own standard. A tribe may choose to adopt the same test, but apply it differently, but at a minimum it must meet the Strickland test and any changes to that test the Supreme Court make in the future.

---

<sup>25</sup> Strickland v. Washington, 466 U.S. 668 (1984).

<sup>26</sup> Muniz v. Smith, 647 F.3d 619 (6<sup>th</sup> Cir. 2011).

The two key requirements of TLOA and VAWA 2013 are that the tribe must guarantee a minimum standard of competency for court-appointed defense counsel and that the standard chosen cannot be lower than the standard used by the federal courts when interpreting the U.S. Constitution. The details for this standard and how it is interpreted are often supplied in court decisions and court rules.

Both TLOA and VAWA 2013 mandate that a tribe require that its court-appointed attorneys be licensed to practice law by any jurisdiction in the United States that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys. Tribes have a number of options for satisfying these requirements, including:

1. Creating its own tribal licensing procedure (see [Chapter 10](#) for more details),
2. Requiring membership in a state bar association, and
3. Requiring membership in the bar association of another tribe (provided that tribal bar satisfies the requirements).

## **Tribal Code Examples**

[Hopi Code](#) (Enacted August 28, 2012)

**Title 1. ESTABLISHMENT OF COURTS AND APPOINTMENT OF JUDGES**

**Chapter 6. Officers of the Tribal Court**

### **1.6.1 OFFICERS.**

Officers of the Trial Court include: Attorneys and lay advocates who are members of the Bar of the Hopi Tribe.

(1.6.2 Omitted)

### **1.6.3 PUBLIC DEFENDER**

- A. The Hopi Tribe shall establish the Office of Public Defender and appoint a suitable person to hold that office.
- B. Any person who is admitted to practice law before any State Supreme Court or U.S. District Court, and is in good standing, shall be qualified for the office.
- C. The Public Defender shall be compensated upon a contractual basis, as authorized by the Tribal Council and subject to negotiation and execution by the Chairman
- D. The Public Defender shall perform the following duties:
  1. Upon order of the court, defend, advise, and counsel without expense to the defendant, any person who is not financially able to employ counsel in the following proceedings and circumstances:
    - a. Offenses triable in the Trial Court at all stages of the proceedings, including the preliminary examination, but only for those offenses defined under 3.4.1 of this

Code as an Offense, Serious Offense or Dangerous Offense;

- b. Extradition hearings;
  - c. Sanity hearings only when appointed by the court;
  - d. Involuntary commitment hearings only when appointed by the court;
  - e. Juvenile delinquency hearings only when appointed by the court;
  - f. Appeals to the Court of Appeals.
2. Keep a record of all services rendered by the public defender in that capacity and file with the Tribal Council an annual report of those services.
  3. By December 1 of each year, file with the Chief Judge and Tribal Council an annual report on the average cost of defending a major offense. For the purpose of this section, a major offense shall mean an offense, serious offense or dangerous offense as defined in Section 3.4.1 of this Code.
  4. The Public Defender may, with the consent and at salaries authorized by law, appoint those full-time and part-time deputies and assistants necessary to conduct the affairs of the office. The appointments shall be in writing and filed with the Tribal Council.
  5. The Public Defender shall petition the court to withdraw as attorney of record and the court may grant such petition, whenever private counsel is employed either by the defendant or by any other person to represent such defendant and such private counsel is accepted by the defendant.

#### **1.6.4 APPEARANCE OF ATTORNEYS.**

- A. Attorneys, if qualified, may appear before the Courts in all cases.
- B. **Qualification of Attorneys.** Attorneys may become a member of the Bar of the Courts, if they are admitted to practice before the Supreme Court of the United States, a United States Circuit Court of Appeals, U.S. District Court, or the Supreme Court of any state, and are in good standing.
- C. **Certification.** Any attorney eligible under Section 1.6.4(B), who desires to practice in the Courts, shall obtain a certificate from the Court authorizing his or her practice before the Courts each calendar year. A certificate must be obtained prior to any appearance by the attorney in Court. The annual fee shall be established by the Chief Judge at not less than \$100.
- D. **Dignity and Ethics.** Any applicant for a certificate to become a member of the Bar of the Hopi Courts shall agree that he or she will conform to the standards of conduct established by the Professionalism Committee in the performance of his duties as an attorney before the Courts.
- E. **Contempt.** In the event that an attorney is found guilty of contempt before any Court or contempt outside the presence of any Court, the judge may levy a penalty for the contempt not to exceed the sum of five hundred Dollars (\$500.00), and if any attorney who fails to pay the fine as provided by any judgment of any Court therefore, he shall be disqualified to practice before the Courts.

F. **Attorney's fees.** Attorneys practicing before the Court may charge reasonable fees.

## **Title II: Court Rules**

### **Chapter 8: TRIAL, GENERAL PROVISIONS**

#### **2.8.5 RIGHTS OF ACCUSED.**

In all criminal prosecutions, the accused person shall have the right to defend himself in person or, at his own expense, by counsel; to demand the nature and cause of the accusation against him face to face; to have compulsory process served for obtaining witnesses in his behalf; and to a speedy public trial by an impartial jury. No person shall be compelled in any criminal case to give evidence against himself or be twice put in jeopardy for the same offense; upon request, the accused or a juror shall be entitled to an interpreter.

## **Laws of the Confederated Salish and Kootenai Codified**

**(Revised March 21, 2013)**

### **Title 1, Chapter 2. Courts**

#### **Part IV. Representation by Counsel**

##### **1-2-401. Declaration of Policy.**

- (1) Every person appearing as a party before Tribal Court, except as otherwise provided for proceedings associated with Small Claims, has a right to be represented by an attorney or other person admitted to practice before the Court at the person's own expense.
- (2) An indigent defendant accused of a criminal offense punishable by imprisonment has a right to representation by the Tribal Defender's Office.
- (3) Other persons are entitled to representation by the Tribal Defenders Office pursuant to the policies of that Office as approved by the Tribal Council.

##### **1-2-402. Indigence Defined.**

An individual accused by the Tribes of a criminal offense shall be determined to be indigent if he or she presents to the Tribal Defenders Office a statement documenting that his or her income is less than 200% of the current standard for poverty contained in the Federal Poverty Income Guidelines. If the individual's income is between 200% and 300% of that standard, he or she may elect to have the Tribal Defenders Office represent them for a fee to be determined by the Tribal Defenders Office and approved by the Tribal Council, but shall not be entitled to representation by that Office in the absence of making that election. If the individual's income is over 300% of the current standard for poverty contained in the Federal Poverty Income Guidelines then he or she shall be responsible for retaining and paying their own attorney or advocate, and shall not be entitled to representation by the Tribal Defenders Office.

**Confederate Tribes of the Umatilla Reservation Code**

(Amended March 24, 2014)

**CRIMINAL CODE AND PROCEDURES**

**Chapter 3. CRIMINAL PROCEDURE**

**PART VI. SENTENCING**

**Section 3.28. DEFENDANT’S RIGHTS**

- A. Every defendant is entitled to those rights enumerated in the Indian Civil Rights Act, 25 U.S.C. 1302.
- B. Every defendant has the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution.
- C. The Tribes shall provide any indigent defendant the assistance of a defense attorney licensed to practice law by any jurisdiction in the United States, including tribes, provided that jurisdiction applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys.

---

**Confederated Tribes of the Umatilla Indian Reservation of Oregon**  
**Rules of Court**

**GENERAL RULES OF THE COURT**

**Rule 11 Advocates or Attorneys**

- a. Any person appearing in tribal court may be represented by a duly admitted advocate or attorney. The person shall authorize his or her representation in writing and request permission of the court to allow such representation. The presiding judge shall approve or deny the request.
- b. Any person who is an active member in good standing of any tribal or state bar association is eligible for admission to the bar of the Umatilla Tribal Court.
- c. Application for admission shall be made by filing an admission fee of \$100.00 and a petition setting forth: name, birth date, sex, residence/office address, general and specific legal education and experience, reference from one bar association member with whom they are personally acquainted, any past or pending disciplinary actions to which she may be subject, any other information as required by the court.
- d. If the court is satisfied that the applicant is of good moral character and professional standing, the petition shall be granted and the applicant may take the oath of admission.

Title 5 of the Gila River Indian Community Code

**CHAPTER 15. CRIMINAL PROCEDURE**

**5.1505. Right to Counsel.**

- A. A defendant shall be entitled to be represented, at his own expense, by counsel in any criminal proceeding. The right to be represented shall include the right to consult in private with counsel or counsel's agent as soon as feasible after a defendant is taken into custody, at reasonable times thereafter and sufficiently in advance of a criminal proceeding to allow adequate preparation.
- B. Appointment of counsel**
1. A defendant subject to less than one year of imprisonment per criminal proceeding shall be entitled to have the assistance of counsel at his own expense; however, if the defendant is a Community member, the court shall appoint counsel from Defense Services Office, or in the event of conflict from a list of eligible conflict attorneys or advocates.
  2. A defendant subject to more than one year of imprisonment per criminal proceeding shall be entitled to have the assistance of counsel at his own expense; however, if a defendant is a Community member or is indigent, the court shall appoint a licensed attorney from Defense Services Office, or in the event of conflict from a list of eligible conflict licensed attorneys.
  3. Whenever counsel is appointed, the court shall enter an order to that effect, a copy of which shall be given or sent to the defendant, the attorney appointed, and the Office of the Prosecutor within 24 hours of appointment.
  4. The defendant may reject an appointed counsel and inform the judge of his intention to retain counsel at his own expense.
  5. The trial court or court of appeals shall appoint new counsel for a defendant entitled to representation under Section 5.1505.B.2 on appeal, when prior counsel is permitted to withdraw.
  6. In the event the Community Council approves appointment of counsel for individuals other than Community members or indigent defendants, those individuals shall be appointed counsel in the same manner as Sections 5.1505.B.1 and 5.1505.B.2.
- C. Appointment of a conflict attorney.** The court shall maintain a list of eligible contracted conflict attorneys for appointment as provided under Sections 5.1505B.1 and 5.1505.B.2. For appointment under Section 5.1505.B.2, the attorney shall be a member in good standing with the State Bar of Arizona; shall have practiced in the area of criminal litigation for at least three years immediately preceding the appointment; and shall not have a conflict with the Community as a former Community prosecutor within five years prior to appointment.
- D. Waiver of rights to counsel.** A defendant may waive his right to counsel in open court, after the judge has determined that the defendant knowingly, intelligently, and voluntarily desires to forego counsel. A defendant may withdraw a waiver of his right to counsel at any time. A subsequent retention of counsel shall not entitle the defendant to repeat any previous proceedings. If there is a

question of a defendant's competency, defendant shall have appointed counsel until the defendant has been found to be competent. If a defendant appears without counsel at any proceeding having been given a reasonable opportunity to retain counsel, the court may proceed with the matter, with or without securing a waiver of counsel under this section.

## **Gila River Indian Community Rules of Criminal Procedure**

### **III. RIGHTS OF PARTIES**

#### **Rules 6. ATTORNEYS, APPOINTMENT OF COUNSEL**

##### **Rule 6.1. Right to Counsel, Waiver of Rights to Counsel.**

The appointment and waiver of counsel shall be subject to the requirements in the GRIC Code § 5.1505.

##### **Rule 6.2. Appointment of Counsel.**

- a. As provided in Rule 6.1, the court shall appoint an attorney for a defendant where the defendant faces incarceration as a potential punishment upon finding of guilt for the charged offense.
- b. Whenever counsel is appointed, the court shall enter an order to that effect, a copy of which shall be served on the defendant, the attorney appointed, and the Office of the Prosecutor within 24 hours of appointment.
- c. A judge appointing an attorney for an indigent defendant shall first determine if the defendant is indigent.
  1. A determination of indigency or continuing indigency of a non-Community member defendant subject to more than one year in jail may be made by a judge at any stage of the criminal proceedings.
  2. A defendant claiming indigency shall file a sworn financial statement to determine eligibility for appointment of counsel. The statement shall advise the defendant of the criminal penalties for making of a false sworn statement or false official statement. There is an obligation by defendant to disclose all sources of income, all assets, which the defendant owns or may derive financial benefit from, all sources of financial support and any information required to accurately assess the defendant's indigency.
  3. Indigency means that a person:
    - i. Does not have sufficient income, assets, credit or other means to provide for the payment of legal counsel and all other necessary expenses of representation without depriving that person or the family of that person of food, shelter, clothing, and other necessities; or
    - ii. Has an income level at or below 150% of the federal poverty level as defined by the most recently revised poverty income guidelines published by the United States Department of Health and Human Services; and

- iii. Has not transferred or otherwise disposed of any assets since the commission of the offense with the intent of establishing eligibility for the appointment of counsel under this section.
4. In making a determination of indigency the judge shall consider:
  - i. The probable expense and burden of defending the case;
  - ii. The gross income including total salary, wages, earnings from personal services or sales, and all other income; including income from sale of crafts, Bureau of Indian Affairs Individual Indian Monies accounts, Social Security benefits, union funds, veteran's benefits, support from absent family members, public or private employee pensions, dividends, interest payments, per capita payments, rents, estates, trusts, or gifts;
  - iii. Deductions from determinations from gross income for necessities shall be for the following expenses only: food, utilities, housing, child support by court order, child care expenses, medical expenses, nursing home expenses, reasonable transportation for employment or medical treatment. A judge may consider any unusual and necessary expense for the defendant or the defendant's family that would prevent the defendant from being able to pay for the cost of private counsel;
  - iv. The value of assets, which may be converted into cash within a reasonable period of time without causing substantial hardship or jeopardizing the defendant's ability to maintain a home or employment. Those assets include, but are not limited to: cash on hand, checking or savings accounts, stocks, certificates of deposit, tax refunds, or accounts payable ( i.e., reasonable expectancies of payment);
  - v. The ownership of, or any interest in, any tangible or intangible personal property or real property, or reasonable expectancy of any such interest;
  - vi. The amounts of debts owned by the defendant or that might reasonably be incurred by the defendant because of illnesses other needs within the defendant's family;
  - vii. Number, ages, and relationships of any dependents; and
  - viii. Other relevant factors.
5. The court may assess monthly contributions for the cost of defense based upon gross income, including the income of a spouse or family members, where the spouse or family member is not the victim of the alleged offense.
6. The Probation or Pretrial Services program may verify information provided by the defendant from any source, and may require the defendant to provide any documents to verify information provided.
  - i. Proof of income, assets or expenses includes, but is not limited to: bank statements, statements from employers, tax returns or income reporting forms, statements or receipts for medical expenses, nursing home expenses, child support payments, rent or mortgage receipts or statements, trader pawn slips, records of monies receivable, or

documents which show the receipt and amounts for unemployment, welfare or other social security benefits.

- ii. The defendant may be required to execute necessary releases, Privacy Act authorizations or other documents required to verify information.
  - iii. A judge may enter orders for the production of information regarding eligibility.
7. After making a finding of indigency, the judge shall enter the findings on the record and enter an order assigning counsel.
  8. Whenever counsel is appointed, the court shall enter an order to that effect, a copy of which shall be given or sent to the defendant, the attorney appointed, and the Office of the Prosecutor within 24 hours of appointment.
  9. Any person who intentionally or knowingly makes a material false statement or omits a material fact in a sworn financial statement for indigency is guilty of the offense of fraudulent schemes and practices against the Community in violation of Section 5.1108, Fraudulent Schemes and Practices Against the Community. No defendant who is charged with providing false, misleading or incomplete information may claim a denial of the right against self-incrimination following any charge or penalty for such conduct.

## **RULE 29. APPEALS**

### **Rule 29.4 Right to Assistance of Counsel for Purposes of Appeal.**

- a. For appeals of criminal convictions:
  1. If the sentence of imprisonment was one year or less, the defendant has the right to counsel as provided in Rule 6.1 (a).
  2. If the sentence of imprisonment was more than one year, the defendant has a right to counsel as provided in Rule 6. 1 (b) and if the defendant is unable to obtain counsel as provided in Rule 6 .2 (d) counsel will be appointed as provided in Rule 6 .2.

[Tulip Tribal Code](#) (Current through February 7, 2015)

Title II. TRIBAL JUSTICE SYSTEM

Chapter 2.05 Tribal Court

2.05.030 General Provisions.

(1. through 7. Omitted)

- (8) **Right to Counsel.** Any person appearing as a party in Tribal Court shall have the right to counsel at his or her own expense. "Counsel" includes attorneys and spokespersons. Such counsel shall be of the parties' own choosing and need not be an attorney or admitted to practice before the bar of any state, but must be members of the Tulip Tribal Bar. Indigent persons charged with a felony crime shall be appointed an attorney at the Tribes' expense at all critical stages of a criminal proceeding, up to and through trial.
- (9) **Attorneys Fees.** Attorneys fees are not awardable unless otherwise provided by contract, ordinance, statute, or other law.
- (10) **Eligibility for Appointed Counsel in Criminal Cases.** The Court may appoint counsel to assist any person appearing as a criminal defendant for charges carrying a potential jail sentence. In order to be eligible for such services, the defendant must be determined to be financially qualified based upon standards of indigency established by the Court.

Confederated Tribes of the Umatilla Reservation

[Criminal Court Directive](#) (Effective January 22, 2014)

1. **Public Defender Eligibility.** Every indigent criminal defendant has a right to be represented by an attorney free of charge. Typically the court will appoint a public defender regardless of income if a defendant requests representation. However, in the event future resources limit the ability of the Court to provide counsel to everyone, the following schedule will apply to the determination of eligibility for a public defender. It is based on 150% of the 2014 federal poverty level. The Court also reserves the right to appoint a public defender to any criminal defendant even if they exceed income qualifications.

	# of Persons in Family/Household
1	\$17,235
2	\$24,265
3	\$29,295
4	\$35,325
5	\$41,355
6	\$47,385
7	\$53,415
8	\$59,445

For Each Additional Person Add \$6,030

## **Tribal Code Commentary**

The Hopi Tribal Code established an Office of Public Defender and sets out a list of the duties of that office and the attorneys' qualifications. The tribe uses a contract system to provide public defenders for indigent defendants.

The Confederated Salish and Kootenai Tribes maintain a Tribal Defenders Office, and an indigent defendant accused of a criminal offense punishable by imprisonment has a right to representation by that office. The Confederated Salish and Kootenai Tribal Code defines three categories of income level for appointment of counsel: a level at which the defendant is entitled to representation by the Tribal Defenders Office at no charge, a level at which the defendant is entitled to representation for a fee, and a level at which the defendant is not entitled to representation by the Tribal Defenders Office (although the defendant can hire and pay for his or her own attorney).

The Umatilla Code articulates the standards required by TLOA and VAWA 2013, and then provides more detail in the court rules. This approach provides flexibility, as court rules are often easier to update and change than are statutes. Note that the regulation is focused on the licensing requirement and does not directly address the effective assistance of counsel requirement. That is a fairly typical approach, as the effective assistance of counsel standards will often be addressed more fully by the courts in opinions. In practice Umatilla contracts out cases to local state bar licensed attorneys who practice criminal defense in surrounding communities.

The Gila River Indian Community also addresses the matter of indigent defense counsel in both the tribal code and in court rules. The code indicates that an indigent defendant is eligible for a court-appointed attorney when the defendant may be subject to incarceration of more than a year, not when subject to incarceration for less than a year. The court rules contain a detailed process for determining whether a defendant is indigent. Note that the tribe provides a more extensive right to counsel for tribal members, and that the tribe also provides a right to appellate counsel in certain cases.



# CHAPTER 9. JUDGES

## Overview

TLOA requires that the judge who presides over the case must have “sufficient legal training to preside over criminal proceedings” and must be “licensed to practice law by any jurisdiction in the United States.”

VAWA 2013 echoes these requirements, declaring that before a term of imprisonment of any length may be imposed, the tribe must provide a defendant with all rights described in section 1302(c), which includes TLOA’s standards for judges.

This chapter will focus on the “sufficient legal training” portion of the requirements first, and then turn to the licensing requirements.

Most tribes already set standards for judicial qualifications. To satisfy TLOA, however, those standards must include requirements designed to insure that a judge has sufficient legal training to preside over criminal proceedings. Note, however, that these standards do not necessarily apply to all members of the tribal judiciary. They do not even necessarily apply to all judges hearing criminal cases. Rather, they apply only to judges who preside over criminal cases in which the enhanced sentencing authority will be used or which involve SDVCJ. A tribe may, however, decide to apply these training requirements more broadly.

TLOA does not require that the judge hold a law degree. Rather, it requires only that the judge have “sufficient” legal training to preside over criminal proceedings. That training may be acquired through law school, through judicial training certification programs, or other workshops. The tribe also retains the authority (at least initially) to determine what constitutes sufficient training.

As for the licensing requirements, tribes have a number of options for satisfying those, including:

1. Creating its own tribal licensing procedure,
2. Requiring membership in a state bar association, and
3. Requiring membership in the bar association of another tribe.

A tribe may want to use the same licensing process for judges and defense attorneys, or may choose to use separate standards. It is worth noting judges must only be licensed to practice law in any

### Discussion

How many judges does your tribal court have? What are the required qualifications to be a judge? Do all judges have to satisfy the same standards?

Do you currently have any licensing requirements for your judges? If so, what are those requirements?

Do you have ethical standards for judges? Who enforces those standards?

jurisdiction in the United States, while defense counsel are subject to more stringent requirements. They must not only be licensed; their licensing body must apply appropriate standards and ensure both the competence and the ethical (professional responsibility) duties of its attorneys.

This division is not just driven by the language of TLOA. Most states have a different set of standards for qualification of judges and qualification of attorneys. Judges may be members of the bar association, but judicial standards of conduct are usually set by court rule or statute. Allegations that a judge has violated those standards are usually heard by a different organization than the one that hears allegations against attorneys. There will often be a statutory committee to review judicial conduct, and sometimes that authority is placed in the tribal council (although the latter is potentially fraught with separation of powers issues).

## **Tribal Code Examples**

### **Eastern Band of the Cherokee Indians Tribal Code**

(Enacted November 5, 2012)

#### **Chapter 7. JUDICIAL CODE**

##### **Sec. 7-8. - Judicial qualifications.**

- (a) The Chief Justice of the Supreme Court and the Chief Judge of the Trial Court shall be attorneys licensed by the North Carolina State Bar and members in good standing of the practicing bar of the Eastern Band of Cherokee Indians. No person shall serve as a justice or judge who has ever been convicted of a felony or other crime of moral turpitude in any jurisdiction, convicted of any crime involving embezzlement, fraud, bribery or theft against the Eastern Band of Cherokee Indians, removed by impeachment from any office, or resigned from any office while under official investigation for impeachment.
- (b) All persons appointed as associate justices of the Cherokee Supreme Court and as associate judges of the Cherokee Tribal Court shall also be attorneys licensed by and in good standing with the North Carolina State Bar. This subsection shall not apply to persons appointed and confirmed before the effective date of this amendment.

(Sec. 7-9. Omitted)

##### **Sec. 7-10. - Removal by impeachment.**

- (a) The Ethics Commission shall have the sole power to remove Judges and Justices by impeachment, and any other power delegated by law. . . .

[Confederated Tribes of the Umatilla Reservation Court Code \(July 1, 2013\)](#)

**Chapter 2. JUDICIAL APPOINTMENTS AND QUALIFICATIONS**

**SECTION 2.02. Eligibility**

- A. Any person over 21 years of age shall be eligible to serve as a Chief or Associate Judge.
- B. All judges shall serve a probationary one year term. The Board of Trustees may appoint any person who has performed satisfactorily during the probationary period and who is otherwise qualified, to a term of ten (10) years.
- C. No candidate shall ever have been convicted of a felony or, within one year past, of a misdemeanor involving moral turpitude. An eligible candidate must be of high moral character and physically sound.
- D. Any judge presiding over a criminal trial shall be a member in good standing of any state bar and a graduate from an accredited law school.

[Gila River Indian Community Rules of Criminal Procedure](#)

**(Amended May 15, 2013)**

**Rule 41. Judicial Education**

**Rules 41.1 Purpose**

The protection of the rights of Community members depends upon the existence of an independent and competent judiciary. The task of maintaining judicial competence depends on the willingness of the judiciary itself to assure that its members are knowledgeable and skilled and that the judges are trained in the application of legal principles. For purposes of Rule 41 a judge shall include the chief judge; associate judges; appellate court judges, and judges pro tempore (visiting judges) appointed on a full-time, part-time or on-call basis to preside over criminal proceedings.

**Rule 41.2 Educational Requirements**

- a. **Initial Educational Requirements.** Before initial case assignment, a judge shall have completed a minimum of 30 hours of instruction in substantive, procedural and evidentiary laws, including at least two hours of judicial ethics, from an accredited program.
- b. **Ongoing Educational Requirements.** Each fiscal year after the initial year of taking office or of initial appointment, judges shall complete a minimum of 15 hours of instruction in substantive, procedural and evidentiary laws, including at least two hours of judicial ethics, from an accredited program.
- c. **Enhanced Sentencing Requirements.** A judge presiding over criminal proceedings where a defendant is subject to more than one year of incarceration shall:
  - 1. Be licensed to practice law by any jurisdiction in the United States; and

2. Have sufficient legal training to preside over criminal proceedings. Sufficient legal training is considered satisfied after completing a minimum of 40 hours in criminal substantive, procedural and evidentiary laws, from an accredited program.
- d. **Program Accreditation.** Attendance at an education program sponsored by the following shall be presumed to meet standards and be accredited:
1. Judicial College of Arizona;
  2. National Judicial College;
  3. National Tribal Judicial Center;
  4. Programs accredited by Arizona's Committee on Judicial Education and Training;
  5. Any accredited law school;
  6. Local, state or national bar association.
- e. Judicial education shall address relevant areas such as judicial competence, performance, case management, opinion writing and administration.
- f. **Certification.**
1. A judge shall file an affidavit certifying compliance with Rule 41.2(a) and (b) with the court administrator, or designee, for each fiscal year beginning October 1 and ending September 30, not later than October 31 of each fiscal year.
  2. The court administrator, or designee, shall forward to the Legislative Standing Committee no later than November 30 of every fiscal year, the names of any judge that does not fulfill the requirements of Rule 41.2(a) and (b), and thereafter upon request by the Community Council or any Community member.
  3. For appointment of cases under Rule 41.2(c), a judge shall forward a copy of his/her license to practice law issued by any jurisdiction in the United States and an affidavit certifying compliance with Rule 41.2(c)(2), which shall be substantiated by certificates of attendance, to the court administrator, or designee, prior to appointment.
  4. The court administrator, or designee, shall notify the chief judge when a judge does not meet the requirements of Rule 41.2(c). The chief judge, in consultation with the court administrator, shall ensure that all judges appointed to cases where a defendant is subject to more than one year of incarceration, meet the requirements under Rule 41.2(c), and may reappoint case assignments to ensure compliance with Rule 41.2(c).

[Tulalip Tribal Code](#) (Current through February 7, 2015)

Title II. TRIBAL JUSTICE SYSTEM

Chapter 2.05 Tribal Court

2.05.040 Judges.

The Tulalip Tribal Court shall consist of a Chief Judge and such Associate Judges as needed, whose duties shall be regular and permanent, as fixed and determined by the Board of Directors. No person shall exercise the judicial authority of the Tulalip Tribes in any Tulalip Tribal Court, Employment Court, Gaming Court, or other Court under this code or any other Tulalip ordinance or regulation unless and until such person has been appointed by the Board of Directors in accordance with this chapter. Judges shall receive such compensation as is set by resolution of the Board.

- (1) **Eligibility.** To be eligible to serve as a Judge of the Tribal Court, a person must:
  - (a) Be over 25 years of age;
  - (b) Never have been convicted or found guilty of a felony in any Federal or State Court or of a Class E offense under Tulalip Tribal law;
  - (c) Within the previous five years, not have been convicted of a misdemeanor in any Tribal, Federal, or State Court;
  - (d) Be of high moral character and never have been convicted of any offense involving moral turpitude;
  - (e) Be either a Judge from any Federally recognized Indian tribe, licensed to practice before the Washington State Bar Association, or any other qualified person appointed by the Tribal Board of Directors, or possess a J.D. from an accredited law school; and
  - (f) Be a member in good standing of the Tulalip Bar.

To be eligible to serve as Chief Judge of the Tribal Court, a person must also possess administrative experience in addition to the requirements included in this section.

(2. and 3. Omitted)

- (4) **Powers and Duties.** Judges shall have the authority to act in all matters within the jurisdiction of the Tulalip Tribal Court. Justices shall have authority to act in all matters within the jurisdiction of the Court of Appeals. No Judge or Justice shall be qualified to act as such in any case where the Judge has any direct interest or wherein any relative by marriage or blood, in the first or second degrees, is a party.
- (5) **Removal.** During tenure in office, Judges or Justices may be suspended, dismissed, or removed for cause by the Board of Directors. . . .
- (6) **Felony Crimes.** To be eligible to preside over all stages of a felony criminal case, the Judge must: (a) have sufficient legal training to preside over criminal proceedings; and (b) be licensed as an attorney in the State of Washington or other state.

## **Tribal Code Commentary**

The Eastern Band of Cherokee requires that its judges be licensed by the North Carolina State Bar and members in good standing of the practicing bar of the Eastern Band of Cherokee Indians. The statute gives the Ethics Committee the power to remove judges. The law does not, however, contain an explicit requirement that the judge have sufficient training to preside over criminal trials. It is likely that the North Carolina bar requires that attorneys possess a JD, which should be sufficient to meet the training requirement.

The Umatilla Code explicitly requires that its judges be graduates of an accredited law school. The Umatilla code also requires membership in good standing of a state bar, but it accepts membership in any state bar, unlike the Eastern Cherokee who limited licensure to the bar of the state where they are located.

Gila River does not require its judges to have a law degree, but it has established a very detailed set of rules regarding judicial education. Those standards require a minimum amount of educational instruction prior to being assigned a case as well as a continuing education requirement. It has imposed even higher standards for the initial education requirements for judges presiding over cases involving defendants subject to enhanced sentencing. Gila River has also defined what topics are acceptable to fulfill the educational requirement and which programs are deemed to be accredited. The code also establishes a procedure for judges to certify they have satisfied the requirement.

The Tulalip code establishes several alternative requirements for serving as a judge. Possessing a Juris Doctorate from a law school is only one option.

# CHAPTER 10. ESTABLISHING A TRIBAL BAR ASSOCIATION

## Overview

Both TLOA and VAWA 2013 impose certain licensing requirements for both judges and for defense counsel. As discussed in Chapters 8 and 9, one way to satisfy these requirements is to create a tribal bar association.

Bar associations can be organized in many different ways and can serve a variety of functions. They run the spectrum from being a social networking organization for lawyers and judges to being the organization that sets and enforces the minimum standards of training, education, and knowledge a person must possess in order to practice law in that jurisdiction. Under the latter function, the bar association usually also sets and enforces standards of professionalism and ethical conduct, and imposes requirements for continuing education.

A bar association can also set and enforce Continuing Legal Education (CLE) requirements, including minimum quantities of annual training and defining standards for who can teach CLE courses.

TLOA and VAWA 2013 both distinguish the licensing requirements for judges and for defense attorneys. With respect to judges, the two statutes require only that the judge be licensed to practice law in any jurisdiction in the United States. With respect to defense counsel, the requirements are more stringent. Defense attorneys must not only be licensed, but also their licensing body must apply appropriate standards and ensure both the competence and the ethical (professional responsibility) duties of its attorneys. As discussed more fully in Chapter 9, this difference is likely a result of the fact that judicial standards of conduct are usually set by court rule or statute.

If a tribe wishes to satisfy TLOA's and VAWA 2013's requirements by using its existing tribal bar association or by establishing a tribal bar association, it must ensure that the tribal bar applies

### Discussion

What are the current requirements to practice in your tribal court?

How many attorneys practice in your courts? Is it enough to make it worthwhile having your own bar association?

If you have a tribal bar, does it have an exam? How does it ensure attorneys have sufficient training? How does it handle disciplinary matters?

“appropriate standards” to ensure “both the competence and professional responsibility of its licensed attorneys.”<sup>27</sup>

It is not entirely clear what will satisfy this requirement. Many tribes have tribal bar associations that require only that the attorney be licensed in another jurisdiction and pay the membership fee. The tribal bar association does not do any screening, but rather relies on the other bar association to serve that function. It is possible that a tribal bar association that requires an attorney be a member in good standing of another bar association is sufficient, so long as the other bar association applies the necessary standards. In essence, this would be no different than using the other bar association as the licensing agent. A tribe choosing this option would need to make sure that the attorney continues to be licensed by and in good standing with the other bar association.

It is also possible to interpret TLOA and VAWA 2013 to require that if a tribe is relying on a tribal bar association to fulfill the licensing requirement for defense attorneys, the tribal bar association must be the one who sets and enforces the standards. There are advantages and disadvantages to this approach.

The primary advantages are that the tribe controls the standards for who is allowed to practice law in its jurisdiction and who is allowed to appear in tribal court. These standards can include requiring knowledge not only of Indian law in general, but of tribal law specifically. An attorney applying for membership can be required to take a bar examination to demonstrate the attorney possesses the required knowledge. The tribe can also establish its own standards of professional conduct, pro bono requirements (a bar association may require a certain amount of public service annually from its members), and CLE requirements.

The disadvantages relate to the time and resources required. Setting up and administering a bar exam is time consuming and can be expensive, as can screening applicants for character and fitness issues. A tribal bar association that sets its own standards must also have a way to enforce those standards, which requires some sort of disciplinary procedures. Establishing a tribal bar association that serves these functions requires making decisions about who will run the association (staff? volunteers? some combination?) and where funding will come from.

It is also possible to set up a hybrid system. A tribe may, for example, require membership in a state bar and passage of a tribal bar exam. That way the tribe can leave the expensive screening and disciplinary processes to the state bar. The tribal courts can handle the key professional conduct standards through court rules and contempt of court citations.

---

<sup>27</sup> 25 U.S.C. § 1302(c)(2).

Another possibility might be for tribes, particularly those in one geographic area or that are culturally related, to develop an intertribal bar association to share the work and expense and to assist in building a critical mass of attorneys.

## **Tribal Code Examples**

### Hopi Code (Enacted August 28, 2012)

#### **Title 1. ESTABLISHMENT OF COURTS AND APPOINTMENT OF JUDGES**

##### **Chapter 6. Officers of the Court**

##### **1.6.4 APPEARANCE OF ATTORNEYS.**

- A. Attorneys, if qualified, may appear before the Courts in all cases.
- B. **Qualification of Attorneys.** Attorneys may become a member of the Bar of the Courts, if they are admitted to practice before the Supreme Court of the United States, a United States Circuit Court of Appeals, U.S. District Court, or the Supreme Court of any state, and are in good standing.
- C. **Certification.** Any attorney eligible under Section 1.6.4(B), who desires to practice in the Courts shall obtain a certificate from the Court authorizing his or her practice before the Courts each calendar year. A certificate must be obtained prior to any appearance by the attorney in Court. The annual fee shall be established by the Chief Judge at not less than \$100.
- D. **Dignity and Ethics.** Any applicant for a certificate to become a member of the Bar of the Hopi Courts shall agree that he or she will conform to the standards of conduct established by the Professionalism Committee in the performance of his duties as an attorney before the Courts.

### Confederate Tribes of the Umatilla Reservation Rules of Court

(March 24, 2014)

#### **GENERAL RULES OF COURT**

##### **Rule 11 Advocates or Attorneys**

- a. Omitted
- b. Any person who is an active member in good standing of any tribal or state bar association is eligible for admission to the bar of the Umatilla Tribal Court.
- c. Application for admission shall be made by filing an admission fee of \$100.00 and a petition setting forth: name, birth date, sex, residence/office address, general and specific legal education and experience, reference from one bar association member with whom they are personally acquainted, any past or pending disciplinary actions to which she may be subject, any other information as required by the court.
- d. If the court is satisfied that the applicant is of good moral character and professional standing, the petition shall be granted and the applicant may take the oath of admission.

**OGLALA SIOUX TRIBE: LAW AND ORDER CODE (Amended 1996)**

**CHAPTER 45: OGLALA SIOUX TRIBAL BAR ASSOCIATION**

**SECTION 1. Establishment.**

The Oglala Sioux Tribal Council hereby establishes the Oglala Sioux Tribal Bar Association for the purposes and responsibilities stated herein. The Oglala Sioux Tribal Bar Association, hereinafter the Tribal Bar, is hereby created, established and constituted by law as a public association.

**SECTION 2. Purpose.**

The Oglala Sioux Tribal Bar shall be to regulate the conduct of all practicing attorneys before the Oglala Sioux Tribal Courts in the administration of justice and in maintaining a high standard of professional conduct at the Bar, to uphold the honor of the profession of the law, and to encourage adequate preparation for its practice before the Court of the Oglala Sioux Tribe.

**SECTION 3. Authorization.**

The Tribal Bar is authorized and shall have the power to enact bylaws and rules of practice not inconsistent with tribal law, as may be deemed necessary for Tribal Bar government, including the establishment of an annual membership fee. However, no such bylaws or rules of practice shall become effective until recommended for approval by the Supreme Court of the Oglala Sioux Nation and adopted by the Oglala Sioux Tribal Council.

The Tribal Bar shall have the power from time to time, subject to the approval of the Supreme Court to formulate rules of professional conduct of all its members.

**SECTION 4. Bylaws, Rules and Regulations.**

The bylaws, rules and regulations adopted by the Tribal Bar and approved by the Supreme Court and which may be hereafter adopted and approved as provided by law, or the willful violation of any such bylaw, rule or regulation by any member of the Tribal Bar shall constitute sufficient grounds for the discipline of such member before the Tribal Bar and Supreme Court.

**SECTION 5. Clerk of the Supreme Court.**

The Clerk of the Supreme Court shall be the secretary to and maintain the records of the Tribal Bar and shall maintain a list of all active members of the Bar in good standing, and for the collection and maintenance of fees thereof. Said lists shall be provided on the first day of each month.

**SECTION 6. Attorney admitted to practice law.**

Any attorney admitted to practice law before the Courts of the Oglala Sioux Tribe and any attorney specifically admitted by the Oglala Sioux Tribal Courts for a particular purpose or proceeding is subject to the exclusive disciplinary jurisdiction of the Supreme Court and the disciplinary Board of the Tribal Bar.

### **SECTION 7. Attorney list.**

The Supreme Court shall have sole power to strike from the list of attorneys licensed to practice before the Courts of the Oglala Sioux Tribe the name of any attorney and counselor at law and to revoke their license or to suspend such attorney from the practice for such time as shall deem just for cause shown.

### **SECTION 8. Contempt.**

Nothing contained in this chapter shall be construed to deny to any Oglala Sioux Tribal Court such powers as are necessary for that Court to maintain control over proceedings conducted before it, such as the power of contempt.

### **SECTION 9. Interim Board of Commissioners.**

An Interim Board of Commissioners, Oglala Sioux Tribal Bar Association, composed of five (5) members shall be appointed by the Judiciary Committee. A minimum of three such members shall possess Juris Doctorate degrees. The chairman of the Interim Commissioners shall be selected from within the Board. The Judiciary Committee shall work with said Board.

The Interim Commission shall present to the Oglala Sioux Tribal Council for approval bylaws, rules and regulations governing the Tribal Bar Association.

---

## **Navajo Nation Bar Association (Current 4/3/2015)**

### **Bylaws of Navajo Nation Bar Association**

#### **I. Membership**

There shall be the following classes of membership:

- A. **REGULAR MEMBERS** are all active members residing within or outside the Navajo Nation. Except as provided in Subsection D. and E. hereof, only regular members in good standing may appear in the Courts of the Navajo Nation or before boards, agencies, committees, commissions or agencies of the Navajo Nation, or may engage in the practice of law within the Navajo Nation.
- B. **JUDICIAL MEMBERS** are members who are active or retired judges of the Navajo Nation Courts. Judicial members shall also include members in good standing of the Navajo Nation Bar Association who are active and full time judges of any state, federal or non-Navajo tribal court during their tenure as judges. Such members shall be non-voting judicial members.
- C. **INACTIVE MEMBERS** are those members not actively practicing law in the Courts of the Navajo Nation but who wish to maintain their membership. Inactive status members are non-voting members.
- D. **Non-resident Attorneys** who are not members of the Association, but are members in good standing of the bar of any state, may participate in one case per year before the Courts or any quasi-judicial, administrative or legislative body of the Navajo Nation. A non-resident attorney desiring to practice

law within the Navajo Nation shall associate with a regular member of the Association in good standing, upon whom notice may be served, who shall sign the first motion or pleading and who shall continue in the case unless another regular member is substituted. The unauthorized practice of law is prohibited on the Navajo Nation by 7 N.N.C. 606 (CAP-38-00) and 17 N.N.C. 377 (CJA-08-00).

Members wishing to change membership status or to withdraw from membership altogether shall file a request with the Vice President of the Association for action by the Admissions Committee. Members wishing to change their membership status will be assessed a \$25.00 fee.

Status for purposes of assessing dues shall be determined as of January 1st of each year. The Executive Director of the Association shall collect dues from each member by the first Friday in February.

Failure to pay dues is grounds for suspension from the Association. The Secretary shall report to the President the names and addresses of those members who have failed to pay their annual dues. The President shall then file a Motion for Suspension with an Order with the Navajo Nation Supreme Court. Those members shall have thirty (30) days after the motion is filed to pay the annual dues and a \$30.00 penalty fee. A copy of the motion shall be mailed to those affected, after it is filed. Once the order is signed, a member may be reinstated within one year upon payment of a \$150.00 reinstatement fee, in addition to the membership dues.

If a member has been suspended for more than one year, he/she must reapply to the Navajo Nation Bar Association, Inc. for membership and take the regularly scheduled Navajo Nation Bar Examination.

(II. Omitted)

### **III. Qualifications**

#### **A. QUALIFICATIONS REQUIRED OF ALL APPLICANTS**

In order to take the Navajo Nation Bar Examination and subsequently be admitted to membership, a person must:

- Be at least 21 years of age as of the date when the application is submitted; and
- Submit an application for membership in the Association which is approved by the Admissions Committee of the Association; and
- Be of good moral character, and have personal qualities with which to abide by the oath of office and ethical standards of the Navajo Nation; and
- Have no conviction of a felony, or equivalent criminal offense, in any jurisdiction; and
- Have no conviction of a misdemeanor offense, or equivalent criminal offense, involving moral turpitude in any jurisdiction; and
- Not have been disbarred by any bar association for criminal activity, violation of ethical standards, malpractice, or any other matter concerning personal integrity or violation of standards of practice for the protection of the public.

## B. QUALIFICATIONS REQUIRED OF PERSONS WHO ARE NOT ENROLLED MEMBERS OF ANY INDIAN TRIBE

In order to take the Navajo Nation Bar Examination, a person who is not an enrolled member of any Indian tribe must:

1. Reside and be employed full time within the State of Arizona, Colorado, New Mexico or Utah; and
2. Be a member in good standing of the bar of Arizona, Colorado, New Mexico or Utah or have taken a bar examination of such state and be awaiting the results of that examination; and
3. Be a graduate of a law school.

## C. QUALIFICATIONS REQUIRED OF PERSONS WHO ARE ENROLLED MEMBERS OF ANY INDIAN TRIBE

In order to take the Navajo Nation Bar Examination, an enrolled member of any Indian tribe must:

1. Present proof that he or she is enrolled in a federally recognized Indian tribe of the United States; and
2. Be a graduate of one of the following:
  - a. A law school; or
  - b. An accredited four-year institution (Bachelor's Degree); or
  - c. A course of studies approved by the Navajo Nation Bar Association, Inc.; or
  - d. A paralegal training program, advocacy program, apprenticeship program, or equivalent, which is certified by the NNBA, Inc.
3. All non-law school graduate applicants under this subsection C shall take the NNBA Bar Review course prior to taking the NNBA Bar Examination.

## D. REQUIREMENTS FOR ADMISSION TO MEMBERSHIP IN THE NAVAJO NATION BAR ASSOCIATION, INC.

In order to be eligible for admission to membership in the Navajo Nation Bar Association, Inc., a person must:

1. Take and pass the Navajo Nation Bar Examination, and any included or separate examination on ethics; and
2. Provide updated or additional application information, including background information and consent for a background check, as required by the Admissions Committee of the Association; and
3. If permitted to take the Navajo Nation Bar Examination pursuant to Section III.B.2, then have been admitted to practice by such state; and
4. Complete a prescribed course in Navajo law, culture, traditions and history, prior to or subsequent to the bar examination; and

5. Execute a written pledge and certificate that the applicant, if admitted to the privileges of membership, shall at all times comply with pro bono public requirements at the call of the Courts of the Navajo Nation; and
6. Have membership moved by the Association before the Supreme Court of the Navajo Nation, subject to objection by any person, with such motion granted by the Court.

#### **IV. Bar Admission**

- A. The Admissions Committee shall administer a Bar Examination to qualified applicants twice yearly, in March and August, at such times and places as the Committee may designate. Announcement of the date and place of any Examination shall be made, throughout the Navajo Nation, no less than sixty (60) days prior to the date set.
- B. Any person desiring to take the Bar Examination shall submit a complete application and a non-refundable application fee in the amount of \$100.00, no less than thirty (30) days prior to the date of the Bar Examination.
- C. Applicants shall be informed of their eligibility to take the Examination no less than twenty (20) days prior to the date of the Examination. A determination of ineligibility to take the Examination may be appealed to the Admissions Committee.
- D. The Bar Examination shall be a written test emphasizing Navajo Common Law, the Navajo Nation Code and Navajo Nation Supreme Court decisions, including the skills required to practice in the Courts of the Navajo Nation. It shall consist of questions, either short answers or essays or a combination of both, covering aspects of the following subjects:
  - Torts
  - Contracts
  - Domestic Relations (9 N.N.C.)
  - Criminal Law
  - Federal Indian Law
  - Indian Child Welfare Act
  - Navajo Nation Children's Code (9 N.N.C. 1001, et seq.)
  - District Court Rules of Civil and Criminal Procedure
  - Business Associations, Including Corporations and Partnerships
  - Model Rules of Professional Conduct
  - Navajo Nation Jurisdiction
  - Navajo Uniform Commercial Code (5A N.N.C.)
  - Navajo Nation Government (2 N.N.C.)
  - Navajo Rules of Evidence
  - Indian Civil Rights Act
  - Navajo Property Law-Personal/Real Property

- Navajo Employment and Business Preference Laws
  - Navajo Nation Bill of Rights
  - Decedents' Estates (8 N.N.C.) and Rules of Probate Procedure
  - Treaty of 1868
  - Administrative Law
  - Navajo Rules of Civil and Criminal Appellate Procedure
  - Navajo Sovereign Immunity Act (1 N.N.C. 551 et seq.)
  - Navajo Peacemaking
- E. A passing score for the bar examination shall be seventy percent (70%) of all possible points for that examination.
- F. Results of the Examination shall be certified to the Board by the Committee no more than thirty (30) days after the Examination. Within ten (10) days after certification of the results of the Examination by the Committee, the Board, through the President or Vice-President of the Association, shall notify the Supreme Court of the identity of persons passing the Examination and shall petition the Supreme Court for the admission of all eligible applicants.
- G. The Committee shall notify all applicants of their score at the same time the Committee notifies the Board.
- H. Any person who does not receive a passing score on the Examination shall have the right to review the Examination; his or her Examination answers; the model answers; and the score sheet for his or her Examination.
- I. Within fifteen (15) days after the date of notification of the results of the Examination, any person who did not pass the Examination and who wishes to contest the Committee's determination shall file a Petition with the Admissions Committee setting forth in specific detail and with appropriate citation to authority the claimed errors of the Committee, and how the errors, if corrected, would result in the person receiving a passing score.
1. Within three (3) working days of the filing of the Petition, the Chairperson of the Committee shall designate two (2) members of the Association to review the Petition.
  2. Within fifteen (15) days of such designation, the designated members of the Association shall review the Petition and report back to the Committee with their recommendations.
  3. Within ten (10) days of receipt of the Report of the Association members concerning the Petition, the Committee, either at a regular or special meeting shall consider the Petition and Report and take action thereon, notifying the applicant of the Committees decision within five (5) days.
  4. Any person whose Petition is not acted on favorably by the Committee may appeal, by Petition, the Committees determination to the Supreme Court within fifteen (15) days after the date of notification of the Committee's decision. A copy of the petition shall be served on the Association and the Association shall have five (5) days thereafter to submit the entire

record to the Supreme Court. The Association shall have fifteen (15) days after service of the Petition to file a response with the Supreme Court. Further pleading will only be permitted by leave of the Court.

5. Within ten (10) days after granting the relief sought by any person petitioning the Committee for review of the results of the Examination, the Board, through the President or Vice-President of the Association shall notify the Supreme Court of the identity of persons passing the Examination and shall petition the Supreme Court for the admission of all eligible applicants.

## **V. Board of Bar Commissioners**

- A. The Board of Bar Commissioners (Board) shall consist of one (1) member from each Judicial District of the Navajo Nation, with the exception that the Judicial District of Ramah shall also include the Circuit Courts of Alamo and Thajilee. Any district having more than twenty-five (25) regular members shall have one (1) additional Board member for each twenty-five (25) regular members or part thereof. Each regular member shall declare a district to which he or she shall be assigned for purposes of Board distribution and voting. Board members must be regular members of the Association in good standing, from the district which they represent.
- B. Upon the election of the first Board, the members shall draw straws to determine which third shall serve one-year terms, which third shall serve two-year terms, and which third shall serve full three-year terms. Thereafter, all future members shall be elected for three-year terms.
- C. Election of the Board members shall be by mail, and shall be conducted no more than sixty (60) days following the Annual Meeting. Any member desiring to run for a seat on the Board may nominate himself/herself, or may be nominated by another member, by letter to the President, no more than thirty (30) days after the Annual Meeting. Each voting member of the Association shall vote for the commissioner(s) representing the district where the member is listed on the Association membership roster. Elections shall be by plurality vote.
- D. In the event a board member is unable to complete his/her term, the President, with the approval of the Board, shall appoint an interim Board member to sit until the next regularly scheduled election, at which time a board member shall be elected to serve the uncompleted term, if any. The President may appoint the interim board member based upon the recommendation of the resigning board member.
- E. Members of the Board of Bar Commissioners who are unable to be in actual attendance at a meeting of the Board may vote at such meeting by proxy, and such proxy shall be counted for purposes of constituting a quorum. No member shall vote by proxy at more than three (3) meetings of the Board in one calendar year. Voting by proxy at any meeting of the Board does not constitute actual attendance at the meeting. Failure of a member of the Board of Bar Commissioners to actually attend three consecutive meetings of the Board in one calendar year may result in the removal of the member from the Board of Bar Commissioners by the Board.

## **VI. Officers**

- A. The President shall be a regular member of the Association in good standing. He/she shall be elected for a term of two years, at the same time and in the same manner as the Board elections are held, and must be elected by a plurality vote of those casting a vote. The President shall appoint and may remove committee chairpersons, with the approval of the Board, preside at all meetings, represent the Association at all official functions, hire and supervise any employees of the Association, and perform such other duties as the Board may direct.
- B. The Vice-President shall be a regular member of the Association in good standing, who shall be selected by the President annually, with the approval of the Board. He/she shall act as Chairperson of the Admissions Committee, shall act on behalf of the President in the latter's absence, and shall perform such other duties as the President of the Board shall direct.
- C. The Secretary shall be a regular member of the Association in good standing, who shall be selected by the President annually, with the approval of the Board. He/she shall record and maintain official actions of the Board and the Association and perform such other duties as the President of the Board may direct. He/she may delegate any of the above-specified functions to any employees of the Association, with the written approval of the President.
- D. The Treasurer shall be a regular member of the Association in good standing, who shall be selected by the President annually, with the approval of the Board. He/she shall handle all of the finances of the Association, maintain accurate records thereof, report regularly to the Board thereon, and perform such other duties as the President of the Board may direct. He/she may delegate any of the above-specified functions to any employees of the Association, with the written approval of the President.

## **VII. Committees**

There shall be the following standing committees of the Association:

- A. The Admissions Committee shall be chaired by the Vice-President, and its members must be approved by the Board. It shall have seven (7) members. This committee shall be responsible for determining the qualification of applicants for the Bar, and administering the Bar Examination, as set out by the Bylaws. The Committee may propose appropriate changes in or revisions of the qualifications for admission.
- B. The Disciplinary Committee shall consist of seven (7) members. The Committee shall hear and decide subject to appeal to the Board, complaints of violations of ethical or other rules and regulations of the Association by members, shall regulate the unauthorized practice of law, and shall set appropriate penalties. The Committee shall establish written procedures to govern itself, and recommend appropriate changes in the rules of ethics and other rules of the Association, subject to approval by the Board.
- C. The Rules Committee shall consist of five (5) members. The Committee shall regularly review the various rules of the Navajo Nation Courts, and shall propose to the Association improvements in such rules, which, upon approval by the Association, shall be forwarded to the Chief Justice of the Navajo Nation Supreme Court. The Committee may also prepare commentaries for all members of the Association.

- D. The Training Committee shall consist of eight (8) members at least five (5) of whom shall be regular members of the NNBA. Members of the Training Committee shall be selected by the President of the NNBA and shall be confirmed by the Board. The Training Committee shall have the following duties and powers:
1. To recommend to the Board of Bar Commissioners minimum standards for Advocacy Training Programs and Navajo Culture, History and Law Courses.
  2. To approve courses which meet said approved minimum standards and to certify entities offering such courses and, for good cause shown, to suspend or de-certify such entities. The Training Committee may require any person or entity providing such program or courses to furnish such information as the Training Committee deems appropriate in order to carry out the Committee's duties.
  3. To coordinate or offer other courses providing training to members of the NNBA, Inc. or persons seeking to become members of the NNBA, Inc. (such as Bar Review Courses) or who provide support services for NNBA, Inc. members.
  4. To approve or disapprove on a case-by-case basis requests submitted by NNBA members or persons seeking NNBA membership with respect to approval of advocacy training programs, Navajo culture or History and Law Courses.
  5. To establish a budget subject to approval by the Board, and to make expenditures within this budget.
  6. To establish and collect fees for services provided.
  7. To establish such policies and procedures and documents which may be necessary or appropriate to carry out the duties of the Committee.
  8. To enter into agreements with entities and individuals providing training services or support for training activities (such as facilities where training is conducted to entities making copies of training material).
  9. To hold meetings in places and at times designated by the Training Committee.
  10. To report to the membership and Board on the activities of the Committee.
- E. The Judicial Evaluation Committee shall consist of five (5) members. The Committee shall act as the Association's liaison with the Judiciary Committee of the Navajo Nation Council and the Courts of the Navajo Nation for purposes of evaluating Judge candidates and Judges.
- F. The Continuing Legal Education ("CLE") Committee shall consist of five (5) members. The Committee shall have all necessary authority over implementing and supervising the MCLE policy for the NNBA, Inc., including, but not limited to: (1) regularly reviewing and, if necessary, proposing appropriate changes in or revisions to the NNBA, Inc. MCLE Standards to the Board; (2) certifying programs for continuing legal education credit; (3) approving continuing legal education credit for persons who prepare articles or make presentations at programs; (4) monitoring members' compliance with the continuing legal education requirements; and (5) encouraging the provision of low-cost or no-cost CLE programs.

[Tulalip Tribal Code](#) (Current through February 7, 2015)

Title II. TRIBAL JUSTICE SYSTEM

Chapter 2.05 Tribal Court

**2.05.080 Tulalip Tribal Bar—Attorneys and Tribal spokespersons.**

- (1) **Jurisdiction.** Any attorney or Tribal spokesperson admitted, or permitted by rule, to practice law in the Tulalip Tribal Court, and any attorney or spokesperson specially admitted by this Court for a particular case, is subject to the rules of this chapter. Jurisdiction exists regardless of the attorney's or spokesperson's residency. Attorneys and spokespersons are considered counsel.
- (2) **Tulalip Tribal Court Bar.** Any person practicing as counsel in Tulalip Tribal Court must be a member in good standing of the Tulalip Tribal Court Bar. In order to qualify as a member in good standing, all applicants must:
  - (a) Schedule and pass the Tulalip Tribal Bar Exam;
  - (b) Sign and take the Spokesperson's Oath of Admission;
  - (c) Pay the Bar application fee and annual admission fee as may be established; unless such fee is waived by the Tulalip Tribal Court; and
  - (d) Certify they are a member in good standing in any other jurisdiction in which the applicant is licensed.
- (3) **Spokesperson's Oath of Admission.**

I [insert name of spokesperson], do solemnly swear:

  1. I have read the Tulalip Indian Tribes Constitution and laws and am familiar with their contents;
  2. I will support the Constitution of the Tulalip Indian Tribes in all respects;
  3. I will abide by the rules established by the Board of Directors of the Tulalip Tribes and the Tulalip Tribal Court;
  4. I will at all times maintain the respect due to the Tribal Court and its officers;
  5. I will not counsel or speak for any suit or proceeding which shall appear to me to be unjust, or any defense except such as I believe to be honestly debatable under the laws of the Tulalip Indian Tribes unless it be in defense of a person charged with a criminal offense;
  6. I will employ such means only as are consistent with truth and honor and will never seek to mislead a judge or jury by any false statements; and,
  7. I will abstain from all offensive conduct in the Tribal Court.
- (4) **Tulalip Tribal Court Bar Roster.** The Court Clerk of the Tulalip Tribal Court will maintain a roster and the signed oaths of all attorneys and spokespersons admitted to practice before the Court.
- (5) **Disciplinary Action Taken Against an Attorney or Spokesperson.**
  - (a) **Tulalip Tribal Court.** The Tulalip Tribal Court has

- (i) the exclusive responsibility to administer attorney and spokesperson discipline,
  - (ii) the inherent power to maintain appropriate standards of professional conduct, and
  - (iii) the authority to dispose of individual cases of attorney and spokesperson discipline.  
Persons carrying out the functions set forth in the following rules act under the Court's authority.
- (b) **Definitions.** Unless the context clearly indicates otherwise, terms used in these rules have the following meanings:
- (i) "Disciplinary action" means sanctions as defined within this chapter.
  - (ii) "Final" means no review has been sought in a timely fashion or all appeals have been concluded.
  - (iii) "Panel" means a Hearing Panel.
  - (iv) "Party" means the person aggrieved or directly affected by the attorney or spokesperson's behavior or action.
  - (v) "Respondent" means an attorney or spokesperson against whom a grievance is filed or an attorney or spokesperson investigated by the investigative officer.
  - (vi) "May" means "has discretion to," "has the right to," or "is permitted to."
  - (vii) "Must" means "is required to."
  - (viii) "Should" means recommended but not required.
- (c) **Grounds for Sanctions and/or Disbarment of Spokespersons.** Any spokesperson admitted to the Tulalip Tribal Court Bar may be subject to disciplinary sanctions, including disbarment, for any of the following reasons arising after his or her admission to practice:
- (i) Conviction of a felony or misdemeanor involving moral turpitude, in which case the record of conviction shall be conclusive evidence;
  - (ii) Willful disobedience or violation of a Court order;
  - (iii) Violation of any provision of the Spokesperson's Oath of Admission, or his or her duties as a spokesperson;
  - (iv) For the commission of any act involving moral turpitude, dishonesty, or corruption;  
or
  - (v) Suspension or other disciplinary action taken against the spokesperson by an authority of another jurisdiction, except that disbarment, or resignation during pendency or any disciplinary investigation, by competent authority in any other tribe, state, federal or foreign jurisdiction shall subject the spokesperson to automatic disbarment from the Tulalip Bar until such time as the person has been reinstated in such other jurisdiction in which the person has been disbarred.
- (d) **Grounds for Sanctions and/or Disbarment of Attorneys.** Any attorney admitted to the

Tulalip Tribal Court Bar may be subject to disciplinary sanctions, including disbarment, for any of the reasons listed in subsection (5)(c) of this section.

- (e) **Tulalip Tribal Court Bar—Sanctions and Disbarment.** Upon the request of any party, or upon its own, the Tulalip Tribal Court may order an investigation of any allegations of misconduct by a member of the Tulalip Tribal Court Bar. The Court Director shall appoint an investigative officer to review the allegations. If the officer determines there is no merit in the allegations, he or she shall file a written report with the Court Director suggesting that no further action be taken, including reasons for such decision. The Court Director, in consultation with the Chief Judge, shall either adopt or reject the decision. If the recommendation is adopted, then notice shall be sent to the attorney or spokesperson and the complaining witness within 10 days and the matter shall be concluded.

If the investigative officer does find merit to the allegations, he or she shall file a written complaint with the Court Director against such member. The Court Director will then appoint a Hearing Officer or a three-person panel in consultation with the Chief Judge, who will then review(s) the complaint and set a hearing as necessary.

(f) **Investigative Officer.**

- (i) **Function.** An investigative officer, appointed by the Court Director, investigates allegations of misconduct by a member of the Tulalip Tribal Court Bar and performs other functions as provided under these rules.
- (ii) **Appointment.** The Court Director shall appoint an investigative officer from the list of Hearing Officers.
- (iii) **Term of Office.** The investigative officer shall be appointed to a one-year term, to be extended at the discretion of the Chief Judge.

(g) **Hearing Officer and Hearing Panel.**

- (i) **Function.** A Hearing Officer or Hearing Panel conducts the hearing and performs other functions as provided under these rules.
- (ii) **Qualifications.** A Hearing Officer or panel member must be an active member of the Tulalip Tribal Court Bar and have no record of discipline.
- (iii) **Appointment.** The Court Director, in consultation with the Chief Judge, shall appoint a Hearing Officer or a Hearing Panel. The list of Hearing Officers and potential panel members should include as many attorneys or spokespersons as the Chief Judge considers necessary to carry out the provisions of these rules effectively and efficiently.
- (iv) **Terms of Appointment.** Appointment to the Hearing Officer and Hearing Panel shall be appointed to a one-year term, to be extended at the discretion of the Chief Judge.
- (v) **Hearing Panel.** A panel shall consist of three persons.

- (vi) **Training.** Hearing Officers and Hearing Panel members shall comply with training requirements established by the Court.
- (h) **Removal of Appointees.** The Chief Judge may remove the Hearing Officer or a panel member whenever that Hearing Officer or panel member appears unwilling or unable to perform his or her duties, or for any other good cause. The Court Director has the authority to fill any resulting vacancy.
- (i) **Compensation and Expenses.** The Tulalip Tribal Court shall determine what compensation, if any, is to be provided to the Hearing Officer or Hearing Panel members.
- (j) **Right to Representation.** An attorney or spokesperson may be represented by counsel during any stage of an investigation or hearing under these rules at their own expense.
- (k) **Attorney-Client Privilege.** An attorney or spokesperson may not assert the attorney-client privilege or other prohibitions on revealing client confidences or secrets as a basis for refusing to provide information during the course of an investigation, but information obtained during an investigation involving client confidences or secrets must be kept confidential to the extent possible under these rules unless the client otherwise consents. Nothing in these rules waives or requires waiver of any attorney's or spokesperson's own privilege or other protection as a client against the disclosure of confidences or secrets.
- (l) **Commencement of Proceedings.**
  - (i) **Formal Complaint.**
    - (A) **Filing.** After a matter is ordered to hearing, the investigative officer files a formal complaint and summons with the Court Clerk.
    - (B) **Service.** After the formal complaint is filed, it must be personally served on the respondent attorney or spokesperson with the summons notifying him or her that they have 20 days to respond.
    - (C) **Content.** The formal complaint must state the respondent's acts or omissions in sufficient detail to inform the respondent of the nature of the allegations of misconduct. The investigative officer must sign the formal complaint, under penalty of perjury.
    - (D) **Prior Discipline.** Prior disciplinary action against the respondent should be included in a supporting declaration if the respondent is charged with conduct demonstrating unfitness to practice law.
  - (ii) **Filing Commences Proceedings.** A disciplinary proceeding commences when the formal complaint is filed
  - (iii) **Joinder.** The investigative officer ordering a hearing on alleged misconduct or the Hearing Officer or Hearing Panel may in its discretion consolidate for hearing two or more charges against the same respondent, or may join charges against two or more respondents in one formal complaint.

(m) **Answer.**

- (i) **Time to Answer.** Within 20 days of service of the formal complaint and notice to answer, the respondent attorney or spokesperson must file and serve an answer with the Court Clerk and the investigative officer. Failure to file an answer as required may be grounds for discipline and for an order of default.
- (ii) **Content.** The answer must contain:
  - (A) A specific denial or admission of each fact or claim asserted in the formal complaint;
  - (B) A statement of any matter or facts constituting a defense, affirmative defense, or justification, in ordinary and concise language without repetition; and
  - (C) An address at which all further pleadings, notices, and other documents in the proceeding may be served on the respondent.
- (iii) **Filing and Service.** The answer must be filed and served pursuant to this title and TTC Title 3 on the investigative officer and the Court Clerk.

- (n) **Hearing.** If a complaint is filed, a Hearing Officer or Hearing Panel shall conduct an open hearing to determine whether the findings of alleged misconduct are well founded. All interested parties shall be notified at least 20 days in advance of the hearing, and shall be entitled to present evidence and confront witnesses.

Following the hearing, the Hearing Officer or Hearing Panel shall make a finding by a preponderance of evidence of whether a violation has been established. The officer or panel will then reconvene to determine appropriate sanctions allowing both sides to make recommendations. The panel will memorialize the sanction(s) in a written opinion. Sanctions may include censure, reprimand, suspension, or disbarment.

Alternatively, the respondent may admit to the violation and agree to appropriate sanctions, which can be presented to the officer or panel. The officer or panel may accept or reject the agreement within its discretion.

(o) **Appeal.**

- (i) **Respondent's Right to Appeal.** The respondent attorney or spokesperson has the right to appeal a decision to the Chief Judge recommending suspension or disbarment. There is no other right of appeal.
- (ii) **Notice of Appeal.** Only the respondent attorney or spokesperson has the right to appeal. To appeal he or she must file a Notice of Appeal with the Court Clerk within 20 days of service of the panel's decision on the respondent. The Chief Judge will review the appeal based on the record before the Hearing Panel. Evidence not presented to the panel cannot be considered by the Chief Judge.

- (iii) **Action by Chief Judge.** On appeal, the Chief Judge may adopt, modify, or reverse the findings, conclusions, or recommendation of the Hearing Officer or panel. The Chief Judge may also direct that the Hearing Officer or the panel hold an additional hearing on any issue, on its own motion, or on either party's request.
  - (iv) **Oral Argument.** The panel may hear oral argument if requested by either party.
  - (v) **Order or Opinion.** The Chief Judge must issue a written order or opinion. If the Chief Judge amends, modifies, or reverses any finding, conclusion, or recommendation of the panel, the Chief Judge must state the reasons for its decision in a written order or opinion.
  - (vi) **Decision of Chief Judge Is Final.** A respondent may ask the Chief Judge to review an adverse determination by the Hearing Officer or panel, including review of the reasonableness of a proposed periodic payment plan for restitution. The Chief Judge's ruling is not subject to further review.
- (p) **Remedies—Restitution, Censure, Reprimand, Suspension and Disbarment.**
- (i) **Restitution May Be Required.** A respondent attorney or spokesperson that has been sanctioned or admonished under this rule may be ordered to make restitution to persons financially injured by the respondent's conduct.
    - (A) **Payment of Restitution.**
      - (I) A respondent ordered to make restitution must do so within 30 days of the date the order becomes final. The restitution order may include a periodic payment plan.
      - (II) The Hearing Officer or panel may enter into an agreement with a respondent for a reasonable periodic payment plan if:
        1. The respondent demonstrates in writing a present inability to pay restitution; and
        2. There is no objection from the person(s) owed restitution.
    - (B) **Failure to Comply.** A respondent's failure to make restitution when ordered to do so or to comply with the terms of a periodic payment plan may be grounds for further discipline.
  - (ii) **Censure.** The respondent attorney or spokesperson may be censured.
  - (iii) **Reprimand.** The respondent attorney or spokesperson may be reprimanded with a course of action.
  - (iv) **Suspension.** The respondent attorney or spokesperson may be suspended and/or placed on probation and ordered to engage in remedial services for up to two years.
  - (v) **Disbarment.** The respondent attorney or spokesperson may be disbarred if their conduct rises to such a level.

(q) **Probation.**

(i) **Conditions of Probation.** A respondent attorney or spokesperson that has been sanctioned or admonished under this rule may be placed on probation for a fixed period of two years or less.

(A) Conditions of probation may include, but are not limited to, requiring:

(I) Alcohol or drug treatment;

(II) Medical care;

(III) Psychological or psychiatric care;

(IV) Professional office practice or management counseling;

(V) Other reasonable services in light of the complaint; or

(VI) Periodic audits or reports.

(B) The Hearing Officer or panel may designate a suitable person to supervise the probation. Cooperation with a person so appointed is a condition of the probation.

ii. **Failure to Comply.** Failure to comply with a condition of probation may be grounds for discipline and any sanction imposed must take into account the misconduct leading to the probation. [Res. 2010-207; Ord. 49 § 1.8, 1-8-2010 (Res. 2010-10)].

## Tribal Code Commentary

The statutes and rules excerpted in the preceding text illustrate the wide variety of possible approaches to setting standards for attorneys.

Hopi allows “qualified” attorneys to appear in tribal court, and to be qualified an attorney must satisfy three requirements: (1) be a member in good standing of a state bar association or the bar association of one of the federal courts; (2) obtain a certificate and pay the required fee; and (3) agree to follow the ethical standards established by the Professionalism Committee. Because most federal courts require membership in a state bar association, Hopi has taken an approach that relies on the extensive state bar association infrastructure to handle the testing and screening of attorneys. Hopi has, however, created its own standards of professional conduct.

The Umatilla code requires applicants to be a member in good standing of any state or tribal bar, but also requires a more extensive application process including setting forth education and experience possessed by the attorney and providing a reference.

The Oglala Sioux have established a more extensive tribal bar association. Its tribal bar has the power to enact bylaws, rules of practice, and rules of professional conduct. It also has the authority to discipline members who violate those rules.

Navajo and Tulalip have established more extensive and explicit standards. Navajo has several categories of membership, including one for judges, and has detailed application requirements. Navajo also has its own bar exam (with specified subjects) and disciplinary procedures. Tulalip also has its own bar examination and has established extensive disciplinary procedures.

# PART IV. CONDUCT OF PROCEEDINGS

A tribe planning to exercise the enhanced sentencing authority under TLOA and the special domestic violence jurisdiction under VAWA 2013 must ensure that certain court procedures and processes are used in cases impacted by these two statutes. This section of the resource focuses on those requirements.

Chapter 11 discusses the requirement to be a court of record. Chapter 12 deals with the standards required in jury trial under VAWA 2013. Chapter 13 explores sentencing options under TLOA and VAWA 2013. Staying detention during a Habeas Review is discussed in Chapter 14.



# CHAPTER 11. COURT OF RECORD

A defendant being prosecuted for a crime with enhanced sentencing under TLOA is guaranteed that the tribal court maintains a record of the criminal proceeding, including an audio or other recording of the trial proceeding.<sup>28</sup> VAWA 2013 incorporates this requirement through its amendments to ICRA, if imprisonment of any length may be imposed.<sup>29</sup> This does not mean that the tribal court must maintain a record of all of its proceedings, but only those with enhanced sentencing under TLOA and those with “special domestic violence” jurisdiction under VAWA 2013. Many tribes maintain a record of all proceedings.

The primary function of a court record is to provide a record of proceedings for possible review by an appellate court. The record generally includes evidence introduced by the parties, copies of all papers filed by the parties, and an audio or video recording of the proceedings (appearances, hearings, trial), which is generally reduced to a transcript on appeal. This record must be kept for a period of time—clearly for as long as any appeal or habeas corpus action is possible. After that time frame the evidence may be returned to the parties or destroyed.

Many tribal courts are courts of record in criminal cases and no change in their statutes are required, but every tribe should look closely at the process and equipment being used in preserving evidence and recording the proceedings. No doubt there will be more appeals and possibly habeas corpus actions due to the increased sentencing power and the inclusions of non-Indians.

Many courts have specific court rules dealing with the quality and type of equipment that must be used to record proceedings and have other requirements to ensure an accurate record is preserved for the requisite period of time. These rules would generally not be in a statute, but would be in court rules that are developed by the chief judge. Authorization for the judge to develop court rules could appear in the statute.

Court rules can be easily changed and updated to consider technology and process. Review of court rules in your federal district or state courts could be helpful in your development of rules.

## Discussion

What are the current requirements for keeping a court record in your tribal court criminal proceedings? What does your statute say? What do your court rules say?

What procedures are currently followed for preserving the trial record? For what period of time? Who is responsible for monitoring these?

What equipment is being used by your court to record the proceedings? Do you have a court reporter?

---

<sup>28</sup> 25 U.S.C. § 1302(b)(5).

<sup>29</sup> 25 U.S.C. § 1304(d)(2)

# Tribal Code Examples

Hopi Code (Enacted August 28, 2012)

Title 1. ESTABLISHMENT OF COURTS AND APPOINTMENT OF JUDGES

Chapter 5. POWERS AND DUTIES OF TRIBAL COURT

## 1.5.7. COURTS OF RECORD.

- A. The Trial and Appellate Courts are hereby declared to be Courts of Record and the Clerk thereof shall certify under seal as to the accuracy and validity of the files and records of all proceedings before the Courts of the Hopi Tribe.
- B. The Clerk of the Courts shall take, preserve and certify under seal to the accuracy of a verbatim record of the proceedings before the Courts. Such record may be taken and recorded by a stenographic, electronic, mechanical, or other recording means of devices approved by the Chief Judge of the Court as a trustworthy means of creating a permanent verbatim record of all proceedings.
- C. The Chief Judge of the Trial Court and Chief Justice of the Appellate Court shall, by rule, prescribe the length of time such verbatim transcripts shall be preserved by the Clerk.
- D. It shall be a criminal offense, punishable by the penalties and under the rules and procedures of Hopi law for the Clerk of the Trial Courts to knowingly make or keep a false file, record or certificate or to alter, amend or destroy any file, record or transcript without lawful authority.

**Confederate Tribes of the Umatilla Reservation Code**

(Amended March 24, 2014)

**CRIMINAL CODE AND PROCEDURES**

**Chapter 3. CRIMINAL PROCEDURE**

**Part 7. GENERAL PROVISIONS**

**SECTION 3.33. COURT REPORTER AND TRANSCRIPTS.**

All trials shall be recorded by a Court Reporter. Any party wishing a transcript of the trial shall bear the cost therefore.

**SECTION 3.34. COURT RECORDS AND FILES.**

All Court records and files shall be in the custody of the Clerk of the Court under the discretion and supervision of the Chief Judge.

Note: Court Directive #4 – allows indigent defendants a copy free of charge.

---

**Eastern Band of the Cherokee Indians Tribal Code**

(Enacted November 5, 2012)

**Chapter 15 - CRIMINAL PROCEDURE**

**APPENDIX A. - THE CHEROKEE RULES OF CRIMINAL PROCEDURE**

**Rule 7: Pretrial Proceedings**

- a. Omitted
- b. **Recording of Proceedings.** All criminal proceedings before the Cherokee Court shall be recorded.

**Rule 30: Service, Filing, and Records**

- (a., b., and c. Omitted)
- d. **Records:** The Clerk shall keep records in the form prescribed by the Chief Justice, entering in the records every Court Order or Judgment and the date of entry.

## **Tribal Code Commentary**

The statute or rule relative to recording criminal proceedings appears in different places in tribal codes. Sometimes it appears in the section establishing and empowering the court and other times it appears in the Rules of Criminal Procedure of a tribe.

The Hopi statute is the most comprehensive of the tribal examples. There is a whole section on court of record. It declares that all tribal and appellate courts are courts of record and that the clerk of court has the responsibility to ensure accuracy and validity of files and records. The Chief Judge is responsible for determining what type of device is trustworthy to create a permanent verbatim record of all proceedings. It is anticipated that the Chief Judge would develop rules or policy and procedures relating to the recording and preservation of the court record. It is a criminal offense for the clerk of court to knowingly make or keep a false record or destroy, alter, or amend any file, record, or transcript.

The Confederated Tribe of the Umatilla Reservation inserted the provision requiring that all trials be recorded by a court reporter. A court reporter is an individual trained to provide a verbatim transcript of proceedings. A person with court reporter credentials is not required by ICRA, but use of a court reporter does provide assurance of authenticity and accuracy due to their training and certification.

The Eastern Band of Cherokee place a simple statement in their Rules of Criminal Procedure indicating that all proceedings are recorded. It would be left to the judge or court administration to determine the equipment and procedure to ensure accuracy and authenticity of the recording. The clerk of court is responsible for maintenance of all court records.

# CHAPTER 12. JURY TRIALS

Prior to 2013, ICRA declared that no tribe shall “deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.”<sup>30</sup> TLOA made no changes to the jury requirement, but VAWA 2013 did make changes.

This resource guide has combined discussions of TLOA and VAWA 2013 because, for the most part, the two statutes impose the same requirements on tribes that wish to exercise the powers in each statute. Although TLOA does not explicitly impose any new standards for juries other than those already contained in ICRA, federal case law is pretty clear either there must be a unanimous verdict in felony cases, or if guilty by a majority of the jury, it must be a twelve person jury and probably at least a nine to three verdict.<sup>31</sup>

Tribes who wish to exercise the SDVCJ by VAWA 2013 must comply with the standards for juries set forth in that statute. VAWA 2013 requires that trials held pursuant to the special domestic violence jurisdiction must include: “an impartial jury that is drawn from sources that—

- (A) reflect a fair cross-section of the community; and
- (B) do not systematically exclude any distinctive group in the community, including non-Indians<sup>32</sup>

Thus, tribes opting to hold non-Indians accountable for “special domestic violence crimes” in Indian country need to review their laws related to juries and their processes to ensure that the jury pool for the “special domestic violence crimes” includes a fair cross-section of the community, including non-Indians. The fair cross-section of the community including non-Indians may not need to apply to all criminal cases, nor to all TLOA cases, but only to those cases involving the special domestic violence jurisdiction over non-Indians. However, some experts believe that the fair cross-section of the community requirement applies to all defendants not just SDVCJ cases.

Because the requirements for juries can be fairly technical, some background information about the U.S. Constitution and how its jury requirements have been interpreted may provide helpful context. The right to trial by jury contained in the U.S. Constitution has been interpreted to have two aspects: when that right applies and how the jury is formed.

---

<sup>30</sup> 25 U.S.C. § 1302(a)(10).

<sup>31</sup> See *Apodaca v. Oregon*, 406 U.S. 404 (1972), *Johnson v. Louisiana*, 406 U.S. 356 (1972), and *Burch v. Louisiana*, 441 U.S. 130 (1979).

<sup>32</sup> 25 U.S.C. § 1304(d)(3)

The right to trial by jury in criminal cases is found in the Sixth Amendment. The Sixth Amendment applies to the federal government, but the right to trial by jury has been extended through the Fourteenth Amendment to apply to the states.<sup>33</sup> The U.S. Supreme Court has interpreted the clause differently for federal and state courts.<sup>34</sup> States are not required to provide juries in cases in which the potential penalty includes a jail sentence of less than six months.<sup>35</sup>

ICRA, however, requires that tribes provide juries in all criminal cases in which imprisonment is a possibility.<sup>36</sup> Thus, tribes whose laws include imprisonment as a possible sentence must have a procedure for selecting a jury. Because the primary purpose of a jury is to provide a fair and impartial body to decide the facts of a case, the U.S. Supreme Court requires that a jury be drawn from a fair cross-section of the community.

The process by which a jury is selected is evaluated at two stages: determining who is eligible to be summoned to serve on a jury (often referred to as the jury pool) and determining who will actually serve on a particular jury.

A court will keep a list of who is eligible to serve on a jury and will summon a number of people from that list to come to court on the day a jury trial is scheduled. The judge and the attorneys will then question the potential jurors to select ones that can decide the case at hand fairly and impartially.

Many tribes have statutes that allow only their tribal members to serve on juries. These laws need to be changed if tribes intend to expand jurisdiction to non-Indians under VAWA 2013. Some tribes before VAWA 2013 included non-Indians and nontribal members in their jury pools, even though the federal government had taken away their authority to criminally prosecute non-Indians. They include not only residents of Indian country, but people who work in Indian country. Review of their statutes may be helpful and are included in the Tribal Code Example section.

## Discussion

Do you have a civil process that is used for enforcement of the jury obligation? Any reason it is not enforceable against non-Indian residents or non-Indian employees called for jury duty?

In reviewing your jury process, is there any procedure that systematically excludes non-Indians from serving on a jury?

Is there a random process that selects potential jurors from the jury pool for the jury panel?

---

<sup>33</sup> *Duncan v. Louisiana*, 391 U.S. 145 (1968).

<sup>34</sup> E.g., federal juries must consist of twelve persons, but state juries can consist of six jurors. *Williams v. Florida*, 399 U.S. 78 (1970); federal juries must reach a unanimous verdict, but unanimity is not required of state juries unless they contain only six jurors. *Apodaca v. Oregon*, 406 U.S. 404 (1972).

<sup>35</sup> *Baldwin v. New York*, 399 U.S. 66 (1970).

<sup>36</sup> 25 U.S.C. § 1302(a)(10).

What is a “fair cross-section of the community”? According to the U.S. Constitution the “fair cross-section of the community” means that juries must be drawn from a source fairly representative of the community. It does not guarantee that the jury selected actually represents the community.<sup>37</sup>

States commonly use lists of people registered to vote or actual voters for jury pools. Driver license lists and other lists such as tax rolls, welfare lists, city directories, and utility lists have been used as well. Some type of random selection process is used to select the jury panel from the designated source lists, often a computerized selection process.

Determining what lists could be used in your community and whether those lists or combination of lists “fairly represent your community” is important. The jury pool should be roughly proportional to the distinctive groups that are residents in your jurisdiction. It is critical that the process not exclude any distinctive group, including non-Indians.

Courts have developed a three-prong test to determine whether a particular group of people is a distinctive group for cross-section analysis:

1. The group must be defined and limited by some clearly identifiable factor (such as race or sex),
2. There must be a common thread or basic similarity in attitude, ideas, or experience that runs through members of the group, and
3. There must be a community of interest among the members of the group to the extent that the group’s interest cannot be adequately represented if the group is excluded from the jury selection process.<sup>38</sup>

Just as they cannot be excluded from the jury pool, members of distinctive groups also cannot be systematically excluded from sitting on the jury. This means that the process by which a jury is selected (including both peremptory challenges and challenges for cause) must be examined. Included under additional resources is the link to the ABA Principles for Juries and Jury Trials, which may be helpful in developing rules and process that meet fairness standards, although many of the suggestions may not fit small community standards in much of Indian country. Review of court rules and procedure on jury selection in adjoining counties or the federal district may also be helpful, but not controlling. It is important you carefully consider a process that is workable for your nation, considering its size, population, and resources.

---

<sup>37</sup> See *Taylor v. Louisiana*, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975); *Duren v. Missouri*, 439 U.S. 357, 99 S.Ct. 664, 58 L.Ed.2d 579 (1979).

<sup>38</sup> *State v. Pelican*, 154 Vt. 496, 580 A.2d 942 (1990) (collecting cases).

Although this guide is focused on the tribal statutes, it is important to review both court rules and rules of procedure to understand the entire process used by a particular tribe and ensure it complies with the VAWA 2013 requirements.

## Tribal Code Examples

### Confederate Tribes of the Umatilla Reservation Code

(Amended March 24, 2014)

#### CRIMINAL CODE AND PROCEDURES

#### Chapter 3. CRIMINAL PROCEDURE

#### Part IV. Pretrial

#### SECTION 3.19. JURY

- A. **Eligibility, List, Record of Service.** Any resident within the boundaries of the Umatilla Indian Reservation of the age of 18 or over is eligible to be a juror regardless of race or tribal citizenship. A list of eligible jurors shall be kept by the Clerk of the Court and a record of each juror's service as a juror shall be noted thereon.
- B. **Selection of Jury Panel.** In January of each year, the Judge shall select at least 50 names from the list of eligible jurors and each shall be notified of his or her selection. This selected list shall comprise the trial jury list for the ensuing year from which jury panels shall be selected from time to time. A jury panel shall consist of not less than 18 names.
- C. **Time and Manner of Notification.** Those persons who are selected to serve on a jury panel shall be notified at a reasonable time prior to the trial date and the notice shall state the date, time, place and title of the proceeding for which they shall serve.
- D. **Exemption from Jury Service.** For good cause shown, the Judge may exempt any person from jury service. The Judge shall order the exemption be either permanent or for a specified period of time. If the exemption is temporary, the name of the prospective juror shall be returned to the annually selected jury list for possible selection for another panel at the expiration of the exemption. In the Court's discretion, the name of a person with a temporary exemption may be removed for that year from the selected list of jurors. If the exemption is permanent, the name of the person shall be removed from the list of eligible jurors.

(SECTION 3.20. Omitted)

#### SECTION 3.21. TRIAL BY JURY

- A. The defendant shall have the right to a trial by a jury of his peers composed of not less than six persons and one alternate unless such right has previously been waived. The prosecution has the burden of proving beyond a reasonable doubt that the defendant is guilty as charged.
- B. **Selection of the Jury.**
  1. **Voir Dire.** The prosecution and defense, in that order, shall have the opportunity to ask questions of the prospective jurors as they are individually called upon by the court to

determine if there is any reason why a particular candidate should not be seated as a juror. Either party may question the propriety of any question asked by the other party of a prospective juror and it shall be within the discretion of the Court to rule on the propriety of the question.

2. **Challenges.** When both sides have completed their voir dire questioning of the six prospective jurors and the one alternate, they shall confer privately with the Judge and state all challenges they have to make against any prospective juror.
  - a. **Peremptory Challenges.** Both parties shall have four peremptory challenges with which they may disqualify any prospective juror and need not state any reason for doing so.
  - b. **Challenges for Cause.** When it is established that any prospective juror is prejudiced, biased or otherwise unable to sit as a fair and impartial juror, he may be disqualified by a challenge for cause by either side. The allowance or disallowance of a challenge for cause shall be within the discretion of the Court. The number of challenges for cause by either party is unlimited.
3. **Oath to Trial Jury.** After the six members and one alternate of the jury have been selected and seated, the Court shall administer an oath by which the jury swears that it will act fairly and impartially in the trial it will hear.

---

**Tulalip Tribal Code (Current through February 7, 2015)**

**Title II. TRIBAL JUSTICE SYSTEM**

**Chapter 2.05 Tribal Court**

**2.05.110 Juries.**

- (1) **Jury Pool.** A list of eligible jurors shall be prepared by the Court. The eligible juror list shall be updated from time to time, but no less than once in each year. The Court shall provide for the selection of names of persons eligible for service as jurors. Jurors shall be 18 years of age or older and, notwithstanding any other law of the Tulalip Tribes or any of its agencies, shall be chosen from the following classes of persons:
  - (a) Tribal members living on or near the Tulalip Indian Reservation;
  - (b) Residents of the Tulalip Indian Reservation; and
  - (c) Employees of the Tulalip Tribes or any of its enterprises, agencies, subdivisions, or instrumentalities who have been employed by the Tribes for at least one continuous year prior to being called as a juror.
- (2) **Formation of Jury.** Juries will be comprised of six jurors. A person may be excused from serving on a jury upon good cause shown under oath to a Judge. Jurors whose employers provide for compensated leave for jury service shall not be excused by the Court because of work-related

responsibilities, except under extraordinary circumstances. The Judge shall consider the needs of the Court to maintain an adequate jury pool before allowing jurors to be excused for employment reasons. Members of the Board of Directors shall be exempt from serving on juries during their terms of office.

- (a) **Random Selection.** The Clerk of the Court will randomly select a minimum of 25 names from the jury pool.
  - (b) **Juror Summons.** The Court shall issue summons and thereby notify persons selected for jury service. Persons selected for jury service shall be summoned by mail or personal service. Persons who do not appear after proper notice of jury service shall be subject to contempt of Court.
- (3) **Selection (Voir Dire).** After summoning jurors and before trial, or at a time designated by the Court, the Clerk shall notify the Court and counsel of the names of the members of the jury pool appearing for selection. In selecting a jury from among the panel members, the initial questioning of the jurors shall be conducted by the Judge in order to determine whether each prospective juror is capable of being fair and impartial. Questions to be asked by the Court include whether a panel member:
- (a) Is directly related to any person involved in the action, including, but not limited to, the parties, counsel, alleged victims, or any prospective witness;
  - (b) Is or has been involved in any business, financial, professional, or personal relationship with a party or alleged victim;
  - (c) Has had any previous involvement in a civil or criminal lawsuit or dispute with a party or alleged victim;
  - (d) Has a financial or personal interest in the outcome of the action before the Court; or
  - (e) Has formed an opinion as to the defendant's guilt.

When the Court determines that a juror is prejudiced or cannot act impartially, the juror shall be excused. After questioning by the Judge, both parties may question the jurors using the struck jury system. Either party may question the jurors concerning the nature of the action, including burden of proof in criminal cases and the presumption of innocence. The Judge may limit examination of jurors when the Judge believes such examination to be improper or unacceptably time consuming.

- (4) **Challenges.** All challenges must be made to the Tribal Court before the jury is empanelled and sworn. When a potential challenge for cause is discovered after the jury is sworn, and before the introduction of any evidence, the Court may allow a challenge for cause to be made.
- (a) **For Cause.** Each party shall have unlimited challenges for cause. Each challenge must be tried and determined by the Court at the time the challenge is made.
  - (b) **Peremptory.** Each party shall have two peremptory challenges. In criminal cases where defendants are tried together, the prosecution and defense shall each be entitled to one additional peremptory challenge. In civil cases involving multiple parties, additional

challenges may be allowed at the discretion of the Court.

(5) **Motion to Discharge.**

(a) **Venire or Jury.** Any objection to the manner in which the venire or jury has been selected or drawn shall be raised by motion to discharge.

(b) **Court's Ruling.** It shall be the duty of the Court to conduct a hearing on any motion to discharge. The burden of proof shall be on the movant. If the Court finds that the venire was improperly selected or drawn, the Court shall order a new venire. If the Court finds that the jury was improperly selected or drawn, the Court shall order the jury discharged and the selection or drawing of a new jury.

(6) **Conflicts of Interest.** No person shall be qualified to sit on a jury panel in the Tribal Court in any case where that person has a direct interest or wherein any relative, by marriage or blood, in the first or second degree is a party; nor shall any party be required to use a peremptory challenge to remove a person not qualified to serve as a juror under this section. This section shall not be construed as the sole cause upon which a juror may be challenged for cause, and other conflicts of interest shall be considered by the Judge.

(7) **Emergency Additions.** In the event there is a shortage of jurors, the Court may call upon anyone eligible to serve as a juror in the case without giving any advance notice.

(8) **Fees.** Every person who is required to attend Court for selection or service as a juror shall be entitled to fees for each day, unless otherwise compensated through Tribal ordinance, as set by resolution of the Board of Directors.

(9) **Juror Oath.** The jury shall be sworn in by the Court. Any juror who violates the oath may be held in contempt of Court.

(10) **Conduct of Jury During Trial.** Once empanelled, jurors shall be instructed by the Judge that it is their duty not to converse among themselves or with anyone else on any subject connected with the trial, or to form or express any opinion thereon, until the issues of the case are finally submitted to them. Jurors may be allowed to take notes, in the discretion of the Court. At each adjournment recess prior to submission of the case to the jury, jurors' notes shall be collected by the Bailiff and the Judge shall instruct the jurors as to whether they may separate or must remain in the care of the Bailiff or other proper officer of the Court.

## Tribal Code Commentary

The Umatilla Tribal Code provides that any resident of the Umatilla Nation is eligible for jury service. A list of eligible individuals is maintained by the clerk of court. The statute does not indicate where the clerk gets the names of individuals who are residents that become a part of the jury pool. However, the pool is drawn from the voting records of the district that is a rough overlay of the reservation. Selection is manual and random. In January of each year a pool of fifty potential jurors are selected by the judge from that list. These fifty residents serve as the jury pool for that year. They are notified of their selection to the trial jury list for the year from which jury panels of not less than eighteen names are selected for a trial.

The remainder of the Umatilla statute relating to juries describes how a jury is selected at trial. The statute allows for the questioning of prospective jurors by the attorney for each the prosecution and the defense and exclusion of jurors for cause when there is some evident bias. Four peremptory challenges that required no reason for exclusion are allowed for each the prosecution and the defense. Six members and one alternate are seated for a trial.

The Tulalip Tribal Code instructs the court to prepare and update a list of eligible jurors (the jury pool). The list would include the following classes of people: tribal members living on or near the reservation; residents of the Tulalip Reservation; and employees of the Tulalip tribes or any of its enterprises, agencies, subdivisions, or instrumentalities who have been employed by the tribes for at least one year continuously prior to being called as a juror. From this jury pool the clerk of court randomly selects twenty-five names for a potential jury panel. The persons selected are summoned by mail or personal service to appear at a designated time. If they fail to appear they are subject to contempt of court action.

The Tulalip Code instructs the judge to first question potential jurors, screening for bias or impartiality. Specific questions appear in the code. The code is also specific about eliminating relatives from the jury panel, at least those that are of the first or second degree by marriage or blood to any party. We can probably assume that this probably also includes the relatives of the victim in a criminal case, as well as any person who might have a direct interest in the case.

The Tulalip Code provides for a motion to discharge, which is the method that a party would question the manner in which a jury venire (pool) was selected. If a motion is raised, the judge would be required to conduct a hearing and if the judge finds that the jury was improperly selected, a new one would be impaneled.

Challenges for cause and peremptory challenges are described in the statute. In the event the court finds it is short of jurors, the statute allows the court to call anyone eligible to serve without any advance notice so that the case can move forward. Fees for jurors are also provided, although the amount of the fee is probably established by court rule.

# CHAPTER 13. SENTENCING OPTIONS

## Overview

One of the core provisions of the TLOA, and the primary reason this resource guide exists, is the enhanced sentencing powers to tribes. As was discussed in Chapter 3, the Indian Civil Rights Act (ICRA) places limitations on the amount of jail time and the size of the fines that a tribal court can impose upon a defendant. Before TLOA, ICRA prohibited tribes from imposing more than one year of imprisonment and a \$5,000 fine. After TLOA, a tribe that complies with the prerequisites may sentence a defendant to three years for any one offense and up to nine years total for one criminal proceeding. TLOA also contains provisions regarding where a tribe can order a defendant to serve his or her term of incarceration. This chapter addresses both parts of the sentencing options.

## Enhanced Sentencing

A tribe that chooses to comply with TLOA's prerequisites regains the ability to sentence certain defendants (see Chapter 6) to three years of imprisonment and/or a fine of \$15,000 for any one offense, and up to a total of nine years for any one criminal proceeding. An example will help illustrate the difference between a single offense and a criminal proceeding. Suppose a defendant breaks into a house, beats up the owner, and steals a television set. These are all part of one continuous event and generally will be prosecuted in one criminal proceeding. Each one, however, is a separate offense. Thus, the three offenses (breaking and entering, assault and battery, and stealing the television) make up one criminal proceeding. Under TLOA, the tribal court can sentence the defendant to a maximum of three years (plus a fine) on each of the offenses, provided the combined total for the entire criminal prosecution is no more than nine years.

Although federal law places a limit on the amount of imprisonment and fines that can be imposed, the actual sentencing range is a matter of tribal law. Thus, if a tribal government wants its courts to be able to use the enhanced sentencing power, the tribe must review its code and make any necessary amendments to increase the amount of imprisonment and fines permitted for each offense. Amending tribal law is also important to ensure that potential defendants have appropriate notice of the penalties for violating tribal law.

A tribe may also want to provide guidance to its judges, either through its code or its court rules, for how to determine whether sentences should be served concurrently or consecutively. For example, in the situation discussed in the preceding paragraph, suppose the judge sentences the defendant to

### Discussion

Which crimes should have longer sentences?

How should the court determine what sentence to impose on a particular defendant?

Where will defendants serve their sentence?

two years for breaking into the house, two years for beating up the owner, and two years for stealing the television. If these are served concurrently, the defendant will serve a total of two years in prison. If they are served consecutively, the defendant will serve a total of six years in prison.

## Serving the Sentence

Each tribe must also decide where defendants will serve their sentences. TLOA declares that the tribal judge may require the defendant

1. to serve the sentence—
  - (A) in a tribal correctional center that has been approved by the Bureau of Indian Affairs for long-term incarceration, in accordance with guidelines to be developed by the Bureau of Indian Affairs (in consultation with Indian tribes) not later than 180 days after July 29, 2010;
  - (B) in the nearest appropriate federal facility, at the expense of the United States pursuant to the Bureau of Prisons tribal prisoner pilot program described in section 304(c)[1] of the Tribal Law and Order Act of 2010;
  - (C) in a State or local government-approved detention or correctional center pursuant to an agreement between the Indian tribe and the state or local government; or
  - (D) in an alternative rehabilitation center of an Indian tribe; or
2. to serve another alternative form of punishment, as determined by the tribal court judge pursuant to tribal law.

A complete examination of each of these options is beyond the scope of this resource guide, as this resource guide concentrates on the code and rule changes tribes need to make to comply with the prerequisites of TLOA and VAWA 2013. The details regarding where a defendant will serve his or her sentence is not usually a matter to be resolved in the tribal code or the tribal court rules. Instead, the issue of where a defendant will serve his or her sentence is both an administrative matter and the subject of negotiated agreements between the tribal and other governments. We will, however, take a brief look at the key issues involved in the first two of the listed options, as those options contain some potentially hidden issues.

**Tribal Correctional Center.** TLOA requires that a tribal correctional center must be approved by the BIA in order to house inmates under the enhanced sentencing provisions. The BIA issued a draft of these guidelines in December 2010, and at the time this resource guide was written, the guidelines are still in draft form (2010) and have not yet been finalized. The draft guidelines contain several provisions that may be of concern to tribes, including requiring compliance with American Correctional Association Core Jail Standards and the Prison Rape Elimination Act, and requiring that personnel policies conform to both the Equal Employment Opportunity and Americans with Disabilities Acts. The current draft also does not permit tribes to house non-Indian inmates who may be sentenced under VAWA in BIA facilities. The Department of Interior (DOI) has, however,

announced plans to change this latter provision and allow tribes to house non-Indians in BIA-approved facilities.

**Federal Facility.** TLOA created a Bureau of Prisons (BOP) [Pilot Project](#) that allows tribes to house prisoners in federal prison at federal expense. This project is very specific and has a limited time frame. At the time of this writing, the pilot project was set to conclude on November 26, 2014. However, the project may be extended.

The project was structured to accept a maximum of one hundred prisoners at any one time. The resource has only been used by a few tribes. First, complying with the federal prerequisites to exercising enhanced sentencing authority is time consuming and expensive. Some tribes cannot afford to satisfy the requirements, other tribes have decided the extra authority is not worth the expense, and other tribes are still working through the process. Second, the regulations established by the BOP limit which prisoners it will accept. To be eligible, the offender must (among other requirements) be at least eighteen years old at the time of the offense, be convicted of a violent crime, and be sentenced to a term of two or more years of imprisonment. Third, the forms to apply to transfer a prisoner into the BOP are complicated and time consuming to complete.

## **Sentencing Alternatives**

Many of the defendants convicted will be on probation at some time during their sentence. Many may reside off tribal land in an adjacent community. Your tribe needs a plan from the outset on the use of available resources. In some cases state resources may be tapped to deliver offender classes or provide other resources for those on probation. What resource will the tribe provide? Extradition issues may also prove important. Developing a plan on service delivery and supervision with the necessary Memorandum of Understandings (MOUs) or other agreements will be needed.

## **Tribal Code Examples**

**Eastern Band of the Cherokee Indians Tribal Code**  
(Enacted November 5, 2012)

[Chapter 14. CRIMINAL LAW](#)

[Article III. Property Crimes](#)

**Sec. 14-10.30. - Robbery with a dangerous weapon.**

- (a) Any person who unlawfully takes or attempts to take personal property from another or from any place of business, residence or banking institution or any other place where there is a person or persons in attendance, at any time, either day or night, while having in possession or with the use or threatened use of any firearms or other dangerous weapon, implement or means, whereby the life of a person is endangered or threatened, or who aids or abets any such person or persons in the commission of such crime, shall be guilty of robbery with a dangerous weapon.
- (b) Robbery with a dangerous weapon shall be punishable by a fine of not less than \$500.00 nor more than \$15,000.00, by imprisonment for not less than three months nor more than three years, by

exclusion for a period of not less two years nor more than ten years, or by any combination of them. Should the commission of the offense result in the death or serious bodily injury to any person, a sentence of exclusion may be imposed for any period not exceeding life in addition to the punishment authorized above.

## **Hopi Code (Enacted August 28, 2012)**

### **Title III. CRIMINAL CODE**

#### **Chapter 4. PENALTIES**

##### **3.4.1 IMPRISONMENT AND FINES**

The Court may impose the following criminal penalties against a person who is convicted for violating this Code:

- A. A maximum of three years in custody and/or a fine of up to \$15,000.00 upon conviction for an offense which is defined in this Code as a “dangerous offense”;
- B. A maximum of two years in custody and/or a fine of up to \$10,000.00 upon conviction for an offense which is defined in this code as a “serious offense”;
- C. A maximum of one year in custody and/or a fine of up to \$5,000.00 upon conviction for offense which is defined in this Code as an “offense”;
- D. A maximum of six months in custody and/or a fine of up to \$2,500.00 upon conviction for an offense which is defined in this Code as a “minor offense”;
- E. A maximum of three months in custody and/or a fine of up to \$1,250.00 upon conviction for an offense which is defined in this Code as a “petty offense.”

##### **3.4.2 REPETITIVE OFFENDERS.**

The Court may, at its discretion, sentence a person who has been previously convicted of the same offense, or a comparable offense by any jurisdiction in the United States, to one class higher than the sentence imposed in the previous conviction. Convictions for two or more offenses committed for the same act may be counted as one conviction for the purposes of this section.

##### **3.4.3 CONSECUTIVE TERMS OF IMPRISONMENT.**

If multiple crimes are committed, and multiple sentences of imprisonment are imposed on a person at the same time, the Court may, at its discretion, direct the sentences to run consecutively.

##### **3.4.4 OTHER CRIMINAL PENALTIES.**

In addition to, or in lieu of, the penalties set forth in Section 3.4.1, the Court may order restitution, diversion from criminal prosecution, community service, treatment, probation, parole, or suspension of sentence, unless a provision of this Code provides otherwise with respect to a certain type of offense.

## Salt River Pima-Maricopa Indian Community Rules of Community Court

### Article IV: Rules of Civil Procedure

#### Division 6: Post Trial Proceedings and Sentencing

##### Rule 26.3. Date of Sentencing; Extension.

##### Sec. 8-3. Sentencing Classifications, Restitution or Alternative Compensation, Offense Specific Penalty or Sentence.

(a) **Sentencing classifications and terms.**

- For a Class A offense, the maximum penalty that may be imposed upon any person convicted of the offense shall be no more than three (3) years of incarceration, and/or a fine up to \$15,000.00. In addition, the minimum sentence that may be imposed upon any person convicted of a Class A offense shall be one year of incarceration and a fine in the amount of \$1,000.00.
- For a Class B offense, the maximum penalty that may be imposed upon any person convicted of the offense shall be no more than one (1) year of incarceration, and/or a fine up to \$5,000.00.
- For a Class C offense, the maximum penalty that may be imposed upon any person convicted of the offense shall be no more than six (6) months of incarceration, and/or a fine up to \$1,000.00.
- For a Class D offense, the maximum penalty that may be imposed upon any person convicted of the offense shall be no more than thirty (30) days of incarceration, and or a fine up to \$750.00.
- For a Class E offense, the maximum penalty that may be imposed upon any person convicted of the offense shall be a fine up to \$500.00.

(b) **Restitution or alternative compensation.** In addition to any other penalty, the court may require a person convicted of an offense, who has injured a person(s), property of a person(s) and/or entity in that offense to make restitution or to compensate for the injury through the surrender of property, the payment of money damages or the performance of any other act for the benefit of the injured, or any combination of such. Such restitution or compensation is wholly separate from any fine imposed.

(c) **Offense specific penalty or sentence.** In no event shall the court impose a sentence or penalty in excess than what is permitted by the specific offense, or for the class of sentence assigned to the offense. If in any matter in which the sentence permitted by this section for the class of offense is inconsistent with the specific sentencing mandate in a particular criminal offense of tribal code, the specific sentencing term for the tribal offense shall be applied.

#### Division 6: Post Trial Proceedings and Sentencing

##### Rule 26.3. Date of Sentencing; Extension.

- (a) **Date of Sentencing.** Upon a determination of guilt, the Court may immediately proceed to sentencing unless the Court upon its own motion or upon a request of the parties may set another date for sentencing. The sentencing shall be held within five (5) days after determination of guilt except in cases where a presentence report is required by Code. The date may be extended for good cause.
- (b) **Extension of Time.** If a pre-sentencing hearing is requested under Rule 26.6, or if good cause is

shown, the trial Court may reset the date of sentencing within sixty (60) days after the determination of guilt.

**Rule 26.4. Pre-sentence Report.**

- (a) **When Prepared.** A presentence report shall be prepared in all cases mandated by Code. The Court may require a pre-sentence report in all cases in which it has discretion over the penalty to be imposed. A pre-sentence report shall not be prepared until after the determination of guilt has been made or the defendant has entered a plea of guilty or no contest. If a pre-sentence report is ordered, sentencing date shall not be set earlier than thirty-five (35) days after determination of guilt.
- (b) **When Due.** Except when a request under Rule 26.3(a) has been granted, the pre-sentence report shall be delivered to the sentencing judge and to parties at least ten (10) calendar days before the date set for sentencing.

**Rule 26.5. Contents of the Pre-sentence Report.**

- (a) **In General.** If ordered, the probation officer must conduct a pre-sentence investigation and submit a report to the Court before the Court imposes its sentence.
- (b) **Restitution.** The probation officer must make reasonable efforts to obtain restitution information and submit a report that contains sufficient information for the Court to order restitution.
- (c) **Interviewing the Defendant.** The probation officer who interviews a defendant as part of a pre-sentence investigation must, on request, give the defendant's counsel reasonable notice of the time and place of the interview and a reasonable opportunity to attend the interview.
- (d) **Pre-sentence Report.** The pre-sentence report must contain the following information:
  - (1) The defendant's history and characteristics, including:
    - (A) Any verified criminal convictions of the defendant regardless of the jurisdiction of the conviction;
    - (B) The defendant's financial condition; and (C) any circumstances affecting the defendant's behavior that may be helpful in imposing sentence or in correctional treatment;
  - (2) Verified information, stated in a nonargumentative style, that assesses the financial, social, psychological, and medical impact on any individual against whom the offense has been committed; when appropriate, the nature and extent of non-incarceration programs and resources available to the defendant;
  - (3) When the law provides for restitution, information sufficient for a restitution order; any other information that the Court requires.

**Exclusions.** The presentence report must exclude the following:

- (A) Any diagnoses that, if disclosed, might seriously disrupt a rehabilitation program;
- (B) Any sources of information obtained upon a promise of confidentiality; and

- (C) Any other information that, if disclosed, might result in physical or other harm to the defendant or others.
- (e) **Victim Input.** The probation officer shall make reasonable efforts to obtain the views of the victim regarding the offense and to obtain victim's recommendation regarding sentencing. The victim's input shall be included in the pre-sentence report. If a victim is a juvenile, the probation officer shall comply with the provisions of Section 11-83.
- (f) **Disclosing the Report and Recommendation.**
  - (1) **Time to Disclose.** Unless the defendant has consented in writing, the probation officer must not submit a pre-sentence report to the Court or disclose its contents to anyone until the defendant has pleaded guilty or no contest or has been found guilty.
  - (2) **Sentence Recommendation.** If the probation officer makes a sentencing recommendation to the Court, the sentencing recommendation shall be disclosed to the parties.

**Rule 26.6. Request for Aggravation or Mitigation Hearing.**

- (a) **Request for a Pre-Sentencing Hearing.** When the Court has discretion as to the penalty to be imposed, it may on its own initiative, and shall on the request of any party, hold a pre-sentencing hearing at any time prior to sentencing to consider any mitigating or aggravating information.
- (b) **Nature, Time, and Purpose of the Pre-sentencing Hearing.** A pre-sentencing hearing shall not be held until the parties have had an opportunity to examine any reports prepared under Rules 26.4 and 26.5. At the hearing any party may introduce any reliable, relevant evidence, including hearsay, in order to show aggravating or mitigating circumstances, to show why sentence should not be imposed, or to correct or amplify the pre-sentence, diagnostic or mental health reports, the hearing shall be held in open court and a complete record of the proceedings made.

**Rule 26.7. Notice of Objections; Special Duty of the Prosecutor; Corrections to Pre-Sentence Report.**

- (a) **Notice of Objections.** Prior to sentencing or pre-sentence hearing, each party shall notify the Court and all other parties of any objection it has to the contents of any pre-sentence report prepared under Rule 26.5. The party shall state the reason and any applicable authority for the objection.
- (b) **Special Duty of the Prosecutor.** The prosecutor shall disclose any information upon discovery by the prosecutor, if not already disclosed, which would tend to reduce the punishment to be imposed.
- (c) **Corrections to Pre-Sentence Report.** In the event that the Court sustains any objections to the contents of a pre-sentence report, the Court may take such action as it deems appropriate under the circumstances, including, but not limited to:
  - (1) Excision of objectionable language or sections of the report.
  - (2) Ordering a new pre-sentence report with specific instructions and directions.
  - (3) Directing a new pre-sentence report to be prepared by a different probation officer.
  - (4) Directing the probation officer to make corrections to the pre-sentence report.

- (d) **Disclosure of Corrected Pre-Sentence Report.** If the Court exercises its authority under subsection (c) of this Rule, the probation officer shall disclose the new, excised, corrected, or amended pre-sentence report to the parties within ten (10) calendar days of the Court's order. Parties shall have three (3) calendar days to file any objections to the new, excised, corrected, or amended pre-sentence report.

**Rule 26.8. Presence of the Defendant.**

Defendant has a right to be present at the pre-sentence hearing and shall be present at sentencing unless a defendant has requested a resolution of his/her case under Rule 9.2.

**Rule 26.9. Pronouncement of Judgment and Sentence.**

- (a) **Pronouncement of Judgment.** In pronouncing judgment, the Court shall set forth the defendant's plea, the offense of which the defendant was convicted or found guilty, and a determination of whether any sentencing enhancements are applicable.
- (b) **Pronouncement of Sentence.** The Court shall:
  - (1) Give the defendant an opportunity to speak on his or her own behalf;
  - (2) State that it has considered the time the defendant has spent in custody, if any, on the present charge;
  - (3) Explain to the defendant the terms of the sentence or probation;
  - (4) Specify the commencement date for the term of imprisonment and any pre-sentence incarceration time that should be credited towards the sentence imposed;
  - (5) Direct the Clerk of Court to send to the Salt River Pima-Maricopa Indian Community Department of Corrections or probation office the sentencing order; and
  - (6) Issue a written judgment within three (3) calendar days of sentencing,
- (c) **Sentencing Policy.** The Court should impose a sentence consistent with the policy set forth in Chapter 8.

**Rule 26.10. Duty of the Court after Pronouncing Sentence.**

After trial, the Court shall, in pronouncing judgment and sentence:

- (a) **Appeal Rights.** Inform the defendant of his or her right to appeal from the judgment, sentence or both within the time limits established in the Code after the entry of judgment and advise the defendant that failure to file a timely appeal will result in the loss of the right to appeal.
- (b) **Right to Assistance of Counsel.**
  - (1) **Own Expense.** If the sentence of imprisonment is one year or less for each offense of conviction, the Court shall advise the defendant that the defendant has the right to retain counsel at the defendant's own expense.

- (2) **Appointed Counsel.** [Reserved]\*\* If the sentence of imprisonment is more than one year for each offense of conviction, the Court shall advise the defendant that the defendant has a right to an assistance of attorney and if the defendant is unable to obtain an attorney at the defendant's own expense, an attorney will be appointed on behalf of the defendant.

**Rule 26.11. Fines and Restitution.**

- (a) **Method of Payment—Installments.** The Court may permit payment of any fine or restitution, or both, to be made within a specified period of time or in specified installments. Restitution shall be payable as promptly as possible in light of the defendant's ability to pay.
- (b) **Method of Payment—To Whom.** The payment of a fine, restitution, or both, shall be made to the Court, unless the Court expressly directs otherwise. Monies received from the defendant shall be applied first to satisfy the restitution order and the payment of any restitution in arrears. The Court or the agency or person authorized by the Community to accept payments should, as promptly as practicable, forward restitution payments to the victim.
- (c) **Action upon Failure to Pay a Fine.**
- (1) **For Defendants Not on Probation.** If a defendant fails to pay a fine or any installment thereof within the prescribed time, the agency or person authorized to accept payments shall, within 5 days, notify the Prosecutor and the Community Court.
- (2) **For Defendants on Probation.** If a defendant on probation fails to pay a fine, restitution or any installment thereof within the prescribed time, the agency or person authorized to accept payments shall give notice of such delinquency to the defendant's probation officer within five (5) days of the failure to make payments.
- (3) **Court Action upon Failure of Defendant Not on Probation to Pay Fine or Restitution.** Upon the defendant's failure to pay a fine or restitution, the Court shall require the defendant to show cause why said defendant should not be held in contempt of Court and may issue a summons or a warrant for the defendant's arrest.

\*\*At the present time, a sentence of imprisonment for any offense cannot exceed one year. If changes are made to the Code that would allow the Judge to sentence a defendant to a sentence of imprisonment exceeding one year, this subsection should be implemented to comply with TLOA.

**Rule 26.12. Re-sentencing.**

Where a judgment or sentence, or both, have been set aside on appeal or on a post-trial motion, the Court may not impose a sentence for the same offense, or a different offense based on the same conduct, which is more severe than the prior sentence unless:

- (1) it concludes, on the basis of evidence concerning conduct by the defendant occurring after the original sentencing proceeding, that the prior sentence is inappropriate, or
- (2) the original sentence was unlawful and on remand it is corrected and a lawful sentence imposed, or

- (3) other circumstances exist under which there is no reasonable likelihood that the increase in the sentence is the product of actual vindictiveness by the sentencing judge.

**Rule 26.13. Entry of Judgment and Sentence.**

The judgment of conviction and sentence shall be complete and valid as of the time of their oral pronouncement in open court. If the written judgment differs from oral pronouncement, the oral pronouncement shall control unless the sentences has been modified or corrected pursuant to Rules 24.1 and 24.2.

## **Tribal Code Commentary**

Two basic approaches exist to establishing what penalties may be imposed for violating a particular criminal statute. The first, which is illustrated by the example from the code of the Eastern Band of Cherokees, is to list the potential penalty in each separate criminal statute. One benefit to this approach is that the potential penalties are immediately clear upon reading the statute; there is no need to follow a cross-reference to another portion of the code.

The second, which is illustrated by the examples from Hopi and Salt River, is to “classify” criminal offenses into categories and have one code provision that sets out the possible penalties for each of the crimes. One benefit to this approach is that, so long as the classification system does not change, a tribe can amend the potential sentence for every criminal offense simply by amending one section of its code; there is no need to amend every individual code section that defines a criminal offense.

The Hopi sentencing provisions also give some guidance as to other penalties the judge can impose, as well as some guidance as to whether sentences should run consecutively or concurrently.

The Salt River examples illustrate a detailed set of rules governing the process by which a court collects and reviews the information it will consider when imposing a sentence.

# CHAPTER 14. STAY OF DETENTION PENDING HABEAS REVIEW

## Overview

VAWA 2013 requires that tribes wishing to exercise special domestic violence criminal jurisdiction delay a defendant's sentence under certain circumstances. Before discussing the details of VAWA 2013's requirement, some general background regarding habeas corpus is provided.

A defendant accused of a crime in tribal court has rights guaranteed by tribal law and by federal law. Defendants who are convicted and sentenced, and who believe that their rights were violated, can appeal their conviction according to whatever procedures are established by the tribal government and the tribal court. This is sometimes called the "direct" appeals process.

Because the federal government wants to make sure tribal courts properly interpret and apply the rights guaranteed to defendants by federal law, the federal government has also established a process for defendants to ask a federal court to review what happened in tribal court. This is known as "habeas corpus" or the "indirect" appeals process. Since ICRA was first passed in 1968, it has contained a section declaring that "the privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe."<sup>39</sup>

The writ of habeas corpus pre-dates establishment of the U.S., and began in the U.S. as a way to make sure that states did not violate a defendant's federal rights during state criminal trials.

Because federal courts want to avoid interfering with state trials unless it was absolutely necessary, federal courts developed a complicated set of procedures and rules about when and how a defendant accused of a crime in state court can ask a federal court to review the actions of the state court. For example, with very few exceptions, the federal courts will not hear a habeas petition unless the

### Discussion

Do you have a law or code provision regarding the ability of your tribal court to stay an order of detention while a habeas petition is pending in federal court? If so, do its provisions match those required by VAWA 2013?

If you do not have any such law or regulation, do you need one? Or is this something inherently with the authority of your tribal court?

Do you have a tribal statute regarding habeas corpus?

---

<sup>39</sup> 25 U.S.C. § 1303.

defendant is in custody, is alleging a violation of his federal rights, and has first given the state courts a chance to fix the problem.

It is not clear to what extent the rules developed in the state context apply to review of tribal courts. That question does not, however, need to be resolved here. Instead, VAWA 2013's requirements relate to what tribal courts must do if a defendant asks the federal court to review his conviction (to use the technical legal terms, a defendant asks for review by "filing a petition for a writ of habeas corpus").

VAWA 2013 amended ICRA to provide procedures relative to notice of habeas corpus and a stay (suspension) of detention for tribes participating in special domestic violence jurisdiction.

### **25 U.S.C. §1304(e) Petitions to Stay Detention**

- (1) **IN GENERAL.**—A person who has filed a petition for a writ of habeas corpus in a court of the United States under section 1303 may petition that court to stay further detention of that person by the participating tribe.
- (2) **GRANT OF STAY.**—A court shall grant a stay described in paragraph (1) if the court—
  - (A) finds that there is a substantial likelihood that the habeas corpus petition will be granted; and
  - (B) after giving each alleged victim in the matter an opportunity to be heard, finds by clear and convincing evidence that under conditions imposed by the court, the petitioner is not likely to flee or pose a danger to any person or the community if released.
- (3) **NOTICE.**—An Indian tribe that has ordered the detention of any person has a duty to timely notify such person of his rights and privileges under this subsection and under section 1303.

It is important to note that this section applies to defendants who:

- Are held in or sentenced to detention by the tribal court; and
- Have filed a petition for a writ of habeas corpus in federal court, asking the federal court to review the trial court's actions.

A defendant who satisfies these requirements may file a petition in federal court asking the court to stay further detention by the tribe until the federal court has a chance to hear the case. It can take months and sometimes a year or more for a federal court to make a decision regarding a petition for a writ of habeas corpus. It is thus possible that a defendant may serve his or her entire sentence before the court can review whether the defendant's conviction and sentence violated federal law, if the detention is not suspended.

A tribal court must notify defendants subject to a tribal order for detention, of their rights to petition the federal court for a writ of habeas corpus and a stay of detention pending the federal court's decision.

VAWA 2013 also establishes standards and procedures for the federal court to follow in deciding whether to grant the defendant's petition for a stay of detention. The court is required to grant the stay of detention if two conditions are met:

1. The federal court must find there is a substantial likelihood the court will grant the defendant's petition for habeas corpus. In other words, it finds that it is likely that the tribal court violated the defendant's federal rights, and
2. The federal court must find that clear and convincing evidence exists to believe that if the defendant is released, the defendant is not likely to flee or pose a danger to any person or to the community. The court may also impose whatever conditions on release from detention that the court deems appropriate.

Some tribes have their own tribal habeas corpus proceedings. A review of the tribal habeas corpus statute is wise. The reason for tribal habeas proceedings in this situation is so the tribe can argue to the federal court that the defendant has not exhausted the tribal remedies if they haven't first filed a habeas action in tribal court and therefore, the defendant cannot establish "a substantial likelihood that the habeas corpus action will be granted".

## **Tribal Code Examples**

**Eastern Band of the Cherokee Indians Tribal Code**  
(Enacted November 5, 2012)

### **Chapter 15. CRIMINAL PROCEDURE**

#### **Sec. 15-7. - Indian Civil Rights Act.**

The Eastern Band of Cherokee Indians adopts all the protections afforded in Title 25, Chapter 15 of the United States Code, as amended.

### **Confederate Tribes of the Umatilla Reservation Code**

(Amended March 24, 2014)

#### **CRIMINAL CODE AND PROCEDURES**

#### **Chapter 3. CRIMINAL PROCEDURE**

#### **PART VI. SENTENCING**

#### **Section 3.28 Defendant's Rights**

(A. through F. Omitted)

G. Every defendant has the privilege of the writ of habeas corpus in a court of the United States to test

the legality of their detention by order of the Confederated Tribes provided they have first exhausted their remedies in the Umatilla Tribal Court.

1. Every defendant who has been detained in jail by the Confederated Tribes shall be notified of this right and any additional rights and privileges they are entitled to under 25 U.S.C. 1304(e).

---

**Tulalip Tribal Code** (Current through February 7, 2015)

**Title IV. YOUTH, ELDERS AND FAMILY**

**Chapter 4.25. Domestic Violence**

**4.25.040 Special Domestic Violence Criminal Jurisdiction**

(1. and 2. Omitted)

(3) Every defendant has the privilege of the writ of habeas corpus to test the legality of his or her detention by order of the Tulalip Tribes and may petition the court to stay further detention pending the habeas proceeding.

(a) A court shall grant a stay if the court:

(i) finds that there is a substantial likelihood that the habeas corpus petition will be granted; and

(ii) After giving each alleged victim in the matter an opportunity to be heard, finds by clear and convincing evidence that under conditions imposed by the court, the petitioner is not likely to flee or pose a danger to any person or the community if released.

## **Tribal Code Commentary**

This section of VAWA 2013 is clear and leaves little room for interpretation or for debates about how to satisfy the requirements. One option, then, for tribes is to not include these provisions in any tribal law, but to simply ensure that tribal judges understand that the requirement exists and what standards it imposes. However, there should be a standard method to provide notice to the defendants' rights to petition a federal court for a writ of habeas corpus and a stay of detention.

Another possible approach, illustrated by the excerpts from the code of the Eastern Band of Cherokee, is to adopt a basic catchall provision declaring that the tribe adopts the protections established in ICRA. This is not necessarily recommended as it may lead to confusion as to the exact rights.

The Umatilla and Tulalip tribes, both participating in the pilot project exercising special domestic violence criminal jurisdiction, went one step further and enacted a provision that echoed the language of VAWA 2013. Note that the Umatilla code does expressly require that defendants exhaust their tribal court remedies prior to filing a petition with the federal court. Umatilla has an

extensive habeas process in Section 3.47 of their Criminal Code. The code also explicitly requires that every defendant who is detained in jail shall be notified of all relevant rights.



# PART V. HELPFUL RESOURCES

This section provides a description of and links to online resources to help in developing tribal codes and further understanding TLOA and VAWA 2013. Some of the resources help in understand key issues that may need to be addressed during implementation.

## VAWA 2013 Resources

- [Intertribal Technical-Assistance Working Group on Special Domestic Violence Criminal Jurisdiction \(ITWG\)](#) is a website that provides information on ITWG. The pilot project for VAWA included three tribes that implemented tribal statutes that satisfied federal requirements of VAWA 2013. Review of their codes may be instructive: Code, Pascua, and the [Tulip Tribal Code](#). The three tribes' applications to participate in the pilot project permitting early use of jurisdiction over non-Indians may also be helpful, as the applications look for compliance with the VAWA 2013 requirements and provide the tribes examples of their compliance. The applications are publically available: [Umatilla application](#), [Pascua Yaqui application](#), and [Tulip application](#).
- [Resource Center for Implementing Tribal Provisions of VAWA 2013](#) was developed and is maintained by NCAI to provide information, news, resources, notice of events, and funding opportunities on the implementation of tribal provisions of VAWA 2013. It also contains information on the ITWG, a group of tribal representatives that met to discuss issues and best practices relative to tribal VAWA 2013 implementation.
- [Code Development Checklist](#) for implementing VAWA 2013. This checklist is designed as a tool to assist tribal governments seeking to develop tribal codes that implement SDVCJ over all persons within their jurisdiction.
- [Ten Principles of a Public Defense Delivery System](#), American Bar Association, Standing Committee on Legal Aid and Indigent Defense (2002). Principles and considerations in maintaining a public defense system.
- [Lessons from Gideon](#), Erwin Chemerinsky, 122 Yale Law Journal 2676 (2013). *Gideon v. Wainwright*, 372 U.S. 336 (1963) holds that the Sixth Amendment right to counsel requires that state governments provide an attorney to all indigent defendants facing a possible prison sentence. The article explores the shortcomings of this unfunded mandate.
- [State Court Organization 2004](#), Bureau of Justice Statistics, D. Rottman and S. Strickland, pp. 218–27 (August 2006). The comparison charts starting on page 218 provide comparison information on juries and on various topics including jury pools, qualifications, selection process, jury pay, peremptory challenges, and so forth.
- [Principles for Juries and Jury Trials](#) provides nineteen American Bar Association approved principles that define fundamental aspirations for management of a jury system.
- [Harvard Law Review](#), Recent Legislation Note provides a profile of VAWA 2013, Special Domestic Violence Jurisdiction, Vol. 127, No. 5 (March 2014). Discusses the history of the

federal and tribal governments and provides the legal history relative to tribal criminal jurisdiction.

- [UCLA Law Review](#), Two-Tiered Program of the Tribal Law and Order Act, Seth Fortin, 61 UCLA L. Rev. Disc. 88 (2013). Provides an overview of the reasons and need for TLOA with references to VAWA 2013.
- [Tribal Protection Order website](#) is a clearinghouse of information and resources on tribal protection orders and tribal enforcement.

## **Tribal Law and Order Act Resources**

- [Tribal Law and Order Act Resource Center](#) is a website specifically developed by NCAI to share information and resources relative to TLOA. It contains many of the resources described in this resource sections and many more, as well as news, events, webinars, and other helpful information.
- [Enhanced Sentencing in Tribal Courts: Lessons Learned from Tribes](#), by Christine Folsom-Smith, Director, The National Tribal Judicial Center, is a publication of the BJA. The publication provides an overview of the TLOA, examples of issues faced by tribes in the implementation, a checklist to help guide discussion on implementation of sentencing enhancement and correction issues, and information on financial resources.
- [Tribal Law and Order Act: Long Term Plan to Build and Enhance Tribal Justice Systems](#), by the DOJ and DOI in collaboration with the work group on corrections. TLOA mandates that DOJ and DOI develop, in consultation with tribal leaders and tribal justice professionals, a long-term plan to address incarceration and the alternatives to it in Indian country. This plan was published in August 2011.
- [BIA Adult Detention Facility Guidelines](#) (Draft) BIA, Office of Justice Services (December 2010). Guidelines for BIA adult facilities.
- [Indian Law and Order Commission \(ILOC\) Report](#), A Road Map for Making Native America Safer, Troy Eid et al. (November 2013). TLOA required the ILOC to study the reasons behind the high rates of crime in Indian nations and make recommendations to make Native American and Alaska Native nations safer and reduce the high rates of violent crime. Their final report is one of the most comprehensive assessments ever undertaken of criminal justice systems servicing Native American and Alaska Native communities.
- [Indian Law and Order Commission website](#) contains a substantial amount of background material related to ILOC work, as well as summaries of testimony before the commission.

# APPENDIX

## The Indian Civil Rights Act, as amended by TLOA and VAWA 2013

- **TLOA amendments in Bold.**
- VAWA 2013 amendments Underlined.

### The Indian Civil Rights Act, as Codified

#### 25 U.S.C. §§ 1301-1304

##### § 1301. Definitions

For purposes of this subchapter, the term—

- (1) “Indian tribe” means any tribe, band, or other group of Indians subject to the jurisdiction of the United States and recognized as possessing powers of self-government;
- (2) “powers of self-government” means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses; and means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians;
- (3) “Indian court” means any Indian tribal court or court of Indian offense; and
- (4) “Indian” means any person who would be subject to the jurisdiction of the United States as an Indian under section 1153, title 18, if that person were to commit an offense listed in that section in Indian country to which that section applies.

##### § 1302. Constitutional rights

- (a) In general — No Indian tribe in exercising powers of self-government shall—
  - (1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;
  - (2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;
  - (3) subject any person for the same offense to be twice put in jeopardy;
  - (4) compel any person in any criminal case to be a witness against himself;

- (5) take any private property for a public use without just compensation;
  - (6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense **(except as provided in subsection (b))**;
  - (7)
    - (A) **require excessive bail, impose excessive fines, or inflict cruel and unusual punishments;**
    - (B) **except as provided in subparagraph (C), impose for conviction of any 1 offense any penalty or punishment greater than imprisonment for a term of 1 year or a fine of \$5,000, or both;**
    - (C) **subject to subsection (b), impose for conviction of any 1 offense any penalty or punishment greater than imprisonment for a term of 3 years or a fine of \$15,000, or both; or**
    - (D) **impose on a person in a criminal proceeding a total penalty or punishment greater than imprisonment for a term of 9 years;**
  - (8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;
  - (9) pass any bill of attainder or ex post facto law; or
  - (10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.
- (b) **Offenses subject to greater than 1-year imprisonment or a fine greater than \$5,000 — A tribal court may subject a defendant to a term of imprisonment greater than 1 year but not to exceed 3 years for any 1 offense, or a fine greater than \$5,000 but not to exceed \$15,000, or both, if the defendant is a person accused of a criminal offense who—**
- (1) **has been previously convicted of the same or a comparable offense by any jurisdiction in the United States; or**
  - (2) **is being prosecuted for an offense comparable to an offense that would be punishable by more than 1 year of imprisonment if prosecuted by the United States or any of the States.**
- (c) **Rights of defendants — In a criminal proceeding in which an Indian tribe, in exercising powers of self-government, imposes a total term of imprisonment of more than 1 year on a defendant, the Indian tribe shall**
- (1) **provide to the defendant the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution; and**

- (2) at the expense of the tribal government, provide an indigent defendant the assistance of a defense attorney licensed to practice law by any jurisdiction in the United States that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys;
  - (3) require that the judge presiding over the criminal proceeding—
    - (A) has sufficient legal training to preside over criminal proceedings; and
    - (B) is licensed to practice law by any jurisdiction in the United States;
  - (4) prior to charging the defendant, make publicly available the criminal laws (including regulations and interpretative documents), rules of evidence, and rules of criminal procedure (including rules governing the recusal of judges in appropriate circumstances) of the tribal government; and
  - (5) maintain a record of the criminal proceeding, including an audio or other recording of the trial proceeding.
- (d) Sentences — In the case of a defendant sentenced in accordance with subsections (b) and (c), a tribal court may require the defendant—
  - (1) to serve the sentence—
    - (A) in a tribal correctional center that has been approved by the Bureau of Indian Affairs for long-term incarceration, in accordance with guidelines to be developed by the Bureau of Indian Affairs (in consultation with Indian tribes) not later than 180 days after July 29, 2010;
    - (B) in the nearest appropriate Federal facility, at the expense of the United States pursuant to the Bureau of Prisons tribal prisoner pilot program described in section 304(c) of the Tribal Law and Order Act of 2010;
    - (C) in a State or local government-approved detention or correctional center pursuant to an agreement between the Indian tribe and the State or local government; or
    - (D) in an alternative rehabilitation center of an Indian tribe; or
  - (2) to serve another alternative form of punishment, as determined by the tribal court judge pursuant to tribal law.
- (e) Definition of offense — In this section, the term “offense” means a violation of a criminal law.
- (f) Effect of section — Nothing in this section affects the obligation of the United States, or any State government that has been delegated authority by the United States, to investigate and prosecute any criminal violation in Indian country.

§ 1303. Habeas corpus

The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.

§ 1304. Tribal Jurisdiction Over Crimes of Domestic Violence

(a) Definitions — In this section:

- (1) DATING VIOLENCE.—The term “dating violence” means violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim, as determined by the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship
- (2) DOMESTIC VIOLENCE.—The term “domestic violence” means violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, or by a person similarly situated to a spouse of the victim under the domestic- or family-violence laws of an Indian tribe that has jurisdiction over the Indian country where the violence occurs
- (3) INDIAN COUNTRY.—The term “Indian country” has the meaning given the term in section 1151 of title 18, United States Code
- (4) PARTICIPATING TRIBE.—The term “participating tribe” means an Indian tribe that elects to exercise special domestic violence criminal jurisdiction over the Indian country of that Indian tribe
- (5) PROTECTION ORDER.—The term “protection order”—
  - (A) means any injunction, restraining order, or other order issued by a civil or criminal court for the purpose of preventing violent or threatening acts or harassment against, sexual violence against, contact or communication with, or physical proximity to, another person; and
  - (B) includes any temporary or final order issued by a civil or criminal court, whether obtained by filing an independent action or as a pendent lite order in another proceeding, if the civil or criminal order was issued in response to a complaint, petition, or motion filed by or on behalf of a person seeking protection.
- (6) SPECIAL DOMESTIC VIOLENCE CRIMINAL JURISDICTION.—The term “special domestic violence criminal jurisdiction” means the criminal jurisdiction that a participating tribe may exercise under this section but could not otherwise exercise.
- (7) SPOUSE OR INTIMATE PARTNER.—The term “spouse or intimate partner” has the meaning given the term in section 2266 of title 18, United States Code.

(b) Nature of the Criminal Jurisdiction —

(1) IN GENERAL.—Notwithstanding any other provision of law, in addition to all powers of self-government recognized and affirmed by sections 1301 and 1303, the powers of self-government of a participating tribe include the inherent power of that tribe, which is hereby recognized and affirmed, to exercise special domestic violence criminal jurisdiction over all persons.

(2) CONCURRENT JURISDICTION.—The exercise of special domestic violence criminal jurisdiction by a participating tribe shall be concurrent with the jurisdiction of the United States, of a State, or of both.

(3) APPLICABILITY.—Nothing in this section—

(A) creates or eliminates any Federal or State criminal jurisdiction over Indian country; or

(B) affects the authority of the United States or any State government that has been delegated authority by the United States to investigate and prosecute a criminal violation in Indian country.

(4) EXCEPTIONS.—

(A) VICTIM AND DEFENDANT ARE BOTH NON-INDIANS.—

(i) IN GENERAL.—A participating tribe may not exercise special domestic violence criminal jurisdiction over an alleged offense if neither the defendant nor the alleged victim is an Indian.

(ii) DEFINITION OF VICTIM.—In this subparagraph and with respect to a criminal proceeding in which a participating tribe exercises special domestic violence criminal jurisdiction based on a violation of a protection order, the term “victim” means a person specifically protected by a protection order that the defendant allegedly violated.

(B) DEFENDANT LACKS TIES TO THE INDIAN TRIBE.—A participating tribe may exercise special domestic violence criminal jurisdiction over a defendant only if the defendant—

(i) resides in the Indian country of the participating tribe;

(ii) is employed in the Indian country of the participating tribe; or

(iii) is a spouse, intimate partner or dating partner of

(I) a member of the participating tribe; or

(II) (an Indian who resides in the Indian country of the participating tribe.

- (c) Criminal Conduct — A participating tribe may exercise special domestic violence criminal jurisdiction over a defendant for criminal conduct that falls into one or more of the following categories:
- (1) DOMESTIC VIOLENCE AND DATING VIOLENCE.—An act of domestic violence or dating violence that occurs in the Indian country of the participating tribe.
  - (2) VIOLATIONS OF PROTECTION ORDERS.—An act that—
    - (A) occurs in the Indian country of the participating tribe; and
    - (B) violates the portion of a protection order that—
      - (i) prohibits or provides protection against violent or threatening acts or harassment against, sexual violence against, contact or communication with, or physical proximity to, another person;
      - (ii) was issued against the defendant;
      - (iii) is enforceable by the participating tribe; and
      - (iv) is consistent with section 2265(b) of title 18, United States Code.
- (d) Rights of Defendants — In a criminal proceeding in which a participating tribe exercises special domestic violence criminal jurisdiction, the participating tribe shall provide to the defendant—
- (1) all applicable rights under this Act;
  - (2) if a term of imprisonment of any length may be imposed, all rights described in section 1302(c);
  - (3) the right to a trial by an impartial jury that is drawn from sources that—
    - (A) reflect a fair cross-section of the community; and
    - (B) do not systematically exclude any distinctive group in the community, including non-Indians; and
  - (4) all other rights whose protection is necessary under the Constitution of the United States in order for Congress to recognize and affirm the inherent power of the participating tribe to exercise special domestic violence criminal jurisdiction over the defendant.
- (e) Petitions to Stay Detention
- (1) IN GENERAL.—A person who has filed a petition for a writ of habeas corpus in a court of the United States under section 1303 may petition that court to stay further detention of that person by the participating tribe.
  - (2) GRANT OF STAY.—A court shall grant a stay described in paragraph (1) if the court—

- (A) finds that there is a substantial likelihood that the habeas corpus petition will be granted; and
- (B) after giving each alleged victim in the matter an opportunity to be heard, finds by clear and convincing evidence that under conditions imposed by the court, the petitioner is not likely to flee or pose a danger to any person or the community if released.
- (3) NOTICE.—An Indian tribe that has ordered the detention of any person has a duty to timely notify such person of his rights and privileges under this subsection and under section 1303.
- (f) Grants to Tribal Governments — The Attorney General may award grants to the governments of Indian tribes (or to authorized designees of those governments)
  - (1) to strengthen tribal criminal justice systems to assist Indian tribes in exercising special domestic violence criminal jurisdiction, including—
    - (A) law enforcement (including the capacity of law enforcement or court personnel to enter information into and obtain information from national crime information databases);
    - (B) prosecution;
    - (C) trial and appellate courts;
    - (D) probation systems
    - (E) detention and correctional facilities;
    - (F) alternative rehabilitation centers;
    - (G) culturally appropriate services and assistance for victims and their families;  
and
    - (H) criminal codes and rules of criminal procedure, appellate procedure, and evidence;
  - (2) to provide indigent criminal defendants with the effective assistance of licensed defense counsel, at no cost to the defendant, in criminal proceedings in which a participating tribe prosecutes a crime of domestic violence or dating violence or a criminal violation of a protection order;
  - (3) to ensure that, in criminal proceedings in which a participating tribe exercises special domestic violence criminal jurisdiction, jurors are summoned, selected, and instructed in a manner consistent with all applicable requirements; and
  - (4) to accord victims of domestic violence, dating violence, and violations of protection orders rights that are similar to the rights of a crime victim described in section 3771(a) of title 18, United States Code, consistent with tribal law and custom.

- (g) Supplement, Not Supplant — Amounts made available under this section shall supplement and not supplant any other Federal, State, tribal, or local government amounts made available to carry out activities described in this section.
- (h) Authorization of Appropriations — There are authorized to be appropriated \$5,000,000 for each of fiscal years 2014 through 2018 to carry out subsection (f) and to provide training, technical assistance, data collection, and evaluation of the criminal justice systems of participating tribes.

# Tribal Domestic Violence Special Jurisdiction Model Code

**Note** This model code was developed by the three tribes that piloted 2013's Special Domestic Violence Criminal Jurisdiction (SDVCJ) and is the latest copy (3/2/2015). This model code will no doubt be revised. Check [Intertribal Technical-Assistance Working Group on Special Domestic Violence Criminal Jurisdiction](#) for later versions.

## **.010 Purpose.**

Domestic violence and family violence are serious crimes against society, the (Tribe: substitute the name of the Indian Nation for Tribe where appropriate), and the family. The victim of domestic violence or family violence deserves the maximum protection from further violence that the law, and those who enforce the law, can provide. Furthermore, the strength of the (Tribe/s) is founded on healthy families, and the safety of victims of domestic and family violence, especially children, must be ensured by immediate intervention of law enforcement, prosecution, education, treatment, and other appropriate services.

It is the intent of the (Tribe/s) that the official response to domestic violence and family violence shall stress the enforcement of the laws to protect victims and to hold perpetrators accountable, which will, in turn, communicate the (Tribe's) values that violent behavior against intimate partners or family members is criminal behavior and will not be excused or tolerated. This in turn will promote healing of families and the (Tribe) where possible, and promote cultural teachings and traditional (Tribal) values so as to nurture nonviolence and respect within families. This chapter shall be interpreted and applied to give it the broadest possible scope to carry out these purposes.

## **.020 Special Domestic Violence Court created.**

There is hereby created a Special Domestic Violence Jurisdiction Court, which shall be subject to all criminal procedures of the (Tribe) to the extent they do not conflict with the provisions contained within this chapter/title/code. All proceedings under this chapter/title/code shall be recorded. All tribal laws related to these proceedings shall be published by posting on the tribal court website and available at the tribal court to all those subject to this chapter/title/code.

## **.030 Special Domestic Violence Criminal Jurisdiction.**

1. The (Tribe) hereby exercises "Special Domestic Violence Criminal jurisdiction" as a "participating tribe," as defined within [25 U.S.C. 1304](#) (2013), subject to applicable exceptions defined therein, in the (Tribe)'s Special Domestic Violence Jurisdiction Court.
2. In all proceedings in which the Tribal Court is exercising Special Domestic Violence Criminal Jurisdiction as a participating tribe, the rights in section .040 shall be provided in addition to all rights enumerated in the Indian Civil Rights Act, [25 U.S.C. 1302](#) to all defendants. Should there be any conflict between the rights herein and [25 U.S.C. 1302](#), those of [25U.S.C. 1302](#) shall apply.

3. The (Tribe) hereby declares its special domestic violence criminal jurisdiction over any person only if he or she:
  - a. Resides within the (Tribe)'s Indian country; or
  - b. Is employed in the (Tribe)'s Indian country; or
  - c. Is a spouse, intimate partner, or dating partner of:
    - i. A member of the (Tribe)s; or
    - ii. An Indian who resides within the (Tribe)'s jurisdiction.

#### **.040 Rights Applicable.**

It is the policy of Special Domestic Violence Jurisdiction Court to provide all defendants the full protection of the laws. Therefore, in all proceedings in which the Special Domestic Violence Jurisdiction Court is exercising this jurisdiction, all defendant rights afforded herein shall apply. These rights include the following:

1. **Rights of the Defendant.** In all criminal proceedings, the defendant shall have the following rights:
  - a. To be free from excessive bail and cruel punishment;
  - b. To defend in person or by counsel;
  - c. To be informed of the nature of the charges pending against him or her and to have a copy of those charges;
  - d. To confront and cross-examine all prosecution or hostile witnesses;
  - e. To compel by subpoena:
    - i. The attendance of any witnesses necessary to defend against the charges; and
    - ii. The production of any books, records, documents, or other things necessary to defend against the charges;
  - f. To have a speedy and public trial by Judge or a jury, unless the right to a speedy trial is waived or the right to a jury trial is waived in writing by the defendant;
  - g. To appeal any final decision of the Tribal Court to the Tribal Court of Appeals;
  - h. To not be twice put in jeopardy for the same offense;
  - i. Not to be required to testify, and no inference may be drawn from a defendant's exercise of the right not to testify; and
  - j. To petition for a writ of habeas corpus as set forth in 25 U.S.C. 1304(e) and 25 U.S.C. 1303. The (Tribe) shall ensure notice required by 25 U.S.C. 1304(e) is timely provided to the defendant.
2. **Right to Counsel**

- a. All defendants, regardless of the length of the potential sentence for the crime being charged, have the right to effective assistance of counsel meeting the requirements of 25 U.S.C. 1302 while the Special Domestic Violence Jurisdiction Court is exercising its Jurisdiction. An indigent defendant shall be provided the assistance of a defense attorney meeting the requirements of 25 USC 1302 at the expense of the tribal government.
- b. Any person appearing as a party in Tribal Court shall have the right to counsel at his or her own expense. "Counsel" includes attorneys and spokespersons. Such counsel shall be of the parties' own choosing and need not be an attorney or admitted to practice before the bar of any state, but must be members of the Tribal Bar.

### 3. **Right to Jury Trial**

A defendant charged under Special Domestic Violence Jurisdiction has a right to a trial by jury of six fair and impartial jurors drawn from the community. A defendant may waive the right to a jury trial in a written, voluntary statement to the Court. All jury verdicts must be unanimous.

- a. **Jury Pool.** A list of eligible jurors shall be prepared by the Court. The eligible juror list shall be updated from time to time, but no less than once in each year. It shall reflect a fair cross-section of the community, and not systematically exclude any distinctive group in the community, including non-Indians. The Court shall provide for the selection of names of persons eligible for service as jurors. Jurors shall be 18 years of age or older and, notwithstanding any other law of the (Tribe)s or any of its agencies, shall be chosen from the following classes of persons:
  - i. Tribal members living on or near the Indian Reservation;
  - ii. Residents of the Indian Reservation; and
  - iii. Employees of the (Tribe)s or any of its enterprises, agencies, subdivisions, or instrumentalities who have been employed by the (Tribe)s for at least one continuous year prior to being called as a juror.

### 4. **Presiding Judges.**

- a. To have a judge presiding over the criminal proceeding:
  - i. Who has sufficient legal training to preside over criminal proceedings; and
  - ii. Who is licensed to practice law in any jurisdiction in the United States;
- b. Judge(s) meeting the qualifications in (4)(a) can be designated to preside in the Special Domestic Violence Court. The Chief Judge shall designate and assign Judges to the Special Domestic Violence Court every January by standing order and the standing order and qualifications of the Judge will become part of the trial record.
- c. To appeal any final decision to the Tribal Court of Appeals

### 5. **Writ of Habeas Corpus.**

- a. **Availability of Writ**

- i. Except as provided in subsection (5)(a)(ii) of this section, every person within the jurisdiction of the (Tribe)s imprisoned or otherwise restrained of liberty may prosecute a writ of habeas corpus to inquire into the cause of imprisonment or restraint and, if illegal, to be delivered from imprisonment or restraint.
  - ii. The writ of habeas corpus is not available to attack the validity of the conviction or sentence of a person who has been adjudged guilty of an offense by a court of competent jurisdiction and has exhausted the remedy of appeal, nor is it available to attack the legality of an order revoking a suspended or deferred sentence. Moreover, a person may not be released on a writ of habeas corpus due to any technical defect in commitment not affecting the person's substantial rights.
  - iii. When a person is imprisoned or detained in custody by the (Tribe)s on any criminal charge for want of bail, such person is entitled to a writ of habeas corpus for the purpose of giving bail upon averring that fact in his petition, without alleging that he is illegally confined.
- b. Issuance of Writ.**
- i. Application for a writ of habeas corpus is made by petition signed either by the party for whose relief it is intended or by some person on the petitioner's behalf, and must be filed with the Clerk of the Court. It must specify:
    - 1. That the petitioner is unlawfully imprisoned or restrained of liberty;
    - 2. Why the imprisonment or restraint is unlawful; and
    - 3. Where or by whom the petitioner is confined or restrained.
  - ii. The parties to a writ, namely the Prosecutor, Chief Judge of the Tribal Court, and the Chief of Police, must be named. All parties must be named if they are known or otherwise described so that they may be identified.
  - iii. The petition must be verified by the oath or affirmation or declaration under penalty of perjury that the contents of the declaration are true to the best of the declarant's belief of the party making the application.
- c. Granting of the Writ.** Any Justice of the Court of Appeals may grant a writ of habeas corpus upon petition by or on behalf of any person restrained of liberty within the Justice's jurisdiction. If it appears to such Justice that a writ ought to issue, it shall be granted without delay, and may be made returnable to the Court of Appeals.
- d. Time of Issuance and Requirements for Service.**
- i. A writ of habeas corpus or any associated process may be issued and served on any day at any time. The writ should be served on the Tribal Prosecutor and Chief Judge of the Tribal Court.
  - ii. The writ must be served upon the person to whom it is directed. If the writ is directed to a Tribal agency or employee, a copy of the writ must be served upon the Tribal Prosecutor.

- iii. The writ must be served by a Tribal Police Officer, or any other person directed to do so by the Justice or the Court, in the same manner as a civil summons, except where otherwise expressly directed by the Justice, the Court, or the employee of any correctional facility in which the petitioner is held.
- e. **Return of the Writ.** The Prosecutor or his or her designee shall make a return and state in that return:
  - i. Whether the person is in custody or under that person's power of restraint; and
  - ii. If the person is in custody or otherwise restrained, the authority for and cause of the custody or restraint; or
  - iii. If the person has been transferred to the custody of or otherwise restrained by another to whom the party was transferred, the time and place of the transfer, the reason for the transfer, and the authority under which the transfer took place.

The return must be signed and verified by affirmation.

- F. **Hearing.** The prosecutor/police/jailer (Chief Judge) commanded by the writ shall cause the petitioner to be brought before the Court as commanded by the writ unless the petitioner cannot be brought before the Court without danger to the petitioner's health. Sickness or infirmity must be confirmed. If the Court is satisfied with the truth of the writing, the Court may proceed and dispose of the case as if the petitioner were present or the hearing may be postponed until the petitioner is present. Any law enforcement officer may bring the person as directed. Unless the Court postpones the hearing for reasons of the petitioner's health, the Court shall immediately proceed to hear and examine the return. The hearing may be summary in nature. Evidence may be produced and compelled as provided by the laws governing criminal procedures and evidence.
  - G. **Refusal to Obey Writ Is Contempt.** If the person commanded by the writ refuses to obey, that person must be adjudged to be in contempt.
  - H. **Disposition of Petitioner.** If the Court finds in favor of the petitioner, an appropriate order must be entered with respect to the judgment or sentence in the former proceeding and any supplementary orders as to reassignment, retrial, custody, bail, or discharge as may be necessary and proper. If the Court finds for the prosecution, the petitioner must be returned to the custody of the person to whom the writ was directed.
6. **Right to a Speedy and Public Trial.** A defendant not released from jail pending trial shall be brought to trial not later than 60 days after the date of arraignment. A defendant released from jail, whether or not subjected to conditions of release pending trial, shall be brought to trial not later than 90 days after the date of arraignment.

**.050 Special jurisdiction—Criminal conduct applicable.**

The (Tribe)s exercise the special domestic violence criminal jurisdiction of a defendant for criminal conduct that falls into one or more of the following categories:

1. **Domestic Violence and Dating Violence.** An act of domestic violence or dating violence as defined in 25 U.S.C. 1304(a) that occurs within the jurisdiction of the (Tribe).
2. **Violations of Protection Orders.** An act that occurs in the (Tribe)'s Indian country, and:
  - a. Violates the portion of a protection order that:
    - i. Prohibits or provides protection against violent or threatening acts of harassment against, sexual violence against, contact or communication with, or physical proximity to the person protected by the order;
    - ii. Was issued against the defendant;
    - iii. Is consistent with [18 U.S.C. 2265\(b\)](#).

**.060 Statute of limitations. (use if your tribe has such a statute, if not eliminate)**

For purposes of this chapter, the statute of limitations shall be consistent with the statute applicable to other crimes committed under the (Tribe)'s or any successor code.

**.070 Nonwaiver of sovereign immunity.**

Nothing in this chapter shall be deemed to constitute a waiver by the (Tribe)s of its sovereign immunity for any reason whatsoever.

**.080 Severability.**

If any part, or parts, or the application of any part of this chapter is held invalid, such holding shall not affect the validity of the remaining parts of this chapter. The Tribal Council hereby declares that it would have passed the remaining parts of this chapter even if it had known that such part or parts or application of any part thereof would be declared invalid.

**.090 Savings.**

This chapter takes effect on the date approved by the Tribal Council and does not extinguish or modify any civil or criminal liability or enforcement of such penalty or forfeiture that existed on or prior to the effective date of this chapter and such code shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such civil or criminal action, enforcement of any penalty, forfeiture or liability.

# Tulalip Tribal Court Rules

Adopted by the Tulalip Tribes Board of Directors

November 30, 2012

Amended by Resolutions No. 2013-123, 2013-551, 2014-142, 2014-237

## Section 1 Administrative Rules

### 1.1 COMMUNICATION WITH JUDGES

Unless permitted by Tulalip Tribal Code or Court Rule, no one other than court personnel shall have ex parte communication with judges of the Tulalip Tribal Court regarding a matter pending before the Court until final resolution of the case. Communication means any type of communication, oral, written, by telephone or electronic device, or otherwise. This rule does not limit communication on administrative matters, such as scheduling of cases.

### 1.2 EX PARTE CALENDAR

The Court shall establish a calendar with time set aside for the presentation of ex parte orders.

### 1.3 COURTROOM SAFETY

1.3.1 No person, except for Judges of the Court, and duly and regularly commissioned law enforcement officers of the Tulalip Tribes, State of Washington, or the United States government are allowed in the Tulalip Tribal Court while armed with any firearm, taser, explosive device, knife, billyclub, blackjack, truncheon or bat, or other dangerous weapon, nor shall any person be in the courthouse while possessing any gas gun, or other device for the spraying of tear gas, mace or other noxious chemical substance, or any incendiary device.

1.3.2 Any person found having any of the articles or devices mentioned in this rule is subject to having such articles or devices seized by law enforcement officers, bailiffs on court order, or as otherwise directed by the Court.

1.3.3 A license to carry a concealed pistol does not allow any of the items listed in this rule to be brought into the courthouse.

### 1.4 FILING AND PRE-MARKING REQUIREMENTS

Pleadings

When filing any pleading with the Court, the party or attorney must provide two (2) copies, one for the Court, and one to be conformed for the filing party, which may be delivered in person or by mail. Pleadings delivered in person must be filed by 4 p.m. If filed by mail, a self-addressed stamped envelope shall be included.

1.4.2 Pre-Marking Exhibits

A. In all cases, if exhibits number more than ten (10) per party, exhibits shall be pre-marked. Arrangements shall be made with the Court Clerk for the marking of all exhibits prior to trial.

B. In a criminal case, only the prosecution is required to pre-mark exhibits, unless otherwise ordered by the Court.

## **1.5 WORKING COPIES OF MOTIONS AND BEDACHELH DOCUMENTS**

The parties shall furnish an extra copy as a working copy of any motions or briefs marked “Judges Copy” when they file motions or briefs. In beda chelh cases, working copies of reports, recommendations, and home studies shall be provided in the same format as for briefs and motions. Working copies of the motions or briefs shall be delivered by the party filing such documents to the Court Clerk no later than the day they are to be served on all other parties. All working copies shall state, in red ink in the upper right corner, the following: the date and time of such hearing and the name of the judge hearing the matter.

## **1.6 CITED CASES**

A copy of any case cited within a pleading must be attached to the Judges Copy.

## **1.7 COMPUTATION OF DAYS**

### **1.7.1 Computation**

In computing any period of time prescribed or allowed by these rules, by order of court, or any applicable ordinance, the day of the act, event, or default from which the designated period of time begins to run shall not be included.

### **1.7.2 Enlargement**

When by court rule or by law an act is required to be performed within a certain time period, the Court may extend or shorten the time within which a party must perform the act; except this rule shall not apply where the law or court has specified a procedure for extending or shortening the time within which an act must be performed and except for motions for reconsideration, time for filing notice of appeal, motions for new trial, and motions for relief of judgment.

## **1.8 SERVICE**

### **1.8.1 On Attorney or Party**

Whenever service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party himself is ordered by the Court. Service upon the attorney or upon a party shall be made by delivering a copy to him or by mailing it to him at his last known address or, if no address is known, filing with the Court Clerk an affidavit of attempt to serve. Delivery of a copy within this rule means: handing it to the attorney or to the party; or leaving it at his office with his clerk or other person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein.

### **1.8.2 Service by Mail**

#### **A. How made**

If service is made by mail, the papers shall be deposited in the United States mail addressed to

the person on whom they are being served, with the postage prepaid. The service shall be deemed complete upon the fifth day following the day upon which they are placed in the mail, unless the fifth day falls on a Saturday, Sunday or legal holiday, in which event service shall be deemed complete on the first day other than a Saturday, Sunday or legal holiday, following the fifth day. Legal holidays are those declared by the Tulalip Tribal Board of Directors.

Proof of service by mail

B. Proof of service of all papers permitted to be mailed may be by written acknowledgment of service, by declaration under penalty of perjury of the person who mailed the papers, or by certificate of an attorney. The certificate of an attorney may be in form substantially as follows:

CERTIFICATE

I certify that I mailed a copy of the foregoing \_\_\_\_\_ to (John Smith),  
  
(plaintiff's) attorney, at (office address or residence), and to (Joseph Doe), an additional  
(defendant's) attorney (or attorneys) at (office address or residence), postage prepaid, on (date).

\_\_\_\_\_  
  
(John Brown)

Attorney for (Defendant) Jane Jones

**1.9 NOTICE BY PUBLICATION**

To prove service by publication, a party must file a declaration of publication from the publishing newspaper and a copy of what was published.

**1.10 SEALING AND REDACTION OF COURT RECORDS**

**1.10.1 Purpose and Scope**

This rule sets forth a uniform procedure for the sealing and redaction of court records. This rule applies to all court records, not already protected by Tulalip law and applicable federal law. However, even within a sealed file, the Court may further limit or determine access to sensitive documents.

**1.10.2 Definitions**

"Court file" means the pleadings, orders, and other papers filed with the clerk of the court under a single or consolidated cause number(s).

"Court record" includes, but is not limited to: Any document, information, exhibit, or other thing that is maintained by a court in connection with a judicial proceeding, and any index, calendar, docket, register of actions, official record of the proceedings, order, decree, judgment, minute, and any information contained in a case management system created or prepared by the court that is related to a judicial proceeding. Court record does not include information and data maintained by or for a judge pertaining to a particular case or party, such as personal notes and communications, memoranda, drafts, or other working papers or information gathered, maintained, or stored by the Tulalip Tribes to which the Court has access but which is not

entered in the record.

Seal. To seal means to protect from examination by the public and unauthorized court personnel.

Redact. To redact means to protect from examination by the public and unauthorized court personnel a portion or portions of a specified court record.

Restricted Personal Identifiers are social security numbers, account numbers and driver's license numbers.

Strike. A motion or order to strike from the record is not a motion or order to seal or destroy.

Vacate. To vacate means to nullify or cancel.

### 1.10.3 Sealing or Redacting Court Records

#### A. Requests

In a civil case, the court or any party may request a hearing to seal or redact the court records. In a criminal case, the court, any party, any victim or alleged victim, or any witness may request a hearing to seal or redact the court records. Reasonable notice of a hearing to seal must be given to all parties in the case. In a criminal case, reasonable notice of a hearing to seal or redact must also be given to the victim, if ascertainable, and the person or agency having probationary supervision over the affected individual.

#### B. Written Findings

After the hearing, the court may order the court files and records in the proceeding, or any part thereof, to be sealed or redacted if the court makes and enters written findings that the specific sealing or redaction is justified by identified compelling privacy or safety concerns that outweigh the public interest in access to the court record. Agreement of the parties alone does not constitute a sufficient basis for the sealing or redaction of court records. Sufficient privacy or safety concerns that may be weighed against the public interest include findings that:

- i) The sealing or redaction is permitted by Tulalip ordinance;
- ii) The redaction includes only restricted personal identifiers contained in the court record;
- iii) Another identified compelling circumstance exists that requires the sealing or redaction.

#### C. Redaction

A court record shall not be sealed under this section when redaction will adequately resolve the issues before the court pursuant to subsection (B) above.

#### D. Sealing of Entire Court File

When the clerk receives a court order to seal the entire court file, the clerk shall seal the court file and secure it from public access. All court records filed thereafter shall also be sealed unless otherwise ordered. The order to seal and written findings supporting the order to seal shall also remain accessible to the parties, unless protected by Tulalip ordinance.

#### E. Sealing of Specified Court Records

When the clerk receives a court order to seal specified court records the clerk shall:

On the docket, preserve the docket code, document title, document or subdocument number and date of the original court records;

Remove the specified court records, seal them, and return them to the file under seal or store separately. The clerk shall substitute a filler sheet for the removed sealed court record. If the court record ordered sealed exists in another storage medium form other than paper, the clerk shall restrict access to the alternate storage medium so as to prevent unauthorized viewing of the sealed court record; and

File the order to seal and the written findings supporting the order to seal. Both shall be accessible to the parties.

Before a court file is made available for examination, the clerk shall not allow access to the sealed court records.

#### F. Procedures for Redacted Court Records

When a court record is redacted pursuant to a court order, the original court record shall be replaced in the public court file by the redacted copy. The redacted copy shall be provided by the moving party. The original unredacted court record shall be sealed.

### 1.10.4 Grounds and Procedure for Requesting the Unsealing of Sealed Records.

#### A. Court Orders

Sealed court records may be examined by the public only after the court records have been ordered unsealed pursuant to this section or after entry of a court order allowing access to a sealed court record.

#### B. Criminal Cases

A sealed court record in a criminal case shall be ordered unsealed only upon proof of compelling circumstances, unless otherwise provided by Tulalip ordinance or other applicable law, and only upon motion and written notice to the persons entitled to notice under subsection 1.10.3(A) of this rule except:

If a new criminal charge is filed and the existence of the conviction contained in a sealed record is an element of the new offense, or would constitute a statutory sentencing enhancement, or provide the basis for an exceptional sentence, upon application of the prosecuting attorney the court shall nullify the sealing order in the prior sealed case(s).

#### C. Civil Cases

A sealed court record in a civil case shall be ordered unsealed only upon stipulation of all parties or upon motion and written notice to all parties and proof that identified compelling circumstances for continued sealing no longer exist. If the person seeking access cannot locate a party to provide the notice required by this rule, after making a good faith reasonable effort to provide such notice as required by Tulalip ordinances and rules, an affidavit may be filed with the

court setting forth the efforts to locate the party and requesting waiver of the notice provision of this rule. The court may waive the notice requirement of this rule if the court finds that further good faith efforts to locate the party are not likely to be successful. In such cases where notice is not possible, the Court shall make an independent determination as to whether it is appropriate to unseal the requested file or documents.

1.10.5 Maintenance of Sealed Court Records

Sealed court records may be maintained in mediums other than paper.

1.10.6 Use of Sealed Records on Appeal

A court record or any portion of it, sealed in the trial court shall be made available to the appellate court in the event of an appeal. Court records sealed in the trial court shall be sealed from public access in the appellate court subject to further order of the appellate court.

1.10.7 References to Minor Children in Court Files or Court Records

In criminal proceedings, all court records and court files must refer to any minor children by initials and date of birth only, unless such references are sealed or redacted.

**1.11 EXAMINATION OF COURT FILES**

1.11.1 The following court files may not be viewed without a judge's authorization: youth in need of care; guardianship; paternity; adoption; domestic relations; workers compensation; gaming license appeal; all civil cases related to domestic violence or elder protection; or any other action that is confidential by law or in the discretion of the Court.

1.11.2 The following parts of court files may not be viewed without a judge's authorization: parts of files covered by HIPAA; medical information; financial information; portions of files that are sealed; or reports marked sealed or confidential.

1.11.3 Files may be viewed only in the Court Clerk's office under the supervision of a Court Clerk.

1.11.4 The following conditions must be met in order to view court files:

A request form must be filled out.

The viewer may not:

Remove anything from the court file;

Add anything to the court file;

Write in the court file;

Make any alteration to the court file whatsoever.

1.11.5 Expedited consideration shall be given to requests related to criminal prosecutions. Such requests may be made at the Court Clerk's office or at the ex parte calendar.

1.11.6 Copies may be made of parts of files allowed to be viewed. The Court Clerk's office may assess a

cost for the copies except for those copies made by court appointed counsel.

## **1.12 PROCEDURES FOR THE TULALIP BAR EXAM**

### **1.12.1 Application**

To apply for the bar exam, the applicant must complete the Tulalip Bar Exam Application Form and return the completed form to the Court Clerk.

### **1.12.2 Provisional License**

The Court may grant a 30-day provisional license to applicants who register to take the bar exam. It is the responsibility of the applicant to request the 30-day provisional license in conjunction with applying for the bar exam.

### **1.12.3 Fees**

Application fees shall be set by the Court.

### **1.12.4 Limitations**

An applicant may take the exam three times in a year from the date of the first attempt.

### **1.12.5 Oath**

The applicant shall read and agree to abide by the Tulalip Rules of Professional Responsibility and certify under penalty of perjury that the applicant has done so.

## **1.13 MEMBERSHIP IN THE TULALIP TRIBAL BAR**

The Court has the authority to assess fees for continuing membership in the Tulalip Tribal Bar.

## **1.14 WARRANT QUASHES**

### **1.14.1 Calendar**

The Court shall establish regularly scheduled calendars to address the quashing of warrants. Under extenuating circumstances, judges may hear warrant quashes at any other time with notice to the parties.

### **1.14.2 Notice**

The Court Clerk shall notify the prosecutor and defense counsel when a warrant quash is requested.

## **1.15 INFORMATION TECHNOLOGY EQUIPMENT IN THE COURTROOMS**

### **1.15.1 Responsibility of Parties**

All courtrooms are equipped with electrical outlets and guest wireless internet access. However, it is the responsibility of the parties to provide electrical cords, shadow boxes, overhead projectors, laptops, audio/visual equipment or other electronic equipment for use in the

courtroom during hearings. The party using private equipment shall provide mats or gaffer's tape for securing cables crossing floors to avoid creating tripping hazards in the courtrooms. Each party who wishes to use private equipment or equipment based on other technologies during court hearings shall obtain approval from the judge.

#### 1.15.2 Technical Coordination and Support

Once the request to use private equipment is approved, the party must contact the Court Specialist/TDS, 360-716-5119 or 360-716-5101, no later than 10 days prior to the court date. The Court Specialist/TDS will coordinate any necessary installation of equipment in the courtroom. The party must provide their own technical support for any private equipment during the hearing.

#### 1.15.3 Other Considerations

There are a limited number of electrical outlets available in each courtroom.

Additional telephone and/or network connections may not be available in the courtrooms.

Private equipment must not interfere with the line of sight of the judge or jury.

### **1.16 GUEST WIRELESS INTERNET ACCESS**

#### 1.16.1 Guest User Account

Free public wireless internet access is available throughout the courthouse. To obtain a guest user account and password, please contact the TDS Helpdesk at 360-716-5101 or the Court Specialist and provide the following information: name, company, contact number, and duration needed.

#### 1.16.2 Agreement of Terms of Use

Users should be aware that there are security, privacy and confidentiality risks inherent in wireless communications and associated technologies, and the Tulalip Tribes and its entities do not make any assurances or warranties relating to such risks.

#### 1.16.3 General Access Instructions and Guidelines

##### A. Power Supply

Electrical outlets may not be readily available, so make sure the laptop or wireless device has a fully charged battery. Should the use of an electrical cord be required, such electrical cords shall not be placed across public pathways or traffic areas. Should any electrical cord pose a safety hazard, court personnel will request its removal.

##### B. Connecting to Free Public Wireless Internet Access System

To connect to the free public wireless internet access system, connect the laptop or wireless device to SSID/Network Name – Tulalip Wi-Fi Guest.

Open a web browser on the laptop or wireless device. The browser will automatically be directed to a Login webpage. If the login webpage does not automatically appear, you may get a message saying "We recommend that you close this webpage and do not continue to this website."

Click “Continue to this website (not recommended)” and then enter the username and password provided in the login webpage. The laptop or wireless device should now have Internet access.

#### 1.16.4 Technical Support

Technical support will not be provided to any user trying to access the guest wireless internet system.

### **1.17 COURTROOM PHOTOGRAPHY AND RECORDING BY THE NEWS MEDIA**

#### 1.17.1 Permission

Video and audio recording and still photography by the news media are allowed in the courtroom during and between sessions, provided that:

Permission shall have first been expressly granted by the judge; and

Media personnel not, by their appearance or conduct, distract participants in the proceedings or otherwise adversely affect the dignity and fairness of the proceedings.

#### 1.17.2 Discretion

The judge shall exercise reasonable discretion in prescribing conditions and limitations with which media personnel shall comply.

#### 1.17.3 Guiding Principles

If the judge finds that sufficient reasons exist to warrant limitations on courtroom photography or recording, the judge shall make particularized findings on the records at the time of announcing the limitations. This may be done either orally or in a written order. In determining what, if any, limitations should be imposed, the judge shall be guided by the following principles:

Open access is presumed; limitations on access must be supported by reasons found by the judge to be sufficiently compelling to outweigh that presumption;

Prior to imposing any limitations on courtroom photography or recording, the judge shall, upon request, hear from any party and from any other person or entity deemed appropriate by the judge; and

Any reasons found sufficient to support limitations on courtroom photography or recording shall relate to the specific circumstances of the case before the court rather than reflecting merely generalized views.

## **Section 2 General Rules**

### **2.1 GUIDING PRINCIPLES FOR INTERPRETATION OF TULALIP LAW**

#### 2.1.1 Purpose

Tulalip Tribal Law provides that Tulalip Tribal Court shall apply the custom laws of the tribe. To this end, the Court shall incorporate Tulalip Vision and Values into its practices and decisions.

### 2.1.2 Tulalip Vision and Values

The Court shall consider the following Tulalip Vision and Values in all aspects of the judicial process:

#### A. Vision

We gathered at Tulalip are one people.

We govern ourselves.

We will arrive when each and every person has become most capable.

#### B. Values

We respect the community of our elders past and present and pay attention to their good words.

We uphold and follow the teachings that come from our ancestors.

It is valued work to uphold and serve our people.

We work hard and always try to do our best.

We show respect to every individual.

We strengthen our people so that they may walk a good walk.

We do not gossip, we speak the truth.

### 2.1.3 Incorporated Values

#### A. Courtroom Conduct

In all proceedings, should time allow, elders in the community shall be allowed to address the court about an ongoing proceeding and their beliefs or recommendations. The Court shall give it appropriate legal weight but shall allow the elder to speak.

#### B. Judicial Demeanor

In all proceedings, each party shall be given an opportunity to speak uninterrupted.

#### C. Alternative Sentencing

In all criminal proceedings, the court shall favor treatment for offenders and shall monitor the treatment to insure compliance.

#### D. Other Incorporated Values

The Court may incorporate the Vision and Values into judicial proceedings in other ways as it deems necessary.

## 2.2 INVOLUNTARY DISMISSAL

### 2.2.1 Effect

For failure of the plaintiff to prosecute or to comply with these rules or any order of the court, a defendant may move for dismissal of an action or of any claim against him or her.

### 2.2.2 Dismissal for Want of Action of Record on Motion of Party

Any civil action shall be dismissed, without prejudice, for lack of action of record whenever the plaintiff, counterclaimant, cross claimant, or third party plaintiff neglects to note the action for trial or hearing within 1 year after any issue of law or fact has been joined, unless the failure to bring the same on for trial or hearing was caused by the party who makes the motion to dismiss. Such motion to dismiss shall come on for hearing only after 10 days' notice to the adverse party. If the case is noted for trial before the hearing on the motion, the action shall not be dismissed.

### 2.2.3 Dismissal on Court Clerk's Motion

#### A. Notice

In all civil cases in which no action of record has occurred during the previous 12 months, the Court Clerk shall notify the parties or attorneys of record by mail that the Court will dismiss the case for lack of action of record unless, within 30 days following the mailing of such notice, a party or attorney takes action of record or files a status report with the Court including the reason for inactivity and projecting future activity and a case completion date. If the Court does not receive such a status report, it shall, on motion of the Court Clerk, dismiss the case without prejudice and without cost to any party.

#### B. Mailing Notice; Reinstatement

The Court Clerk shall mail notice of impending dismissal not later than 30 days after the case becomes eligible for dismissal because of inactivity. A party who does not receive the Court Clerk's notice shall be entitled to reinstatement of the case, without cost, upon motion brought within a reasonable time after learning of the dismissal.

#### C. Discovery in Process

The filing of a document indicating that discovery is occurring between the parties shall constitute action of record for purposes of this rule.

#### D. Other Grounds for Dismissal and Reinstatement

This rule is not a limitation upon any other power that the Court may have to dismiss or reinstate any action upon motion or otherwise.

## 2.3 **TIME ALLOWED FOR ARGUMENT ON MOTION**

Each party shall be allocated ten minutes for the purpose of arguing in support of the party's motion, unless otherwise ordered by the Court.

## 2.4 **DISCLOSURE OF WITNESSES**

### 2.4.1 Civil Cases

The names, addresses and telephone numbers of possible primary witnesses and a short summary of their expected testimony shall be disclosed by the parties by filing a statement setting forth that information and serving it on the other parties at a time set by the Court. The names of any possible rebuttal witnesses shall be disclosed in the same fashion after the primary witnesses have been disclosed at a time set by the Court. If disclosure is not made as set forth in this rule, the testimony of the witness not disclosed will not be allowed at trial.

#### 2.4.2 Criminal Cases

Disclosure of witnesses in criminal cases shall be governed by the Tulalip Law and Order Code.

### **2.5 MOTION FOR NEW TRIAL AND AMENDMENT OF JUDGMENTS**

#### 2.5.1 Grounds for New Trial

On the motion of the party aggrieved, a verdict may be vacated and a new trial granted to all or any of the parties, and on all issues, or on some of the issues when such issues are clearly and fairly separable and distinct, or any other decision or order may be vacated and reconsideration granted. Such motion may be granted for any one of the following causes materially affecting the substantial rights of such parties:

Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion, by which such party was prevented from having a fair trial.

Misconduct of prevailing party or jury; and whenever any one or more of the jurors shall have been induced to assent to any general or special verdict or to a finding on any question or questions submitted to the jury by the Court, other and different from his own conclusions, and arrived at by a resort to the determination of chance or lot, such misconduct may be proved by the affidavits of one or more of the jurors;

Accident which ordinary prudence could not have guarded against;

Damages so excessive or inadequate as unmistakably to indicate that the verdict must have been the result of passion or prejudice;

Error in the assessment of the amount of recovery whether too large or too small, when the action is upon a contract, or for the injury or detention of property;

That there is no evidence or reasonable inference from the evidence to justify the verdict or the decision, or that it is contrary to law;

Error in law occurring at the trial and objected to at the time by the party making the application;  
or

That substantial justice has not been done.

#### 2.5.2 Time for Motion; Contents of Motion

A motion for a new trial shall be filed not later than 10 days after the entry of the judgment, order, or other decision. The motion shall be noted at the time it is filed, to be heard or otherwise considered within 30 days after the entry of the judgment, order, or other decision, unless the Court directs otherwise. A motion for a new trial shall identify the specific reasons in fact and law

as to each ground on which the motion is based.

### 2.5.3 Time for Serving Affidavits

When a motion for new trial is based on affidavits, they shall be filed with the motion. The opposing party has 10 days after service to file opposing affidavits, but that period may be extended for up to 20 days, either by the Court for good cause or by the parties' written stipulation. The Court may permit reply affidavits.

### 2.5.4 On Initiative of Court

Not later than 10 days after entry of judgment, the Court on its own initiative may order a hearing on its proposed order for a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and opportunity to be heard, the Court may grant a timely motion for a new trial for a reason not stated in the motion. When granting a new trial on its own initiative or for a reason not stated in a motion, the Court shall specify the grounds in its order.

### 2.5.5 Hearing on Motion

When a motion for a new trial is filed, the judge by whom it is to be heard may on the judge's own motion or on application determine:

#### A. Time of Hearing

Whether the motion shall be heard before the entry of judgment;

#### B. Consolidation of Hearings

Whether the motion shall be heard before or at the same time as the presentation of the findings and conclusions and/or judgment, and the hearing on any other pending motion; and/or

#### C. Nature of Hearing

Whether the motion or motions and presentation shall be heard on oral argument or submitted on briefs, and if on briefs, shall fix the time within which the briefs shall be served and filed.

### 2.5.6 Statement of Reasons

In all cases where the Court grants a motion for a new trial, it shall, in the order granting the motion, state whether the order is based upon the record or upon facts and circumstances outside the record that cannot be made a part thereof. If the order is based upon the record, the Court shall give definite reasons of law and facts for its order. If the order is based upon matters outside the record, the Court shall state the facts and circumstances upon which it relied.

### 2.5.7 Reopening Judgment

On a motion for a new trial in an action tried without a jury, the Court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

### 2.5.8 Motion to Alter or Amend Judgment

A motion to alter or amend the judgment shall be filed not later than 10 days after entry of the judgment.

#### 2.5.9 Alternative Motions

Alternative motions for judgment as a matter of law and for a new trial may be made.

#### 2.5.10 Limit on Motions

If a motion for a new trial, or for judgment as a matter of law, is made and heard before the entry of the judgment, no further motion may be made without leave of the court first obtained for good cause shown.

#### 2.5.11 Challenge to Pro-Tem Ruling

Any motion challenging a ruling made by a pro-tem judge shall be decided by a sitting judge. The Chief Judge shall determine which sitting judge shall hear the motion.

### **2.6 DISPOSITION OF EXHIBITS AFTER APPEAL PERIOD HAS RUN**

#### 2.6.1 Civil Cases

No one shall withdraw an exhibit without a court order. After 30-day notice to all parties of record following final disposition, the Court may order the Court Clerk to destroy or dispose of physical evidence unless good cause is shown why it should be preserved.

#### 2.6.2 Criminal Cases

Non-contraband exhibits in the Court's custody, for which there is no dispute as to ownership, shall be returned to the party who produced that exhibit on motion of that party after expiration of the appeal period. In the event of a finding of guilty, for purpose of this rule, the appeal period shall begin on the day of sentencing. Exhibits not withdrawn shall be delivered by the Court to the applicable law enforcement agency for disposition as abandoned property; or if contraband, for destruction. No exhibit shall be released by the Court without its being receipted for by the receiving person.

### **2.7 WITHDRAWAL OF ATTORNEYS AS COUNSEL**

#### 2.7.1 Withdrawal by Attorney in a Civil Case

##### A. Withdrawal by Order

A court appointed attorney may not withdraw without an order of the court. The client of the withdrawing attorney must be given notice of the motion to withdraw and the date and place the motion will be heard.

##### B. Withdrawal by Notice

Except as provided in subsections (A) and (C) of this rule, an attorney may withdraw by notice in the manner provided in this rule.

##### C. Notice of Intent to Withdraw

The attorney shall file and serve a Notice of Intent to Withdraw on all other parties in the proceeding. The notice shall specify a date when the attorney intends to withdraw, which date shall be at least 10 days after the service of the Notice of Intent to Withdraw. The notice shall include a statement that the withdrawal shall be effective without order of court unless an objection to the withdrawal is served upon the withdrawing attorney prior to the date set forth in the notice. If notice is given before trial, the notice shall include the date set for trial. The notice shall include the names and last known addresses of the persons represented by the withdrawing attorney, unless disclosure of the address would violate the Washington State Rules of Professional Conduct, in which case the address may be omitted. If the address is omitted, the notice must contain a statement that after the attorney withdraws, and so long as the address of the withdrawing attorney's client remains undisclosed and no new attorney is substituted, the client may be served by leaving papers with the Court Clerk.

#### D. Service on Client

Prior to service on other parties, the Notice of Intent to Withdraw shall be served on the persons represented by the withdrawing attorney or sent to them by certified mail, postage prepaid, to their last known mailing addresses. Proof of service or mailing shall be filed, except that the address of the withdrawing attorney's client may be omitted under circumstances defined by subsection (c)(1) of this rule.

#### E. Withdrawal Without Objection

The withdrawal shall be effective, without order of court and without the service and filing of any additional papers, on the date designated in the Notice of Intent to Withdraw, unless a written objection to the withdrawal is served by a party on the withdrawing attorney prior to the date specified as the day of withdrawal in the Notice of Intent to Withdraw.

#### F. Effect of Objection

If a timely written objection is served, withdrawal may be obtained only by order of the court.

#### G. Withdrawal and Substitution

Except as provided in subsection (A) of this rule, an attorney may withdraw if a new attorney is substituted by filing and serving a Notice of Withdrawal and Substitution. The notice shall include a statement of the date on which the withdrawal and substitution are effective and shall include the name, address, and signature of the withdrawing attorney and the substituted attorney. If an attorney changes firms or offices, but another attorney in the previous firm or office will become counsel of record, a Notice of Withdrawal and Substitution shall nevertheless be filed.

#### H. Service

Service on an attorney who has appeared for a party in a civil proceeding shall be valid only until the attorney has withdrawn in the manner provided in this rule.

#### I. Circumstances of Denial of Withdrawal

Nothing in this rule defines the circumstances under which a withdrawal might be denied by the Court.

#### 2.7.2 Withdrawal by Attorney in a Criminal Case

Whenever a criminal cause has been set for trial, no lawyer shall be allowed to withdraw from said cause, except upon written consent of the court, for good and sufficient reason shown.

### 2.8 PROOF OF COMPLIANCE

#### 2.8.1 Requirement

The Court may require a party to file proof of compliance with any court order.

#### 2.8.2 Responsibility

The party is responsible for filing the proof of compliance with the Court.

#### 2.8.3 Electronic Transmissions

Electronic transmission of proof of compliance is not allowed.

### 2.9 RESULTS OF DRUG AND ALCOHOL TESTS

#### 2.9.1 Results

The results of tests to determine use of drugs or alcohol are presumptively valid.

#### 2.9.2 Burden of Proof

The burden to prove invalidity is on the contesting party.

#### 2.9.3 Lab Analysis

The party contesting the validity of the results of a test may request further laboratory analysis of the test. If the results of any subsequent tests corroborate the results of the first test, the costs of the subsequent tests shall be paid by the contesting party.

### 2.10 HEARINGS REGARDING IMPOUND FEES

Persons who have vehicles impounded by the Tulalip Police Department may request a hearing to determine if the impound was lawful by filing a petition requesting a hearing to determine if the impound was authorized by law. The Court will set a hearing to determine the lawfulness of the impound. The petition and order setting the hearing shall be served on the Tulalip Police Department.

## Section 3 Civil Rules

### 3.1 FILING FEES

#### 3.1.1 Petitions

A filing fee will be charged for each petition filed with the Court, unless otherwise specified by law.

### 3.1.2 Filing Fee Schedule

<b>Type of Petition</b>	<b>Filing Fee</b>
Adoption	\$0.00
Child Custody – Uncontested	\$100.00
Child Custody – Contested	\$200.00
Child Support	\$100.00
Court Bar Admission	\$100.00
Dependency (YINC)	\$0.00
Dissolution – Uncontested	\$100.00
Dissolution – Contested	\$200.00
Domestic Partnership	\$100.00
Elder Protection	\$0.00
Employment Appeal (if approved)	\$100.00
Exclusion Deferral	\$100.00
Gaming Appeal	\$100.00
General Civil	\$100.00
Guardianship	\$0.00
Harassment Protection Order	\$100.00
Marriage	\$100.00
Name Change	\$100.00
Paternity	\$100.00
Personal Injury	\$250.00
Protection Order	\$0.00
Unlawful Detainer	\$100.00
Workman’s Compensation	\$100.00
Zoning	\$100.00

## 3.2 PLEADINGS IN CIVIL CASES

### 3.2.1 Late Filing; Terms

Any material offered at a time later than required by rule may be stricken by the Court and not considered. If the Court decides to allow the late filing and consider the materials, the Court may continue the matter or impose other appropriate remedies including terms, or both.

### 3.2.2 Motion; Contents Of

A motion must contain the following:

Relief Requested. The specific relief the Court is requested to grant;

Statement of Grounds. A concise statement of the grounds upon which the motion is based;

Statement of Issues. A concise statement of the issue(s) of law upon which the Court is requested to rule;

Evidence Relied Upon. The evidence on which the motion or reply is based shall be identified with particularity.

Legal Authority. Any legal authority relied upon must be cited and copies of case law must be provided.

### 3.2.3 Evidence Supporting Motion

Motions must be supported by admissible evidence.

### 3.2.4 Scheduling Orders

#### A. Schedule

After the petition and response have been filed, a scheduling order shall be entered at the pre-trial hearing, which may include the following:

Motion deadlines;

Discovery methods allowed and deadlines;

Dispositive motion deadlines;

Witness list deadlines;

Exhibit list and exhibit pre-marking deadlines, if applicable;

Trial readiness hearing date; and vii) Any other matter the court deems necessary for scheduling.

#### B. Mediation

A scheduling order shall not be entered if the parties are ordered to mediation. If the parties mediate and come to an agreement, a court order may be entered. If the parties mediate and do not come to an agreement, a new pre-trial conference shall be held.

### 3.2.5 Settlement Dismissal Order

In civil cases where a settlement has been reached such that there will be no need for further litigation, the parties shall file a motion requesting that the case be removed from the active pending caseload of the Court. A hearing shall be set to address the settlement order.

## 3.3 SETTING HEARING DATE

Once the Declaration of Service has been filed with the Court, the Court Clerk shall set a hearing date and mail a Notice of Hearing to the parties.

### **3.4 TYPES OF EVIDENCE ALLOWED IN CIVIL MOTION HEARINGS**

Civil motions shall be argued only upon sworn affidavits, declarations under penalty of perjury, or stipulated facts. Live testimony shall only be permitted as allowed by the Court.

### **3.5 DEFAULT AND JUDGMENT**

#### **3.5.1 Entry of Default**

##### **A. Order of Default**

When there has not been an appearance by any non-moving party, the moving party shall seek entry of an Order and Judgment of Default from the Ex Parte Calendar. When there has been an appearance by any non-moving party, the motion for default shall be noted for hearing.

##### **B. Late Appearance or Answer**

When a non-moving party has appeared or answered before consideration of the Motion for Order of Default, the moving party shall notify the judge.

#### **3.5.2 Entry of Default Order and Judgment**

If the Court determines that testimony is required, the moving party shall schedule the matter.

#### **3.5.3 Setting Aside Default Orders and Judgments**

Orders to show cause to vacate default judgments shall be presented to the Ex Parte Calendar. A hearing shall be held to determine whether the order will be set aside or vacated and notice shall be given.

#### **3.5.4 Failure to Appear at Trial**

Where a party fails to appear for trial and the appearing party asks the Court to enter judgment in their favor, the Court may in its discretion, require testimony covering the facts alleged or relief requested before granting the request.

#### **3.5.5 Effect of Default**

When a party against whom a judgment is sought fails to appear, plead, or otherwise defend within the time allowed, and that is shown to the Court by a motion and affidavit or testimony, the Court may enter an order of a default and, without further notice to the party in default, enter a judgment granting the relief sought in the complaint.

### **3.6 SANCTIONS FOR FAILURE TO MAKE DISCOVERY AVAILABLE IN CIVIL CASES**

#### **3.6.1 Motion for Order Compelling Discovery**

If a deponent fails to answer a question or makes an evasive or incomplete answer, fails to designate someone to answer interrogatories or be deposed on behalf of a corporation, or other business entity, or fails to allow inspection, any party may move for an order compelling the failed act. When taking a deposition on oral examination, the proponent of the question

may complete or adjourn the examination before they apply for an order.

### 3.6.2 Award of Expenses of Motion to Compel

If the motion is granted, the Court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney fees, unless the Court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust. If the motion is granted in part, and denied in part, the Court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

### 3.6.3 Sanctions

If a party, officer, director or managing agent of a party or a person designated as the person to testify or be deposed fails to permit discovery, the Court shall have the discretion to make orders in regard to the failure to comply. In lieu of any orders or in addition, the Court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney fees, caused by the failure, unless the Court finds that the failure was substantially justified or that other circumstance make an award of expenses unjust.

### 3.6.4 Failure of a Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Production or Inspection

If a party, or an officer, director, or managing agent of a party or a person designated to testify on behalf of a corporation or like entity, fails to:

Appear before the officer who is to take his or her deposition, after being served with a proper notice;

Serve answers or objections to interrogatories after proper service of the interrogatories; or

Serve a written response to a request for production of documents for inspection, after proper service of a request, the Court may make such orders in regard to the failure as are just.

In lieu of any order or in addition, the Court shall require the party failing to act or the attorney advising them to pay the reasonable expenses, including attorney fees, caused by the failure, unless the Court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust. The failure to act described in this rule may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order. For purposes of this rule, an evasive or misleading answer is to be treated as a failure to answer.

## 3.7 **MEDIATION FOR CIVIL CASES**

### 3.7.1 Purpose

The purpose of mandatory mediation of civil actions is to provide a simplified and economical procedure for obtaining the prompt and equitable resolution of disputes. Mediation hearings should be informal and expeditious.

### 3.7.2 Matter Subject to Mediation

Mediation is mandatory for all tort claims.

It is the at the Court's discretion to order mediation for matters involving parenting plans and modification of parenting plans, third party custody, dissolutions, elder protection, and guardianship.

Mediation is not required if there is a history of domestic violence between the parties.

### 3.7.3 Attorney Involvement

No attorneys will be permitted during mediation for dissolution or custody issues.

Attorneys may be permitted during mediation for tort claims or any other civil case at the discretion of the Court.

## 3.8 JAIL TRANSPORT

### 3.8.1 Exclusions

If the Respondent is in the Snohomish County Jail or the Marysville Detention Center when served with a Petition for Exclusion, they may be transported to court for the hearing. The Petitioner shall notify the Respondent of the process to be brought to court for the hearing. The Respondent or his or her attorney shall make the request to the Court in writing at least one week prior to the hearing.

### 3.8.2 Jail Transport for Youth in Need of Care Cases

A parent to a Youth in Need of Care case may be transported to court for the Adjudicatory Hearing and for the Permanent Plan hearing. The parent or parent's attorney shall make the request to the Court in writing at least one week prior to the hearing.

### 3.8.3 Other Civil Cases

Upon written request by the Respondent, the Court may order transport to court of the Respondent in other civil cases.

## 3.9 GUARDIAN AD LITEMS

### 3.9.1 Purpose

The purpose of these rules is to establish a minimum set of standards applicable to all court cases when the Court appoints a guardian ad litem or any person to represent the best interest of a child, an alleged incapacitated person, or an adjudicated incapacitated person pursuant to tribal law.

### 3.9.2 Definition

Unless otherwise defined by ordinance or other law, a guardian ad litem shall mean any person or program appointed pursuant to tribal law in an action to represent the best interest of a child, an alleged incapacitated person, or an adjudicated incapacitated person. The guardian ad litem is not a court appointed attorney.

### 3.9.3 General Responsibilities of a Guardian ad Litem

Consistent with the responsibilities set forth by tribal law and rules of court, in every case in which a guardian ad litem is appointed, the guardian ad litem shall perform the responsibilities set forth below.

#### A. Represent Best Interests

A guardian ad litem shall represent the best interests of the person for whom he or she is appointed. Representation of best interests may be inconsistent with the wishes of the person whose interest the guardian ad litem represents. The guardian ad litem shall not advocate on behalf of or advise any party so as to create in the mind of a reasonable person the appearance of representing that party as an attorney.

#### B. Maintain Independence

A guardian ad litem shall maintain independence, objectivity and the appearance of fairness in dealings with parties and professionals, both in and out of the courtroom.

#### C. Professional Conduct

A guardian ad litem shall maintain the ethical principles established by the Court.

#### D. Avoid Conflicts of Interests

A guardian ad litem shall avoid any actual or apparent conflict of interest or impropriety in the performance of the guardian ad litem responsibilities. A guardian ad litem shall avoid self-dealing or association from which a guardian ad litem might directly or indirectly benefit, other than for compensation as guardian ad litem. A guardian ad litem shall take action immediately to resolve any potential conflict or impropriety. A guardian ad litem shall advise the Court and the parties of action taken, resign from the matter, or seek court direction as may be necessary to resolve the conflict or impropriety. A guardian ad litem shall not accept or maintain appointment if the performance of the duties of guardian ad litem may be materially limited by the guardian ad litem's responsibilities to another client or a third person, or by the guardian ad litem's own interests.

#### E. Treat Parties with Respect

A guardian ad litem is an officer of the court and as such shall at all times treat the parties with respect, courtesy, fairness and good faith.

#### F. Become Informed About Case

A guardian ad litem shall make reasonable efforts to become informed about the facts of the case and to contact all parties. A guardian ad litem shall examine material, information and sources of information, taking into account the positions of the parties.

#### G. Timely Inform the Court of Relevant Information

A guardian ad litem shall file a written report with the Court and the parties as required by law or by the court order, no later than 10 days prior to a hearing for which a report is required. The report shall be accompanied by a written list of documents considered or called to the

attention of the guardian ad litem and persons interviewed during the course of the investigation.

H. Limit Duties to Those Ordered by Court

A guardian ad litem shall comply with the Court's instructions as set out in the order appointing a guardian ad litem, and shall not provide or require services beyond the scope of the Court's instruction unless by motion and on adequate notice to the parties, a guardian ad litem obtains additional instruction, clarification or expansion of the scope of such appointment.

I. Appear at Hearings

The guardian ad litem shall be given notice of all hearings and proceedings. A guardian ad litem shall appear at any hearing for which the duties of a guardian ad litem or any issues substantially within a guardian ad litem's duties and scope of appointment are to be addressed. In Elder and Vulnerable Adult Protection proceedings, the guardian ad litem shall appear at all hearings unless excused by court order.

J. Maintain Privacy of Parties

As an officer of the court, a guardian ad litem shall make no disclosures about the case or the investigation except in reports to the Court or as necessary to perform the duties of a guardian ad litem. A guardian ad litem shall maintain the confidential nature of identifiers or addresses where there are allegations of domestic violence or risk to a party's or child's safety. The guardian ad litem may recommend that the Court seal the report or a portion of the report of the guardian ad litem to preserve the privacy, confidentiality, or safety of the parties or the person for whom the guardian ad litem was appointed.

3.9.4 Qualifications

The Court shall establish qualifications for a guardian ad litem.

A. Credentials

A current valid license to practice law in the state of Washington or at the Tulalip Tribes; or

A current valid license to practice as a mental health therapist, psychologist or psychiatrist in the state of Washington; or

A Certification of Qualification by the Director of the local CASA program; or iv) Waiver of the licensure or qualification requirement by the Chief Judge.

B. Core Training

All guardian ad litem shall receive core training before accepting appointment by the Court. Attendance at a guardian ad litem training with a curriculum of at least 16 hours that has been approved by the Chief Judge satisfies this requirement. The curriculum must include specified learning outcomes and activities designed to meet these outcomes, and must cover domestic relations, dynamics of domestic abuse and its effect on children, dynamics of divorce and its effect on children, child development, the effects of abuse, neglect and trauma on children, substance abuse, legal issues and processes, the duties and obligations of the Guardian as an

agent of the court and interviewing techniques. For a guardian ad litem acting under the auspices of the CASA program, successful completion of CASA training satisfies this requirement.

### 3.9.5 Cultural Competency

The guardian ad litem shall establish and maintain a cultural competence of the community as required by the Court.

### 3.9.6 Guardian ad Litem Reports

#### A. Types of Reports

All guardian ad litem shall prepare two reports for the Court: 1) a comprehensive sealed report and 2) a redacted report that is available to all parties. The comprehensive report may be viewed by an attorney of record upon a properly filed motion and may be subject to restrictions within the discretion of the Court.

#### B. Content of Reports

See forms for specific requirements.

## 3.10 CHILD SUPPORT

Once a petition for a parenting plan and child support has been filed with the Court, the parties have three days to contact the Tulalip Child Support Program (TCSP) to request child support services or provide updated information for enforcement of a child support order. TCSP shall prepare and maintain a referral form for the Court.

## 3.11 PARENTING SEMINARS; MANDATORY ATTENDANCE

3.11.1 In all cases involving child custody pursuant to tribal law, both parents, and such non-parent parties as the Court may direct, shall participate in, and successfully complete, an approved parenting seminar within 60 days after service of a petition, or an initiating motion, on the responding party. Standards for an approved parenting seminar shall be established by Administrative Order of this Court. Successful completion shall be evidenced by a certificate of attendance.

### 3.11.2 Special Considerations/Waiver

In no case shall opposing parties be required to attend a seminar together.

Upon a showing of domestic violence or abuse which would not require mutual decision-making pursuant to tribal law, or that a parent's attendance at a seminar is not in the children's best interest, the Court shall either:

- i) Waive the requirement of completion of the seminar; or
- ii) Provide an alternative voluntary parenting seminar for battered spouses.

The Court may waive the seminar requirement for one or both parents in any case for good cause shown.

3.11.3 Failure to Comply

Delay, refusal or default by one parent does not excuse untimely compliance by the other parent. However, a parent who fails to complete the parenting seminar, shall be precluded from confirming the case for trial or presenting any final order affecting the parenting/residential plan, and may be precluded from seeking affirmative relief in this or subsequent proceedings in this file until the parenting seminar has been successfully completed. Refusal or delay by either parent may constitute contempt of court and result in sanctions imposed by the Court, or may result in the imposition of monetary terms, default and/or striking of pleadings.

**3.12 NAME CHANGE FOR MINORS**

3.12.1 An applicant who applies to the Court for a change of name must meet the following requirements:

Birth Certificate A certified copy of any minor applicant's birth certificate or tribal identification card shall be presented with the Petition for Name Change.

Parental Consent

All applicants under eighteen (18) years of age shall be represented by a parent or legal guardian, and parent or guardian must approve the change of name either by personal appearance or by verified affidavit. In the absence of consent from one of the parents, the Court may grant the petition if such action would be in the best interests of the child and the non-consenting parent has received notice of the hearing on the petition.

**3.13 APPEARANCE BY TELEPHONE IN CIVIL CASES**

3.13.1 In some situations, a party may be permitted to participate in a hearing by telephone rather than by personally appearing in court based on the following criteria:

the party lives out of state;

the party has a medical condition preventing travel;

the party is in treatment thus is unable to be present; or

any other reason as deemed appropriate by the Court.

3.13.2 A party requesting to participate by telephone should contact the Court to make the request. The opposing party may object to such appearance. The requesting party shall provide a number where the Court Clerk can call when the Court is ready to hear the case. Those participating by telephone will not receive priority; therefore the requesting party shall be available at the stated number for at least two hours past the set hearing time.

**Section 4 Criminal Rules**

**4.1 CRIMINAL CONFLICT COUNSEL**

In the event the University of Washington Tribal Public Defense Clinic, which acts as the

public defender in Tulalip Tribal Court, has a conflict of interest in representing a defendant in Tulalip Tribal Court, conflict counsel may be appointed by the Court, if the defendant qualifies for such appointment, on such terms as the Court sets.

#### **4.2 JURY INFORMATION FORMS**

Jury information forms shall be provided to the attorneys or pro se defendants prior to voir dire.

#### **4.3 JURY QUESTIONNAIRES**

The Court may use jury questionnaires when appropriate. The parties may suggest questions for the jury questionnaires.

#### **4.3 INSTRUCTIONS TO THE JURY FOR CRIMINAL CASES**

##### **4.3.1 Proposed Instructions**

Unless otherwise ordered by the trial judge, proposed instructions shall be submitted by the parties two days prior to trial. Proposed instructions upon questions of law developed by the evidence, which could not reasonably have been anticipated, may be submitted at any time before the Court instructs the jury.

##### **4.3.2 Submission**

All instructions filed by a party shall be identified as the party's proposed instructions.

Cited instructions shall be numbered and uncited instructions shall not be numbered.

Parties shall file their proposed instructions as follows:

- i) Original cited copy file with the Court; ii) One cited copy and one uncited copy to the Judge; and iii) One cited copy to opposing counsel.

##### **4.3.3 Form**

Each proposed instruction shall be typewritten or printed on a separate sheet of letter size paper.

##### **4.3.4 Disregarding Requests**

The Court may disregard any proposed instruction not submitted in accordance with this rule.

##### **4.3.5 Written Questions from the Jury during Deliberations**

The jury shall be instructed that any question it wishes to ask the Court about the instructions or evidence should be signed, dated, and submitted in writing to the Court Clerk or bailiff without any indication of the status of the jury's deliberations. The Court shall notify the parties of the contents of the questions and provide them an opportunity to comment upon an appropriate response. Written questions from the jury, the Court's response and any objections thereto shall be made a part of the record. The Court shall respond to all questions from a deliberating jury in open court or in writing. In its discretion, the Court may grant a

jury's request to rehear or replay evidence, but should do so in a way that is least likely to be seen as a comment on the evidence, in a way that is not unfairly prejudicial and in a way that minimizes the possibility that jurors will give undue weight to such evidence. Any additional instruction upon any point of law shall be given in writing.

#### **4.4 APPEARANCE BY TELEPHONE IN CRIMINAL CASES**

When counsel is unable to be physically present at court because of other duties, illness, or other reasonable circumstances, counsel may appear at hearings by telephone with the permission of the Court, notice to the Court Clerks, and approval by the defendant.

#### **4.5 VIDEO CONFERENCING (Reserved)**

#### **4.6 PARTICIPATION IN SNOHOMISH COUNTY COMMUNITY CORRECTIONS PROGRAMS**

Defendants and offenders may participate in the Community Corrections programs provided by Snohomish County Corrections if ordered to do so by the Court, pursuant to the Pre-trial Release or Sentencing provisions of Tulalip Law and Order Code.

### **Section 5 Traffic Infraction Rules**

#### **5.1 CALL OF CALENDARS**

At the start of each session, the judge shall read the names of Respondents scheduled for hearing or trial to be read. When a Respondent fails to appear at the call of the calendar, the Court shall issue a finding that the infraction was committed, and enter a default judgment in the amount of the penalty prescribed, plus penalties for failure to pay the amount of the penalty.

#### **5.2 DISCOVERY**

Discovery in traffic infraction cases shall consist of copies of material filed with the Court. Respondents may receive copies of materials in the court file upon filing a written request therefor and paying the cost for copying in advance. The Court Clerk shall determine the copying fee.

#### **5.3 SUBPOENAS**

Respondents may request subpoenas for any witnesses they seek to have attend a hearing or trial. The Respondent is responsible for service of any subpoenas issued by the Court.

#### **5.4 EVIDENCE REQUIREMENTS**

The Petitioner, the Tulalip Tribes, by and through their police department, the Tulalip Tribal Police, shall furnish evidence to support the traffic infraction alleged by: sworn narrative on the back of the ticket that is filed with the Court; live testimony of the police officer issuing the infraction; or sworn police report. If such evidence is not furnished, the infraction will be dismissed.

#### **5.5 SPEED MEASURING DEVICE EXPERTS**

The Tulalip Tribes are not required to furnish speed measuring device experts for trials or hearings. If the Respondent desires such testimony, the Respondent is responsible for subpoenaing and paying for such expert.

## **5.6 PROCEDURE FOR NOTICES OF TRAFFIC INFRACTION**

### **5.6.1 Issuance of Notice of Infraction**

Notice of a traffic infraction may be issued by a police officer in the field or may be filed with the Clerk of Court by a police officer or a prosecuting attorney.

### **5.6.2 Contents of Notice of Infraction and Procedure**

The notice of infraction shall set forth the basis for jurisdiction and shall include a sworn statement of the officer initiating the infraction setting forth the facts of the infraction attached to the notice of infraction.

If a notice of infraction is filed with the Court Clerk, the Court will mail a copy of the notice to the Respondent.

The notice of infraction shall notify the Respondent to respond to the notice within fifteen days of the date of issuance or the date of mailing by paying the fine listed on the notice of infraction or returning a copy of the citation to the Court indicating that the Respondent requests a mitigation hearing or a contested hearing.

If the Respondent does not respond within fifteen days a default judgment will be issued which will be sent for collection.

### **5.6.3 Hearing Requested by Respondent**

If a hearing is requested by Respondent, the Court Clerk shall send a notice of hearing to Respondent setting the date and time of hearing. There is no right to jury trial in traffic cases.

### **5.6.4 Default Judgment**

If the Respondent does not appear at the hearing, a default judgment will issue against the Respondent, which will be sent for collection. A copy of the judgment shall be sent by the Court Clerk to the Respondent.

## **5.7 HEARINGS**

### **5.7.1 Counsel**

A person who has received a notice of infraction may be represented by counsel at an infraction hearing. There is no right to counsel; accordingly, counsel must be retained at the party's own expense. The Tribes may be represented by a representative from the Office of the Reservation Attorney;

### **5.7.2 Contested Hearing**

A contested hearing shall be before a judge; a jury trial is not permitted. The burden of proof is upon the Tulalip Tribes to establish the commission of an infraction by a preponderance of

the evidence. The Court may consider the notice of traffic infraction and any other written report made under oath submitted by the officer who issued the notice or whose written statement or police report establishes the factual basis for the infraction issued to the responding party. The officer need not appear in person. The responding party may present evidence and examine witnesses present in court. At the conclusion of a contested hearing, the Court shall determine whether there was jurisdiction, and whether the infraction was committed. Where the Court finds that it has not been established that the infraction was committed, an order dismissing the notice of infraction shall be entered in the Court's records. Where an infraction is found to have been committed, an appropriate order and/or judgment shall enter in the Court's records.

#### 5.7.3 Mitigating Circumstances

A hearing held for the purpose of allowing a person to explain mitigating circumstances surrounding the commission of an infraction shall be an informal proceeding. The person may not subpoena witnesses. The determination that an infraction has not been committed may not be contested at a hearing held for the purpose of explaining mitigating circumstances. After the Court has heard the explanation of the circumstances surrounding the commission of the infraction, the Court shall enter an order and /or a judgment. There shall be no appeal from the Court's ruling.

#### 5.7.4 Deferral of Judgment

In any hearing held under this rule, the Court may defer entry of an order or judgment for up to one year, on conditions set by the Court. An order deferring an infraction may include a fine or other nonmonetary sanctions. If, at the end of the deferral period the party has satisfied all of the Court's conditions and has not committed any new traffic violations, the Court may dismiss the infraction. A person may not receive more than one deferral within a seven year period.

### **5.8 JUDGMENTS ON TRAFFIC INFRACTIONS**

#### 5.8.1 Civil Actions

Traffic infractions are civil actions. Accordingly, any hearing relating to a traffic infraction is civil in nature.

#### 5.8.2 Penalty

- A. A person found to have committed a traffic infraction shall be assessed a monetary penalty in accordance with the Tulalip Law and Order Code or any fine schedule adopted by the Tulalip Tribal Court.
- B. The Court may, in its discretion, waive, reduce or suspend the monetary penalty prescribed for the infraction. The Court may, at an hourly rate not less than the minimum wage, order the completion of community service hours in lieu of a fine payment.



# **Section 6 Tulalip Tribes Domestic Violence Court Rules**

## **6.1 PURPOSE**

Domestic violence offends the traditional Tulalip tribal values of honoring the family and respecting all members of the community, and it is contrary to the best interests of the family, the Tribes and the community. The purpose of the Tulalip Tribes Domestic Violence Court is to promote important traditional Tulalip tribal values by protecting victims of domestic violence and holding perpetrators accountable while ensuring that all persons accused of domestic violence crimes are provided equal protection and due process of law.

## **6.2 CREATION**

The Tulalip Tribal Court shall exercise the jurisdiction conferred by Chapter 4.25 of the Tulalip Tribal Code and while sitting in the exercise of such jurisdiction shall be known and referred to as the "Tulalip Domestic Violence Court."

## **6.3 DOCKET**

### **6.3.1 Separate Docket**

A separate docket shall be maintained for the Tulalip Domestic Violence Court. Cases assigned to the Tulalip Domestic Violence Court will be heard on Mondays, or as otherwise designated by the Tulalip Tribal Court calendar.

### **6.3.2 Types of Cases Assigned**

All criminal domestic violence cases (all criminal cases with the designation "DV") shall be assigned to the Tulalip Domestic Violence Court docket. Additionally, any civil protection order case involving the issuance, modification or enforcement of a permanent or temporary protection order (any civil case with the designation "RO") may be assigned to the Tulalip Domestic Violence docket at the judge's sole discretion.

## **6.4 RIGHTS OF DEFENDANT**

### **6.4.1 Defendant Rights**

It is the policy of Tulalip Domestic Violence Court to provide all defendants the full protection of the laws. Therefore, in all proceedings in which the Tulalip Domestic Violence Court is exercising its Special Domestic Violence Criminal Jurisdiction pursuant to TTC Chapter 4.25, all defendant rights afforded by TTC §4.25.040(2) shall apply. These rights include the following:

- A. To be free from excessive bail, excessive fines and cruel and unusual punishment;
- B. To defend in person or by counsel;

- C. To be informed of the nature of the charges pending against him or her and to have a copy of those charges;
- D. To have publicly available, the criminal laws, rules of evidence, and rules of criminal procedure of the Tribes, prior to being charged;
- E. To confront and cross-examine all prosecution or hostile witnesses;
- F. To compel by subpoena:
  - i. The attendance of any witness necessary to defend against the charges; and
  - ii. The production of any books, records, documents, or other things necessary to defend against the charges;
- G. To have a speedy and public trial by Judge or a jury, unless the right to a speedy trial is waived or the right to a jury trial is waived by the defendant;
- H. To have a judge presiding over the criminal proceeding:
  - i. Who has sufficient legal training to preside over criminal proceedings; and
  - ii. Who is licensed to practice law in any jurisdiction in the United States;
  - iii. Judge(s) meeting these qualifications can be designated to preside in the Special Domestic Violence Court. The Chief Judge shall designate and assign Judges to the Special Domestic Violence Court every January by standing order and the standing order and qualifications of the Judge will become part of the trial record.
- I. To appeal any final decision of the Tulalip Domestic Violence Court to the Tribal Court of Appeals;
- J. To be tried only once by the Tulalip Domestic Violence Court for the same offense;
- K. Not to be required to testify, and no inference may be drawn from a defendant's exercise of the right not to testify;
- L. To have a record of the criminal proceeding, including an audio or other recording, created and maintained;
- M. To petition for a writ of habeas corpus under Tulalip Tribal law and federal law; and
- N. All other rights whose protection is necessary under the Constitution of the United States including the right to be secure in their persons, houses, papers and effects against unreasonable search and seizures and not to be subjected to a warrant unless it was issued upon probable cause under oath or affirmation and particularly describing the place to be searched and the person or thing to be seized, the right to due process and equal protection of the law and rights in order for Congress to recognize and affirm the inherent power of the participating tribe to exercise Special Domestic Violence Criminal Jurisdiction over the defendant.

#### 6.4.2 Right to Counsel

All defendants, regardless of the length of the potential sentence for the crime being charged, have the right to effective assistance of counsel meeting the requirements of TTC §2.25.070(3)(a) while the Tulalip Domestic Violence Court is exercising its Special Domestic Violence Criminal Jurisdiction conferred by Chapter 4.25 of the Tulalip Tribal Code. An indigent defendant shall be provided the assistance of a defense attorney meeting the requirements of TTC §2.25.070(3)(a) at the expense of the tribal government. Defense attorneys assigned to an indigent defendant will submit their credentials to the court demonstrating they meet the requirements of federal law and such credentials and bar licensing will become part of the trial record.

### **6.4.3 Right to Jury Trial**

A defendant charged under TTC Chapter 4.25 has a right to a trial by jury of six fair and impartial jurors drawn from the community according to TTC §2.05.110. A defendant may waive the right to a jury trial in a written, voluntary statement to the Court. All jury verdicts must be unanimous.

## **6.5 SUPPLEMENTAL PROCEDURE**

### **6.5.1 Pre-Trial/Trial Procedure—Additional Requirement**

- A. The initial appearance and/or arraignment will occur as currently outlined in the Tulalip Tribes criminal procedure rules. A Defendant charged with a domestic violence crime shall also be informed of his/her right to a federal writ of habeas corpus and or a stay under the federal Violence Against Women Act (VAWA). This notification will be contained in the Advisement of Rights Form signed by the Defendant. After the initial appearance and/or arraignment cases will be assigned to the Tulalip Domestic Violence Court calendar.
- B. All other generally applicable Civil and Criminal Rules of Procedure apply to these proceedings.

### **6.5.2 Post-Trial Procedure**

Post-trial procedure is meant to describe the general operation of the Domestic Violence Court and does not include procedures relating to appeals to the Tulalip Tribes Court of Appeals. All appeals will be handled as provided by the rules of appellate procedure.

### **6.5.3 Sentencing and Probation**

- A. The Tulalip Tribes Domestic Violence Court finds that each person who pleads guilty or is found guilty of a crime of domestic violence should be on monitored probation which includes participation in a certified Domestic Violence Batterer's Re-education program.
- B. The Domestic Violence Court will hold a weekly Monday calendar to monitor a participant's progress in their treatment program. This monitoring includes receiving input from treatment providers and probation on the successful participation with the treatment program requirements.

- C. The Judge shall review the client's progress at each review hearing and will impose short term or long term sanctions for noncompliance to encourage participation and completion of appropriate treatment modalities.

# **Tulalip Foundation Request for Applications for Indigent Criminal Conflict Attorney Services**

REQUEST FOR APPLICATIONS: Three to four Grant Funded Indigent Conflict Criminal Defense Contracts will be awarded.

APPLICATION DUE DATE: December 2, 2010

## BACKGROUND INFORMATION:

The Tulalip Tribes Foundation, a Tribal Non-profit agency, requests proposals for the provision of criminal conflict counsel services.

The Tulalip Tribes has a nationally recognized and award winning Tribal court system that is known for its competence and its innovative approach to the legal needs of its community. As the court has grown, so too has the need for conflict criminal defense counsel for indigent clients. Currently, the University of Washington, Tribal Defense Clinic is the primary provider of legal defense. Due to conflict issues, the Clinic cannot represent all eligible defendants. Therefore conflict counsel is regularly appointed.

Period of Performance: January 3, 2011 to December 31, 2011.

## QUALIFICATIONS AND WORK PERFORMANCE EXPECTATIONS:

Those who are qualified to submit proposals are:

1. Members in good standing of the Tulalip Tribal Bar, or
2. Members in good standing of the Washington State Bar Association
3. Those who demonstrate a willingness to take the Tulalip Bar within one month of receiving notice of intent to contract with the attorney pursuant to this request (passage of the Tulalip Bar test will be required before the contract will be awarded), and
4. Five years experience in criminal law and trial practice is preferred; however, a minimum of two years is expected.

Individuals providing criminal defense work will be responsible for providing competent representation. Such will include:

1. A comprehensive understanding of the Tulalip Code and case law, and other applicable federal and state law as it relates to criminal practice in the Tulalip Tribal Court.
2. Appropriate initial client contact.

3. Timely and ongoing factual and legal analysis of the case, development of case strategy, and review of the case prior to the scheduled court date.
4. Effective ongoing contact and communication with the client.
5. Appropriate contact with other parties in the Tulalip criminal justice system, to include the prosecution, probation, treatment providers, etc.
6. Conducting plea negotiation on behalf of the client.
7. Representation of the client at a variety of hearings, which could include first appearance, arraignment, bail hearings, pre-trial, trial readiness and motion hearings, bench and jury trials, and sentencing.
8. Arrival at court 15 minutes prior to the start of all scheduled calendars.
9. Representation of the client through case disposition, except as otherwise determined by the court.
10. Submission of timely invoices to the Court Director, Wendy Church.
11. Ensuring that clients complete a survey at the end of representation.
12. Provision of case statistics and other data necessary for grant reporting on a quarterly basis in an approved format. Such will not include confidential information or information covered by the attorney client privilege.
13. Provision of any other appropriate service necessary for competent criminal defense representation.

Successful applicants will be required to enter into a contract with the Tulalip Foundation and will be independent contractors, not employees of the Tribes. As such, they will be required to maintain their own malpractice insurance. In addition, successful bidders will be required to adhere to the Washington Rules of Professional Responsibility, any Tulalip Court Code of Ethics; Ordinance 49, Section 1.8 and other applicable laws governing representation.

#### SUBMISSION OF APPLICATIONS:

Please submit six (6) copies of the proposal. One (1) copy must have original signatures. The application, whether hand or mail delivered, must be received by Wendy Church, Court Director, no later than 4:00 p.m. on December 3, 2010.

#### NO OBLIGATION TO CONTRACT

The Request for Applications does not obligate Tulalip Foundation to contract for services specified herein. The Tulalip Foundation also reserves the right to cancel or reissue the Request for Applications in whole or in part prior to execution of a contract.

APPLICATION CONTENTS: Interested individuals should provide a resume, references, and a detailed written description of work experience. In light of the qualifications described above. Such should include:

1. written description of the applicant's experience and knowledge in the following areas:
  - a. Tribal courts
  - b. Tribal communities
  - c. Criminal law,
  - d. Tribal and related federal law
  - e. Criminal defense.
2. Specify the organization structure of the law firm or solo practitioner's law office, including staff and resources.
3. Provide a detailed resume for the attorney addressing experience and qualifications related to this proposal.
4. Provide three references. Inclusion of the reference in your proposal is also an agreement that the Tulalip Foundation may contact the named reference. The Foundation may contact any companies or individuals, whether offered as references or otherwise, to obtain information that will assist the Foundation in evaluating the Application. The Foundation retains the right to use such information to make selection decisions. Submittal of a proposal is agreement that the Foundation may contact and utilize such information.

#### EVALUATION AND AWARD

The Foundation reserves the right to award the contracts to the applications that best meet the needs and interest of the Foundation. Evaluation of responsive proposals will be in accordance with the requirements stated herein and any addenda issued. Selection will be based upon the qualifications of the proposer and the proposal(s) that will suit the needs and interests of the Foundation. Indian Preference applies to the award of this contract in accordance with applicable regulations and policies.

#### COMPENSATION

Required Information – Your proposal must provide the following:

- Agreement to the hourly rate of \$75 per hour with a maximum of \$1,000 per case.
- Request for Application Schedule:
- Issue Request: November 2, 2010
- Deadline for Submittal of Proposals: Thursday, December 2, 2010

- Interview for Qualifying Candidate if necessary: Friday, December 10, 2010, between 1 and 5 pm.
- Contract Start Date: Monday, January 3, 2011

All successful applicants will be required to attend an all day training on January 21, 2011. CLE credits will be sought for such training and the training will include one hour of Ethics.

These contracts will replace the existing process for the appointment of conflict counsel services at the Tulalip Tribes. However, it is anticipated that on occasion additional appointment of conflict counsel will be necessary, which will follow the existing rotation assignment procedures.

# Tulalip Consultant Contract

6406 Marine Drive. - Tulalip, WA 98271  
Phone: 360 / 716-4000



## **FOR INDIGENT CONFLICT DEFENSE LEGAL SERVICES**

The Tulalip Foundation (hereafter "Foundation" desires to contract with independent attorneys to provide conflict criminal defense counsel services in the Tulalip Tribal Court; and \_\_\_\_\_, an attorney licensed to practice law in the State of Washington and a member of the Tulalip Bar, and as an independent contractor, is interested in contracting with the Foundation for the provision of conflict criminal defense services (hereafter "Attorney"). In consideration for the mutual benefits to be derived and the promises and conditions contained herein the above parties CONTRACT AND AGREE as follows:

### **I. PURPOSE OF AGREEMENT**

The purpose of the Contract is to provide criminal defense services to indigent defendants charged with offenses or at risk of a loss of liberty or liberty interest in the courts of the Tulalip Tribes. The Foundation has received a Grant from the Bureau of Justice Assistance for Tribal Civil and Criminal Legal Assistance Grant pursuant to BJA-2010-2676 and 78. THIS IS A GRANT FUNDED CONTRACT AND CONTINUED FUNDING IS DEPENDANT ON CONTINUED RECEIPT OF GRANT FUNDING.

### **II. TERM**

The term of this Contract shall be 12 months from January 3, 2011 and this Contract shall terminate by its own terms on December 31, 2011. Payments made or work completed after the termination of the term of this Contract shall not cause this Contract to be renewed. Renewal shall be at the absolute discretion of each of the parties.

### **III. INDEPENDENT CONTRACTOR STATUS**

The express intention of the parties is that the Attorney is an Independent Contractor and not an employee, agent, joint venture or partner of the Foundation. Nothing in this Agreement shall be interpreted or construed as creating or establishing the relationship of employee and employer between the Attorney and the Foundation. The Attorney is not precluded by this contract from engaging in the practice of law beyond the scope of this Contract.

### **IV. PERSONAL SERVICES OF ATTORNEY CONTRACTED**

This Contract is for the personal professional services of the Attorney. The Attorney shall not assign or subcontract this Contract in whole or in part to any other attorney without first obtaining written

consent of the Court Director. In no event may a case be transferred, assigned, or subcontracted to other legal counsel for a fee or other compensation except as provided under this Contract.

#### **V. CASES ASSIGNED AND CASELOAD**

Cases will be assigned by a court defined process. The court will determine the number and type of cases assigned.

#### **VI. SPECIAL CONDITIONS**

The following special conditions apply to this agreement and, unless otherwise indicated, supersede any conflicting provision of this Contract.

- A. **PHYSICAL OFFICE REQUIRED/COMMUNICATION:** The Attorney presently and regularly maintains an office for the practice of law at \_\_\_\_\_ the Attorney's current local office telephone and fax numbers are \_\_\_\_\_ and \_\_\_\_\_, respectively. The Attorney's current office/work e-mail address is \_\_\_\_\_. Throughout the entire term of the Contract, the Attorney will continue to maintain an office, telephone, fax, and e-mail address.
- B. **PROFESSIONAL LIABILITY INSURANCE:** The Attorney agrees to maintain professional liability insurance for the Attorney and all employees for any and all acts which occur during the course of his or her representation of clients pursuant to this Contract. The Attorney will provide proof of insurance to the Court Director by January 31, 2011.
- C. **CLE AND OTHER TRAINING:** Attorney agrees to participate in any court required training and maintain his or her continuing legal education credits at Attorney's own expense.
- D. **WSBA DISCIPLINARY PROCEEDINGS:** The Attorney will immediately report any formal disciplinary proceedings and/or any admonishment, censure, or any other formal discipline by the Washington State Bar Association or by another state or tribal jurisdiction or court to the Court Director. If the circumstances underlying such matters negatively reflect on the Attorney's duty and ability to effectively and competently render legal services under this Contract, it is grounds for termination of this Contract. Suspension or disbarment is grounds for immediate suspension and/or termination of this Contract.
- E. **CLIENT FILES:** The Attorney will establish and maintain organized, orderly, and complete files for each case. Such files shall contain copies of all correspondence, orders, plea offers, discovery, memos and briefs, and other documents, and pleadings related to the case. Such files shall be promptly updated. They shall be immediately transferred to new counsel whenever the case(s) is transferred for any reason. Files will be kept for a period of seven (7) years after closing.
- F. **CLIENT COMMUNICATION/INITIAL MEETINGS:** The Attorney will establish and maintain client contact, keep the client informed of the progress of the case, provide the client with copies of court orders, and be accessible to the client for legal advice and consultation throughout judgment, disposition, acquittal or otherwise as determined by the

court. The Attorney acknowledges that it is the Attorney's duty to initially meet and confer with a client as soon as reasonably possible following appointment. Without limiting that duty, if earlier contact is required under the circumstances, the Attorney shall meet in person with an in-custody client as soon as possible after appointment and must meet with client prior to the pre-trial hearing.

G. **DUTY TO PROVIDE COMPETENT REPRESENTATION:** Attorney is responsible for providing competent representation. Such representation shall include, but not be limited to, a comprehensive understanding of Tulalip Criminal law; maintaining appropriate client communication, as outlined in the preceding paragraph; establishing and maintaining contact with the client's treatment providers (if any); establishing and maintaining contact with persons who are serving in the capacity as a Guardian Angel; developing and implementing a defense strategy that is consistent with the facts, the law, and the attorney's ethical obligations; negotiating resolutions to cases, where appropriate; representing the client at a variety of hearings, including bench and jury trials; reviewing the assigned case prior to each scheduled hearing after the first appearance; arriving at least fifteen minutes before each court hearing; maintaining appropriate contact with other parties in the Tulalip criminal justice system, to include the prosecution, probation, etc., and completing any case pending as of the date of contract termination.

H. **CASELOAD REPORTS:** The Attorney will provide to the Court Director:

1. Within ten (10) days following each calendar month a list of cases assigned during the preceding month, including the client name, cause number, nature of the charge, date assigned, and offense class (if any) will be provided on the invoice;
2. The Court Director may request and the Attorney will thereafter provide a case closing report within five (5) days of the transfer, withdrawal, judgment or other completion of a case assigned under this Contract. The report will be on a form provided by the Court Director.
3. On request of the Court Director, the Attorney shall provide a list of open cases assigned under this Contract, including client, court cause numbers, case type, date assigned, duration or 'age' of the case, and next court date.

I. **CLIENT SURVEYS:** At the conclusion of each case, the Attorney shall request each client represented to fill out a survey about the client's satisfaction with the representation received. Such should be done on a form provided to the Attorney by the Court Director. These surveys are part of the Grant reporting requirements and are material to the contract.

In addition to any other remedy, failure to provide such reports mentioned herein may result in suspension by the Court Director of all or part of any payment due Attorney.

## **VII. COMPENSATION**

In consideration of the professional services made available and provided under the Contract, The Foundation will pay the Attorney as follows:

- A. BASIC CASELOAD: The hourly rate used is \$75 per hour, not to exceed \$1,000 per case. Any payment beyond these limits per case requires the written prior approval of the Court Director, which would require a specific request for the number of hours and reasons for exceeding the case limit.
- B. TRAVEL REIMBURSEMENT: Travel time shall not be billed under this contract.
- C. PROCEDURES FOR PAYMENT: The Attorney shall submit monthly invoices on a form provided by the Court Director, which will include the information required in VI H by the 10<sup>th</sup> of each month. The Attorney will be paid within 30 days of a submitted invoice.

#### **VIII. OTHER DEFENSE SERVICES AND EXPENSES**

- A. COSTS: All normal office expenses including local and long distance telephone cost, copier, fax, postage, consumable supplies, travel within the Tulalip Tribes, general clerical support, and general overhead expenses are included in the Attorney's basic fee provided under this Contract. The Court Director may allow reasonable and necessary out of pocket expenses in extraordinary circumstances upon proof of the cost accrued or expended. All significant or extraordinary expenses must be requested in writing and approved in advance.

#### **IX. TERMINATION OF CONTRACT**

- A. TERMINATION FOR CAUSE: The Foundation may terminate this contract immediately for cause, if in the sole determination of the Court Director, the Attorney is not providing adequate legal services or is in material non-compliance with the terms of this Contract. In termination for cause, the Court Director may direct that some or all pending cases be assigned to other counsel. In such circumstances, the Attorney shall promptly but in no event later than three (3) days after notice of termination for cause, identify to the Administrator any pending cases in which special circumstances exist, such as imminent trial schedule, lengthy or complex course of litigation, special client circumstances. In the event the Court Director and Attorney cannot agree on reassignment or retention of particular cases, the matter shall be referred to the presiding judge for determination of the issue of assignment of counsel. The Attorney will be responsible for the completion of all cases not reassigned. Monies billed and owing to the Attorney shall be paid within 15 days after submission of the final bill.
- B. OTHER TERMINATION: Either party may terminate this Contract upon ten day (10) days advance written notice for any reason. The Attorney shall be responsible for completion of all cases assigned before that time and shall not withdraw or transfer such cases to other counsel unless otherwise directed by the Court Director.

#### **X. TAX RESPONSIBILITIES**

Both parties acknowledge that the contract prosecutor is not an employee for federal or state tax purposes. Both parties acknowledge that the Tribes shall not assist with any federal or state income tax withholdings or make any tax contributions on behalf of the contract prosecutor.

**XI. OTHER PROVISIONS**

- A. The Attorney shall keep confidential all information regarding the Foundation received as a result of his or her performance of his or her duties under this Contract.
- B. This Contract is subject to the provisions of Ordinance 60, the Tribal Employment Rights Ordinance. Consultant, in subcontracting and employment, shall conform to the provisions of Ordinance 60.
- C. Contractor shall be admitted to practice in Tulalip Tribal court.
- D. Contractor shall adhere to the Washington Rules of Professional Responsibility, any Tulalip Court Code of Ethics, the Tulalip Rules of Professional Responsibility for non-lawyer spokespersons; Ordinance 49, Section 1.8 and other applicable laws governing representation

**XII. GOVERNING LAW**

This contract and all disputes arising hereunder shall be governed by and construed in accordance with the laws of the Tulalip Tribes and enforceable only in the Tulalip Tribal Courts. This provision does not waive any immunity the Foundation may have.

**XIII. INTEGRATED AGREEMENT**

This Contract embodies the entire agreement between the Foundation and The Attorney. No verbal agreements, conversations, or understandings with any officer, agent or employee of the Foundation prior to the execution of this contract shall affect or modify any of the terms, conditions or obligations contained in any documents comprising this Contract.

**XIV. MODIFICATION**

After signature by the parties, this Contract may be modified, amended, or extended only upon written agreement of the parties.

\_\_\_\_\_  
**For the Foundation**

\_\_\_\_\_  
DATE

\_\_\_\_\_  
**Attorney**

\_\_\_\_\_  
DATE

**Name of Firm:** \_\_\_\_\_

Address:

\_\_\_\_\_  
**Social Security # or Tax ID #**  
*(please provide as it is necessary for Income Tax reporting purposes)*



# GLOSSARY

**Action:** Term that in usual legal sense means lawsuit.

**Civil Jurisdiction:** The power of the court to hear and decide civil actions.

**Civil Law:** Laws relating to private rights and remedies as opposed to criminal law.

**Common Law:** A system of law that is derived from judges' decisions rather than legislation.

**Competent:** Properly qualified; adequate.

**Concurrent:** Together, at the same time. In legal parlance: having the same authority.

**Contempt:** An act that obstructs a court's work or lessens the dignity of the court.

**Conviction:** In a criminal action, the finding that the defendant is guilty of the crime.

**Criminal Justice System:** The network of courts and tribunals that deal with criminal law and its enforcement.

**Custom:** Regular behavior (of persons in a geographical area or type of business) that gradually takes on legal importance so that it will strongly influence a court's decision.

**Declination:** A formal refusal.

**Disposition:** A final settlement or result.

**Elements:** The basic parts of a crime or civil action that must be proven.

**Enhanced Penalties:** Greater or increased penalties as a result of aggravating factors.

**Exclusive Jurisdiction:** The power that a court or other tribunal exercises over an action or over a person to the exclusion of all other courts; that forum in which an action must be commenced because no other forum has the jurisdiction to hear and determine the action.

**Exemption:** Freedom from a general duty; a privilege allowed by law; immunity from certain legal obligations.

**Exhaustion Doctrine:** When a non-Indian company or individual is seeking to challenge the civil jurisdiction of a tribal court, it must first raise those challenges in tribal court, not federal court.

Even if the tribal court first rejects these challenges, the person making these claims must first exhaust all chances to appeal that rejection in the tribal legal system before coming to the federal court.

**Explicit:** Fully developed or described.

**Felony:** A crime of a more serious nature than a misdemeanor. Under many state statutes it is punishable by more than a year in prison or even death.

**Habeas Corpus:** (Latin for “You shall have the body.”) A legal action filed to protect a person from unlawful detention.

**Indigency:** A level of poverty with real hardship and deprivation.

**Inherent:** Used in resource as inherent jurisdiction or inherent power; natural authority not derived from another; powers originating from the nature of government or sovereignty that are not dependent on being granted by another government.

**Injunction:** A judge’s order to a person to do or refrain from doing a particular thing. An injunction may be preliminary or temporary (until the issue can be fully tried in court), or it may be final or permanent.

**Judiciary:** The branch of government that interprets the law; the branch that judges.

**Jurisdiction:** Legal authority. A government’s power to exercise authority over persons and things within its territory.

**Misdemeanors:** Any offense lower than a felony and generally punishable by fine, penalty, forfeiture, or imprisonment. Oftentimes misdemeanors are punishable by less than one year of imprisonment.

**Per Capita:** (Latin for “by head.”) By the number of individual persons, each equally.

**Perpetrator:** One who commits an offense or crime.

**Petition:** A written request or application to a court that it takes a particular action, for example, a petition for protection order.

**Prejudice:** Bias or preconceived opinion.

**Probation:** A sentence of a convicted offender, released into the community under supervision of a probation officer.

**Pro Bono:** Work that is performed for the public good without charge, especially legal work for a client with low income.

**Prosecutor:** The public official who presents the government's case in criminal law.

**Protocol:** The rules of correct or appropriate behavior for a particular group of people in a particular situation. For example, the police protocol for handling domestic violence.

**Recusal:** Disqualification or removal of a judge from hearing a case due to actual or potential bias or conflict of interest.

**Respondent:** The person against whom an appeal is taken or against whom a motion is filed.

**Restitution:** Giving something back; making good for something.

**Revoking:** Reversing a legal decision.

**Sanctioned:** Admonished, cautioned, or reprimanded. A sanction is a penalty or punishment attached to a law so that it is obeyed.

**Sentencing:** The phase of a criminal proceeding after the offender is found guilty, when the punishment is imposed.

**Sovereign Immunity:** A government's freedom from being sued.

**Unanimity:** The condition of being unanimous; complete agreement within a group.

**Waive:** To voluntarily give up a right.

**Ward:** A person, especially a child, placed by the court under the care of a guardian.



# ACRONYMS

**BIA:** Bureau of Indian Affairs

**BOP:** Bureau of Prisons

**BJA:** Bureau of Justice Assistance

**CLE:** Continuing Legal Education

**DOI:** Department of Interior

**DOJ:** Department of Justice

**ICRA:** Indian Civil Rights Act

**ICWA:** Indian Child Welfare Act

**ILOC:** Indian Law and Order Commission

**ITWG:** Intertribal Technical-Assistance Working Group on Special Domestic Violence Jurisdiction

**NCAI:** National Congress of American Indians

**NCIC:** National Crime Information Center

**OVW:** Office on Violence Against Women

**SART:** Sexual Assault Response Team

**SAUSA:** Special Assistant United States Attorney

**SDVCJ:** Special Domestic Violence Criminal Jurisdiction

**TLOA:** Tribal Law and Order Act

**TLPI:** Tribal Law and Policy Institute

**VAWA:** Violence Against Women Act