

Tribal Sexual Assault Resource Series

# Sexual Assault and Stalking Laws

## Tribal Legal Code Resource: Sexual Assault and Stalking Laws

*Guide for Drafting or Revising  
Victim-Centered Tribal Laws Against  
Sexual Assault and Stalking*



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## **SEXUAL ASSAULT AND STALKING LAWS**

# **Tribal Legal Code Resource: Sexual Assault and Stalking Laws**

### *Guide for Drafting or Revising Victim-Centered Tribal Laws Against Sexual Assault and Stalking*

**A product of the Tribal Law and Policy Institute**

**June 2008**

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## **TRIBAL SEXUAL ASSAULT RESOURCE SERIES**

### **COMMUNITY BASED LEGAL DEVELOPMENT**

*With support from the Office on Violence Against Women (OVW), the Tribal Law and Policy Institute (TLPI), in collaboration with the Southwest Center for Law and Policy (SWCLAP) and other national leaders in tribal law, have developed a series of publications to assist tribal governments in creating a comprehensive, community based, victim-centered response to sexual violence and stalking against adult victims. Each publication is designed to help your tribal government customize laws and policies that fit your community's values, principles, and capacities. They are ideal for a community with a strong grassroots victim advocacy program.*

#### **Tribal Legal Code Resource: Sexual Assault and Stalking Laws**

This guide for drafting or revising victim-centered tribal laws against sexual assault and stalking is written with a philosophy that tribal laws should reflect tribal values. In addition, writing a tribal law usually requires careful consideration of how state and/or federal laws might apply in the community. 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.

#### **Tribal Law Enforcement Protocol Resource: Sexual Assault**

This guide for drafting or revising tribal law enforcement agency's protocols responding to sexual assault (including a model sexual assault protocol) is 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 your tribal government has strong laws in place, this publication will help you create policies and protocols for your law enforcement agency to enforce your laws.

#### **Tribal Prosecutor Protocol Resource: Sexual Assault**

This guide for drafting or revising tribal prosecutor's protocols responding to sexual assault (*including a model sexual assault protocol*) is a tool for improving the prosecution of sexual assault crimes. Holding offenders accountable for their actions is a key part of making your community safe. This publication is designed to help your 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.

#### **Tribal Sexual Assault Response Team (SART) Resource**

This guide for development of a Sexual Assault Response Team (SART) in tribal communities is 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.

## **VIOLENCE AGAINST NATIVE WOMEN RESOURCES**

### **COMMUNITY BASED LEGAL DEVELOPMENT**

*With support from the Office on Violence Against Women (OVW), the Tribal Law and Policy Institute (TLPI) has developed the following resources to assist tribal governments in creating a comprehensive, community based, victim-centered response to violence against Native women. Each resource is designed to help your tribal government customize laws and policies that fit your community's values, principles, and capacities. These resources are all freely available for downloading on the Tribal Court Clearinghouse ([www.tlpi.org](http://www.tlpi.org)) except the textbook.*

#### **Tribal Legal Code Resource: Domestic Violence Laws**

This guide for drafting or revising victim-centered tribal laws against domestic violence is written with a philosophy that tribal laws should reflect tribal values. In addition, writing a tribal law usually requires careful consideration of how state and/or federal laws might apply in the community. 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.

**Listen to the Grandmothers Video and 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.

#### **Sharing our Stories of Survival: Native Women Surviving Violence**

This textbook 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 U.S. 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.

[www.TribalProtectionOrder.org](http://www.TribalProtectionOrder.org) This website is designed to provide both tribal and non-tribal entities with a clearinghouse of information and resources pertaining to the issuance and enforcement of tribal protection orders.

#### **Tribal Domestic Violence Case Law: Annotations for Selected Tribal Cases Related to Domestic Violence**

This resource is designed to assist 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.

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# Part One:

## INTRODUCTION

All governments should be very concerned about sexual assault against Native women. Tribal governments across the United States are creating programs to improve response to violent crime. As sovereign governments, tribes can assert concurrent criminal jurisdiction in sexual assault and stalking cases. Tribal criminal laws are, with a few limited exceptions, a pre-requisite for intervention by tribal criminal justice agencies, including law enforcement and prosecutors.

There is a close relationship between stalking and sexual assault. Thirty-one percent of female victims of intimate partner stalking indicate that they have been sexually assaulted by their stalker.

This resource guide was developed to provide a starting point for drafting or revising tribal criminal laws on sexual assault and stalking. It is written with a philosophy that tribal laws should reflect tribal values. In addition, writing a tribal law usually requires careful consideration of how state and/or federal laws might apply in the community. This resource guide includes sample language and discussion questions which are designed to help tribal community members decide on the best laws for your community. The sample laws may not be appropriate for every community and are provided as examples only.

*The main goal of this resource guide is to offer suggestions on how tribal criminal laws can be drafted in a way that provides safety and support for adult survivors of sexual assault and stalking.*

***Developing a statutory response to child sexual abuse cases is beyond the scope of this resource guide. Child sexual abuse cases require separate statutory attention for a variety of important reasons.***

## What This Resource Guide Can Do

This resource guide provides discussion questions and exercises to assist in the development of criminal statutes to address sexual assault and stalking. *(Note: Child sexual abuse is not specifically addressed in this guide.)*

This resource guide was designed for non-attorneys. It assumes that tribal governments already have the ability to draft their own laws. Tribal beliefs, cultures, and language already include good words about protecting women and children. Tribal leaders and community members are usually the best people to decide what is needed in the laws. Attorneys can be important to the process, but not always required.

We encourage you to create a committee to discuss the ideas in this guide and develop a plan for moving forward. Bringing a facilitator who is experienced in sexual assault and stalking laws can be helpful. The facilitator can help move discussions forward, establish plans for action, and provide overall structure to the process.

### *Point of Discussion: What questions should our community ask?*

Comprehensive criminal laws answer six important types of questions:

1. **WHO** is the law designed to protect?
2. **WHAT** kind of behavior is the law designed to address?
3. **WHERE** does the court have authority to assert jurisdiction?
4. **WHEN** has a crime been committed?
5. **WHY** is this law important? Why does this law exist?
6. **HOW** is the statute enforced?

Answering these six questions will help build strong tribal laws that address safety and accountability.

## What This Resource Guide Cannot Do

This resource guide cannot teach about the dynamics of sexual assault and stalking. The exercises and language assume that you have a basic understanding of these crimes. If you do not have training in the dynamics of sexual assault and stalking, we strongly encourage you to contact one or more of the following organizations for information and training:

Sacred Circle  
National Resource Center to End Violence Against Native Women  
722 Saint Joseph Street  
Rapid City, SD 57701  
877-RED-ROAD  
[www.sacred-circle.com](http://www.sacred-circle.com)

Mending the Sacred Hoop  
202 East Superior Street  
Duluth, MN 55802  
218-722-2781  
[www.msh-ta.org](http://www.msh-ta.org)

Clan Star, Inc.  
P.O. Box 1835  
Cherokee, NC 28719  
828-497-5507  
[www.clanstar.org](http://www.clanstar.org)

Southwest Center for Law and Policy  
4055 E. 5<sup>th</sup> St.  
Tucson, AZ 85711  
520-623-8192  
[www.swclap.org](http://www.swclap.org)

## **A Few Words of Caution**

Protocol development (how the systems in your community respond to sexual assault and stalking cases) is a separate but critical discussion. This resource guide is not a replacement for training or protocol development. It is very important that all people who come into contact with survivors of sexual assault receive specific training and education on the appropriate responses to victims. Even the best law in the world is not effective if people do not understand it and support it.

This resource guide is not a model code. Your tribal community is the best judge of what language will work best for your people. 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 and traditional practices. The exercises and 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 exercises. 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 which is consistent with your needs, goals and resources.

Keep in mind that this resource guide provides a very broad overview of important points of criminal law. It does not include every detailed legal issue, so you will probably need to do additional research 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. Making decisions about how to respond to sexual assault and stalking is important. 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.

When using this guide and throughout the drafting process, it is a good idea to keep at least one dictionary by your side. We recommend using one or more of the following:

- A general dictionary, such as Webster’s Dictionary
- A law dictionary, such as Black’s Law Dictionary
- A law dictionary for non-lawyers, such as *Law Dictionary for Non-Lawyers* by Daniel Oran

This resource guide also includes a glossary at the back.

### ***Point of Discussion: English Language and Tribal Law***

- \* How many people in our community speak our traditional language?
- \* Does English always reflect our tribal community values accurately?
- \* Are there legal terms in our traditional language which might be important to use in our tribal laws?

## How to Use This Resource Guide

There are four main sections:

- I. Introduction
- II. Jurisdiction (tribal sovereign authority)
- III. Criminal Sexual Assault Statute
- IV. Basic Criminal Stalking Statute

Each of these sections has five main parts:

1. Overview
2. Tribal Code Examples
3. Tribal Code Commentary
4. Exercises
5. Additional Resources

The **overview** will introduce you to the section. Reading the overview should give you basic background on the issue.

The **tribal code examples** provide language from existing tribal codes. Whenever possible, we have included laws that other tribes have written to address sexual assault. We also provide information on the federal sexual assault law, as many tribes share jurisdiction with the federal government. After each section of tribal code examples, **tribal code commentary** is provided. This commentary is designed to help you consider the variety of possibilities when constructing statutory language.

The **exercises** are probably the most important part of this resource guide. They are designed to help you think about the important issues and select words that will fit your community.

There are several ways to use the exercises. Consider having each member write answers to the exercises separately, and then come together and share your individual answers as a group. You may also choose to go through the exercises together. A facilitator may be helpful in this process.

Each section concludes with **additional resources**. This is a list of books, articles, and websites that you can use for further research.

## 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/agencies that may be useful in drafting codes – but each community is different.

- Survivors of sexual assault and their advocates
- Tribal prosecutors
- 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/ 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?***

Writing a law is not the only benefit of working with a multi-disciplinary team. Other possibilities include:

- \* Educating more community members about sexual assault/stalking
- \* Sharing ownership of the problem and responsibility to solve it
- \* Communicating about tribal values

## 10 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 no one “right” way to research and draft laws. The tips below 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 of improving 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 and learn to 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. 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. Since 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 lot 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 non-grant funds for food. If you are considering using federal grant funds, be sure to check with your grant manager.)

**10. Expect to spend a lot 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.

## Sexual Assault and Stalking Code Development Dos and Don'ts

DO . . .	DON'T . . .
Select code development members with various viewpoints who have demonstrated interest, expertise, or experience in addressing the safety of women.	Select code development members based only on their position within the tribal judicial system or elsewhere.
Incorporate the perspective of survivors of sexual assault and stalking.	Disregard the importance of traditional beliefs and customary law.
Proceed in phases with set time frames, including a study phase in which issues are identified before drafting recommended provisions.	Devote resources to drafting before a consensus is reached concerning priority issues and recommendations.
Design a process that invites broad-based participation in identifying issues and making recommendations.	Be discouraged by lack of participation or lack of progress.
Assign manageable tasks to team members or subcommittees to be accomplished within established time frames.	Delay too long before dividing the work of the committee into tasks that can be accomplished within the time frames established.
Emphasize creative solutions to jurisdictional issues that avoid compromising the safety of women.	Emphasize jurisdictional limitations.
Emphasize person-to-person communication and education to address difficult issues.	Seek to address difficult issues solely through large-scale change in the law or legal system.

## Before You Begin....

As you sit down together to begin the process of developing sexual assault, and/or stalking statutes 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: *Write laws that support the safety of Native women and reflect our community's cultural, legal, and spiritual needs.*

You should review your constitution and by-laws or other foundational legal documents. Additionally, it is important to understand the federal and/or state laws that impact your tribe. Review the Violence Against Women Act (VAWA) and other federal laws aimed at protecting women.

It is also important to evaluate what sexual assault and stalking laws are already in place in your community. Be sure to analyze the strengths and weaknesses in any current sexual assault or stalking laws.

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.

Keep in mind that crimes against women may be located in different places throughout the tribal code – check the criminal, civil, and family laws.

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

Consider creating a binder for all team members which includes:

- \* Tribal Constitution and/or By-laws
- \* Current tribal laws
- \* Tradition, custom, stories (if appropriate)
- \* Copies of any tribal court opinions your tribe has issued on sexual assault, stalking, and full faith and credit (for both criminal and civil cases).

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 a review of 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 to sexual assault and stalking.

Be prepared to remove or edit entire sections as necessary.

# NOTES

# Part 2

## CRIMINAL JURISDICTION

### OVERVIEW

**Jurisdiction** refers to the power or authority of a court over a particular person, territory, and subject matter. Criminal jurisdiction laws at the tribal level determine what kinds of sexual assault and stalking cases can be prosecuted by the tribe. If a tribal government asserts broad authority, then the tribal court can take action in many cases.

From a tribal perspective, tribal jurisdiction is based upon **sovereignty**, an independent, inherent power by which a tribe can govern itself. Tribal jurisdiction has been negatively impacted by federal laws. However, tribal governments still have the power to address sexual violence and stalking in many circumstances.

An important basic philosophy to remember is: *If a tribal government power has not been specifically taken away by federal law that power still exists because the tribal government is a sovereign authority.*

This resource guide focuses on criminal jurisdiction:

**Criminal jurisdiction** refers to the power of a court to prosecute a crime. If a person is found guilty of a crime, the penalty may be incarceration. The state, tribe, or United States is the party prosecuting a criminal proceeding or action.

**NOTE: Civil jurisdiction** generally refers to the power of a court to handle law suits or actions between two private persons or parties. In sexual assault and stalking cases, a victim may bring a civil action by petitioning for a protection order against her offender or suing the offender for damages. This resource guide focuses on criminal jurisdiction. If you are interested in

developing or strengthening tribal laws on protection orders, please refer to our domestic violence publication:

*Tribal Legal Code Resource: Domestic Violence Laws  
Guide for Drafting or Revising Victim-Centered Tribal Laws  
Against Domestic Violence*

available at [www.tlpi.org](http://www.tlpi.org) or by calling 651-644-1125.

Section five of the domestic violence resource guide includes information about civil jurisdiction, protection orders, and full faith and credit. Much of this information will be relevant to developing civil protection order statutes for victims of sexual assault and/or stalking.

Tribal jurisdiction laws need to address three important areas in order for a court to have the power to act.

**1. *Personal Jurisdiction***

Power of a court over a specific person

**2. *Territorial Jurisdiction***

Power of a court to hear a case that occurs within a specific area of land

**3. *Subject Matter Jurisdiction***

Power of a court to deal with the general subject involved in the action.

It is rare to have a jurisdiction law that is specific to a certain crime (like sexual assault). Therefore, you need to review your tribe's current criminal jurisdiction laws (if they exist) to decide if they need revisions.

## CRIMINAL JURISDICTION

### *Criminal Jurisdiction Overview*

Criminal jurisdiction is a critical part of the right of self-governance. It refers to the right of tribes to protect their people from criminal behavior. Holding perpetrators accountable can include fines, jail/prison time, probation, restitution, and other sanctions.

In tribal communities, criminal jurisdiction is sometimes limited by federal law. It is important to understand these limits when drafting tribal jurisdiction statutes. Tribal governments may chose to assert their maximum rights in regards to criminal prosecution.

#### ***Point of Discussion: Do we have authority to prosecute?***

##### **Personal Jurisdiction**

Who committed the crime? Does the tribal court have authority over that person?

##### **Territorial Jurisdiction**

Where did the crime take place?

Tribal courts' territorial jurisdiction has been restricted to include only crimes which occur in "Indian Country" as defined by 18 U.S.C. §1151. Indian Country includes all land within the limits of any Indian reservation under the jurisdiction of the U.S. Government, dependent Indian communities and all Indian allotments, the Indian titles to which have not been extinguished.

##### **Subject Matter Jurisdiction.**

What was the crime?

The court must determine whether it has subject matter jurisdiction over a case. For tribal communities, this depends on the type of crime and who the victim and offender are. (See the jurisdiction charts for more information.)

## Two Important Limitations

The U.S. Supreme Court decision *Oliphant v. Suquamish*<sup>1</sup> limits the ability of tribal governments to try and punish non-Indians. Therefore, tribal governments cannot criminally prosecute a sex offender who is not considered “Indian.”

The Indian Civil Rights Act<sup>2</sup> (ICRA) limits a tribe’s ability to incarceration for any one crime to one year in jail and/or a \$5,000 fine. If a person is convicted of more than one crime (kidnapping and rape, for example), federal law allows up to 1 year for each offense.

ICRA does not limit other forms of sanctions – including restitution, banishment, and probation.

### ***Point of Discussion: Tribal inherent authority***

Tribal authority to prosecute crimes committed by Indians has not been eliminated by federal law.

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<sup>1</sup> 435 U.S. 191 (1978).

<sup>2</sup> 25 U.S.C. §1301-1303.

## **Concurrent Jurisdiction**

Concurrent jurisdiction means that more than one government can take action. In most cases of sexual assault, your tribe shares criminal jurisdiction with either the **federal** (United States) government or the **state** government.

### ***Point of Discussion: Double jeopardy?***

If the state or federal government prosecutes a person for sexual assault, this does not eliminate the authority of the tribe. Because a tribe is considered to be an independent sovereign, the laws against double jeopardy do not apply.<sup>3</sup>

#### ***Example:***

Joe, a Native man, commits a sex offense on the reservation. The federal government files charges against him in federal court. The tribal prosecutor files separate charges in tribal court. In this case, there could theoretically be two trials. (However, it will likely be important for the federal prosecutor and the tribal prosecutor to coordinate their efforts.)

## **Federal Jurisdiction**

Federal (United States) courts have concurrent jurisdiction over violent cases under the Major Crimes Act (MCA) in many tribal communities. The MCA currently refers to the following crimes:

- Murder
- Manslaughter
- Kidnapping
- Maiming
- Felonies under chapter 109A (includes sex crimes)
- Incest
- Assault with intent to commit murder
- Assault with a dangerous weapon
- Assault resulting in serious bodily injury

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<sup>3</sup> United States v. Wheeler, 435 U.S. 313 (1978).

- Assault of a person under the age of 16
- Felony child abuse or neglect
- Arson
- Burglary
- Robbery
- Felonies under 661 (Stealing property worth more than \$1,000)

***Point of Discussion: What is the history of sexual assault within the Major Crimes Act?***

- \* Rape (unlike domestic violence, stalking, and most other criminal offenses) was one of the original seven major crimes in the Major Crimes Act in 1885.
- \* For the next 100 years, most federal officials interpreted the Major Crimes Act as giving the federal government *exclusive* federal jurisdiction for rape/sexual assault.
- \* Many tribal codes have never included rape because the Department of Interior (through the Bureau of Indian Affairs) refused to approve tribal rape laws.

**Criminal Jurisdiction on Reservations Not Affected by Public Law 280/State Jurisdiction**

<i>Indian Status</i>	<i>Type of Crime</i>	
	<i>Major Crime</i> <i>(as defined by Major Crimes Act)</i>	<i>All Other Crimes</i>
Indian perpetrator, Indian victim *	Federal (under Major Crimes Act) & Tribal Jurisdiction	Tribal Jurisdiction
Indian perpetrator, Non-Indian victim **	Federal (under Major Crimes Act) & Tribal Jurisdiction	Federal (under General Crimes Act) & Tribal Jurisdiction
Non-Indian perpetrator, Indian victim	Federal Jurisdiction (under General Crimes Act)	Federal (under General Crimes Act) Jurisdiction
Non-Indian perpetrator, Non-Indian victim	State Jurisdiction	State Jurisdiction

\* If the offense is listed in the Major Crimes Act, there is federal jurisdiction, exclusive of the state, but probably not the tribe. If the listed offense is not otherwise defined and punished by federal law applicable in the special maritime and territorial jurisdiction of the United States, state law is used in federal courts. See section 1153(b). If not listed in Major Crimes, the tribal jurisdiction is exclusive.

\*\* If listed in the Major Crimes Act, there is federal jurisdiction, exclusive of the state, but probably not of the tribe. If the listed offense is not otherwise defined and punished by federal law applicable in the special maritime and territorial jurisdiction of the United States, state law is used in federal courts. If not listed in the Major Crimes Act, there is federal jurisdiction, exclusive of the state, but not of the tribe, under the General Crimes Act. If the offense is not defined and punished by a statute applicable within the special maritime and territorial jurisdiction of the United States, state law is used in federal courts under 18 U.S.C. §13.

## Public Law 280

In 1953 the U.S. Congress passed a law which substantially affected criminal jurisdiction in Indian Country. Public Law 280<sup>4</sup> transferred federal jurisdiction over crimes occurring in Indian country to certain states. Six states (California, Minnesota, Nebraska, Oregon, and Wisconsin with certain exempted reservations and then Alaska upon statehood) were required to accept the transfer of jurisdiction. The other states were given the option of asserting jurisdiction. Dissatisfaction with Public Law 280 has led to the partial or full **retrocession** (return of jurisdiction from the state to the federal government) of 25 reservations once covered by PL 280.

If you are on a reservation in which the state still exercises full criminal jurisdiction under Public Law 280 (or similar acts such as those affecting Kansas and New York), then the chart below would apply.

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<sup>4</sup> 18 U.S.C. §1162

**Criminal Jurisdiction for States and Reservations where Public Law  
280 Applies**

<i>Indian status</i>	<i>Type of Crime</i>	
	<i>Major Crime</i> <i>(as defined by Major Crimes Act)</i>	<i>All Other Crimes</i>
Indian perpetrator, Indian victim	State & Tribal Jurisdiction	State & Tribal Jurisdiction
Indian perpetrator, Non-Indian victim	State & Tribal Jurisdiction	State & Tribal Jurisdiction
Non-Indian perpetrator, Indian victim	State Jurisdiction	State Jurisdiction
Non-Indian perpetrator, Non-Indian victim	State Jurisdiction	State Jurisdiction

# TRIBAL CODE EXAMPLES

## Criminal Jurisdiction

The following tribal laws are provided as illustrative examples. There are many different ways for a tribe to protect victims.

### Tribes with Concurrent Federal Jurisdiction

#### *Example 2.1*

##### ***Poarch Band of Creek Indians***

##### *Sec. 4-1-5(b) Original and Exclusive Jurisdiction*

*The Tribal Court shall have original and exclusive jurisdiction over all criminal offenses committed within the territorial jurisdiction of the tribe by enrolled members of the tribe, or other federally recognized Indians, except to the extent that the Major Crimes Act or other federal laws provide for criminal jurisdiction on Indian Reservations, or within the territorial jurisdiction of Indian Tribes, and in that event, the jurisdiction shall be concurrent with the United States Government. The State of Alabama shall have no jurisdiction, criminal or civil, within the reservation or territorial jurisdiction of the tribe and there shall be no concurrent jurisdiction with the State of Alabama with respect to the jurisdiction of the tribe for civil or criminal matters, unless and only to the extent that approval has been given for the same by the Tribal Council.*

#### *Example 2.2*

##### ***White Mountain Apache Criminal Code***

##### *Sec. 1.2 (2000).*

*The White Mountain Apache Tribe has original and absolute jurisdiction on any basis consistent with its sovereignty, constitution and laws to prosecute any person for acts covered under this code, except as may be expressly limited by the laws of the United States. This jurisdiction is not affected by, nor shall it be deemed to preclude, any federal prosecution.*

## **Tribes with Concurrent State Jurisdiction**

### **Example 2.3**

#### **White Earth Band of Chippewa Judicial Code**

##### *Title 1, Ch. 2, Sec. 1*

*The jurisdiction of the Tribal Court shall extend to:*

*b. All actions arising under the Codes, Laws, and Ordinances of the White Earth Band of Chippewa, and to all persons alleged to have violated provisions of those Ordinances, provided that the action of violation occurs within the boundaries of the White Earth Reservation, including all lands, islands, waters or any interest therein hereafter added to the Reservation. Hereinafter, reference to "Reservation" shall include all lands and waters described in this paragraph.*

*d. The White Earth Band of Chippewa Tribal Court shall have criminal jurisdiction over all persons who violate any Band codes, laws or ordinances provided that such violation occurs within the boundaries of the White Earth Reservation, including all lands, islands, waters or any interest therein hereafter added to the Reservation.*

*h. The jurisdiction invoked by this Code over any person, cause of action, or subject shall be concurrent with any valid jurisdiction over the same of the courts of the United States, any state, or any political subdivision thereof; provided, however, this Code does not recognize, grant, or cede jurisdiction to any other political or governmental entity in which jurisdiction does not otherwise exist in law.*

### **Example 2.4**

#### **Ho-Chunk Nation Code**

##### *1 HCC § 1*

*4. Jurisdiction. The Ho-Chunk Judiciary shall exercise jurisdiction over all matters with the power and authority of the Ho-Chunk Nation including controversies arising out of the Constitution of the Ho-Chunk Nation; laws, statutes, ordinances, resolutions, and codes enacted by the Legislature; and such other matters arising under enactments of the Legislature or the customs and traditions of the Ho-Chunk Nation. The jurisdiction extends over the Nation and its territory, persons who enter its territory, its members, and persons who interact with the Nation or its members wherever found.*

## TRIBAL CODE COMMENTARY

Each of the examples comes from a general criminal jurisdiction law. These laws are not specific to sexual assault. It is not common to have a separate law on sexual assault jurisdiction that differs from general criminal jurisdiction.

The Poarch Band of Creek Indians law acknowledges shared (concurrent) jurisdiction with the federal government in dealing with crimes in the Major Crimes Act (which includes sexual assault).

The White Mountain Apache Criminal Code expresses the tribe's sovereign right to prosecute criminal cases. It acknowledges limitations due to U.S. laws, as well as the federal government's responsibility to prosecute Major Crimes.

The White Earth Band of Chippewa Judicial Code acknowledges concurrent jurisdiction with a state (Minnesota), as they are currently a tribe affected by Public Law 280. They also spell out their territorial jurisdiction and account for future additions to their reservation. They have a broad statement of jurisdiction over all persons.

Tribal codes are not required to mention federal or state laws. The example from the Ho-Chunk asserts its broad authority without acknowledging other governments.

## **EXERCISES**

These exercises are designed to guide in reviewing and revising your tribal criminal jurisdiction laws.

### **STEP 1: Determine Existing Tribal Law**

Does your tribal code already contain laws concerning criminal jurisdiction?

Yes (If yes, write the citation here)

No

***Point of Discussion: Are our criminal jurisdiction laws sufficient?***

Are our laws broad enough to cover sexual assault and stalking crimes?

Do our laws address personal, territorial, and subject matter jurisdiction?

## **STEP 2: Determine Concurrent Jurisdiction**

Which government has concurrent (shared) power to prosecute sexual assault cases that occur in your tribal community?

- Federal (United States) government
- State government under Public Law 280
- State government under another federal law

### ***Point of Discussion: Concurrent Jurisdiction***

Should our tribal law refer to or acknowledge the government that shares jurisdiction in sexual assault cases?

### **STEP 3: Drafting Law**

Use your answers to Steps 1 and 2 to draft or revise the criminal jurisdiction sections for your tribal code.

This checklist will help make sure you have covered the major criminal jurisdiction issues.

#### **CRIMINAL**

- Personal Jurisdiction
- Territorial Jurisdiction
- Subject Matter Jurisdiction

## ADDITIONAL RESOURCES

### BOOKS:

Deer, Sarah et al, Eds., *Sharing Our Stories of Survival: Native Women Surviving Violence* (AltaMira Press 2007).

Garrow, Carrie E. and Sarah Deer, *Tribal Criminal Law and Procedure* (AltaMira Press 2004).

Jessup Newton, Nell, Ed., *Cohen's Handbook of Federal Indian Law 2005 Edition* (Lexis-Nexis 2005).

Richland, Justin R. and Sarah Deer, *Introduction to Tribal Legal Studies* (AltaMira Press 2004).

### ARTICLES:

Christopher B. Chaney, *The Effect of the United States Supreme Court's Decisions During the Last Quarter of the Nineteenth Century on Tribal Criminal Jurisdiction*, 25 B.Y.U. J. of Pub. L. 173 (2000).

Geoffrey C. Heisey, *Oliphant and Tribal Criminal Jurisdiction Over Non-Indians: Asserting Congress' Plenary Power to Restore Territorial Jurisdiction*, 73 Indiana L. J. 1051 (1998).

Kevin Meisner, *Modern Problems of Criminal Jurisdiction in Indian Country*, 17 Am. Indian L. Rev. 175 (1995).

Frank Pommersheim, *The Crucible of Sovereignty: Analyzing Issues of Tribal Jurisdiction*, 31 Ariz. L. Rev. 329 (1989).

Amy Radon, *Tribal Jurisdiction and Domestic Violence: The Need for Non-Indian Accountability on the Reservation*, 37 U. Mich. J. L. Reform 1275 (2004).

Melissa L. Tatum, *Civil Jurisdiction: The Boundaries Between Federal and Tribal Courts*, 29 Ariz. St. L.J. 705 (1997).

## Part 3

# DEVELOPING A TRIBAL CRIMINAL SEXUAL ASSAULT STATUTE

### OVERVIEW

American Indian and Alaska Native women are victims of sexual assault at a higher rate than any other population. One in three Indian women will be raped during her lifetime. Indian women are stalked at more than twice the rate of other women. Only 16 – 32% of rape victims report the crime to law enforcement authorities.<sup>5</sup>

*Over the past five years, several national surveys, including the National Crime Victimization Survey and the National Violence Against Women Survey, have consistently indicated that American Indian and Alaska Native women experience rates of violence far exceeding those of other racial groups. The National Violence Against Women Survey, for example, concluded that 34.1% of American Indian and Alaska Native women will be raped during their lifetime. The National Crime Victimization Survey indicates that American Indian and Alaska Native women suffer a rate of sexual assault of 7 per 1000 people, compared to 2 per 1000 for all women. Several other state and local studies reveal similar high sexual victimization rates among Native women. Individual tribal nations have also reported a high rate of sexual assault. In 2003, for example, the Navajo Nation estimated that sex crimes may account for more than 70 percent of criminal investigators' time.<sup>6</sup>*

Making sure that your tribal code defines sexual assault and stalking as **crimes** is one way (but not the only way) to respond to sexual assault and stalking.

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<sup>5</sup> National Institute of Justice, 2000. *The Sexual Victimization of College Women*. Washington, DC: U.S. Department of Justice.

<sup>6</sup> Sarah Deer, *Toward an Indigenous Jurisprudence of Rape*, 14 *Kans. J. L. & Pub. Pol'y* 121 (2004).

***Point of Discussion: Why have a law?***

Why should we have tribal criminal laws against sexual assault and stalking?

1. It sends a message that we do not accept violent and abusive behavior.
2. It gives tribal law enforcement the power to arrest suspects.
3. It gives tribal prosecutors the power to prosecute suspects.
4. It gives tribal judges the power to punish people who commit sexual assault and stalking.

Some tribes do have criminal laws against sexual assault. However, many of these tribal laws were copied from state or federal statutes many years ago. States and the federal government have significantly changed their laws through “rape law reform” which began in the 1970’s. Many tribes have not changed their sexual assault laws since they were enacted, mostly because tribal governments have not had money or attorneys to help re-write laws.

In order to enhance safety, you should consider reviewing your tribe’s sexual assault laws. If they do not meet the needs of your community, this resource guide can help you revise them.

Sexual assaults that occur on reservations are generally criminally prosecuted in federal court unless criminal jurisdiction has been transferred from the federal government to the state under Public Law 280 (PL 280) or similar federal legislation.<sup>7</sup> However, **the tribe also has the power to prosecute sexual assault cases**. On a PL 280 affected reservation, the state and tribe have concurrent jurisdiction. If a reservation is not affected by PL 280, than the federal government and the tribe have concurrent jurisdiction.

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<sup>7</sup> For more information concerning PL 280, see:

Goldberg, C. (1997). *Planting Tail Feathers: Tribal Survival and Public Law 280* Los Angeles: UCLA American Indian Studies Center.

Goldberg, C., & Valdez Singleton, H. (2005). *Public Law 280 and Law Enforcement in Indian Country: Research Priorities* (No. NCJ 209839): U.S. Department of Justice, Office of Justice Programs.

Melton, A.P., & Gardner, J. (2000). Public Law 280: Issues and Concerns for Victims of Crime in Indian Country. Retrieved October 22, 2007, from [www.tribal-institute.org/articles/gardner\\_full.htm/](http://www.tribal-institute.org/articles/gardner_full.htm/)

***Point of Discussion: Tribal Prosecution Rights***

ALL federally recognized tribes have the right to prosecute some sexual assault and stalking cases – even if they aren’t doing it right now.

The federal government has limited tribal sovereignty by restricting who tribes can punish criminally and how much punishment they can impose. Tribes cannot prosecute non-Indians.<sup>8</sup> Tribes cannot impose more than a one year sentence or a \$5,000 fine for each criminal violation.<sup>9</sup> Yet, many tribes are enforcing criminal sexual assault laws, and updating sexual assault, stalking and sex offender registration laws. The limitations do not prevent the tribe from taking action.

***Point of Discussion: Limitations on Prosecutions***

Limitations on tribal criminal response:

1. Cannot prosecute non-Indians.
2. Cannot sentence to more than one year (per offense) and/or \$5,000 fine.

If a state or federal government is already prosecuting a person for sexual assault or stalking, why should the tribe use its limited resources to prosecute the same offender? There are many possible reasons.

A federal or state prosecution may take a long time. The tribe may have the benefit of being the first on the scene of a crime, the first to investigate and can act quickly. Imagine the difficulty a victim has when her rapist or stalker is freely moving about the community sometimes for months and years, while cases are prepared. There may also be differences between a tribe’s sexual assault and stalking laws and the federal/state law, which make a difference in the ability to prosecute a particular case.

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<sup>8</sup> *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 98 S.Ct. 1011, 55 L.Ed.2d 209 (1978).

<sup>9</sup> Indian Civil Right Act, 25 U.S.C. 1301-1303.

If a particular stalking case does not rise to the level of the Major Crimes Act or one of the federal stalking or cyberstalking statutes (these are so-called “misdemeanor” or “no-contact” stalking cases), then the tribe may have exclusive jurisdiction.

The main reason to prosecute is that the victims are members of your tribal community, and your tribe has a responsibility to protect them to its best ability.

***Point of Discussion: Why prosecute?***

Why prosecute sexual assault or stalking if the federal or state government also has the power?

1. Tribe may be able to act more quickly.
2. Tribe may have a higher priority to protect citizens.
3. Some particular non-touching stalking cases which does not cross jurisdictional lines may not fall under federal jurisdiction, leaving the tribal government the sole responder.
4. Tribe may want to protect tribal sovereignty: women’s safety is important to our tribe’s future.

This section focuses on the drafting of a criminal sexual assault law.

***Having a law is just the beginning.*** The ability to enforce and prosecute is very important. Cooperation and sharing information and evidence between jurisdictions is vital. Agreements and protocols with other tribes, states, and the federal government are often necessary.

## A. FACTS ABOUT RAPISTS

**Most rapes are not committed by strangers.** 77% of all rapes are committed by someone who knows the victim (an acquaintance). When you review your tribe's laws, think about the behavior you are trying to stop. Many times, we have been programmed to believe that rape is something that happens when a stranger attacks a woman and uses a lot of violence. The reality is different.

David Lisak, Ph.D.,<sup>10</sup> a leading researcher in the area of acquaintance rapists, has found that acquaintance rapists fit the following patterns:<sup>11</sup>

A. Rapists who attack acquaintances usually plan their crimes in advance.

- They trick their victims into positions where they will be alone – in a room, or in a car, or in a private area.
- They often give their victims alcohol and/or drugs – or they target women who have already used alcohol and/or drugs.
- Like other kinds of criminals, rapists are very good at picking out vulnerable women; women who are least likely to fight, least likely to scream, and least likely to report the crime once it has been committed.

B. Rapists who attack acquaintances do not always use a lot of physical violence.

- They may threaten the victim with violence. (Example: “If you don’t do what I say, I will beat you up.”)
- They may scare their victims into not telling anybody. (Examples: “You’re drunk -- no one will believe you,” or “If you tell anyone, you will lose your kids.”)
- They usually don’t need a weapon. They can use their body weight and arms to pin down their victims. Victims often say they were terrified.

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<sup>10</sup> Lisak, David Ph.D. is an Associate Professor of Psychology at the University of Massachusetts Boston and a leading expert on the behavior of men who commit sexual assault.

<sup>11</sup> Lisak, David Ph.D. *The Rape Fact Sheet*, March 2002. Retrieved November 7, 2007, from [http://www.sexualassault.army.mil/files/RAPE\\_FACT\\_SHEET.pdf](http://www.sexualassault.army.mil/files/RAPE_FACT_SHEET.pdf).

When you write your tribal sexual assault law, you want to consider all kinds of “excuses” and “defenses.” See box below for examples.

***Point of Discussion: Unacceptable Excuses***

When writing a sexual assault law, think about all the ways a rapist might try to “get away” with it.

Forcing a woman or girl to have sex is always wrong:

- If she does not agree to have sex
- If she has been drinking or using drugs
- If she is unconscious
- If she is disabled
- If she feels afraid to say “no” or “stop”
- If she is threatened – including verbal threats
- If she is physically forced

## B. REVIEWING FEDERAL SEXUAL ASSAULT LAW

Most tribes with criminal court systems have concurrent jurisdiction with the federal government for sexual assault prosecutions.<sup>12</sup> Consequently, this section reviews the federal law on sexual assault. It is important to understand the federal law, so that the tribe can develop laws that are more effective and comprehensive. The federal laws use the term “sexual abuse” rather than “sexual assault” or “rape”.

### *Point of Discussion: Concurrent Jurisdiction*

What is “concurrent jurisdiction?”

1. “Concurrent” means at the same time.
2. “Concurrent jurisdiction” means that more than one sovereign government has power.
3. “Concurrent” does not mean that the tribal power is any less important than the federal/state power.

The Major Crimes Act<sup>13</sup> gives federal courts the jurisdiction to prosecute Indian suspects for rape occurring in Indian country.

The General Crimes Act<sup>14</sup> gives federal courts authority to prosecute non-Indian suspects when the victim is Indian.

Tribal sexual assault laws do not have to match the federal laws. Tribal laws may be stricter or cover more issues than federal laws.

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<sup>12</sup> Tribes affected by PL 280 are much less likely to have contemporary criminal court systems

<sup>13</sup> Major Crimes Act, 18 U.S.C. §1153

<sup>14</sup> General Crimes Act, 18 U.S.C. §1152

Both the Major Crimes Act and the General Crimes Act refer to the following federal statutes:

*U.S.C. Title 18 – Crimes and Criminal Procedure  
Part I – Crimes  
Chapter 109A – Sexual Abuse*

**2241. Aggravated sexual abuse**

*(a) By force or threat.--Whoever, ....., knowingly causes another person to engage in a sexual act--*

- (1) by using force against that other person; or*
- (2) by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping; or attempts to do so, shall be fined under this title, imprisoned for any term of years or life, or both.*

*(b) By other means.--Whoever, ....., knowingly--*

- (1) renders another person unconscious and thereby engages in a sexual act with that other person; or*
- (2) administers to another person by force or threat of force, or without the knowledge or permission of that person, a drug, intoxicant, or other similar substance and thereby--*
  - (A) substantially impairs the ability of that other person to appraise or control conduct;*
  - and*
  - (B) engages in a sexual act with that other person; or attempts to do so, shall be fined under this title, imprisoned for any term of years or life, or both*

*(c) With children.--Whoever ....., knowingly engages in a sexual act with another person who has not attained the age of 12 years, or knowingly engages in a sexual act under the circumstances described in subsections (a) and (b) with another person who has attained the age of 12 years but has not attained the age of 16 years (and is at least 4 years younger than the person so engaging), or attempts to do so, shall be fined under this title and imprisoned for not less than 30 years or for life. If the defendant has previously been convicted of another Federal offense under this subsection, or of a State offense that would have been an offense under either such provision had the offense occurred in a Federal prison, unless the death penalty is imposed, the defendant shall be sentenced to life in prison.*

*(d) State of mind proof requirement.--In a prosecution under subsection (c) of this section, the Government need not prove that the defendant knew that the other person engaging in the sexual act had not attained the age of 12 years.*

**2242. Sexual abuse**

*Whoever, ..., knowingly—*

- (1) causes another person to engage in a sexual act by threatening or placing that other person in fear (other than by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping); or*
- (2) engages in a sexual act with another person if that other person is--*
  - (A) incapable of appraising the nature of the conduct; or*
  - (B) physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act; or attempts to do so, shall be fined under this title and imprisoned for any term of years or for life.*

**2243. Sexual abuse of a minor or ward**

(a) *Of a minor.--Whoever, ....., knowingly engages in a sexual act with another person who--*

- (1) has attained the age of 12 years but has not attained the age of 16 years; and*
- (2) is at least four years younger than the person so engaging; or attempts to do so, shall be fined under this title, imprisoned not more than 15 years, or both.*

(b) *Of a ward.--Whoever, ..., knowingly engages in a sexual act with another person who is--*

- (1) in official detention; and*
- (2) under the custodial, supervisory, or disciplinary authority of the person so engaging; or attempts to do so, shall be fined under this title, imprisoned not more than 15 years, or both.*

(c) *Defenses.—*

*(1) In a prosecution under subsection (a) of this section, it is a defense, which the defendant must establish by a preponderance of the evidence, that the defendant reasonably believed that the other person had attained the age of 16 years.*

*(2) In a prosecution under this section, it is a defense, which the defendant must establish by a preponderance of the evidence, that the persons engaging in the sexual act were at that time married to each other.*

(d) *State of mind proof requirement.--In a prosecution under subsection (a) of this section, the Government need not prove that the defendant knew--*

- (1) the age of the other person engaging in the sexual act; or*
- (2) that the requisite age difference existed between the persons so engaging.*

**2244. Abusive sexual contact**

(a) *Sexual conduct in circumstances where sexual acts are punished by this chapter.—Whoever.... knowingly engages in or causes sexual contact with or by another person, if so to do would violate--*

- (1) subsection (a) or (b) of section 2241 of this title had the sexual contact been a sexual act, shall be fined under this title, imprisoned not more than ten years, or both;*
- (2) section 2242 of this title had the sexual contact been a sexual act, shall be fined under this title, imprisoned not more than three years, or both;*
- (3) subsection (a) of section 2243 of this title had the sexual contact been a sexual act, shall be fined under this title, imprisoned not more than two years, or both;*
- (4) subsection (b) of section 2243 of this title had the sexual contact been a sexual act, shall be fined under this title, imprisoned not more than two years, or both; or*
- (5) subsection (c) of section 2241 of this title had the sexual contact been a sexual act, shall be fined under this title and imprisoned for any term of years or for life.*

(b) *In other circumstances.--Whoever, ... knowingly engages in sexual contact with another person without that other person's permission shall be fined under this title, imprisoned not more than two years, or both.*

(c) *Offenses involving young children.--If the sexual contact that violates this section (other than subsection (a)(5)) is with an individual who has not attained the age of 12 years, the maximum term of imprisonment that may be imposed for the offense shall be twice that otherwise provided in this section.*

#### **2245. Offenses resulting in death**

*(a) In general.--A person who, in the course of an offense under this chapter, or section 1591, 2251, 2251A, 2260, 2421, 2422, 2423, or 2425, murders an individual, shall be punished by death or imprisoned for any term of years or for life.*

#### **2246. Definitions for chapter**

*As used in this chapter--*

*(1) the term "prison" means a correctional, detention, or penal facility;*

*(2) the term "sexual act" means--*

*(A) contact between the penis and the vulva or the penis and the anus, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however, slight;*

*(B) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus;*

*(C) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or*

*(D) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person;*

*(3) the term "sexual contact" means the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person;*

*(4) the term "serious bodily injury" means bodily injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty;*

*(5) the term "official detention" means--....*

#### **2247. Repeat offenders**

*(a) Maximum Term of Imprisonment.--The maximum term of imprisonment for a violation of this chapter after a prior sex offense conviction shall be twice the term otherwise provided by this chapter, unless section 3559(e) applies.*

*(b) Prior Sex Offense Conviction Defined.--In this section, the term "prior sex offense conviction" has the meaning given that term in section 2426(b).*

## A Review of Federal Laws

The federal sexual assault laws distinguish between “types” of sexual abuse on the basis of the degree of force or threat of force. These types are sometimes called “degrees”.

The federal laws are gender neutral. It doesn’t matter if the victim is a man or a woman.

Federal law has two main categories of sexual assault: *aggravated sexual abuse* and *sexual abuse*.

*Aggravated sexual abuse* (18 U.S.C. § 2241) is the most serious federal sex offense. This crime carries a statutory maximum term of life imprisonment and a minimum of 30 years when a child is involved

- It is “aggravated sexual abuse” for a person to knowingly engage in a sexual act through the use of force (violence) or threats of serious physical harm.
- It is “aggravated sexual abuse” to use other ways to commit a sexual assault such as giving the victim drugs and/or alcohol. This is sometimes called a “non-forcible” sexual assault.
- Any sexual act with a child under the age of 12 is “aggravated sexual abuse.” This type of sexual assault is sometimes called “statutory rape.” It requires no violence. A child under the age of 12 can never agree or consent to sexual behavior.
- If a child is between the age of 12 – 15, and the suspect is more than 4 years older than the child, it is “aggravated sexual abuse” to use force, threats, or drugs/alcohol to commit sexual assault.

*Sexual abuse* (18 U.S.C. §2242), is considered a “less serious” crime than *aggravated sexual abuse*. (This does not mean that the victim doesn’t experience serious harm.) *Sexual abuse* carries a maximum term of 20 years imprisonment.

- It is “sexual abuse” to cause someone to engage in a sexual act by threatening or placing the other person in fear, but not fear of serious bodily injury, kidnapping or death (as is required in “aggravated sexual abuse”).

- It is “sexual abuse” when one engages in a sexual act with another who is incapable of understanding the conduct or is physically incapable of declining participation.

The following information is needed in order to prosecute for *aggravated sexual abuse* or *sexual abuse* under federal law.

- The victim’s state of mind at the time of the crime (fear of death or serious bodily harm);
- The victim’s physical and psychological injuries (to assist in classification);
- Types of unwanted acts which were committed (to assist in classification);
- Types of force or coercion used by the perpetrator; and
- The ages of the victim and the perpetrator.

*Sexual abuse of a minor* (18 U.S.C. §2243) makes it illegal for anyone to engage in a sexual act with child between the ages of 12 and 15, if the person engaging is at least 4 years older. This is often referred to as “statutory rape” and a federal conviction carries a maximum penalty of 15 years in prison.

*Abusive sexual contact* is another federal crime, but it does not require sexual penetration. It includes intentional touching of the genitalia, anus, groin, breast, inner thigh or buttocks of any person with intent to abuse, humiliate, harass, degrade or arouse or gratify the sexual desire of any person.

## **C. REVIEWING SPECIFIC LANGUAGE**

If your tribe currently has sexual assault laws, review these issues:

1. Marital immunity (domestic violence)
2. Corroboration requirement (proof)
3. Prompt complaint
4. High threshold for proving rape – the strict force requirement

## Marital Immunity

Most non-tribal American governments did not traditionally recognize that a man could rape his wife (or ex-wife). *This means that a man forcing his wife (or ex-wife) to have sex was not considered a crime – no matter how violent.*

Nearly all states and the District of Columbia have now eliminated total immunity (exception) for sexual assault crimes for perpetrators who are married to the victim. Many tribal laws, however, still retain this immunity provision.

### *Points of Discussion: Marital Immunity*

The following passages represent marital immunity statutory language.

“It shall be unlawful to intentionally, wrongfully and without consent subject another, **not his/her spouse**, to any sexual contact...”

“The provisions related to sexual offenses **shall not apply to conduct between married persons...**”

These provisions mean that a prosecutor cannot take action if the accused is married to the victim.

## **Corroboration Requirement**

Older Anglo-American laws looked very suspiciously at the complaining witness (victim) of sexual assault. These special laws allowed the judge to tell the jury that there needs to be evidence of the assault beyond the statement of the victim. Most experts say that these laws were based on the belief that women lie about rape. There are tribal governments which still retain this type of law.

### ***Point of Discussion: Corroboration Requirements***

The following passage represents a sexual assault-specific corroboration requirement.

“Whenever appropriate in any prosecution before a jury regarding a sexual offense in this Code, the jury shall be instructed to evaluate the testimony of a victim or complaining witness with special care in view of the emotional involvement of the witness and the difficulty of determining the truth with respect to alleged sexual activities carried out in private, when such are not otherwise corroborated.”

This type of law may allow a judge to instruct a jury to view victim-witness testimony in a sexual assault case with skepticism that wouldn't apply in other types of cases.

## **Prompt Complaint**

Along with the idea that women tend to “lie” about sexual assault, older Anglo-American laws said that women should report the crime immediately after it happens. As most advocates know, most victims wait several days (or weeks or years) before they tell anyone what happened.

It is always easier for a prosecutor to make a case if the crime is reported right away. Prompt reporting is helpful in the conviction of all crimes. Many sexual assault victims, however, are unable to come forward until they have established a strong support system.

### ***Point of Discussion: Prompt Complaint***

The following passage represents a prompt complaint requirement.

No prosecution may be instituted or maintained for rape, deviant sexual contact or sexual assault unless the alleged offense was brought to the notice of the Tribal Police Department or other law enforcement official or agency **within thirty (30) days after its occurrence**, except when the alleged victim is less than sixteen (16) years of age or otherwise incompetent to make complaint at the expiration of the thirty (30) day period...

## High Bar for Proving Rape - Strict Force Requirement

Older sexual assault laws may require a certain level of physical injury in order to prove rape. A statute may include language requiring that there be proof that force was used or death or serious bodily injury threatened and that the victim believed the threat. When this is the only definition of sexual assault, it eliminates the possibility of holding most rapists accountable.

*Most victims of sexual assault do not have physical injuries.*

### ***Point of Discussion: High Bar***

The following passages represent specific thresholds for sexual assault crimes.

- (1) A person commits the offense of sexual assault knowingly making sexual contact with another without consent.
- (2) “Without consent”, as used in this section means:
  - (a) the victim is **compelled to submit by force** against himself, herself or another, or,
  - (b) As used in subsection (2)(a), the term “**force**” means; The infliction, attempted infliction, or threatened infliction of bodily injury or the commission of a forcible felony by the offender.

Another example of a statutory threshold requirement:

A person who engages in a sexual act with another, or who causes another to engage in a sexual act, is guilty of rape if:

- (a) The defendant compels the other person to submit **by force or by any threat that would render a person of reasonable firmness incapable of resisting...**

Examples of cases which might be excluded by this kind of law:

1. *Mrs. Randall is an older woman with health problems and she uses a wheelchair. A man comes to her house to deliver some groceries. While he is there, he touches her breast and bottom. He doesn't threaten to hurt Mrs. Randall, but she can't physically resist him.*

2. *Rebecca is a single mom, late on her rent. When she goes to her landlord's office, he locks the door and says that if she doesn't have sex with him, he will evict her and the children. Because she is afraid of losing her kids, she has sex with him.*

3. *Patty is a 20 year old who drank a lot while partying and passed out. While she was passed out, Victor pulled down her pants and had sex with her.*

## TRIBAL CODE EXAMPLES

The following tribal sexual assault laws are provided as illustrative examples. There are many different ways for a tribe to protect victims through criminal laws.

### **Sexual Assault Codes**

#### ***Example 3.1***

***Hannahville Indian Community***  
*Criminal Sexual Conduct Code § 1.2084*

#### **No Marital Immunity**

(8) Married persons. *A person may be charged and convicted under the criminal sexual conduct code even though the victim is his or her legal spouse. However, a person may not be charged or convicted solely because his or her legal spouse is under the age of 16 years, or is mentally disabled, or is mentally incapable, or is mentally incapacitated.*

#### **No Corroboration Requirements**

(4) Corroboration of victim's testimony. *The testimony of a victim need not be corroborated in prosecutions under any section of the criminal sexual conduct code.*

#### **High Threshold for Proving Rape Addressed**

(5) Resistance. *A victim need not resist the perpetrator in the perpetrators commission of an offense under any section or subsection of the criminal sexual conduct code. Resistance by a victim is not an element of any offense under any section or subsection of the criminal sexual conduct code, and the absence of a victim's resistance is not a defense in a prosecution under any section or subsection of the criminal sexual conduct code.*

#### ***Example 3.2***

#### ***Nez Perce Tribal Code***

#### ***§ 4-1-48 Rape***

(a) *It shall be unlawful for any person to engage in sexual intercourse with another:*

*(1) who is incapable, through mental defect or any other unsoundness of mind, whether temporary or permanent, of giving legal consent;*

*(2) who is prevented from resistance by force or threats of immediate bodily harm, accompanied by an apparent ability to carry out such threats or by any intoxicating narcotic, or anesthetic substance administered by the accused;*

*(3) who is at the time, unconscious of the nature of the act and this is known to the accused; or*

*(4) against the will or consent of the other.*

(b) *Sexual intercourse occurs when any sexual penetration, however slight takes place.*

## TRIBAL CODE COMMENTARY

The Hannahville Indian Community has specifically addressed marital immunity by flatly rejecting it in its statute. It states that a married person can be charged with rape even if the victim is the offender's spouse. The Nez Perce Tribal sexual assault statute simply indicates that it is unlawful for **any person** to engage in intercourse against the will of the other.

The Hannahville statute also specifically states that evidence corroborating the victim's testimony is not needed. The Nez Perce statute does not have any mention of the need for corroborating evidence, so it is implied that it is not necessary.

Neither statute requires prompt filing of a sexual assault complaint nor do they have a high threshold for proving rape. The Nez Perce definitions of sexual assault in section (a)(4), indicate that sexual activity *against the will or consent of another* is always a crime.

## D. OTHER KEY CONSIDERATIONS FOR AN EFFECTIVE SEXUAL ASSAULT LAW

### Defining Consent

The trend in state laws has been to define sexual violence as a **consent-based** crime as opposed to a **force-based** crime. However, the federal *aggravated sexual abuse*, U.S.C. Title 18 § 2241 (a), focuses on the forcible rape.

*§ 2241 (a) Aggravated sexual abuse: Whoever...causes another to engage in a sexual act ..by using force against the person or threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury or kidnapping...*

Many tribal laws have been modeled after older federal statutes or older state statutes and contain similar requirements of force, but do not contain other options that do not require force. However, tribes are increasingly redefining sexual assault as a lack of consent.

What is the meaning of “consent?” In relation to sex, consent is usually considered to be an agreement that two people make if they want to have sex.

What if one person says “yes” because she is afraid? What if one of the people is drunk, drugged or sleeping? Most laws say that a person who is intoxicated, drugged or sleeping can’t knowingly consent to engage in sex.

#### *Points of Discussion: Defining Consent*

What is consent? Consider the following situations:

- One person is unconscious, drunk, stoned, or sleeping.
- One person is a boss, a police officer, a teacher, or a spiritual leader (or other person in authority).
- One person doesn’t actually say “no” – but implies “no” through other words or behavior.
- One person changes his or her mind and wants to stop.
- One person is too young to consent.

There are different methods to address “consent.”

Some laws define “consent” using words such as “voluntarily” or “knowingly.” Other laws don’t define “consent,” but instead define “non-consensual” sex.

The definition section of the sexual assault statute is a very important portion of the statute. The definition of the crime lays the foundation for prosecution and sentencing.

### **Varying “Degrees” of Sexual Assault**

Most states and the federal government have different degrees or categories of sexual assault. As shown earlier, the federal law divides sexual assault into two key categories: *aggravated sexual abuse* and *sexual abuse*. Most states also divide sexual assault into different degrees.

On one hand, defining sexual assault in “degrees” might send the message that some sexual assaults are more “serious” or “dangerous” than other sexual assaults.

### **Sentencing**

After a defendant is convicted of sexual assault, the tribal court imposes sanctions or sentences the defendant. Sanctions are used to punish people who disobey the law and encourage people to obey the law. Sanctions should reflect the community’s feeling about the crime.

The Indian Civil Rights Act limits the amount of jail time and monetary fines which can be given by a tribal court. The maximum jail time is one year (per crime) and/or a \$5,000 fine per offence.

However, a tribe does have the power to order other forms of punishment. Some examples are: Restitution, banishment, electronic monitoring, probation, forfeiture, exclusion from tribal housing or tribal employment, seizure of weapons or other cultural sanctions. In addition, the tribe can order the defendant into treatment programs or other programs when appropriate. Requiring a minimum sentence is a common practice used in federal and state courts, and has been adopted by some tribes.

Some sexual assault laws have stronger punishments for repeat offenders. If someone has been convicted of a sexual assault before (in tribal, state, or federal court) – this can be considered in sentencing.

## TRIBAL CODE EXAMPLES

The following tribal sexual assault laws are provided as illustrative examples. There are many different ways for a tribe to protect victims through criminal laws.

### **Defining Sexual Assault Simply**

#### ***Example 3.3***

#### ***Little Traverse Bay Band of Odawa Indians***

#### ***4. Sexual Assault***

*(a) Offense. A person commits sexual assault if that person intentionally or knowingly engages in sexual penetration or sexual contact with any person without the consent of that person. Sexual contact means any fondling or manipulating of any part of the genitals, anus or female breast.*

#### ***Example 3.4***

#### ***Blackfeet Tribal Law***

#### ***Chapter 5, Section 9***

*Sexual Intercourse without consent*

*1. Any person who knowingly has sexual intercourse without consent with another person commits the offense of sexual intercourse without consent.*

### **Degrees of Sexual Assault**

#### ***Example 3.5***

#### ***Hannahville Indian Community***

#### ***Criminal Sexual Conduct Code***

#### ***Sections 1.2084***

*(3) Consent not a defense. The actual or apparent consent of the victim shall not be a defense to charges of criminal sexual conduct in the first or second degrees and shall not otherwise be relevant if any of the circumstances listed herein exist. A person shall be guilty of the crime of criminal sexual conduct in the first degree if he or she engages in sexual penetration with another person and any of the following listed circumstances exist. A person shall be guilty of the crime of criminal sexual conduct in the second degree if he or she engages in sexual contact with another person and any of the following circumstances exist. The circumstances referred to in this paragraph are as follows:*

*(1) The victim is under 13 years of age.*

*(2) The victim is at least 13 years of age, but less than 16 years of age, and either [1] the perpetrator is a member of the same household as the victim, or [2] the perpetrator is related to the victim by blood or affinity to the fourth degree, or [3] the perpetrator is in a position of authority over the victim and used this authority to coerce the victim to submit, or [4] the perpetrator is 5 or more years older than the victim.*

*(3) The perpetrator knows or has reason to know that the victim is mentally disabled, temporarily incapacitated or physically helpless.*

*(4) The perpetrator uses force or coercion to accomplish the sexual penetration or contact.*

(5) *The victim has knowledge that the perpetrator is armed with a weapon, as defined in subsection 1.2084(1)(m) of the criminal sexual conduct code, or the victim has knowledge that the perpetrator is armed with any article used or fashioned in a manner to lead the victim to reasonably believe it to be a weapon.*

(6) *The perpetrator engages in the medical treatment or examination of the victim in a manner or for purposes, which are medically recognized as unethical or unacceptable.*

*1.208 a Criminal sexual conduct in the first degree; penalty. A person is guilty of the crime of criminal sexual conduct in the first degree if he or she engages in sexual penetration with another person without the voluntary consent of that person. Criminal sexual conduct in the first degree may be punished upon plea or conviction by incarceration for not more than 1 year, or by a fine of not more than \$5,000.00, or by both, plus costs.*

(1) *Upon plea or conviction of a second or subsequent offense under section 1.2084a, the sentence imposed for such second or subsequent offense shall require a mandatory minimum sentence of incarceration for not less than 1 year and a fine of not less than \$5,000.00, plus costs.*

(2) *For purposes of subsection (1) immediately above, an offense shall be considered a second or subsequent offense if, prior to conviction of said second or subsequent offense, the perpetrator has at any time been convicted under section 1.2084a (criminal sexual conduct in the first degree), or under a predecessor statute of this jurisdiction substantially corresponding to said section 1.2084a, or under any substantially similar statute of this or any other jurisdiction for a criminal sexual offense including rape, carnal knowledge, indecent liberties, gross indecency, or an attempt to commit any of such offenses.*

*1.2084b Criminal sexual conduct in the second degree; penalty. A person is guilty of the crime of criminal sexual conduct in the second degree if he or she engages in sexual contact with another person without the voluntary consent of that person. Criminal sexual conduct in the second degree may be punished upon plea or conviction by incarceration for not more than 270 days, or by a fine of not more than \$3,500.00, or both, plus costs.*

(1) *Upon plea or conviction of a second or subsequent offense under section 1.2084b, the sentence imposed for such second or subsequent offense shall require a mandatory minimum sentence of incarceration for not less than 270 days and a fine of not less than \$3,500.00, plus costs.*

(2) *For purposes of subsection (1) immediately above, an offense shall be considered a second or subsequent offense if, prior to conviction of said second or subsequent offense, the perpetrator has at any time been convicted under either section 1.2084a (criminal sexual conduct in the first degree) or section 1.2084b (criminal sexual conduct in the second degree), or under any predecessor statute of this jurisdiction substantially corresponding to either section 1.2084a or 1.2084b, or under any similar statutes of this or any other jurisdiction for a criminal sexual offense including rape, carnal knowledge, indecent liberties, gross indecency, or an attempt to commit any of such offenses.*

*1.2084c Assault with intent to commit criminal sexual conduct in the first degree; penalty. A person is guilty of the crime of assault with intent to commit criminal sexual conduct in the first degree if he or she commits an assault or a battery against another person, as those terms are defined in sections 1.2004(1)(a) and (b) of this code, with the intent to engage in sexual penetration with that other person without the voluntary consent of that person. Assault with intent to commit criminal sexual conduct in the first degree may be punished upon plea or conviction by incarceration for not more than 180 days, or by a fine of not more than \$1,000.00, or both, plus costs.*

1.2084d

Assault with intent to commit criminal sexual conduct in the second degree. A person is guilty of the crime of assault with intent to commit criminal sexual conduct in the second degree if he or she commits an assault or a battery against another person, as those terms are defined in subsections 1.2004(1)(a) and (b) of this code, with the intent to engage in sexual contact with that other person without the voluntary consent of that person. Assault with intent to commit criminal sexual conduct in the second degree may be punished upon plea or conviction by incarceration for not more than 120 days, or by a fine of not more than \$500.00, or both, plus costs.

## TRIBAL CODE COMMENTARY

The Little Traverse Bay Band statute provides an example of a law treating all types of sexual assault as one offense no matter whether it is inappropriate touching or sexual penetration. Law enforcement and prosecutors work with one single definition as opposed to a variety of “degrees” of the crime. Since the tribe has such limited punishment, it makes some sense. A downside to this practice, however, is the confusion it can cause. It does not provide community members with any information concerning the relative danger presented by a person convicted of this crime. It could also cause confusion when it comes to requiring registration of sex offenders.

The Blackfeet statute is also quite simple. However, it does not provide a definition for consent. Consequently, it is not clear how consent will be interpreted by the tribal court.

The Hannahville Indian Community statute provides an example of a law that uses the term sexual conduct, and has *criminal sexual conduct in the 1<sup>st</sup> degree* and *criminal sexual conduct in the 2<sup>nd</sup> degree*. The 1<sup>st</sup> degree requires sexual penetration without voluntary consent. The 2<sup>nd</sup> degree requires only sexual contact without voluntary consent. Voluntary consent is not defined; however there is an entire section which describes under what circumstances a defendant is prohibited from using consent as a defense. These circumstances include everything from being under the age of thirteen or mentally disabled (incapable of giving consent) to the use of a weapon or use of force or coercion. The statute also includes unethical sexual contact by medical staff.

Hannahville further grades the sexual assault act through *assault with intent to commit criminal sexual assault in the 1<sup>st</sup> degree* and *assault with intent to commit criminal sexual assault in the 2<sup>nd</sup> degree*. These are the crimes where sexual assault was intended, but not achieved.

Hannahville’s sentencing includes some mandatory sentencing. The second offense in both 1<sup>st</sup> degree and 2<sup>nd</sup> degree sexual conduct requires mandatory sentences of the maximum penalty for each offense. For a first conviction in the 1<sup>st</sup> degree the Judge can order up to 1 year imprisonment and a \$5,000 fine. For a second conviction, 1 year and a \$5,000 fine is the mandatory sentence. The Tribe considers not only convictions in their own court, but also in courts of other jurisdictions.

## **E. EVIDENCE IN SEXUAL ASSAULT CASES**

Evidence laws can be extremely important in cases of sexual assault. Evidence laws are rules that describe what and how evidence (testimony or exhibits) can be considered in court. They are designed to make sure the case is fair, help the judge or jury determine the truth, and prevent wasted time and cost.

### **Rape Shield Laws**

A common issue in a sexual assault case is whether a defendant should be allowed to submit evidence of the previous sexual activity of the victim.

In historical Anglo-American rape trials, the defendant may have been allowed to say, “This woman who claims to be a victim is an unmarried mother. She has a bad reputation sexually. She is promiscuous.” This kind of testimony was extremely damaging to victims. Women did not come forward and report sexual assault because they feared being humiliated in public. The question is one of “relevance.” Is a victim’s past relevant to the crime?

Rape shield laws are designed to provide some protection for victims against character attacks. At times, evidence of past sexual history is still admissible if it is relevant to the issue of consent or credibility of the victim. The theory is that it is necessary in these limited situations in order to support the defendant’s right to due process.

If your tribe has adopted the Federal Rules of Evidence, there is some protection for victims. Federal Rule 412 excludes the victim’s sexual behavior from being entered into evidence:

- except to prove another was responsible for the injury or physical evidence;
- sexual conduct with the accused is admissible to prove consent;
- evidence which if excluded would violate the defendant’s constitutional rights.

**Federal Rule of Evidence 412.**

**Sex Offense Cases; Relevance of Alleged Victim's Past Sexual Behavior or Alleged Sexual Predisposition**

(a) Evidence generally inadmissible.--The following evidence is not admissible in any civil or criminal proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):

- (1) Evidence offered to prove that any alleged victim engaged in other sexual behavior.
- (2) Evidence offered to prove any alleged victim's sexual predisposition.

(b) Exceptions.--

(1) In a criminal case, the following evidence is admissible, if otherwise admissible under these rules:

- (A) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury or other physical evidence;
- (B) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and
- (C) evidence the exclusion of which would violate the constitutional rights of the defendant.

(2) In a civil case, evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. Evidence of an alleged victim's reputation is admissible only if it has been placed in controversy by the alleged victim.

(c) Procedure to determine admissibility.--

(1) A party intending to offer evidence under subdivision (b) must--

- (A) file a written motion at least 14 days before trial specifically describing the evidence and stating the purpose for which it is offered unless the court, for good cause requires a different time for filing or permits filing during trial; and
- (B) serve the motion on all parties and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative.

(2) Before admitting evidence under this rule the court must conduct a hearing in camera and afford the victim and parties a right to attend and be heard. The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.

**Points for Discussion: Rape Shield Laws**

Does your tribe use the Federal Rules of Evidence in tribal court? If so, is the rape shield provision adequate or do you want to have different language in your sexual assault law?

What are the pros and cons of having a rape shield section in your law?

## TRIBAL CODE EXAMPLES

The following tribal sexual assault laws are provided as illustrative examples. There are many different ways for a tribe to protect victims through criminal laws.

### **Rape Shield Laws**

#### *Example 3.6*

#### **Skokomish Tribal Code**

#### *9.02A.020 Testimony – Evidence – Written Motion – Admissibility*

*(a) In order to convict a person of any crime defined in S.T.C. 9.02A it shall not be necessary that the testimony of the alleged victim be corroborated.*

*(b) Evidence of the victim's past sexual behavior including but not limited to the victim's marital history, divorce history, or general reputation for promiscuity, nonchastity, or sexual mores contrary to tribal community standards is inadmissible on the issue of credibility and is inadmissible to prove the victim's consent except as provided in subsection (c) of this section, but when the perpetrator and the victim have engaged in sexual intercourse with each other in the past, and when the past behavior is material to the issue of consent, evidence concerning the past behavior between the perpetrator and the victim may be admissible on the issue of consent to the offense.*

*(c) In any prosecution for the crime of rape or for an attempt to commit or an assault with an intent to commit any such crime, evidence of the victim's past sexual behavior including but not limited to the victim's marital behavior, divorce history, or general reputation for promiscuity, nonchastity or sexual mores contrary to tribal community standards is not admissible if offered to attack the credibility of the victim and is admissible on the issue of consent only pursuant to the following procedure:*

*(1) A written pretrial motion shall be made by the defendant to the court and prosecutor stating that the defense has an offer of proof of the relevancy of evidence of the past sexual behavior of the victim proposed to be presented and its relevancy on the issue of the consent of the victim.*

*(2) The written motion shall be accompanied by an affidavit or affidavits in which the offer of proof shall be stated.*

*(3) If the court finds that the offer of proof is sufficient, the court shall order a hearing out of the presence of the jury, if any, and the hearing shall be closed except to the necessary witnesses, the defendant, counsel, and those who have a direct interest in the case or in the work of the court.*

*(4) At the conclusion of the hearing, if the court finds that the evidence proposed to be offered by the defendant regarding the past sexual behavior of the victim is relevant to the issue of the victim's consent, and the evidence is not inadmissible because its probative value is substantially outweighed by the probability that its admission will create a substantial danger of undue prejudice and that the exclusion of the evidence would result in denial of substantial justice to the defendant, then the court shall make an order stating what evidence may be introduced by the defendant, which order may include the nature of the questions to be permitted. The defendant may then offer evidence pursuant to the order of the court.*

*(d) Nothing in this section shall be construed to prohibit cross-examination of the victim on the issue of past sexual behavior when the prosecution presents evidence in its case in chief tending to prove the nature of victim's past sexual behavior, but the court may require a hearing pursuant to subsection (c) of this section concerning such evidence.*

**Example 3.7**  
**Salish and Kootenai Tribes**

**2-1-606. Provisions generally applicable to sexual crimes.**

(2) No evidence concerning the sexual conduct of the victim is admissible in prosecutions under this part except evidence of the victim's past sexual conduct with the offender or evidence of specific instances of the victim's sexual activity to show the origin of semen, pregnancy or disease which is at issue in the prosecution.

(3) If the defendant proposes for any purpose to offer evidence described in subsection (2), the trial judge shall order a hearing out of the presence of the jury to determine whether the proposed evidence is admissible under subsection (2).

## TRIBAL CODE COMMENTARY

The Skokomish Tribal statute prohibits the admission of the victim's past sexual activity into evidence to prove the character of the victim. It allows the admission of past sexual activity for the purposes of proving consent provided the procedure for a pre-trial motion is followed and the judge determines that the evidence is strong evidence that substantially outweighs the **prejudice** that may result to the victim. The judge must also find that if the evidence were excluded it would result in a substantial injustice to the defendant. The judge is required to issue an order that specifically describes the evidence that is admissible.

The Salish and Kootenai statute provides for the exclusion of evidence of the victim's sexual activity except for the victim's past sexual activity with the defendant or to show evidence of semen, disease, or pregnancy which is at issue in the case. It allows admission of the evidence of the victim's sexual activity in only a few situations. If the defendant seeks admission of such testimony, it does require a separate hearing before the judge.

## **Prior Bad Acts of the Defendant**

Another evidence issue relating to sexual assault is whether the defendant's prior convictions or "bad acts" should be admissible.

Generally, evidence of other crimes and bad acts are not admissible to prove the character of the defendant. However, the evidence of bad acts or prior convictions is admissible for other purposes, such as to prove motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake.

Many rape convictions have been overturned by appellate courts because the courts disagreed on the purpose served by the admission of evidence of the prior bad acts. As a result, some jurisdictions changed their rules of evidence or statute to allow greater use of prior bad acts in sexual assault cases. For instance, the Federal Rules of Evidence include the following Rule.

### ***Federal Rule of Evidence 413***

*(a) In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant.*

*(b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.*

*(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.*

Under this rule, evidence of the defendant's commission of another offense or offenses of sexual assault can be admissible. If the prosecutor intends to offer evidence under this rule, she must tell the defendant in advance. This disclosure must also include statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least 15 days before the scheduled date of trial or at such later time as the court may allow for good cause.

***Points for Discussion: Prior Bad Acts***

Has your tribe incorporated the Federal Rules of Evidence? If so, does Federal Rule 413 describe how your tribe wants to handle the admission of bad acts of the defendant into evidence?

If not, does your tribe have any rules of evidence or statutes which allow the admission of a defendant's previous sexual offenses into evidence at a sexual assault trial? Does it adequately describe how you want this evidence handled in the future?

What procedure should be followed in your Tribal Court before admission of such evidence?

**Confidentiality (Privacy) for Sexual Assault Victims**

Over the past 20 years, many jurisdictions have passed laws which protect private conversations between sexual assault and/or domestic violence victims and their advocates. Some of these jurisdictions have determined that these communications should always be strictly confidential. Other jurisdictions have decided that they should be made available to the defense in a criminal case under special circumstances.

When certain conversations and information are considered confidential and not subject to disclosure, it is called "privileged". If the information can be disclosed in some situations, it may be a qualified privilege and in other situations where the information can never be disclosed without consent, it is an absolute privilege.

Sexual assault advocates or domestic violence advocates perform many services to victims similar to the services provided by attorneys, social workers, psychologists or clergy. Most jurisdictions recognize the need for confidentiality in these relationships.

Confidentiality promotes trust between the victim and advocate, which allows a victim to feel comfortable sharing information. Information can help the advocate promote healing and safety. A victim who is concerned

that the advocate may have to tell the defendant what she said may be too afraid to seek help.

***Points of Discussion: Victim/Advocate Confidentiality***

What is the role of advocates in your community?

Should discussions between advocates and victims be kept private?

Does your tribal code protect other forms of communication, such as attorney/client, doctor/patient, psychologist/patient?

Should the defendant be able to read a victim's file in a shelter or other program?

Should the defendant be able to require advocates to testify about what they see and hear?

Four elements are generally considered necessary to justify establishing a testimonial privilege: (1) the communications must originate in confidence; (2) confidentiality must be essential to the proper maintenance of the relationship; (3) the relationship must be one that society deems worthy of protecting and (4) disclosure must injure the relationship more than it benefits the litigation.<sup>15</sup>

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<sup>15</sup> John H. Wigmore, Evidence in Trials at Common Law, §2285 (John T. McNaughton rev. ed. 1961).

## TRIBAL CODE EXAMPLES

The following tribal sexual assault laws are provided as illustrative examples. There are many different ways for a tribe to protect victims through criminal laws.

### **Victim-Advocate Privilege**

**Example 3.8**  
**Oglala Sioux Tribe Domestic Violence Code**  
Sec. 224

*Victim-advocate privilege applicable in cases involving domestic violence.*

1. *Except as otherwise provided in subsection 2, and in compliance with the Victim-Advocate Privilege Act, a victim of domestic violence may refuse to disclose, and may prevent an advocate, elder, or medicine person from disclosing, confidential oral communications between the victim and the advocate and written records and reports concerning the victim unless the privilege is waived by:*
  - a. *The victim; or*
  - b. *The death of the victim.*
2. *The privilege does not relieve a person from any duty imposed in the mandatory reporting of child abuse or neglect. A person may not claim the privilege when providing evidence in proceedings concerning child abuse and neglect.*
3. *As used in this subsection, “advocate” means an employee of or volunteer for a program for victims of domestic violence who:*
  - a. *Has a primary function of rendering advice, counseling, or assistance to victims of domestic violence; supervising the employees or volunteers of the program; or administering the program;*
  - b. *Has undergone a minimum of 40 hours of specialized domestic violence advocacy training; and*
  - c. *Works under the direction of a supervisor of the program, supervises employees or volunteers, or administers the programs.*

**Example 3.9**  
**Turtle Mountain Band of Chippewa Indians Domestic Violence Code**  
Section 3050 (A)

6. *Except as otherwise provided in Section 3050.9(a), a victim of domestic violence may refuse to disclose and may prevent an advocate, elder, or medicine person from disclosing confidential oral communication between the victim and the advocate and written records and reports concerning the victim unless the privilege is waived by the victim.*
  - a. *The privilege does not relieve a person from any duty imposed in the mandatory reporting of child abuse or neglect. A person may not claim the privilege when providing evidence in proceedings concerning child abuse or neglect.*

## TRIBAL CODE COMMENTARY

Both the Oglala Sioux and the Turtle Mountain Chippewa have a victim-advocate privilege which extends to conversations a victim has with an advocate, elder or medicine person. The Oglala law defines advocate to clarify that it can include an employee or volunteer whose primary function is to provide advice, counseling or assistance to victims and has received the 40 hour advocacy training. Both statutes indicate that the privilege does not apply to child abuse and neglect cases. Although both laws apply to domestic violence and have not included sexual assault within the provisions, the principle and the laws would be similar. Many tribes have not yet focused on updating and revising their sexual assault laws.

## F. SANCTIONS IN SEXUAL ASSAULT CASES

### *Sanctions Overview*

After a defendant is convicted of sexual assault, the tribal court imposes **sanctions** (penalties) on the defendant. Sanctions are used to provide an incentive for obedience to the law, as well as punishment for disobeying the law. The tribal code provides the legal expectations and possible penalties to be imposed. These penalties reflect the community's anti-violence sentiment.

Different governments operate from different philosophical perspectives. The tribal code-writing committee may choose to discuss the primary purposes of punishment from the tribal perspective. For example, discussing the following questions will help to illuminate the tribal "philosophy":

### *Point of Discussion: Holding Perpetrators Accountable*

Is the primary goal of sanctions: Punishment? Safety? Rehabilitation?

How can sanctions ensure the safety of victims?

How can sanctions serve to rehabilitate the perpetrator?

There are two major limitations on the sanctions that can be imposed by a tribal government. The Indian Civil Rights Act, 25 U.S.C. 1302(7) limits the sanctions imposed by a tribal court to sentences not exceeding one year in jail and/or a fine of up to \$5,000, or both.

The Indian Civil Rights Act Imposes NO LIMITATIONS ON:

- Probation
- Restitution
- Public apology / personal apology
- Banishment
- Other remedies not related to incarceration or fines

## **EXERCISES**

These exercises are designed to guide you in drafting and revising your tribal sexual assault laws.

### **STEP 1: Review the Law in Concurrent Jurisdiction**

Is your reservation affected by Public Law 280 or another law which gives criminal authority to the state government?

Yes

No

#### ***Points of Discussion: Federal law***

If federal sexual abuse laws apply to your community, think about:

What are the most important parts of the federal laws?

How does the federal government define sexual abuse?

What is effective or positive about the federal laws?

What is ineffective or negative about the laws?

Is the federal law broad enough to convict rapists who use methods to sexually assault acquaintance (known) victims?

How does the federal law treat spouses who commit rape?

Are there parts of the federal law you think would be effective in tribal courts and consistent with your culture?

If your reservation is affected by PL 280 (state jurisdiction), what is the citation (or reference number) for the state's criminal sexual assault statute? (You can skip this section if federal laws apply.)

*To find the state laws on sexual assault, Tribal Law and Policy Institute's web site: <http://www.tribal-institute.org/lists/state.htm>, will link you to state laws. State sexual assault coalitions also frequently have links to or sections of their web sites referencing their state's sexual assault laws*

***Points of Discussion: State law***

What are the most important parts of the state laws?

How does the state government define sexual abuse?

What is effective or positive about the state laws?

What is ineffective or negative about the laws?

Is the state law broad enough to convict rapists who use methods to sexually assault acquaintance (known) victims?

How does the state law treat spouses who commit rape?

Are there parts of the state law you think would be effective in tribal courts and consistent with your culture?

## STEP 2: Determine Existing Tribal Law

Does your tribal code currently have a criminal law on sexual assault?

Yes (If yes, write the citation here)

No

If yes, does your sexual assault law apply to married persons?

Yes (If yes, write the citation here)

No

### ***Points for Discussion: Tribal Traditions***

What are our tribal cultural values that guide relationships? What types of behavior were forbidden? What consequences traditionally existed?

Is it against our tribal traditions for a husband to rape his wife?

Discuss problems with marital rape within your community.

Should our tribal law make rape within marriage a crime?

Does your sexual assault law include a corroboration requirement?

Yes (If yes, write the citation here)

No

***Point for Discussion: Victim Testimony***

Should victim testimony in sexual assault cases be treated the same as victim testimony for other crimes?

Does your tribal sexual assault law require prompt reporting?

Yes (If yes, write the citation here)

No

***Points for Discussion: Problems with Testifying***

What are some problems that victims experience in reporting a sexual assault?

If a victim waits to report a sexual assault, should the crime still be prosecuted?

Does your tribal sexual assault law require that the victim have injuries or other proof of force?

Yes

No

***Points for Discussion: Proof of Sexual Assault***

How does a person consent to sexual activity?

What should be required to prove that a sexual assault happened?

If the victim does not have physical injuries, are there other ways to prove a crime was committed?

### **STEP 3: Make decisions on key parts of the law**

Now that you have identified existing laws, you can begin to make decisions about what your new tribal sexual assault law will contain.

#### ***Points of Discussion: Defining Sexual Assault***

Should we have more than one different “type” or “degree” of sexual assault?

How will we define sexual assault?

What should punishments be for sexual assault?

#### **STEP 4: Decisions on Evidence Laws**

Do you want a “rape shield” section in your law?

Yes

No

If yes, write the key points you want in your tribe’s rape shield laws. You can refer to the examples or write your own.

Do you want to allow the admission of a defendant's prior bad acts?

Yes

No

If yes, write the key points you want in your prior bad acts laws. You can refer to the examples or write your own.

Do you want to protect communications between advocates and victims?

Yes

No

If yes, write the key points you want in your privileged communication laws.  
You can refer to the examples or write your own.

## Step 5: Sanctions

Does the tribal code already contain laws concerning sanctions for convicted offenders?

- Yes (If yes, write the citation here)
- No

If the laws exist, discuss whether or not the laws are working well to protect victims. If the laws are working well, you may not need to work on this section.

It is important to have a set of “tools” that can be used by tribal judges in sentencing victims. When drafting the punishments, you may want to discuss the following issues and the resources necessary to implement them:

- Mandatory incarceration (jail-time) for a sexual assault or stalking conviction
  - Fines to be paid to the tribal government (not to exceed \$5,000 per offense)
  - Restitution (money or other forms) to the victim and/or the victim’s family
- Mandatory counseling (re-education, drug/substance abuse treatment, parenting classes, etc.) for sexual assault or stalking convictions
- Banishment (Requiring an offender to leave the reservation for a period of time.)
- Seize Weapons
- OTHER \_\_\_\_\_

Discuss whether enhanced punishments should be imposed for the following acts:

- Repeat sexual assault offenders/stalkers
- Use of weapons during an act of sexual assault and/or stalking
- Sexual assault or stalking in the presence of a child or elder
- Sexual assault or stalking against a pregnant woman
- Sexual assault or stalking against a child or elder

## **STEP 6: Draft the Law**

Use your answers in the previous steps to help draft your sexual assault law.

This checklist will help make sure you have covered the major issues.

- Define sexual assault – varying degrees.
- Consider sexual assault of the incapacitated, disabled, underage person.
- Define consent.
- Define all key terms used in the statute.
- Consider the issue of corroboration of victim’s testimony.
- Consider the issue of marital rape.
- Consider admissibility of evidence of victims past sexual activity.
- Consider admissibility of defendant’s past crimes.
- Consider an evidence rule or law that would protect the confidentiality of the conversations between the victim and an advocate and define advocate.
- Define your sentencing structure (enhanced provisions, minimum sentences).

## ADDITIONAL RESOURCES

### BOOKS:

Deer, Sarah et al, Eds., *Sharing our Stories of Survival: Native Women Surviving Violence* (AltaMira Press 2007).

Garrow Carrie E., and Sarah Deer, *Tribal Criminal Law and Procedure* (AltaMira Press 2004)

Richland, Justin and Sarah Deer, *Introduction to Tribal Legal Studies* (AltaMira Press 2004).

### ARTICLES:

Bruno, Jennifer, *Pitfalls for the Unwary: How Sexual Assault Counselor-Victim Privileges May Fall Short of Their Intended Protections*, 2002 U. Illinois L. Rev. 1373 (2002).

Cairney, Kathleen, *Addressing Acquaintance Rape: The New Direction of the Rape Law Reform Movement*, 69 St. John L. Rev. 291 (1995).

Deer, Sarah, *Expanding the Network of Safety: Tribal Protection Orders for Survivors of Sexual Assault*, 2003/2004 Tribal Law Journal, University of New Mexico  
([http://tlj.unm.edu/articles/volume\\_4/violence,%20women/index.php](http://tlj.unm.edu/articles/volume_4/violence,%20women/index.php))

Deer, Sarah, *Federal Indian Law and Violent Crime: Native Women and Children at the Mercy of the State*, 31 Social Justice 17 (2004)(Reprinted in COLOR OF VIOLENCE, Southend Press, 2006).

Deer, Sarah, *Sovereignty of the Soul: Exploring the Intersection of Rape Law Reform and Federal Indian Law*, 38 Suffolk U. L. Rev. 455 (2005).

Deer, Sarah, *Toward an Indigenous Jurisprudence of Rape*, 14 Kan. J. L. & Pub. Pol'y 121 (2004).

Lincoln, Judith D. *Abolishing the Marital Rape Exemption: The First Step in Protecting Married Women from Spousal Rape*, 35 *Wayne L. Rev.* 1219 (1989).

Whitney, Cheryl A. *Non-Stranger, Non-Consensual Sexual Assaults: Changing Legislation to Ensure that Acts are Criminally Punished*, 27 *Rut. L. J.* 417 (1996).

# NOTES

# Part 4

## BASIC STALKING LAWS

### OVERVIEW

Stalking, sexual assault, and murder are closely related. In the United States, 1 in every 12 women have been stalked and 31% of those women have been sexually assaulted by their stalker.<sup>16</sup> In addition 76% of female murder victims and 85% of female attempted homicide victims had been stalked by their intimate partner the year before their murder or attempted murder.

Native women are stalked at a rate twice that of all women.<sup>17</sup> Seventeen percent of American Indian and Alaska Native women are stalked in their lifetime, compared to 8.2 percent of white women, 6.5 percent of African-American women, and 4.5 percent of Asian/Pacific Islander women. Men are also stalked but at much lower incidence. (1 out of every 45 men has been stalked in the U.S.<sup>18</sup>) Strong stalking laws may result in a decrease in other serious crimes such as sexual assault and murder.

The definition of stalking varies depending upon the jurisdiction. The Stalking Resource Center<sup>19</sup> defines stalking as “a course of conduct directed at a specific person that would cause a reasonable person fear.”

Research shows that surveillance (watching, following) is the most common type of stalking behavior. Stalkers can cause serious emotional trauma and terror without ever communicating direct threats. Many victims experience loss of sleep, nightmares, weight loss/gain, depression, anxiety, and

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<sup>16</sup> Tjaden, Patricia, and Nancy Thoennes (1998), *Stalking in America: Finding from the National Violence Against Women Survey*, Washington, DC; U.S. Department of Justice, National Institute of Justice and the Centers for disease Control and Prevention.

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*

<sup>19</sup> [http://www.ncvc.org/src/main.aspx?dbID=dash\\_Home](http://www.ncvc.org/src/main.aspx?dbID=dash_Home)

difficulty in concentrating. Some are forced to change jobs and homes to avoid a stalker.

Many tribes do not have stalking laws. In 1999 approximately 21 tribes had passed codes that address stalking.<sup>20</sup> Those that do have a stalking statute may not have updated their statute in years. The methods that a stalker can use to track his victim have substantially changed in the past ten years. Today stalking via the Internet is common, installation of surveillance software on a computer is possible, global position systems (GPS) have become available, and secret video cameras are an economic possibility. Generally, laws have not kept up with the technology.

This section will review various tribal codes as well as recent updates recommended to stalking codes by the Model Stalking Code Advisory Board at the National Center for Victims of Crime.<sup>21</sup> The January 2007 report entitled *The Model Stalking Code Revisited, Responding to the New Realities of Stalking*, was used extensively in this chapter in framing the issues, describing the problems and providing a model code. For more information on these issues, you can access the report and other useful materials on the Stalking Resource Center site, [http://www.ncvc.org/src/main.aspx?dbID=dash\\_Home](http://www.ncvc.org/src/main.aspx?dbID=dash_Home)

The model code and tribal codes are provided as a starting point for discussions about your own tribal laws.

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<sup>20</sup> <http://www.swclap.org/ArticleStalking.htm>

<sup>21</sup> *The Model Stalking Code Revisited*, National Center for Victims of Crime, Jan 2007

## A. DEFINING STALKING AS A CRIME

### Intent

Every criminal code requires that the offender intends to commit the crime. Intent is generally described either as *specific intent* or *general intent*.

*Specific intent* means a stalker must intend to cause the reaction in the victim, such as fear for her safety. This can be difficult to prove. A prosecutor needs to prove what was on the perpetrator's mind when he performed the acts.

*General intent* means a stalker must intend the actions in which he is engaging (following, calling, emailing), but not necessarily the consequences of those actions. If a tribe desires to hold more stalkers accountable, it is suggested that the statute require *general intent*.

### Fear and Emotional Distress

The main goal of a stalking law is to be able to take action to prevent violence. When has a person "crossed the line?" Many stalking laws look at the issue of fear. Is the stalker doing things that cause fear?

Many jurisdictions require that the victim personally *experience* fear, rather than using a reasonable person standard. If a prosecutor must prove the victim experienced fear, she must call the victim as a witness. This means that the victim must sit in front of the person she fears and in a public setting, describe her fear and the effect that fear had on her (anxiety or psychiatric problems).

If a *reasonable person standard* is used, it may not always be necessary for the victim to testify. The prosecutor must show that a reasonable person (not necessarily the victim) would feel fear when exposed to the stalker's actions.

Some laws require that the victim fear serious bodily injury or death. However there are some milder forms of stalking which can also cause immense fear.

***Point of Discussion: What stalking behaviors should we criminalize?***

Some stalking laws are limited to actions that threaten death or injury. However, there are other forms of stalking that can be terrifying. Stalkers might threaten some of the following:

- \* I will kidnap you / hold you hostage
- \* I will kidnap your children / family members
- \* I will destroy your credit rating / get you evicted
- \* I will destroy your reputation / end your career
- \* I am watching your every move

These kinds of threats do not necessarily rise to the level of death or injury, but are quite frightening to the victim.

Some jurisdictions require that the victim *fear for safety or suffer other emotional distress*. The term *emotional distress* is meant to cover a reasonable person's response to being followed, watched, or threatened.

Fear in many statutes not only includes fear of harm to self, but also to others. Sometimes the *others* is limited to family members or it could be extended to a broader group of people, such as *a current social companion or someone with whom the victim has or has had a continued relationship, or the victim's professional counselor or attorney or any person with whom the victim is acquainted*.

Most stalkers are not strangers, and may have had some kind of relationship with the victim so the stalker may know the important people in the victim's life.

***Point of Discussion: Who might the stalker threaten?***

A victim of stalking might fear more than her own safety. A stalker might threaten a variety of different people in her life. Examples:

- \* Spouse, boyfriend
- \* Children
- \* Parents
- \* Boss
- \* Lawyer
- \* Friends

Stalking laws should also include an understanding of context (the entire situation). Some behavior might look harmless unless you understand the background.

*Example:*

*Joe sends his ex-girlfriend, Nancy, a dozen red roses.*

*One possible interpretation:*

*Joe is romantic. Joe wants to get back together.*

*Reality:*

*Joe once told Nancy that the next time she receives roses, she will be dead.*

The use of phrase *reasonable person in the victim's circumstances* allows for the consideration of context in a law.

## **Acts and Course of Conduct**

The following is a list of behavior (acts) which could be considered stalking under certain circumstances. By itself, an act may not be stalking. However, if you look at the background situation, it might meet the legal definition of stalking.

- Following
- Telephoning/texting
- Sending letters or packages
- Photographing person from a distance or with hidden camera
- Tracking or intimidating a person in any manner
- Violating protection orders
- Using the legal system to harass a victim (“litigation abuse”) by continuously filing motions or other civil process against victims
- Harassing a victim through visitation or custody arrangements
- Using surveillance in person, through technology, or through third parties
- Using the Internet or a computer to steal a victim’s identity or to interfere with a victim’s credit
- Engaging in obsessive or controlling behaviors
- Targeting third parties (e.g., a victim’s family member, friend, or child) to scare a victim
- Committing burglary or trespassing or moving items in a victim’s home
- Killing animals
- Attempting to harm self in a victim’s presence
- Sending flowers, cards, or e-mail messages to a victim’s home or workplace
- Contacting a victim’s employer or forcing a victim to take time off from work
- Using humiliating or degrading tactics such as posting pictures of a victim on the Internet, or disseminating embarrassing or inaccurate information about a victim
- Assaulting a victim
- Using children to harass or monitor a victim
- Impersonating a victim through technology or other means

At what point do these acts become stalking?

Most jurisdictions have a requirement that the behavior be *repeated* or *on two or more occasions*. The words *course of conduct* can be used to describe the action. Some places require that the action take place within a certain time period. Minnesota defines a *pattern of harassing conduct* as *two or more acts within a five-year period*.

Some stalking statutes contain a list of specific acts, sometimes called a “laundry list.” The best way to use a laundry list is to add language such as “*includes but is not limited to*” so that new technology or new tactics can be applied.

## CODE EXAMPLES

### Defining Stalking

The following laws are provided as illustrative examples. There are many different ways for a tribe to protect victims through criminal laws.

#### *Example 4.1* *NCVC Model Code (1/2007)*

##### *SECTION TWO: OFFENSE*

*Any person who purposefully engages in a course of conduct directed at a specific person and knows or should know that the course of conduct would cause a reasonable person to:*

- (a) fear for his or her safety or the safety of a third person; or*
- (b) suffer other emotional distress is guilty of stalking.*

##### *SECTION THREE: DEFINITIONS*

*As used in this Model Statute:*

- (a) "Course of conduct" means two or more acts, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about, a person, or interferes with a person's property.*
- (b) "Emotional distress" means significant mental suffering or distress that may, but does not necessarily, require medical or other professional treatment or counseling.*
- (c) "Reasonable person" means a reasonable person in the victim's circumstances.*

##### *SECTION FOUR: DEFENSES*

*In any prosecution under this law, it shall not be a defense that:*

- (a) the actor was not given actual notice that the course of conduct was unwanted; or*
- (b) the actor did not intend to cause the victim fear or other emotional distress.*

#### *Example 4.2* *Fort Peck Comprehensive Code of Justice:* *Chapter 2. Crimes Against Persons* *Subchapter C. Sexual Offenses* *Sec. 224. Stalking.*

- A. A person commits the offense of stalking if the person purposely or knowingly causes another person substantial emotional distress or reasonable apprehension of bodily injury or death by repeatedly:*
- 1. following the stalked person; or*
  - 2. harassing, threatening, or intimidating the stalked person, in person or by phone, by mail, or by other action, devise or method.*

#### *Example 4.3* *White Mountain Apache:* *SECTION 2.65 STALKING*

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*A. A person is guilty of stalking if he intentionally or knowingly engages in conduct directed against another person which would cause a reasonable person to either:*

- (1) Fear for his own safety or the safety of his immediate family; or*

*(2) Fear for imminent physical injury or death to his person or his immediate family.*

*B. "Conduct" under this Section means maintaining visual or physical proximity to a specific person or directing verbal or written threats, whether express or implied, to a specific person on two or more occasions over a period of time, however short, not including constitutionally protected activity.*

## CODE COMMENTARY

The Model Stalking Code incorporates *general intent* into the statute, instead of *specific intent*. The stalker must intend the actions, but not necessarily intend the consequences. The *course of conduct* means two or more acts. The acts can be committed by the stalker or through others and include:

- Monitoring
- Surveiling
- Threatening
- Communicating

The stalker does not need to be physically close to the victim. The code has not been specific in naming all the possible acts, but provides some direction to the court on the type of acts.

Under the Model Stalking Code these acts need to be “sufficiently disturbing” that a reasonable person would be fearful of her safety or the safety of a third person. The acts could also be the type that causes a reasonable person to suffer emotional distress.

Under this law, a prosecutor would not need to show that the victim suffered emotional distress or feared for her safety, but rather that a reasonable person would. It defines a reasonable person as a person in the victim’s circumstance. This is a broad statute that is intended to punish a wide variety of stalkers, including stalkers using new technology.

The Model Stalking Code recommends that stalking laws specifically exempt two typical defenses claimed by stalkers: (1) that the perpetrator was not given actual notice by the victim that his conduct was not wanted; or (2) that the stalker did not intend to cause the victim fear or other emotional distress.

***Point of Discussion: What are common defense arguments in stalking cases?***

“She didn’t tell me that she didn’t want me to call.”

“I didn’t mean to scare her.”

The Fort Peck law defines stalking much more narrowly. It requires *specific intent*. The prosecutor must show the perpetrator intended to cause the victim to fear harm. It also requires actual fear to the victim. It must be shown that the victim suffered substantial emotional distress or feared bodily injury or death. At a trial, evidence of the victim’s emotional distress would be a required part of the case, if the victim was alleging severe emotional distress.

The Fort Peck statute refers to the following stalking acts: harassing, threatening or intimidating the person *repeatedly*. The method is very broad covering mail, phone, in person, or other method.

The White Mountain Apache’s stalking statute uses *general intent*. This standard means that a reasonable person would fear for her own safety or the safety of her immediate family, if faced with the stalker’s actions. Additionally, a reasonable person could fear imminent physical injury or death to himself or his immediate family. This is narrower scope than the Model Code which refers to the victim or a third person. A boyfriend or good friend would not meet the requirement in the White Mountain Apache’s statute, although harm to a friend might cause an equal amount of concern as family member.

The White Mountain Apache statute does not consider emotional distress as a possible consequence of stalking, but rather only fear of *imminent physical injury or death or his own or his family’s safety*. The statute also requires physical proximity or visual proximity to the person stalked, which eliminates many modern means of stalking.

## B. PUNISHMENTS FOR STALKING

Tribal court sentencing limitations are discussed in Part 3 (see “Sentencing” section). These same limitations apply to criminal stalking cases.

Some governments have developed statutes which allow intervention at the early stages of stalking so that the behavior can be monitored and stopped. Many have used a graduated punishment system with the punishment increasing when there is a previous conviction of stalking or another serious crime or when weapons are involved.

Although a tribe can not hold a non-Indian criminally responsible in tribal court, it can hold a non-Indian civilly responsible.

A victim of stalking may feel safer and more secure if her stalker is excluded from tribal lands. Although stalkers can cause fear even if not physically close to the victim, there are cases in which a stalker is physically following his victim.

Some tribes have developed laws that permit the exclusion of both Indians and non-Indians from reservations. Many tribes have also expanded their protection order statutes to cover stalkers.

***Point of Discussion: Are some stalkers more dangerous than others?***

Some experts believe that certain kinds of behavior indicate a more dangerous kind of stalker. Should the penalty/punishment be greater if the stalker is:

- \* Violating an existing protection order?
- \* Using weapons or threatening to use weapons?
- \* Stalking a child or teenager?
- \* Continuing the behavior even after being convicted?

## CODE EXAMPLES

### Punishments for Stalking

#### *Example 4.5*

#### *Fort Peck Comprehensive Code of Justice*

*Chapter 2. Crimes Against Persons*

*Subchapter C. Sexual Offenses*

*Sec. 224. Stalking.*

*B. Stalking is a Class A misdemeanor. For a second or subsequent offense or for a first offense against a victim who was under the protection of a restraining order directed at the offender, the offender shall be imprisoned for a term of not less than three months, or fined an amount not to exceed \$500, or both. A person convicted of stalking may be sentenced to pay all medical, counseling, and other costs incurred by or on behalf of the victim as a result of the offense.*

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#### *Example 4.6*

#### *White Mountain Apache*

#### *SECTION 2.65 STALKING*

*C. A person found guilty under this Section may be sentenced to imprisonment for a period not to exceed One Hundred Eighty (180) days or to pay a fine not to exceed Five Hundred Dollars (\$500.00), or both.*

#### *Example 4.7*

#### *Model Stalking Code (Updated 2007)*

*Section Five: Classification*

*Stalking is a felony.*

*Aggravating factors.*

*The following aggravating factors shall increase the penalty for stalking:*

- (a) the defendant violated a protective order prohibiting contact with the victim; or*
- (b) the defendant was convicted of stalking any person within the previous 10 years; or*
- (c) the defendant used force or a weapon or threatened to use force or a weapon; or*
- (d) the victim is a minor.*

## CODE COMMENTARY

The Fort Peck statute increases the penalty for those with prior convictions. It also increases the penalty on a first offense, if there is a violation of a restraining order.

The White Mountain Apache statute has no enhancement of the penalty in the statute, although a judge might be able to consider aggravating factors such as past crimes and use of a weapon into consideration at sentencing.

The Model Code increases the punishment for a number of reasons. A violation of a protection order increases the penalty. A previous conviction of stalking within ten years increases the penalty. If force is actually used or threatened or a weapon is used or threatened, the penalty increases. Also, if the victim is a minor there is penalty enhancement.

## **EXERCISES**

These exercises are designed to guide you in drafting or revising your tribal stalking laws.

### **STEP 1: Determine Existing Tribal Law**

Does your tribal code currently have a criminal law on stalking?

Yes (If yes, write the citation here) \_\_\_\_\_

No

## **STEP 2: Make decisions on key parts of the law**

### **What is the intent requirement you want in your stalking statute?**

- General intent
- Specific intent

### **What standard of fear do you want in your statute?**

- Actual fear to the victim (which requires the victim to testify)
- Reasonable person to feel fear
- A reasonable person in the same context as the victim (model code)
- Other \_\_\_\_\_

### **What must the victim fear?**

- Fear for his or her safety or the safety of a third person (model code);
- Reasonable apprehension of bodily injury or death;
- Fear for his own safety or the safety of his immediate family; or
- Fear for imminent physical injury or death to his person or his immediate family.
- Other \_\_\_\_\_

### **Should emotional distress be included as an element of the crime as an alternative to the requirement of fear?**

- Purposely or knowingly causes another person substantial emotional distress
- Knows or should know that the course of conduct would cause a reasonable person to suffer other emotional distress (model code)
- Other \_\_\_\_\_

***Point of Discussion: What type of conduct is considered stalking?***

- \* How many separate acts are required?
- \* Do you want a narrow or broad description of behavior?

**Narrow context:**

*Stalking conduct can mean maintaining visual contact or physical proximity to a specific person or directing verbal or written threats, whether express or implied, to a specific person on two or more occasions over a period of time, however short, not including constitutionally protected activity.*

**Broad context:**

*(a) "Course of conduct" means two or more acts, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about, a person, or interferes with a person's property. (From the model code.)*

### **STEP 3: Addressing common defenses**

Consider whether you want your stalking law to clearly eliminate the following common defenses?

- lack of actual notice that the behavior was unwanted
- lack of intent to cause the fear or emotional distress

#### **STEP 4: Decisions on Penalties**

Does your tribal law categorize criminal penalties?

- Yes (If yes, write citation here)
- No

**If yes, how is stalking categorized?**

**What penalty would be sufficient for the crime of stalking?**

Other questions:

Are there certain actions or conditions which should increase the penalties, such as violation of a protection order, a minor victim, a previous stalking conviction or other criminal offense, or the use or force or a weapon?

If not, are there restrictions in your tribal constitution that prevent exclusion of non-members.

## **STEP 5: Drafting the Law**

Use your answers in the previous steps to help draft your criminal stalking law.

This checklist will help make sure you have covered the major issues.

- Offense provision
  - Required intent (specific or general)
  - Fear of what
  - Fear for whom
  - Emotional distress
- Course of conduct/repeated actions
- Jurisdiction
- Penalty/Punishment
- Define all necessary words

## ADDITIONAL RESOURCES

### ARTICLES:

Sanford, Brenda A., *Stalking is Now Illegal: Will a Paper Law Make a Difference?* 10 Thomas M. Cooley L. Rev. 409 (1993).

Tjaden, Patricia & Thoennes, Nancy. *Stalking in America: Findings from the National Violence Against Women Survey*, National Institute of Justice Centers for Disease Control and Prevention Research in Brief. (April 1998)

### WEBSITES:

The National Center for the Victim of Crime, *The Model Stalking Code: Responding to the New Realities of Stalking*,  
<http://www.ncvc.org/ncvc/AGP.Net/Components/documentViewer/Download.aspx?DocumentID=41822>

Southwest Center for Law and Policy, *Stalking in Indian Country*,  
<http://swclap.org/ArticleStalking.htm>

Carol E. Jordan et al, *Stalking: Cultural, Clinical and Legal Considerations*, 38 Brandeis L. J. 513 (2000).

# NOTES

# GLOSSARY

*The definitions in this glossary are meant to provide a general definition in common language to legal terms. Legal definitions may vary from one jurisdiction to another.*

**Action:** Term in usual legal sense means lawsuit.

**Assault:** An intentional attempt or threat to inflict injury upon another, when coupled with an apparent ability and any intentional display of force that could reasonably make a person feel in danger of harmful physical contact.

**Banishment:** Requiring a convicted offender to leave a reservation or country.

**Burglary:** A person enters a building or dwelling for the purpose of committing a crime.

**Civil Action:** A lawsuit brought to enforce a contract, compensate a party for a loss, or protect private rights. All types of legal actions are not considered criminal. Actions for divorce, actions to recover damages for injury, or actions for a protection order are a few examples of civil actions.

**Civil Contempt:** A civil contempt action is generally brought when a person fails to obey a court order, such as a violation of a protection order or injunction. Contempt of the court is the deliberate failure to comply with an order of the court. Punishment for civil contempt may be a fine or imprisonment. The purpose of such punishment is to compel compliance with the order of the court.

**Civil Jurisdiction:** The power of a court to hear and decide civil actions.

**Civil Process:** May include all acts of the court from the beginning to the end of civil proceedings.

**Code:** A collection, of laws, rules or regulations organized in a particular manner, usually by subject.

**Concurrent Jurisdiction:** When two or more courts, legislative or administrative officers have the same authority to deal with a particular subject matter within the same territory.

**Conspiracy:** When two or more persons join to perform an illegal act.

**Conviction:** In a criminal action, the finding that the offender is guilty of the crime.

**Correctional Personnel:** A general terms used to describe people working in jails, prisons, reformatories and other places of detention.

**Crime:** An act committed in violation of a law which recommends a particular punishment; considered an offense against the state, tribe, or United States. Crimes are generally divided into misdemeanors and felonies.

**Criminal Action:** A proceeding by which a person charged with a crime is brought to trial and either found guilty or not guilty.

**Criminal Contempt:** A crime which obstructs a judicial duty generally resulting in an act done in the presence of the court; *e.g.* insulting a judge, disrupting a court proceeding or refusing to answer questions.

**Criminal Jurisdiction:** Power of a court to hear and dispose of criminal cases.

**Divest:** Deprive or take away a right.

**Elements:** The basic parts of a crime or civil action which must be proven. For example, some elements of a cause of action for battery are intentional, unwanted, physical contact. Each part, “intentional,” “unwanted,” etc. is one element.

**Enhanced Penalties:** Greater or increased penalties as a result of aggravating factors.

**Exemption:** Freedom from a general duty; a privilege allowed by law; immunity from certain legal obligations; or certain information required to be left out of public website.

**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.

**Forfeiture:** Loss of some right or property as a penalty for some illegal act.

**General Intent:** In criminal law, the offender intends the actions in which he is engaging, not necessarily the consequences.

**Harassment:** Words, gestures and actions that tend to annoy, alarm or abuse another person. Civil and criminal definitions of harassment vary. Criminal laws prohibiting harassment may list specific acts of harassment and increase the penalties based on the level of harassment.

**Inchoate:** Partial; unfinished; begun, but not completed.

**Injunction:** A court order prohibiting someone from doing some specified act or commanding someone to undo some wrong or injury.

**Jurisdiction:** The geographical area within which a court has the right and power to operate. The persons about whom and the types of cases a court has the right and power to make binding decisions.

**Jurisprudence:** The philosophy of law and the study of legal principles on which legal rules are based.

**Juvenile Delinquency:** Illegal behavior by a minor child (age defined by laws).

**Legislative Body:** The branch of government whose appropriate function is the making of laws.

**Litigation Abuse:** The use of multiple legal actions to harass another, rather than for its proper purpose.

**Misdemeanors:** Any offense lower than a felony and generally punishable by fine, penalty, forfeiture or imprisonment otherwise than in penitentiary. Oftentimes misdemeanors are punishable by less than one year of imprisonment. There may be various classes of misdemeanors.

**Noncompliant:** Failing to conform or obey the requirements.

**Notice:** Information or written warning, in a more or less formal shape, intended to tell a person of some proceeding in which his interests are involved, or inform him of some fact which it is his right to know and the duty of the notifying person to communicate.

**Offense:** Violation of a criminal statute.

**Offender:** A person who commits a crime.

**Perpetrator:** A person who commits a crime.

**Petition:** A written request or application to a court that it takes a particular action, *e.g.* a petition for a protection order.

**Petitioner:** One who presents a petition to a court and starts a legal action.

**Plea Agreement:** The agreement between the offender and the prosecutor in a criminal case about the punishment.

**Prejudice:** Bias or preconceived opinion. Leaning towards one side of a cause for some reason other than justice. If a case is dismissed with prejudice, it cannot be brought back into court again.

**Privileged Communications:** Those statements made by certain persons within a protected relationship, such as husband-wife, attorney-client, which the law protects from forced disclosure on the witness stand.

**Probation:** A sentence of a convicted offender, whereby he is released into the community under the supervision of a probation officer.

**Prosecution:** A criminal action; a proceeding instituted and carried on according to the law before a court, for the purpose of determining the guilt or innocence of a person charged with a crime.

**Protocol:** The rules of correct or appropriate behavior for a particular group of people in a particular situation. For example, the hospital or police have a protocol for the handling of sexual assault cases.

**Regulations:** Rules issued by agencies of a government to guide the activity of those meant to be regulated by the agency and their employees to ensure uniform application of laws.

**Relevancy:** Evidence which relates to and has a tendency to prove a particular issue.

**Restitution:** The act of restoring something to its rightful owner or giving an equivalent for any loss, damage or injury.

**Retrocession:** Refers to the act of a PL 280 state conveying some or all rights acquired by PL 280, back to the U.S. government.

**Sanction:** A penalty or punishment attached to a law so that it is obeyed.

**Sentencing:** The phase of a criminal proceeding after the offender has been found guilty, when the punishment is imposed.

**Solicitation:** Asking, enticing, requesting, or encouraging someone to engage in an illegal act.

**Sovereignty:** The supreme, absolute and uncontrollable power by which any independent state is governed; supreme political authority.

**Specific Intent:** In criminal law, the offender intends the precise action the law intends to prohibit; e.g. assault with intent to rape, stalking with intent to cause emotional distress.

**Stalking:** Stalking is a pattern of repeated, unwanted attention, harassment, and contact. It is a course of conduct that can include a wide variety of activities which are usually specified in criminal law, including such things as following someone, threatening to harm the victim or her relatives, harassment through the internet and many other activities.

**Statutes:** A law; it can mean a single act of a legislature or a body of acts which are collected and arranged according to a scheme or legislative session.

**Surveillance:** Continual observation of a person, involving visual or electronic methods.

**Trespass:** An unauthorized entry or intrusion on private property or land of another.