

TRIBAL COURT BENCH BOOK  
FOR  
DOMESTIC VIOLENCE CASES



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The Northwest Tribal Court Judges Association

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1999

# ACKNOWLEDGMENTS

## **Oversight Committee–Former and Current Members**

Judge Mary T. Wynne, Former President  
Judge Lorintha Warwick, Current President  
Judge Julian Pinkham  
Judge Charleen Yellow Kidney  
Judge Dennis Nelson  
Judge Collin Kippen  
Judge Michelle Demmert  
Judge Leo Helon  
Judge Buford Johnson, Jr.

## **Project Manager**

Dan Gargan

## **Grant Contact Persons**

Terri Henry and Paula Julian

## **PreTrial Subcommittee**

Judge Julian Pinkham, Chairperson  
Judge Elizabeth Fry  
Judge Rudy James

## **Trial Subcommittee**

Judge Fawn Sharp, Chairperson  
Judge Fred Gabourie  
Judge Leo Ariwite  
Judge Gerald Danzuka  
Judge James Steele

## **Post-Trial Subcommittee**

Judge Katherine Eldemar, Chairperson  
Judge Randy Doucet  
Judge Susan Owens

## **Domestic Violence Experts**

Joan Zegree, M.S.W., ACSW and Mending the Sacred Hoop

## **Final Draftspersons**

Judge Elizabeth Fry, Judge Katherine Eldemar, Judge Fawn Sharp

## **Evaluator**

Judge Mary Linda Pearson

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## FOREWORD

The Tribal Court Bench Book is a general guideline with recommendations to help your court deal with domestic violence cases. We take into account that each tribal court has its own laws, customs, traditions, and procedures to deal with domestic violence, and it is our hope that this Bench Book can assist you in addressing this difficult and emotional area of law.

The Bench Book is arranged into three sections: Pre-Trial, Trial, and Post-Trial. We have included appendices, where necessary, to provide additional information to you.

### **History of the Bench Book**

A grant was written by Judge Mary T. Wynne, as President of the Northwest Tribal Court Judges Association (NWTCA), to the Violence Against Women Grants Office in Washington, D.C. The grant was funded, and Dan Gargan was chosen as the Project Coordinator. The grant contact person was Terri L. Henry, Project Manager, Violence Against Women Act Grants Office, U.S. Department of Justice.

The initial Oversight Committee, which was also the Board of NWTCA, was composed of Judge Mary T. Wynne, President, Judge Julian Pinkham, Vice-President, Judge Collin Kippen, former Secretary-Treasurer, Judge Michelle Demmert, current Secretary-Treasurer, Judge Dennis Nelson, At-Large Board Member, and Judge Charleen Yellow Kidney, At-Large Board Member.

A second Oversight Committee has been installed, composed of Judge Lorintha Warwick, President, Judge Julian Pinkham, Vice-President, Judge Michelle Demmert, Secretary-Treasurer, Judge Leo Helon, At-Large Board Member and Judge Buford Johnson, Jr., At-Large Board Member.

Numerous tribal judges from nearly every tribal court in the Northwest met for over a year organizing and writing the Bench Book. The following judges were responsible for the final writing in their subcommittee: Judge Elizabeth Fry for the Pre-Trial Subcommittee, Judge Katherine Eldemar for the Trial Subcommittee, and Judge Fawn Sharp for the Post-Trial Subcommittee. Judge Elizabeth Fry did the final re-write and edit of the Bench Book. The “nationalized” version was finalized by Judge Elizabeth Fry, Judge Katherine Eldemar, and Judge Fawn Sharp.

Judge Mary Linda Pearson was the independent evaluator for this project. She evaluated and commented upon the writings and procedure used to create the Bench Book.

The Bench Book is the result of a year-long process to which tribal judges devoted many hours of personal time. That effort has created a unique legal guide on domestic violence *by* tribal court judges *for* tribal court judges.

## INTRODUCTION

By Joan Zegree, MSW, ASCW

### STOPPING DOMESTIC VIOLENCE IN INDIAN COUNTRY: AN INTRODUCTION TO THE TRIBAL COURT BENCH BOOK

This Tribal Court Bench Book is a reflection of the wisdom of many who have looked at the best ways for communities to stop domestic violence. Domestic violence has been a hidden and misunderstood problem. Some of the myths about it have resulted in well-intentioned but dangerous practices. This introduction briefly outlines the important facts about domestic violence perpetrators, victims and children, as well as what we know about safe and effective intervention.

For many tribes, domestic violence is seen as a more recent problem which does not have the benefit of traditional and customary ways of intervening. For each tribal community, we hope the following information will help communities decide how to handle this challenging issue.

NOTE: The vast majority, 95%, of domestic violence assaults and behaviors is by males against their female partners. Although most batterers are men, most men are not batterers. To simplify this article, and to reflect the majority of domestic violence cases, we refer to the victim as “she.”

### WHAT ARE THE COMPONENTS OF A DOMESTIC VIOLENCE-FREE COMMUNITY?

In a study of ninety cultures around the world, it was found that only 16 communities had essentially no family violence. What is interesting is that those sixteen societies had several traditions in common<sup>1</sup>:

1. Husbands and wives share in decision-making
2. Wives have some control over the fruits of family labor
3. Wives can divorce their husbands as easily as husbands can divorce their wives
4. Marriage is monogamous
5. There is no premarital sex double standard
6. Divorce is relatively infrequent
7. Husbands and wives sleep together
8. Men resolve disputes with other men peacefully
9. Intervention in wife-beating tends to be immediate

The theme of these traditions is one of balance, equality and a strong community message that violence is not an acceptable form of problem-solving.

### DOMESTIC VIOLENCE: WHAT WE KNOW ABOUT IT

In the early days of recognizing domestic violence, we made some wrong assumptions about what it is, what causes it, and what “cures” it. Two major mistakes were that it was thought to be a

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<sup>1</sup>

Levinson, David, Family Violence in Cross-Cultural Perspective, Sage Publications, Newbury Park, 1989.

problem with anger, and that it was caused by alcohol. We now understand that the problem lies in the person's belief system.

### The Belief System

Simply put, all human behavior, except in psychosis or other severe brain disorders, is guided by learning. We learn by observation and experience. We develop a mental "rulebook" which guides what we choose to do or say. The rulebook, or belief system, for abusers says something like: "If my partner does not meet my expectations or behaves in ways I don't like or disagree with, then I need to do whatever I can to obtain her cooperation."

### Anger

Anger fooled us because sometimes a person looks angry when being violent. We learned from men in treatment that in fact they were not angry at all. They just wanted to get their partner to do what they wanted her to do. When their partners did not obey, they'd tell themselves that it was OK to use force to coerce obedience. That is the belief system which underlies domestic violence.

The other thing we noticed was that many men who were violent with their partners did not have "anger problems" at work or in other settings. That their "out of control behavior" only happened at home. Except in rare instances such as true psychosis, an abusive person chooses certain behaviors that work to get the outcome he wants. Sometimes talking works, sometimes talk has to be louder or scarier, sometime it has to be accompanied with a push, shove, threat with a weapon or other increasingly lethal action. The most significant feature about domestic violence is that it is chosen behavior: it is intentional and strategic. And it works!

### Alcohol

It is true that many incidents of violence occur when the abuser is under the influence of alcohol. We also know that many people drink and get drunk but are not abusive. And many people are abusive even when they are sober. Studies<sup>2</sup> teach us that even when under the influence, it is a person's belief system that determines whether or not he chooses violent behavior to get what he wants. Alcohol will, however, make the risk for injury greater. For an abuser with an alcohol problem, just sobering up will not stop the abuse. It can make the abuse less lethal, but unless the person has treatment for the belief system that gives him permission to use force, he will continue to use tactics which work to control his partner.

## THE TWO DEFINITIONS OF DOMESTIC VIOLENCE

There are two ways that we must look at domestic violence: The Bench Book focuses on the legal definition of domestic violence. This Introduction looks at the behavioral definition. Why two definitions? Because domestic violence is often so subtle, so hidden, and so tricky that unless we

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"Adult Domestic Violence: The Alcohol Connection," New York State Office for the Prevention of Domestic Violence, Troy, NW, Winter-spring 1993.



know *how* it operates, we can end up making things worse for our communities. Domestic violence is a pattern of behaviors, many of which are damaging but not illegal. We need to focus on the behavioral definition to be successful in prevention and in setting standards for intervention.

Only when our laws, policies and procedures reflect a clear understanding of how domestic violence “works,” can we have faith that we will be able to end it in our communities.

#### THE BEHAVIORAL DEFINITION:

Domestic violence is a pattern of assaultive and coercive behaviors, including physical, sexual and psychological attacks, as well as economic coercion, that adults and adolescents use against their intimate partners to control them.

It is any act which causes the victim to do something she doesn’t want to do, prevents her from doing something she wants to do, or causes her to be afraid. It need not involve physical contact since acts of intimidation such as punching a wall, reckless driving, or threatening harm can have the same controlling effect.

Most defendants will insist that their offense was the first act of violence. Research findings support the fact that the instant offense is likely to be part of a pattern of abusive behavior that is long-standing in the relationship. The arrival of the police is but a snapshot in a long-playing videotape of controlling behaviors.

For examples of those behaviors, please see the diagram on page 17, “Domestic Violence: Some of Its Manifestations.”

#### CHARACTERISTICS OF DOMESTIC VIOLENCE WHICH CALL FOR SPECIALIZED OFFENDER TREATMENT

Appropriate domestic violence intervention must reflect the following facts in every part of the community’s response, including any treatment approach with the perpetrator. Domestic violence is<sup>3</sup>:

1. Learned.
2. A variety of tactics and behaviors used to control a partner.
3. Intentional behavior.
4. Not an anger problem.<sup>4</sup>
5. Not caused by drugs or alcohol.
6. Durable because it works.
7. Often hidden.

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Anne Ganley and Joan Zegree, “*Domestic Violence Sentencing and Treatment Options*,” Presentation at the 1997 District and Municipal Court Judges Spring Program, Pasco, Washington.

4

John Gottman, Neil Jacobson, Rusche, Shortt, Babcock, Taillade, Waltz, “*The Relationship Between Heart Rate Reactivity, Emotionally Aggressive Behavior and General Violence in Batterers*,” *Journal of Family Psychology*, 1995, Vol. 9, No. 3, 227-248.

## THE PERPETRATOR

Before a discussion of domestic violence treatment, we need to examine the varied characteristics of perpetrators which must be considered when planning safe and effective intervention.

Given that most perpetrators of domestic violence are male, this discussion is limited primarily to males who assault their female partners.

Although there is no “perpetrator profile” of demographic or other characteristics, there are certain features which are often associated with an abuser. An abuser is likely to<sup>5</sup>:

1. Be of any race, educational level, cultural background, socio-economic level, occupational group, religious group or from any geographic region.
2. Have a belief system which supports the use of violence or abusive behavior to achieve control over a partner.
3. Be “invisible” due to exemplary behavior on the job, and in his social role. He may be an elder or a leader who is highly respected.
4. Deny problems.
5. Blame others, especially the victim.
6. Gain sympathy by sharing convincing stories about his difficult partner, about how miserable he is, how hard it is for him, and make it appear that he is really the victim.
7. Show ‘defensive injuries,’ such as scratch marks, bite marks.
8. Seem so reasonable.
9. Have witnessed his mother being abused by his father.
10. Abuse his children, too.
11. Have positive qualities, too.

## THE VICTIM

There is no “victim profile.” Any woman can become a victim if her partner believes that he has the right to hurt her. When a woman fights back, that often makes it worse in terms of her own safety. Except in rare instances, when women use force in a relationship it is to fend off abuse or to protect the children. Remember, domestic violence is about control in a relationship and the use of force to gain control is what constitutes domestic violence. Use of force in self defense is not domestic violence. The victim:

1. Comes from all age, racial, socioeconomic, educational, occupational, religious, geographic, sexual orientation and personality groups.
2. Is defined not by her behavior, but by that of her partner.
3. May or may not have been abused as a child or in prior relationships.
4. Is isolated.
5. Uses survival strategies.

6. Faces barriers to leaving. Leaving safely is a process and must be carefully planned in order to be successful. Often the most lethal violence occurs after the victim has left the relationship or the abuser fears that she will leave.

## THE CHILDREN

Child psychology researchers<sup>6</sup> find that the following features are more likely to occur in children who witness domestic violence in their homes than those who are not exposed to domestic violence:

1. Denial and minimization of what is going on in their homes.
2. Sadness, depression.
3. Fear, shock.
4. Low tolerance for frustration, poor impulse control.
5. High level of anger, both suppressed and expressed.
6. Higher rates of illness.
7. Stress-related illnesses.
8. Frequent absences from school.
9. Developmental delays in cognitive abilities, physical growth and motor skills, and speech.
10. Regression in behavioral landmarks (e.g.: bed-wetting, thumb sucking)
11. Nightmares.
12. Delinquent behavior.
13. High risk for alcohol and drug abuse, acting-out sexually, running away.
14. Isolation, loneliness.
15. Continual hope that their situation at home will improve.
16. Social isolation.
17. Poor social skills.
18. Blaming themselves for being unable to prevent or stop the violence.
19. Poor problem-solving skills.
20. Tendency to use violence as a form of problem-solving in school and at home.
21. Fear for their own lives and that of their parents.
22. Confusion and insecurity.
23. Fear of abandonment.
24. Suicide thoughts and increased risk for suicide.
25. Loss of respect for mother.
26. Violence toward mother.
27. Feeling used and powerless in custody negotiations.
28. Abuse to siblings.
29. Abuse to pets or other animals.
30. Embarrassment and shame.
31. Low self-esteem.
32. Divided loyalties: feeling guilty about having positive feelings for their father. Identification with the more powerful parent. Children are likely to believe that they will

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Jaffe, Peter, Wolfe and Wilson, Children of Battered Women, Safe Publications, Newbury Park, 1990.

be safer if they side with the abusive parent and often a father will play up this tendency and even overtly work to alienate the children from their mother by blaming her for the violence, “Your mom misbehaved.”

## Child Abuse

Although this Bench Book is designed to address partner violence (which in some tribes is only a portion of the law addressed to domestic violence), child abuse does enter our consideration of domestic violence in many ways.

Sometimes a mother is blamed for her partner’s abuse. She is told she should be able to get him to stop it, or that she should “just leave.” The reality is that many abusive partners make significant and serious threats if she tries to leave. Research shows that nothing she does either causes him to choose violence or can make him stop. This is a very difficult concept until we remember that all abusive behavior is a selection among options, a choice. The abuser could leave the relationship if he dislikes her behavior rather than hitting her or calling her humiliating names in front of the children.

Mothers who are abused need help from the system. The best help is holding the perpetrator accountable. Sometimes the system re-victimizes the mother by taking her children away from her for her “failure to protect.” The appropriate intervention is to hold the person committing a criminal act accountable and providing real consequences for the person who is actually doing the harm. Mothers, once they are safe from their abusive partner, do a fine job of parenting. Safety from the abuser is the key to this.

## HOW CHILDREN ARE ABUSED BY THE ABUSER

Unfortunately, children are victims of domestic violence, intentionally and unintentionally. One of the fallacies of family violence is that when mothers are abused by their partner, they “take it out on the children.” In fact, when researchers have looked at the rates of serious injury and child homicide, holding time spent with each parent constant, fathers were far and away more dangerous to children. And this is especially the case when those father are abusive to their children’s mother.

The following section, “Using the Children,” identifies the many ways children are used by abusers to control the partner and even the legal system.

## BEHAVIOR YOU MAY SEE IN THE COURTROOM

Because we know that domestic violence is about control over one’s partner, we must be very alert to subtle signs that the abuser is using control tactics in the courtroom.

Once physical force has been used to “teach” a partner something, that lesson is well-learned. Researchers recently found that hormones present during fear deeply ingrain that lesson. So then all the abuser needs to do in the future is remind the learner that she needs to do what he wants or she will be at risk of physical harm again. Nonverbal cues do an excellent job sending that message. And

the rest of us may not even be aware that a glance has a chilling effect on a witness's freedom to participate.

In court or other proceedings, the abuser wants things to go his way. All it might take is a raised eyebrow or a certain look which sends a message to the victim or witnesses that they are in jeopardy. Some tactics which maybe affecting the process<sup>6</sup>:

1. Victim and witnesses are threatened with harm or suicide. "You can't do this to me, it brings shame on our family, I can't live if this goes through."
2. Perfect behavior, apologies, remorse, promises.
3. Blaming the victim, saying that the victim is "abusive."
4. Using court proceedings, motions, continuances to harass the victim, threaten her with loss of the children.
5. Giving nonverbal cues, warning looks.
6. Minimization and denial.
7. It is easy to be confused when the abused party recants or states she lied about the incident. It may have been made very clear to the victim that if she tells the truth to anyone, she will "be sorry."
8. The victim may be anxious, fearful, show emotional distress, tearfulness or emotional "numbness."

## WHAT GOOD IS TREATMENT?

### The Program

Domestic violence can easily become lethal, thus it is extremely important that intervention be safe and effective. We have learned the hard way that certain counseling approaches (individual psychotherapy, couples counseling, family therapy) are not only not helpful but can be harmful. Without question, in domestic violence **NO TREATMENT IS BETTER THAN THE WRONG TREATMENT**. This is because the wrong treatment gives false hope to the victim and children while in reality keeping them in continued jeopardy. If treatment does not meet the following minimum standards, the community is better served by imposing jail or sentencing options and providing safety services for the victim and children.

There are several essential components of safe intervention:<sup>7 8</sup>

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6

Anne Ganley, & Carole Warshaw, Improving the Health Care Response to Domestic Violence, 1996, Family Violence Prevention Fund, San Francisco.

7

Anne Ganley, "Court Mandated Treatment for Domestic Violence Perpetrators," Appendix A in Domestic Violence Manual for Judges, 1997, Office of the Administrator of the Court, Olympia, WA, adapted from Dr. Ganley's material in : Domestic Violence: The Crucial Role of the Judge in Criminal Court Cases, A National Model for Judicial Education, 1991, Family Violence Prevention Fund, San Francisco.

8

Barbara Hart, Ed., "Accountability: Program Standards for Batterer Intervention Services," Pennsylvania Coalition Against Domestic Violence, 6400 Flank Dr., #1300, Harrisburg, PA 17112-2778, 888-23-LEGAL.

1. Focus on violence as the problem, not a “symptom.”
2. Domestic violence treatment is not anger management (See following section entitled “Anger Management vs. DV Treatment”) couples counseling, individual psychotherapy, family therapy, pastoral counseling or any other technique. These modalities are not a substitute for specialized domestic violence treatment and have been known to exacerbate the risk to the victim. The only way to create durable change is to change the belief system which supports the violence. The other modalities are not designed to achieve this goal. In fact, they often help the abuser find excuses to externalize the blame for his behavior, “I can’t help it, it is caused by my wife’s nagging, my drinking, my family background, etc. etc. etc.” All of those conditions may be true but they do not explain why the person selected a violence option.
3. Cover specific topics related to domestic violence, its causes, effects, impact on children and ways to obtain the belief system changes which underlie behavior changes.
4. Thorough assessment at intake including review of criminal history, violence history, records from other treatment programs. The program must have the right to decline admission to an individual who does not meet its entry requirements.
5. Hold perpetrator alone accountable for the abusive behavior.
6. Hold the perpetrator alone responsible for changing the abusive behavior.
7. Have policies and procedures which promote victim safety and autonomy.
8. Have clear treatment contracts outlining program expectations.
9. Hold self-referred and court-ordered clients to identical participation requirements.
10. Victim contact to insure referral to appropriate advocacy, shelter or other services, to provide information about the batterers’ program, to invite input to provider regarding perpetrator and to notify victim of safety concerns. Programs should provide a pamphlet with helpful information for those whose abusive partners are in treatment.
11. Single-gender group.
12. Groups no larger than 12. Ideally facilitated by a male and female team.
13. Minimum length of program: One year.
14. Completion is based on accomplishment of clear goals and meeting the exit criteria, not just attendance for a specified time.
15. If Tribal Court refers to a treatment program which is certified by the State to meet its standards, then the client will receive services which meet state guidelines. Please refer to the following section on “Summary of State DV Program Guidelines on page 20.”

## The Community

Without every part of the system (law enforcement, prosecution, court, social services and the community) in place and sending a consistent message, treatment with the batterer is unlikely to be effective. Rural areas have additional challenges because people on the community’s response team could well be friends or even relatives of the batterer.<sup>9</sup> Community response elements should include:

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Carol Adams and Marsha Engle-Rowbottom, “A Commentary on Violence against Women and Children in Rural Areas,” excerpted from M. Fortune, Violence in the Family: A Workshop Curriculum for Clergy and Other Helpers, 1991, Pilgrim Press, Cleveland.

1. Support and advocacy for victims and their children.
2. Court review process<sup>10</sup>
  - a. Require batterer to show compliance with Treatment within 30 days after initial hearing.
  - b. An arrest warrant is immediately issued if compliance is not documented.
3. Probation:
  - a. Close monitoring with “swift, certain and consistent responses to program future.”
  - b. Clear consequences for non-compliance.
  - c. Face-to-face court appearance with judge for all offenders at the end of probation.<sup>11</sup>  
It is essential for judges to see the successes.
4. The larger community sending a consistent, clear and strong message such as zero tolerance posters and brochures and information everywhere: schools, workplaces, places of worship, etc.

## WHEN IS TREATMENT APPROPRIATE?

Before considering a treatment option, certain safety features must be addressed:<sup>12</sup>

1. Would the victim be endangered by ordering the abuser into treatment; should he be in jail?
2. Is victim afraid of re-assault? Is there a safety plan? Are appropriate orders for protection in place?
3. Has the perpetrator disregarded court orders in the past?
4. Has the perpetrator been unsuccessful in a batterers’ program in the past?
5. Is appropriate treatment available?
  - a. If substance abuse or psychosis is present, are adjunct services available? A batterer with substance abuse or mental health problems needs both domestic violence treatment and adjunct services.
  - b. The victim must never be required to participate in perpetrator’s treatment or be mandated into treatment as part of perpetrator’s treatment plan.
6. Is adequate monitoring by the court or probation available?
7. Is there a commitment by the judicial system that should a re-offense occur or the offender fail to comply with treatment appropriately, court proceedings will take place?

## WHO IS A GOOD CANDIDATE FOR A BATTERERS’ PROGRAM?

A good candidate for a batterers’ program:

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Gondolf, Edward, EdD, MPH, “*The Impact of Mandatory Court Review on Batterer Program Compliance: An Evaluation of the Pittsburgh Municipal Courts and Domestic Abuse Counseling Center*,” Mid-Atlantic Addiction Training Institute, Indiana University of Pennsylvania, April 1998.

11

Helen Harberts, Chief Probation Officer, Butte County Probation, Oroville, CA.

12

Anne Ganley, and Joan Zegree, “Domestic Violence Sentencing and Treatment Options,” Presentation at the 1997 District and Municipal Court Judges Spring Program, Pasco, Washington.

1. Acknowledges responsibility for abusive behavior.
2. Shows motivation to change.
3. Has no, or minimal prior domestic violence history.
4. Has language and intellectual capacity to make appropriate use of the program.
5. Has no severe psychiatric diagnosis (e.g. psychosis).
6. Has no severe substance abuse problem.

## DOES IT WORK?

What we know:

1. “Batterers programs appear frequently successful in ending violence and the most threatening behaviors among the majority of participants who complete prescribed programs. A review of treatment program outcome data over the past 20 years shows a range of successful outcomes from 53% - 85%.”<sup>13</sup>
2. Programs in four cities’ (840) subjects are being compared. At 12-month follow-up, some tentative findings emerge:<sup>14</sup>
  - a. *All programs were associated with short-term cessation of assault and improvements overall in the women’s quality of life.*
  - b. *The majority of dropouts occurred early in the programs.*
  - c. *32-39% of the men re-assaulted during the 12-month follow-up. Nearly half of the re-assaults occurred in the first 90 days of the program. Controlling, verbally-abusive behaviors decreased by victim report progressively at each of the 3-month follow-up intervals.*
  - d. *Nearly 66% of the victims reported overall a “better” quality of life, with 12% reporting that they were “worse off,” with the most problems being financial. 72% reported feeling “very safe” over the course of the 12-month follow-up.*
  - e. *Those dropping out in the first 3 months were more likely (40 vs. 28%) to be re-arrested for domestic violence than those who had completed at least 3 months or more of a program.*
  - f. *A severe previous assault and being drunk once a month were the only items at intake that significantly ‘predict’ re-assault.”*
3. Cumulative effects in reducing recidivism were found for successful prosecution, probation monitoring, receiving a court order to counseling, attending counseling intake, and completion of counseling. Individuals with greater involvement in this coordinated intervention system had lower recidivism rates.

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<sup>13</sup>

Anne Ganley, “*Court Mandated Treatment for Domestic Violence Perpetrators*,” Appendix A in Domestic Violence Manual for Judges, 1997, Office of the Administrator of the Courts, Olympia, WA, adapted From Dr. Anne Ganley’s material in: Domestic Violence: the Crucial Role of the Judge in Criminal Court Cases, A National Model for Judicial Education, 1991, Family violence Prevention Fund, San Francisco.

<sup>14</sup> Ganley, *Ibid.*



## ALTERNATIVES

1. Treatment must be looked at as rehabilitation, not punishment or in lieu of punishment. Some offenders are inappropriate for treatment, and alternatives and concurrent sanctions need to be available. Any such options must meet standards for victim safety and offender accountability. Some alternatives include:
  - a. Jail.
  - b. Restitution.
  - c. Electronic monitoring.
  - d. Community service which involves the same amount of supervised time as would attendance at an intervention program.
  - e. Other creative combinations.
2. Challenges for the development of social, criminal justice, law enforcement, treatment and societal interventions which reflect the monumental diversity with which domestic violence manifests itself in our communities.

## DOMESTIC VIOLENCE: SOME OF ITS MANIFESTATIONS

<u>PHYSICAL</u>	<u>SEXUAL</u>	<u>EMOTIONAL</u>	<u>SOCIAL &amp; EMOTIONAL</u>
Pinch, squeeze, slap	Minimize sexual needs	Jokes, insults	Lack of consideration of partner's preferences
Shove, shake	Criticism of partner's sexuality	Ignore feelings	Ridicule of partner's race, class, religion, intelligence
Deny basic needs	Withholding sex	Yelling	Taking over partner's affairs
Choke	Demanding sex	Name calling	Isolation from events
Targeted hitting	Name-calling with sexual humiliation	Repetition of insults	Rejection of partner's friends
Bruising	Humiliation	Targeting	Jealousy, suspiciousness
Throwing partner around	Incest	Humiliation	Restrict access to money
Household items used as weapon	Promiscuity	Shaming in front of family	Reject partner's family
Restrain and hit	Uncomfortable sex	Causing to lose face	Reject partner's support system
Hit wall near partner's head	Forcible sex (rape)	Threats of retaliation	Drive off support system
Abusive during pregnancy	Sex with beating	Degrading partner's roles (as wife, mother)	Censor activities
Lacerations, broken bones	Sex with weapons	Demanding all partner's affection	Deny authority
Internal injuries	Sex resulting in permanent injury	Threats to extended family	Hurt/ destroy pets, possessions
Use of knives, guns	Rape with homicide	Threats against children, marriage	Socially isolate
Irreparable injury		Mixed messages	
Physically restrain, isolate		Lack of cause and effect	
Death (homicide, suicide)		Question partner's sanity	
		Isolation	
		Threats of homicide	
		Threats of suicide	
		Suicide	

This describes some of the behaviors that are part of the pattern of abuse that we know as domestic violence. They do not necessarily occur in order

## USING THE CHILDREN

### WHEN PARENTS ARE TOGETHER

Criticizing mother in front of kids  
Saying she's a bad parent  
Teaching kids she's to blame for the violence  
Getting kids to take sides against mom  
Using kids as confidants  
Getting other relatives to speak badly to the children about their mother  
Yelling at mother when kids misbehave  
Telling children that their mom is crazy, stupid, bad  
Withholding money for children's needs  
Abusing, or threatening to hurt or kill family pet  
Sexually abusing the children  
Battering mother in kid's presence  
Physically abusing children  
Holding the family hostage  
Raping mother in children's presence  
Driving car recklessly with kids  
Threatening to take children if she leaves  
Abusing alcohol/drugs in children's presence  
Threatening to commit suicide  
Threatening to hurt or kill her in front of children

### AFTER SEPARATION

Questioning children about their mother's activities  
Using children to relay messages  
Blaming her for the separation or divorce  
Withholding child support  
Talking about what their mother did "wrong"  
Playing "Disneyland Dad"  
Telling them she didn't want them  
Physically abusing children and telling them not to tell their mom  
Violation terms of Parenting Plan, or other court orders  
Criticizing her new partner  
Abusing his new partner in front of children

### BY USING SOCIAL & LEGAL SERVICES

Reporting her to CPS of welfare  
Filing frequent motion in court  
Using her efforts to seek counseling against her in court  
Saying bad things to teachers, daycare, family court workers, guardian and litem or other evaluators  
Filing charges against her (e.g. mutual restraining orders thru family court)  
Using religious beliefs to portray her as a bad mom  
Calling 911  
Telling police that the victim is lying about the violence  
Getting custody of the children from her

## SUMMARY OF STATE DV PROGRAMS GUIDELINES

### ANGER MANAGEMENT (NO CERTIFICATION)

#### Goal

Control and express anger appropriately

#### Assessment

Optional

#### Focus of Treatment

Skills in the awareness and appropriate  
expression of anger and other emotions  
Communication skills  
Stress management

#### Length of Treatment

Determined by provider

### DOMESTIC VIOLENCE TREATMENT (STATE CERTIFICATION REQUIRED)

#### Goal

End violent and abusive behavior  
Increase victim safety  
Hold batterer accountable

#### Assessment

Complete mental health evaluation referral  
Chemical dependency screening and referral  
Confidential information from victim and/or  
current partner  
History of violent behavior, review of police  
reports, court documents, etc.

#### Focus of Treatment

Change in belief system which supports the  
use of violence in intimate relationships  
Identification of physical, sexual and  
psychological abuse  
Batterer held accountable for all abusive  
behaviors  
Confrontation of denial, minimization, and  
victim blaming  
Examination of societal and personal beliefs  
that support violence  
Impact of battering on family  
Non-violent, non-controlling relationship  
skills  
Skills listed in “anger management”

#### Length of Treatment

Minimum of 12 months by law  
Must meet Exist Criteria set by law

Developed by Joan Zegree & Meg Crager 1997  
402 NE 72<sup>nd</sup> St, Suite 2  
Seattle, Washington 98115, (206)525-4775

## GLOSSARY

### Batterer's Re-education Program

A program, which has, as its goal, the changing of the belief system of the abuser through the method of facilitator-led group participation.

### Contempt

Contempt may generally be defined as disregard for, or disobedience of the order or commands of legislative or judicial authority. In addition, contempt includes misbehavior in the presence of the court by any person or misbehavior by an officer of the court in his official transactions.

### Domestic Violence (Behavioral Definition)

Domestic violence is a pattern of assaultive and coercive behaviors including physical, sexual or psychological acts, as well as economic coercion, that adults or adolescents use against their current or former intimate partners to control them.

It is any act which causes the victim to do something she does not want to do or prevents her from doing something she wants to do, or causes her to be afraid. It need not involve physical contact since acts of intimidation such as punching a wall, reckless driving, or threatening harm can have the same controlling effect.

Some of the behaviors associated with domestic violence are as follows:

Assault	Kidnaping
Reckless endangerment	Rape
Coercion	Unlawful imprisonment
Burglary	Telephone harassment
Criminal trespass	Child molestation
Malicious mischief	Stalking
Violation of protection order	Interfering with reporting a DV crime

### Domestic Violence (Legal Definition)

Physical harm, bodily injury, assault, or the infliction of fear of imminent harm, bodily injury or assault, between family or household members; sexual assault of one family or household member by another, or stalking of one family member or household member by another family or household member.

Family or household member means spouses, former spouses, persons who have a child in common regardless of whether they have been married or have lived together at any time, adult persons related by blood or marriage, adult persons who are presently residing together, or who have resided together in the past, persons 16 years of age or older who are presently residing together or who have resided together in the past and who have or have had a dating relationship, persons 16 years of age or older with whom a respondent 16 years of age or older has or has had a dating relationship, and persons who have a biological or legal parent-child relationship, including stepparents and stepchildren and grandparents and grandchildren.

### Family or Household Members

Family or household member means spouses, former spouses, persons who have a child in common regardless of whether they have been married or have lived together at any time, adult persons related by blood or marriage, adult persons who are presently residing together, or who have resided together in the past, persons 16 years of age or older who are presently residing together or who have resided together in the past and who have or have had a dating relationship, persons 16 years of age or older with whom a respondent 16 years of age or older has or has had a dating relationship, and persons who have a biological or legal parent-child relationship, including stepparents and stepchildren and grandparents and grandchildren.

### Injunction

An injunction is a request for a special proceeding in which an order is issued by a judge, which restrains or enjoins a party from doing an act, or which requires a party to do a particular act. Such orders can be temporary or permanent and are usually issued for a specific time period.

### Protection Orders

Protection orders include the following temporary or permanent orders: No-contact (criminal), Protection (civil), Restraining (civil), or Anti-harassment (civil).

### Treatment

There is a controversy surrounding the use of the word “treatment.” Some advocates believe that the term signifies a mode of working with abusers which does not hold them accountable for their actions nor try to alter their belief system. As used in this Benchbook, the word treatment means a program for abusers in which they are held accountable for their abusive actions, and in which their belief systems are sought to be changed.

## PRETRIAL

### The Role of the Tribal Court Judge

- I. Introduction
- II Guiding Principles
- III. Judicial Checklist
- IV Role of the Judge

### Injunctions

#### Protection Orders for Domestic Violence

- I. Introduction
- II. Issuing Protection Orders
- III. Distribution of Protection Orders

#### Temporary Restraining Orders (TROs)

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## The Role of the Tribal Court Judge

(This section is used with the permission of Chief Judge Mary L. Pearson)

### I. Introduction

There have been many changes in the last ten years in the way the justice system responds to violence against women. The major change has been with the passage of the Violence Against Women Act of 1994. This federal legislation has resulted in many tribes amending or writing their own laws to clearly define family violence as a crime and to set out judicial procedures for protecting women abused by intimate partners and children who are victims.

The tribal court plays a crucial role in implementing these new amendments and codes. It is the tribal courts which impact Indian society's ability to prevent many of the devastating repercussions of violence between intimate partners in the home.

The challenge to tribal judges is clear. Judges must treat victims sensitively and fairly. Calling the man by his formal name and then using familiarity with the victim is in appropriate. Judges must ensure that due process is accorded to those accused of a crime, and at the same time protect the family members at risk of continuing violence. Finally, judges must impose effective sanctions on those found guilty. A judge who takes a strong position regarding enacting No Contact Orders and imposing contempt penalties if those orders are violated, can make a strong impact on the community.

Many components of the tribal justice system are impacted by cases as a result of violence in the home. More social services are required for the victims (including children) and perhaps the perpetrator. The court system will be impacted by review of the probation, if the tribe doesn't have a probation officer. It will be impacted by pressure from the outside for requiring offenders to take responsibility for their actions.

Tribal Court Judges must consider a series of complex questions every time an abused woman brings a case into court:

- A. How does the tribal court best protect the safety and interests of all family members when using a protective order or when imposing sentence?
- B. How can the tribal court best ensure that a defendant will comply with a protective order?
- C. How do alcohol and drug abuse figure into the equation of a woman abused by an intimate partner? What can the Tribal Court do about them?
- D. Should a convicted batterer be sentenced to treatment? If so, what kind, and how does a judge learn of the availability of these resources for sentencing?



- E. How can a tribal court judge, who is responsible for a child's custody or placement, be sure that his or her decision best protects the child?
- F. How can tribal courts protect the rights of abused women appearing ex parte and pro se while preserving the rights of the defendants?

These questions bring up an even more basic question: Should the criminal justice system be the primary institution responsible for confronting family violence? Even though courts are usually the last resort for women in abusive and violent realities, should tribal court judges shoulder the responsibility alone? The answer is "No." It is the responsibility of the community--everyone working together--to prevent abuse of women by intimate partners and child victimization.

Through the codification of tribal domestic statutes, the tribal community expresses the ultimate statement that domestic violence will not be tolerated. All of the component members of the team have a responsibility in protecting women and children from domestic violence. The Tribal court's role is to provide leverage to enhance victim safety and hold perpetrators accountable on behalf of the community.

Domestic Violence cases present unique challenges for the courts. These cases can be handled more effectively and efficiently if fact-finding and decision-making are based on an understanding of both societal and familial context in which domestic violence occurs and is reinforced.

The Tribal Court system's response to domestic violence must be part of a coordinated community effort to end the devastating consequences of violence within the family. Judges play a powerful role in this coordinated response, first by holding perpetrators of domestic violence accountable for stopping the abuse, second, by ensuring that abused women have access to the justice and protection of the courts, and third, by considering the damaging effects of the perpetrator's abuse on the woman, the children and the community.

## II. Guiding Principles

- A. Develop an understanding of domestic violence and the societal context in which it occurs.
- B. Examine individual and societal beliefs regarding domestic violence that influence judicial fact-finding and decision making.
- C. Review current statutes and case law governing the handling of civil (and criminal) cases where domestic violence is an issue.
- D. Discuss tribal court practices designed to improve the tribal courts handling of these cases.

III. Judicial Checklist

How do your rulings in domestic violence cases accomplish the following objectives?

- A. Stop the Violence
- B. Protect the woman abused by her partner
- C. Protect the children and other family members
- D. Protect the general public
- E. Hold the perpetrator accountable for the violent behavior and for stopping that behavior (CIVIL)
- F. Rehabilitate the perpetrator (CIVIL)  
Hold the offender accountable for the violent behavior and for stopping that behavior (CRIMINAL)
- G. Provide restitution for the woman abused by her intimate partner (CIVIL)  
Rehabilitate the offender (CRIMINAL)
- H. Convey to the public that domestic violence will not be tolerated

IV. Role of the Judge

- A. Use your status in the community to convey to the public that domestic violence will not be tolerated.
- B. Be responsible in your role in the coordinated community response.
- C. Develop an accelerated court docket for Domestic Violence cases
- D. Provide and maintain Judicial Accessibility for temporary protection orders  
(If you don't have a fax machine or telephone, find the money to obtain them)
- E. Order restitution to the victim
- F. Encourage a D.V. Code or amendment to the present code which will provide for a jail term of one year and a fine of \$5,000, the maximum allowed under law.
- G. Traditional customary remedies
- H. Consider banishment

# Injunctions

## Protection Orders for Domestic Violence

### I. Introduction

This section of the Tribal Court Bench Book is designed to provide tribal judges with information on dealing with protection orders after they have been issued.

It should be made clear to the victims that the protection order only works when the victim is willing to take action to have it enforced. The victim should also be made aware that the protection order is limited in what it can do in the form of actual protection. Finally, the victim should be given resource information on how to take appropriate precautions to protect themselves from further abuse or harassment.

### II Issuing Protection Orders

Although, issuance of protection orders for domestic violence has been previously covered we have a few additional suggestions you may want to consider.

#### A. Instructions to Victim and Perpetrator

1. Read and explain the order to both the victim and perpetrator.
2. Inform the victim to take necessary safety precautions - Washington Address Confidentiality Protection Program, may be available, check with state agencies.
3. Have available at the court a resources list with current addresses and/or telephone numbers to refer victims to.
4. Make available at the court a community resources list for perpetrators and victims. Please see pre-trial community resources handout.

### II Distribution of Protection Orders

A. Victim - The victim should be given a copy of the protection order before the victim leaves the court. They should be advised to keep a certified copy of the order with them at all times in the event they need to present the protection order to a law enforcement officer.

*Practice Pointer: Develop a procedure in your courtroom that permits the victim to approach the clerk before the perpetrator does. The clerk should first give a copy of the order to the victim while the perpetrator waits within the courtroom. The victim can then safely leave the courthouse before the perpetrator without fear of being followed or intervened by the perpetrator.*

B. Perpetrator - After the victim has received a copy of the protection order and has left the court the clerk then delivers a copy of the protection order to the perpetrator.

C. Law Enforcement - The Court should establish a procedure to ensure a copy of the protection order is immediately transmitted to local law enforcement. All protection

orders should be presented to law enforcement no later than the close of business everyday.

#### Other Safety Tips

- The victim should receive a copy of the protection order before perpetrator leaves the courtroom so she can exit safely without being threatened or followed.
- The perpetrator should receive a protection order *after* the victim has safely left the courtroom.
- The clerk delivers a copy of the protection order to the law enforcement agency before the close of business, the day it is issued.
- Law enforcement receives a copy of the protection order and places it into their information system.

#### IV Writing the Protection Orders

A. Write legibly.

B. Use unambiguous language so the order provides clear direction to parties and law enforcement. The simpler and easier we can make the order to understand the better chance the order will be enforced.

C. Be sure to clearly indicate on the face of the protection order an expiration date.

D. Sign your name and note both the date and time of day the order is entered.

#### IX. Effective Dates of Orders

Designate court personnel to monitor the current status of protection orders. *Example, has the protection order expired or has it been modified?*

##### A. Domestic Violence Information System

There may be a protection order registry or law enforcement information system where the protection order is entered for access by law enforcement. (Check your jurisdiction). This is particularly important if either of the parties is physically regularly within more than one jurisdiction.

*Practice Pointer: If the protection order may be subject to enforcement in multiple jurisdictions in your area, it may be worthwhile to set up a meeting with judges and law enforcement from the various jurisdictions to create a uniform protection order form. This will allow law enforcement to become familiar with one protection order format so that they can obtain the necessary information quickly.*

## Temporary Restraining Orders (TROs)

One party seeks an ex parte temporary restraining order to prevent harm to herself or her property. The judge should apply the following standard in deciding whether to grant an ex parte temporary restraining order:

1. Is there sufficient proof by affidavit or sworn testimony that immediate and irreparable injury or harm will occur unless the object of the TRO is restrained by the court?
2. Has the party requesting the TRO given a copy of the notice, motion and affidavit for TRO to the opposing party? If not, is there a good reason for failing to do so?

### I. Courtroom Safety

- A. Exit Strategies--Again, establish court procedures to keep the perpetrator in the courtroom so the victim has the opportunity to leave the court first thus avoiding being followed or contacted by the perpetrator. Separate Victims from Perpetrators. Advise your court staff clerks and bailiffs to keep in mind that the victim and perpetrator should be kept apart as best as possible. For example, you may want to allow the victim to proceed into the courtroom, while having the perpetrator wait outside until court is ready to go into session. Then allow the victim to leave first before dismissing the perpetrator.
- B. Police Officer or Bailiff for Domestic Calendar--Notify the police if you or your staff have the slightest belief that there may be violence in the courtroom.

### II Tribal Code Section

Review your tribal code sections on temporary restraining orders in order to learn how long a temporary restraining order is normally in effect. (Usually it is between 5 days to two weeks)

### III. Service

The opposing party needs to be served with a copy of the order, HOWEVER, the petitioner should never be required to serve the order on the opposing party because of the danger to her. The order must be served, and can be served by following your tribal code, usually by an uninterested party over the age of 18. It is probably best to have it served by the tribal police. Even if the order is not served by the tribal police, it is important to file a copy of the court's order with the Tribal Police Department, including a specific description of the opposing party, and where he resides and works.

### IV Hearing

- A. The order will tell the opposing party what he is restrained from doing, and it will also tell both parties when and where to appear for the hearing on the temporary restraining order (TRO).
- B. At the hearing, each party should be prepared to introduce either affidavits or witnesses (depending on the tribal code) to support their position.

- C. At the hearing, the court will determine whether the standard continues to be met, whether the adverse party is present or not. The moving party must present evidence sufficient for the court to find all of the following:
  - 1. That the moving party is claiming a protectable right or interest and has a high likelihood of success on the merits;
  - 2. That irreparable injury, loss, or damage to that right or interest is likely to occur unless the preliminary injunction is issued;
  - 3. That the threatened injury, loss or damage is substantial in nature or character, and
  - 4. That the moving party does not have an adequate remedy at law.
- D. If the court finds sufficient facts showing subsections a - d to be true, then he grants a preliminary injunction. The preliminary injunction remains in effect until the hearing on the permanent injunction, which is normally part of another proceeding, such as a dissolution of marriage or a civil complaint for damages.
- E. The hearing can also address other issues such as temporary placement of children, arrangements for visitation with the children, arrangements for picking up belongings, temporary child support, use of automobiles, use of residence, and debt payment.

V. Permanent Injunctions

- A. At the hearing on the permanent injunction, the requesting party will have filed a complaint and summons establishing the basis for the request. The judge will again determine whether the previously stated standard has been met. The opposing party will have been served a copy of the order.
- B. At the permanent injunction hearing, each party will call witnesses and provide other evidence to substantiate their position.
- C. The judge should issue Findings of Facts (those facts considered by the judge to be true), Conclusions of Law (the conclusions the judge is able to draw from the facts), and a Judgment (decision) after the hearing. If granted, the Judgment should be as specific as possible regarding the parties and the acts sought to be restrained. Every order should contain the following words:

Pursuant to the Full Faith and Credit Section of the Violence Against Women Act (Vawa) 18 USC §2265, this order must be honored by all States, U.S. territories, and Indian Tribes, and enforced according to the rules of the Enforcing Entity.

Additionally, the person receiving the order should be given the understanding that the order is good any where.

VI. Disobedience of an Injunction

(For more information see Section on Contempt)

- A. The order, with a copy of the affidavit, shall be served upon the person charged with the contempt within sufficient time to enable the person to prepare and respond to the order.
- B. If such person fails or refuses to respond to the order to show cause, a warrant of arrest may issue directing the Police to arrest and bring the person in contempt before the court. The person in contempt may give bail for his attendance at the trial and his submission to the final judgment of the court.
- C. Upon the appearance of the person in contempt, or at the trial of the issue, the court shall hear the evidence, and if the person enjoined has disobeyed the injunction he may be committed to jail until he clears himself of the contempt or until discharged by law.
- D. Civil Contempt and Criminal Contempt: Look to the section on Contempt, page 68. However, reviewing your tribe's code is the best way to determine the manner in which to deal with contempt of your court orders or contemptuous actions in your presence.
- E. If the judge finds that the opposing party violated the terms of the restraining order, he can find the party in contempt of court and fine or jail him, pursuant to your own Tribal Code. The person acting with contempt is called a *contemnor*. If the person acting with contempt is a non-Indian, then the court has the following alternatives, keeping in mind that this is a developing area of the law:
  1. Fining the contemnor;
  2. Holding the contemnor in civil contempt in jail until he takes the action he has been ordered to take (This is described as the contemnor "holding the key to the jailhouse door in his own pocket," since his release depends upon his own action);
  3. The United States Supreme Court decision in the case of *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978), held that tribal courts do not have the inherent jurisdiction to try and convict non-Indians. Therefore, if you incarcerate a non-Indian, expect him to file a writ of habeas corpus and seek federal court review of your decision. See additional argument on this issue in Appendix B.

*Possible options for punishment of non-Indians are fines, excluding him from appearing in your court, and excluding him from your Reservation (keeping in mind that with all these options the contemnor would still be granted due process of law, to-wit: notice, a hearing and opportunity to be heard.)*

4. Banishment or Exclusion. Some Tribal codes have statutes expressly providing the relief of Exclusion, which is when a particular individual is excluded from the Reservation. This may be a separate cause of action filed by either the Tribe or a

person with standing. Before hearing a case on an Exclusion issue be certain to consult your own statutes/codes and case law.

#### VII. Checklist for Temporary Restraining Orders

- A. Has the requesting party filed a complaint prior to requesting a temporary restraining order, or is it required under your tribal code?
- B. Has the requesting party filed a motion for a temporary restraining order with a supporting affidavit?
- C. What imminent injury is the requesting party alleging will happen if the temporary restraining order is not granted?
- D. What is the history of the relationship of the parties (write this down or have it recorded under oath)?
- E. What effort has the requesting party made to obtain personal service of process of the written complaint motion and affidavit on the opposing party (i.e. have police served the order on the respondent?), and was it successful?
- F. If notice was not successful, is there a sufficient emergency basis to grant the temporary restraining order?
- G. Has the court informed the requesting party how long the TRO will last?
- H. Has the court informed the requesting party of the process regarding the upcoming TRO hearing?
- I. If the court grants the TRO, has it provided the serving party with sufficient copies to have the opposing party served?
- J. Has the court provided the requesting party with a copy to give to the Tribal Police Dept. for its records?



VIII. Flowsheet for TROs  
Used with permission of Judge Elizabeth Fry

See page 33 of the Original Benchbook

### **CIVIL ORDERS FOR PROTECTION**

- I. Standing – who can request a Protection Order?  
Having "standing" means that you have the right to bring a certain legal action because you are a party who has an interest in or is affected by the outcome of the action. Depending upon your tribal code, a person who has standing for a civil order for protection is one who has a fear of imminent injury or harm unless she receives an order for protection.
- II. Background  
Civil orders for protection are normally issued within or during a civil lawsuit, such as a dissolution action, custody suit, or civil complaint.
  - A. Restraining the abuser from coming near the requesting party's residence and workplace.
  - B. Restraining the abuser from tampering with the requesting party's automobile.
  - C. Police escort to remove the abuser's belongings or the requesting party's belongings from a shared residence.
  - D. Restraining the abuser from withdrawing funds from checking or savings accounts.
- III. Judicial Access  
It is important that tribal courts provide judicial access to women who are seeking protection orders. A system or protocol should be established whereby a judge is on call at all times for the court, and a clerk can get in touch with the judge in order for a requesting party to apply for a protection order at any time. This can include by telephone in a recorded conversation.
- IV. Expiration of Protection Orders  
Normally, you can determine the expiration date of protection orders by looking to your tribal code. If your tribal code is silent on the issue, then you should consider the specific requests of the parties and the evidence substantiating their requests at the fact-finding hearing in order to make a determination on when it should expire.
- V. Family and Children  
(For more information regarding custody, visitation, and whether your court has jurisdiction over a particular case of that kind, look to Appendix B on Custody and Visitation, printed with permission of Judge Mary T. Wynne.)

Civil protection orders are suppose to protect the family and children. It is entirely appropriate to use whatever legal orders are necessary to protect the family and children from the violence committed by domestic violence perpetrators.

## **CRIMINAL PENALTIES & PROCEDURES**

### **I. Bail, Conditions of Release, and No Contact Orders**

#### **A. Bail**

After arraignment, the prosecutor raises the issue of bail. Bail is the opportunity for the court to decide whether to release the defendant pending trial, and how much bail amount to set for the defendant. In the case of a domestic violence charge, the court should considering the following:

1. Is the defendant a threat to the alleged victim or other family or household member?
2. Is the defendant a threat to public safety?
3. Is the defendant reasonably likely to appear in court?

If the answer to any of the questions is yes, then the court has several options.

1. The court can issue a No Contact Order, requiring the defendant to be restrained from contacting the alleged victim, and/or their family, at any time for any reason, or
2. The court can set a large bail on the condition that the defendant not contact the alleged victim, and or her family.

Conditions of Release—The court can also set conditions of release such as the following:

1. If the victim and defendant reside together, schedule a time for the police to escort the defendant to retrieve his belongings from the residence, but notify the victim first;
2. Order defendant to refrain from damaging the victim's automobile or other property; and
3. Require the defendant to turn any guns over to the Tribal Police Department.

### **II. Violation of Orders of Protection**

If the defendant violates the protection order, the court has the following options:

- #### **A. Issue a warrant for the defendant's arrest;**

- B. Hold a hearing on the alleged violation, keeping in mind that due process requires that the defendant be given written notice of the alleged violation prior to the hearing;
- C. Upon a finding that the defendant violated the protection order (i.e. by contacting the victim), the court can order the bail rescinded and keep the defendant in jail to prevent harm to the victim.

### III. Second or Subsequent Domestic Violence Crime

Since domestic violence perpetrators usually abuse victims as an ongoing practice, it is possible that the same defendant will appear before you more than once. You have several options at that time, you may:

- A. Choose to not release the defendant on bail if he has violated a prior protection order;
- B. If the defendant is found guilty, you can and should increase the penalty, including requiring the defendant to attend a domestic violence perpetrator intervention program which meets the minimum standards for appropriate care.

### IV. Law Enforcement

It is important for the court and law enforcement to have open lines of communication regarding domestic violence. An understanding between the court and law enforcement of the common goal of reducing domestic violence is very important in defeating the pattern of domestic violence.

### V. Prosecuting Attorney

It is the prosecutor who chooses what crimes will be charged against what defendants. It is also the prosecutor who makes recommendations regarding bail based upon their knowledge of the facts of the case, and the defendant's prior offenses, if any. The prosecutor is a valuable person in your courtroom, and should be expected, at a minimum, to know what is on the police report. The prosecutor should also be greatly encouraged to speak to the victim prior to the initial bail hearing so that he can inform the court of the victim's goals in protecting herself. It is very important for the prosecutor to have a clear understanding of the causes and treatment of domestic violence in order to participate with the court in the common goal of abolishing domestic violence.

### VI. Community Resources

Whoever has first contact with the victim should supply her with a list of community resource people, including addresses and phone numbers. This information should include the Address Confidentiality Program, which is established in the state capitol in Washington State. It is a good idea to include information about local programs which provide advocates who attend court with the victims.

## TRIAL

### Custom and tradition

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## TRIAL ISSUES IN DOMESTIC VIOLENCE CASES

This section of the bench book is intended to assist tribal court judges in understanding the complexities of acts of domestic violence, provide a framework for understanding their unique customs and traditions in a trial setting, provide a checklist of evidentiary issues prominent in domestic violence cases, identify victim issues, and instruct tribal court judges on the full faith and credit provision of the Violence Against Women Act.

I. Understanding the complexities of domestic violence: what is it and what "causes" it?

A. What is domestic violence?

There are two definitions of domestic violence – a legal definition and a behavioral definition. (For a full understanding of these definitions, refer to page 4.) Understanding domestic violence requires an understanding of both the behavioral definitions as well as the legal definitions of domestic violence. Both the behavioral and the legal definitions delineate the relationship between the parties, as well as the behaviors that constitute domestic violence. The behavioral definition is the broader of the two. The legal definition is limited to the particular relationships and behaviors covered by law.

1. Domestic violence is behavior done in an intimate relationship

In domestic violence cases, the abused party and the perpetrator are intimates, usually family or ex-family to each other. The abused party is affected by domestic violence in many of the same ways as victims of violence perpetrated by strangers, but is also affected in unique ways since the abuser is an intimate rather than a stranger.

Both intimate violence and stranger violence can result in the victim being traumatized and terrorized. However, such effects of trauma are accentuated and recidivism is more likely in domestic violence cases due to the fact that the abuser, unlike the perpetrator of stranger violence, has on-going access to the victim, knows the victim's daily routine, and can continue to exercise considerable power and control over the victim's daily life, both physically and emotionally.

Unlike victims of stranger violence, victims of domestic violence cannot just walk away, even if the abuser would let them. The complexity and strength of the intimate relationship creates many barriers to dissolution. Furthermore, perpetrators of domestic violence gain power over the victim through their coercive tactics and violence because the intimacy of the relationship gives them social, if not legal, permission to use such abuse. The intimate context of the abuse in domestic violence cases shapes the behavior of both the abused party and the perpetrator during the court process.

2. Domestic violence is a pattern of assaultive and controlling behaviors, including physical, sexual, and psychological attacks, that one adult intimate does to another.

- a. Domestic violence consists of a wide range of behaviors. Some acts rise to a level of criminal behavior (hitting, choking, raping, kicking, threats of violence, etc.), while other do not (degrading comments, suicide threats, controlling access to family resources, etc.).
- b. Domestic violence is not an isolated, individual event. One battering episode builds on past episodes and sets the stage for future episodes. All incidents of the pattern interact with each other and have a profound effect on the abused party. There is a wide range of consequences, some physically injurious and some not, but all are psychologically damaging.
- c. Domestic violence is purposeful and instrumental behavior. The pattern of abuse is directed at achieving compliance from or control over the abused party. It is directed at circumscribing the life of the abused person so that independent thought and action are eliminated and so that the abused person will become exclusively devoted to fulfilling the needs and requirements of the batterer. The pattern is not impulsive or out of control behavior. Tactics that work to control the abused party are selectively chosen by the perpetrator.
- d. The psychological control of abused parties through intermittent use of physical assault along with the psychological abuse: such as, verbal abuse, isolation, threats of violence, etc., is typical of domestic violence. Verbal attacks are fabricated with particular sensitivity to the victim's vulnerabilities. Perpetrators are able to control abused parties by a combination of physical and psychological tactics since the two are so closely interwoven by the perpetrator.
- e. Some mistakenly argue that both the perpetrator and the abused party are "abusive;" one physically and one verbally. Perpetrators use both verbal and physical assaults. Furthermore, what perpetrators report as "abusive" behavior of the abused party are often acts of resistance by the abused party. Abused parties are not the passive recipients of violence, but often engage in strategic survival during which they sometimes resist the demands of abusers that they see as immoral or inappropriate. Perpetrators respond to such resistance with escalating tactics of control and violence.
- f. Some argue that there is "mutual battering" where both individuals are using physical force against each other. Tribal court judges should employ careful fact-finding when such arguments are advanced in their courtroom. Careful fact-finding often reveals that one party is the primary physical aggressor and the other party's violence is in self-defense (e.g. she stabbed him while he was choking her), or where one party's violence was more severe (e.g. punching/ choking versus scratching).

3. The consequences of domestic violence are often lethal
  - a. The F.B.I. reports that each year one-third of all female homicide victims in this country are killed by a husband or boyfriend.
  - b. Between 22% and 35% of women visiting hospital emergency rooms are there due to injuries sustained as a result of domestic violence.
  - c. Battering is the single major cause of injury to women, even more significant than the numbers injured in auto accidents, rapes, or muggings combined.
  - d. Without intervention, the pattern of abusive behaviors will most likely escalate in both frequency and severity.
  - e. The lethality of domestic violence often increases when the perpetrator believes that the abused party has left or is about to leave the relationship. Thus, battered persons may be at greater risk at the very time they come before the court. For this reason, it is critical that the court use all available legal remedies, such as protective orders, to provide the victim with protection throughout the duration of the court proceedings.
  - f. Domestic violence is lethal and consequently engenders incredible fear in abused parties. Many battered persons live with highly elevated levels of anxiety even though their expressions of this fear may fluctuate. Living in constant fear is exhausting as abused parties repeatedly attempt to protect themselves and children.
4. What "causes" domestic violence?
  - a. Most domestic violence is caused by learning and reinforcement rather than biology or genetics
  - b. Domestic violence behaviors are learned through observation.
  - c. Domestic violence is learned not only in the family but also in society. It is learned and reinforced by interactions with all of society's major institutions: the familial, social, legal, religious, educational, mental health, medical, entertainment/ media, etc. In all of these social institutions there are various customs that perpetuate the use of violence as legitimate means of controlling family members at certain times. These practices inadvertently reinforced the use of violence to control intimates by failing to hold the perpetrator accountable and by failing to protect the abused party.
  - d. Domestic violence is repeated because it works.

- e. The fact that most domestic violence is learned means that the perpetrator's behavior can be changed. Most individuals can learn not to batter when there is sufficient motivation for changing that behavior. The court plays a strong role in providing perpetrators with sufficient motivation to change, and participates in the rehabilitation process by holding the perpetrator accountable for both the violence and for stopping the pattern of coercive control. Most importantly, the court plays an essential role in protecting the abused party during the perpetrator's rehabilitation process, and in monitoring that process to ensure the perpetrator's compliance.
  
- f. Domestic violence is not caused by alcohol or drugs
  - i. Alcohol and drugs such as marijuana, depressants, anti-depressants, or anti-anxiety drugs do not cause non-violent persons to become violent.
  
  - ii. Regardless of the exact role of alcohol or drugs, it is important to focus on the violent behavior and not allow substance use or addiction to become a justification for the violence.
  
  - iii. While the presence of alcohol or drugs does not alter the finding that domestic violence took place, it is relevant to the assessment of lethality and in determining case dispositions. The use of or addiction to substances may increase the lethality of domestic violence and needs to be carefully considered when weighing safety issues concerning the abused party, the children, and the community.
  
  - iv. Court decisions in cases where the domestic violence perpetrator is addicted to alcohol and/ or drugs must be directed at both the violence and the substance abuse.
  
- g. Domestic violence is not "out of control" behavior, but a pattern of behavior that is used by the perpetrator because it works
  - i. Some perpetrators will batter only in particular ways, only use violence towards the victim even though they may be angry at others, break only the abused party's possessions, not their own. They are making choices even when they are supposedly "out of control." Such decision-making indicates they are actually in control of their behavior.
  
  - ii Domestic violence is not caused by "anger." Some battering episodes occur when the perpetrator is not emotionally charged and are done intentionally to gain the victim's compliance. The perpetrator chooses to use violence to get that to which they feel entitled. Displays of anger by the perpetrator are often merely tactics employed by the perpetrator to intimidate the abused party.



- iii. Perpetrators choose those acts of abuse that work and which subject them to the least risk. They choose acts of abuse or violence which they believe the abused person is particularly sensitive or responsive to. They choose the times and places that are designed to have the most powerful impact with the least risk.
- h. Domestic violence is not caused by “stress”
  - i. We all have different sources of stress in our lives. We can respond to stress in a wide variety of ways. People choose to reduce stress according to what has worked for them in the past.
  - ii. It is important to hold people accountable for the choices they make regarding how to reduce their stress, especially when those choices involve violence or other illegal behaviors. When judges remember that domestic violence is a pattern of behavior consisting of a variety of tactics repeated over time, then citing specific stressors becomes less meaningful in explaining the entire problem.
- i. Domestic violence is not caused by problems inherent in the relationship between the two individuals or by the abused party’s behavior
  - i. People can be in distressed relationships and experience negative feelings about the behavior of the other without being forced into responding with violence or other criminal activities.
  - ii Looking at the relationship or the abused party’s behavior as a causal explanation for domestic violence takes the focus off the perpetrator’s responsibility for the violence, and unintentionally supports the perpetrator’s minimization, denial, externalization, and rationalization of the violent behavior. Blaming the victim or locating the problem in the relationship provides the perpetrator with excuses and justifications for the conduct.

## CUSTOM AND TRADITION

The following is intended to assist tribal trial court judges in respecting and upholding the traditional and customary laws of their respective tribes. This material is not intended to instruct or direct a trial court judge on matters concerning custom and tradition. We recognize that each tribe is unique and has its own laws. We urge each tribal judge to be mindful of the tribe’s codified laws as well as its unwritten and unspoken traditional and customary laws and rules.

### I. Preliminary Considerations

#### A. Tribally-Specific

Each tribe has its own values, customs and traditions. Judges should consider the following:

1. Is your tribe a matrilineal (inheritance passes through mother) or patrilineal tribe (inheritance passes through father)?
2. What are the tribe's oral customs and traditional laws? *See section below on Judicial Notice.*
3. In our community, do we presume innocence or guilt?
4. The court may want to keep a calendar of its own tribe's seasonal activities
5. and events to assist when docketing trials.

#### B. Victims' Rights

1. The judge needs to be sensitive to the fact that the Anglo system of justice is geared to protecting the defendant's rights and should consider ways of invoking traditional and customary laws to protect the victim's rights.
2. Victims and victim's families should be treated with dignity and respect.
3. The court should ensure the victims safety in and out of the courtroom. Are extended family members available in assisting the court?
4. The victim should be kept appraised of all significant events in the case

## II. In-Court Procedures

### A. Family Dynamics

#### 1. Privacy Issues

Judges need to be aware and sensitive toward family dynamics in Indian cultures. Some families do not want the embarrassment of inter-family disputes open for the public and juries to see. It is viewed as a private matter to be dealt with within the family.

#### 2. Extended Family

Judges need to consider the extended family. How many family members are going to testify? Is the family divided or is the victim supported by the entire family? Some victims may become an outcast in their family for coming forward and reporting the assault.

#### 3. Family Intimidation

Judges need to be aware of family intimidation. In some families, there may be one or two members who seek to intimidate other family members. They may come to court and seek to intimidate the victim or even the defendant.

#### 4. Nonverbal Communication

Judges must consider the effects of nonverbal communication in the courtroom. It can be a very confrontational atmosphere in the courtroom due to the extent of non-verbal communication among Indian people.

### B. Continuances

Trials should be scheduled for times that are culturally appropriate, and if culturally significant events occur during the course of the trial, the court should respect those times. Examples may include: funerals, memorials, seasonal tribal activities, deaths in the family, medicine dances, root festivals, etc.

## E. Rules of Evidence

### 1. Objections

The court may invoke rules of evidence to deal with objections. Recognizing, for example, that in Indian Country it is not acceptable behavior to interrupt others while they are speaking.

### 2. Expert Witnesses

Judges should consider the qualifications of expert witnesses and make broad provision for cultural and traditional witnesses. What is their standing in the community? Are they a practitioner? They may include long house and spiritual leaders. Consider the argument the defendant may present that their assault is a traditional method of discipline and shouldn't even be in court. This may be accomplished through use of a cultural and traditional witness.

### 3. Motions to Strike Testimony

If a motion to strike the testimony is made, the judge will instruct the jury on the issues and grounds for the motion.

### 4. Judicial Notice

Judges should be aware of those issues in their community which they may consider within the realm of judicial notice.

#### a. Mandatory Notice

These are issues which the court must consider whether or not a party requests. Those issues which are indisputable. The law in your tribe's tribal code. Judges should consider whether other tribal laws should fall in this category. For example, many customary laws are oral and unwritten. The court should take judicial notice of oral traditional laws as well.

#### b. Permissive Notice

These are issues which the court may consider if a party makes a request. They include verifiable facts. These may include issues which are common knowledge within the community.

## D. Witnesses

### 1. Excluding Witnesses

Judges should consider the family dynamics as set forth above and the necessity of excluding witnesses. Should the witnesses be excluded until they are called to testify. What about housing the witnesses in a different room from the perpetrator's witnesses while they are waiting to testify.

### 2. Right of Victim Not To Testify

Consider the right of the victim not to testify versus the right of the defendant to confront his accusers. *See Trial Section.*

### 3. Hostile Witness

People in these types of cases don't want to be in court. This often comes out in their testimony. The court should consider jury instructions to help the jury make sense as to why the case is still in court when nobody wants to be there.

*See Appendix C, "Jury Instructions."* Judges need to know how to handle the

hostile witnesses or recanting witnesses, particularly in Indian cultures where people are taught never to lie. Those in the community and on juries have been taught to be respectful and believe what is said if they are a member of that community.

E. Sanctions

Judges should consider immediately sanctioning any violation of injunctions, conditional releases or other orders effective during the course of the trial. For example, the prosecutor may request after certain testimony that the defendant violated an order by calling and leaving a harassing message on the answering machine of a family member. *See II(A) above – Family Dynamics.*

III. Burden Of Proof

The standard of innocent until proven guilty may not be the belief, in reality, within your tribe. For some tribes the opposite is true. Many people in Indian country believe you're guilty until proven innocent. This is the cultural aspect. In Indian country, you don't question anyone's integrity and if you do, you better back it up. So, if you're brought into a court of law, the assumption may be that it must be true you are guilty of the charge.

IV. Tribal Politics

Tribal politics should not affect the regular proceedings in the courtroom during a trial of a domestic violence case. There may be attempts made to influence the judge in the case, however, the judge has a responsibility to uphold the judicial code of conduct upheld by the court and to fulfill their duty as judge of the case.

## RULES OF EVIDENCE

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      - c. Examples of Inadmissibility
    - 5. Prior Testimony
  - C. Reconciling The Hearsay Rule And Its Exceptions With The Sixth Amendment Right to Confrontation

## RULES OF EVIDENCE

The following section is intended to give tribal court judges guidance in handling evidentiary issues that may be raised during the course of trials in domestic violence cases. We recognize that tribal courts are independent courts and are not bound by federal or state rules of evidence, unless those rules are specifically adopted by the tribe. Because each tribal court is independent and has its own unique set of rules, it is impossible here to give each judge specific guidance on evidentiary issues. Likewise, each state covered by this project has its own rules of evidence. Thus, as a practical matter, we have provided you with general rules of evidence as a model from the federal rules.

### I. Relevancy

#### A. What is Relevant Evidence?

Federal Rule 401 provides:

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

#### B. Exclusion of Relevant Evidence

Federal Rule 403 provides that even if evidence is relevant, it may be excluded if its value is outweighed by unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

#### C. Character Evidence

Generally, character evidence is inadmissible, but there are exceptions outlined below. Evidence of one's character has little value in determining how that individual acted under a particular set of circumstances.

##### 1. Character of the Defendant

Federal Rule 404(a)(1) provides that character evidence is inadmissible except:

- a. Character of Accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same. Since criminal defendants have the burden of raising a reasonable doubt as to their guilt, they may offer evidence to prove they are of good character. Under the rules, they may offer such evidence as an exception to the general rule that character evidence is inadmissible. However, once they offer evidence of good character, the prosecutor may then, and only then, offer evidence to rebut their good character. If the defendant does not offer evidence of their character, the prosecutor is precluded from raising character issues.

##### 2. Character of the Victim

As is the case with the admissibility of the defendant's character, the defendant

may offer evidence concerning the victim's character. Only after that evidence is offered, may the prosecutor offer rebuttal evidence. Federal Rule 404(a)(2) provides:

**Character of Victim.** Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor.

Some jurisdictions have adopted "rape shield statutes" which severely limits a defendant's ability to introduce evidence of a rape victim's past sexual behavior in a rape trial. You should consult your tribal code to determine whether your tribal council has adopted a rape shield provision.

### 3. Admissible Character Evidence

Evidence that is determined to be inadmissible to prove that the defendant acted in conformity with that character under a particular set of circumstances, may be admissible for other purposes (i.e. motive, intent, etc). Federal Rule 404(b) provides:

**Other Crimes, Wrongs, or Acts.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

#### a. Limiting Instruction

In circumstances where evidence is admissible for one purpose but inadmissible for another purpose, the defendant is entitled to a jury instruction limiting the scope of the evidence admitted. See also Jury Instructions, Evidentiary Instructions, paragraph II.

#### b. Prior Convictions

If the prosecution offers evidence concerning the defendant's criminal history, the court should

i. identify the purpose for which the evidence is sought to be introduced;

ii. determine whether the evidence is relevant to prove an essential element of the crime charged; and

iii. weigh, on the record, the probative value of the evidence against its prejudicial effect. The court should also provide a limiting instruction.

### 4. Exclusion of Character Evidence

Although character evidence may be relevant, it may be objectionable as unfairly prejudicial or misleading to the jury (i.e. judging the person rather than the evidence).

*See Federal Rule 403 and paragraph II(B) above.*

## II. Hearsay

### A. What is Hearsay?

Federal Rule 801 defines "hearsay" as:

[A] statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

#### 1. Statement

A statement can be either an oral or written assertion or nonverbal conduct of a person, if it is intended by the person as an assertion. *See Federal Rule 801(a)*. This is important to keep in mind, since in domestic violence cases many acts carried on by the perpetrator are of a nonverbal nature. For example, manipulation of the victim by just giving them "a look."

#### 2. Declarant

The "declarant" is the person who makes the statement.

#### 3. Offered to Prove the Truth of the Matter Asserted

This element can be tricky, since not all statements made out of court are offered to be accepted as a proven fact. For example, if a victim states that they were assaulted at night time, that statement may not be offered to be proven, but simply offered to describe the scene. On the other hand, if the victim stated that they were hit over the head with a gun, the statement is offered to prove a fact. Namely, that the victim was assaulted with a deadly weapon.

#### 4. Out of Court Statements Exempted from Hearsay Treatment

##### a. Prior Statements by the Witness

See Federal Rule 801(d)(1).

##### b. Admission by Party Opponent

See Federal Rule 801(d)(2).

### B. Exceptions to the Hearsay Rule

#### 1. Excited Utterance

##### a. The Rule

A statement made about an event, such as an assault or rape, or a condition, such as injuries or emotional distress, may be admissible if that statement is made while the victim is still under the stress of excitement.

##### b. Examples of Admissibility

If you're faced with a hearsay objection, followed by an argument that it qualifies as an excited utterance, decide whether:

- i. The declarant was still under stress when the statement was made.
- ii. The statement relates to the event or condition.

The first criteria is the trickiest. How much time can elapse between the



event and the statement? One case held that a 20-hour lapse of time qualified. In *State v. Woodward*, 32 Wn. App. 204, 646 P.2d 135 (1982), a child's statement that the defendant had sexual intercourse with her, given 20 hours later in response to her mother's question, was held admissible as an excited utterance. A description of a rape to police 6 hours after its occurrence was also held admissible. *State v. Fleming*, 27 Wn.App. 277, 699 P.2d 774 (1985).

c. Examples of Inadmissibility

A one-day lapse of time between an out of court statement and a rape has been held to be inadmissible *State v. Bargas*, 52 Wn.App. 700, 763 P.2d 470 (1988). The court reasoned that, while a statement by a rape victim in a state of turmoil may be admissible, in this case the victim made the statements after having gone to sleep, taking a shower and talking to a friend.

A statement by a child victim of indecent liberties made to her foster mother 3 days after the incident was held inadmissible as an excited utterance. *State v. Doe*, 105 Wn.2d 889, 719 P.2d 554 (1986).

2. State of Mind or Bodily Condition

a. The Rule

Federal Rule 803(3) provides that the following is not excluded by the hearsay rule:

A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

b. Examples of Admissibility

If you're faced with a hearsay objection, followed by an argument that the statement relates to the victim's state of mind or bodily condition, decide whether:

- i. The statement described the declarant's then-existing state of mind or bodily condition.
- ii. The statement is relevant to a material issue.

With this exception, it's important to remember that a statement about a then-existing condition need not be made immediately after the incident. As an example, in *State v. Flett*, 40 Wn.App. 277, 699 P.2d 774 (1985), a prosecution for rape, hearsay evidence of the victim's statement to her son that "[s]omething upset me," made 2 1/2 hours after the incident was admissible. The court reasoned that, "[t]he fact that [the statement] ... refers to a past event does not take it out of the scope of the rule, since it is reasonable to believe the condition existed at the time of the utterance as

well.."

The second requirement, relevancy, must also be established. A statement may fall within the state of mind exception, but it may not be relevant to a material issue. Clearly, in cases such as assault, where statements by the defendant expressing hatred or ill-will towards the victim are within the rule and relevant to the issue of guilt. *See e.g. State v. Hoyer*, 105 Wash. 160, 177 P. 683 (1919); *State v. Spangler*, 92 Wash. 636, 159 P. 810 (1916).

c. Examples of Inadmissibility

As stated above, threats and statements by the defendant toward the victim are generally admissible as a state of mind exception and relevant to their own guilt, a central issue in the case. However, statements by the *victim* expressing fear of, or anxiety about, the defendant are not relevant to the issue of whether the defendant committed the act charged. The connection between the victim's fears and the defendant's guilt is too remote to justify admissibility. *State v. Parr*, 93 Wn.2d 95, 606 P.2d 263 (1980).

As an example, in *State v. Cameron*, 100 Wn.2d 520, 674 P.2d 650 (1983), a prosecution for murder in which the defendant claimed insanity, the trial court should not have admitted the victim's out-of-court statements to the effect that she was having problems with the defendant and that she feared him. The court rejected the state's argument that the statements were admissible to show the victim's state of mind, saying that the victim's state of mind was irrelevant because it did not relate to either premeditation or insanity, the two principle issues in the case.

However, if the defendant argues that they acted in self-defense, the victim's state of mind may become relevant since their statement may prove that the victim may not have acted as the defendant claims. For example, in *State v. Parr, supra*, the defendant claimed that the victim had grabbed a gun and lunged at him, and that he acted in self-defense but did not intend to actually kill the victim. The court held the victim's out-of-court statement that she feared the defendant was admissible because it was relevant to rebut the defendant's theory that the victim was the first aggressor.

3. Statements for Medical Diagnosis or Treatment

a. The Rule

Federal Rule 803(4) provides that the following is not excluded by the hearsay rule:

Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof

insofar as reasonably pertinent to diagnosis or treatment.

b. Examples of Admissibility

If you're faced with a hearsay objection, followed by an argument that the statement was made for purposes of medical diagnosis or treatment, the requirements for this exception are:

- i. The statement is "reasonably pertinent to medical diagnosis or treatment.
- ii. Remember that the statement need not be made to a physician.

Unlike the hearsay exception for state of mind, this exception is not limited to statements describing the declarant's present symptoms. This exception is much broader and includes statements of *past* symptoms as well as statements of medical history. The rationale behind the exception is that it's reasonable to believe that a person making such a statement is motivated to be truthful by the hope for an accurate diagnosis and successful treatment.

As an example, in *State v. Robinson*, 44 Wn.App. 611, 722 P.2d 1379 (1986), a prosecution for indecent liberties, a 3-year child's description of the incident to an emergency room nurse and a physician were admissible. The courts have also held that the exception is not limited to statements made to physicians. Statements made to hospital employees, ambulance drivers, and the like are admissible under this exception. *In re Welfare of J.K.*, 49 Wn.App. 670, 745 P.2d 1304 (1987).

4. Prior Consistent Statement

a. The Rule

Federal Rule 801(d) provides that a statement is not hearsay if:

The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person ...

b. Examples of Admissibility

By its terms, the rule applies only when the declarant is present and has already testified as a witness. For that reason, the rule is unavailable to the prosecution in domestic violence cases if the victim refuses to testify, altogether. It may, however, be used by the prosecution when the defense claims the victim/witness is biased or has fabricated the allegations against the

defendant.

As an example, in *United States v. Red Feather*, 865 F.2d 169 (8<sup>th</sup> Cir. 1989), a prosecution for assault with an intent to commit rape, in which the defendant had implied on cross-examination that the victim's testimony had been coached, the prosecution was allowed to introduce the victim's diary to corroborate her testimony.

c. Examples of Inadmissibility

In *State v. Bargas*, 52 Wn.App. 700, 763 P.2d 470 (1988), a prosecution for rape, a police officer should not have been allowed to recount the statements by the victim's witness during her interview at police headquarters, one day after the alleged rape. The appellate court said that the reference in Evidence Rule 801 to rebutting a claim of recent fabrication means that a witness' out-of-court statement is admissible only if the opponent claims that the witness fabricated a new story between the time the statement was made and the time of trial. Here, the court said, the defendant's theory was that the victim had fabricated her story from the inception, long before giving her statements to the officer.

In *State v. McDaniel*, 37 Wn.App. 768, 683 P.2d 231 (1984), a prosecution for indecent liberties and statutory rape, in which the victim had given testimony describing the incident, a caseworker should not have been permitted to testify as to consistent statements by the victim shortly after the incident. The appellate court stated, "There was no showing that the victim's consistent statements were made at a time when the motive to falsify was not present. Evidence which merely showed that the victim made similar statements to the caseworker ... was of little probative value ... ."

5. Prior Testimony

Federal Rule 804(b)(1) provides that the following is not excluded by the hearsay rule:

Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

If you're faced with a hearsay objection, followed by an argument that the statement qualifies as a Former Testimony exception to the hearsay rule, decide whether:

- a. The former testimony was made under oath.
- b. The party against whom the prior testimony is offered had an opportunity and

similar motive to develop the testimony by direct, cross, or redirect examination.

C. Reconciling The Hearsay Rule And Its Exceptions With The Sixth Amendment Right to Confrontation

## VICTIM ISSUES

- I. Type Of Trials
  - A. Civil Cases
    - 1. Permanent Restraining Orders
    - 2. Divorce, Custody, Child Support
    - 3. Paternity

4. Meretricious Relationships
5. Contempt of Court

## B. Criminal Cases

1. Permanent Restraining Orders
2. Assault Cases
  - a. Physical Assault
  - b. Sexual Assault
3. Domestic Violence to Victim as the Defendant
4. Contempt of Court

## II Trial Procedures

### A. Defendant's Failure to Appear at Trial – What are the Judge's Options?

1. Proper Service of Process – Does the defendant have proper notice of the trial?  
If yes, trial continues  
If no, reschedule the trial
  - a. Check Speedy Trial Requirement
  - b. Is there a requirement for them to be at the trial?  
If yes to both questions, a bench warrant shall be issued (Check tribal code for court rules regarding a defendant's failure to appear )

### B. Victim Awareness of Procedures

1. Handbook of Procedures
2. Description of trial
3. Definitions
4. Victim Advocate Report
  - a. Explained procedures to victim
  - b. Description of victim's support network
  - c. Description of resources and services made available to victim
  - d. Description of any contact made with the defendant

### C. Victim as Witness

1. Defendant's Right to Confront
2. Domestic Violence Victim

Victims of domestic violence can vary widely in the position they will take in prosecuting the perpetrator. For example, one victim may actively participate and demand prosecution for a seemingly minor act of domestic violence, while another victim who was involved in a very serious act of violence may request that the case be dismissed or may choose not to participate. Keep in mind that victims can vary widely in their posture at trial.

- Cooperative Victim
- Uncooperative Victim
- Unavailable Victim
- Hostile Victim

- Recanting Victim
- Reluctant Victim

3. Domestic Violence Witness

- a. Recesses
- b. Hostile Victim Witness
- c. Denial, threats, fear, coercion, cross- examination issues

III. Victim Sensitivity

A. During Trial

B. Proximity to Defendant in the Courtroom

Defendant eye contact with the victim, subtle threats

C. Recesses

D. Has the victim had an opportunity to be heard?

E. Evidentiary Issues

F. Exhibits (Graphic pictures)

IV. Victim Statements

A. Know the Case History

1. Thorough Preparedness
2. Review the file(dates, places, people)
3. Know the history of the relationship between the victim and perpetrator
4. Know the present status of their relationship
5. Know the victim's background
  - a. Family (Immediate, extended, in-laws)
  - b. Employment
  - c. Education
  - d. Support Network

6. Note-Taking During Trial

B. Understand the Dynamics of Domestic Violence

Judges need to understand that victims of domestic violence face unique issues that prevent them from cooperating in the trial process. Below is a checklist of issues that create barriers for victims at trial:

1. Threats from the batterer toward the victim, the victim's family or friends may prevent the victim from cooperating.
2. The victim might not feel confident that the "system" will protect them if they cooperate.
3. It is likely that the batterer knows where to find the victim and they may continue to intimidate the victim throughout the course of the trial.
4. The victim may be in a position where they feel forced to live with the batterer either because they feel they have no where else to go or they are financially

dependent upon their abuser.

5. The victim may have been forced to recant their story or to drop charges in the past.
6. The victim may have suffered consequences in the past for cooperating at any level, whether in simply getting a TRO or fully participating in a trial.
7. The victim may have participated in the past and the system failed to protect them or did not provide adequate intervention. The system may have also failed to hold the batterer accountable or failed to stop the violence.
8. Batterers can be manipulative and may prevent the victim from making court appearances by intercepting their mail or by giving them false information about court dates.
9. The batterer may seek out the victim to discuss the case and may intimidate them by giving false information about the process.
10. Delays and continuances may place time demands on the victim, which may inhibit them from participating.
11. Time delays can cause many inconveniences for the victim – lost time at work, increased child care and transportation costs.
12. Both the victim's and the batterer's family and friends may pressure the victim to not cooperate.
13. The victim may lack valid information about the trial process.

V. Victim Advocacy

A. Lay Advocates

1. Experience
2. Education
3. Respect in the Community
4. Knowledge of Court Proceedings

B. Family Members

1. Treatment Providers

VI. Courtroom Safety

[Insert Material Drafted for Post-Trial Section]

VII. Order Of Trial

A. In Chambers Pretrial Conference

It is a good idea to hold a conference just prior to trial to resolve preliminary issues. It is during this time that you, as the judge, can set the tone for how the trial will be conducted. It is an opportunity to ensure that the victim will be treated with respect without being badgered or feeling "re-victimized."

B. Expectations of Attorneys

C. Awareness of Victim Issues



D. Advise Attorneys of Victim Issues

E. Order of Witnesses

Determine if and when the victim will be called to testify. Make sure that all precautions are taken to ensure the victim's safety. *See Section VII – Courtroom Safety above.*

F. Discuss the Taking of Recesses

G. Voir Dire

Jury selection is a vital aspect in successfully prosecuting domestic violence cases. Judges can take a more active role in voir dire to help the jury understand the dynamics of domestic violence and the reasons why a victim may choose not to participate in the perpetrator's prosecution. *See Appendix – C for sample voir dire questions.*

H. Taking Testimony

Judges must maintain control of the courtroom, especially during cross-examination of the victim. Judges maintain the formality of the process and should control the treatment of the witnesses to avoid badgering or misquoting the witness. If judges encounter this type of inappropriate questioning, they should immediately stop the questioning and, if necessary, excuse the jury and address the attorney directly. Sarcasm and abusive cross-examinations are real tactics to which attorneys can and do resort. Judges should also guard against "re-victimizing" the victim during the trial. For example, any question to the victim to re-enact their abuse or requests to show the jury how they were touched or where on their body they were touched, may make the victim feel victimized all over again. Those kinds of questions may also be very embarrassing to the victim. Diagrams, dolls, or expert testimony may be used as an alternative to obtain the same information..

VIII. Jury Instructions

A. Definitions

B. Elements

C. Evidentiary Issues

D. Cultural Components

IX. Prepare The Victim For Post-Trial Procedures

A. Victim's Participation at Sentencing

1. Make sure the victim is prepared for the sentencing hearing.

If a victim advocate is available, have that person explain the sentencing hearing to the victim. Make sure the victim is aware of the sentencing possibilities and they have the right to give a statement.

2. Taking the victim's statement at sentencing.

Judges have the flexibility in allowing the victim to control how their statement will be presented to the court. The victim may choose to submit a written statement, offer testimony, ask if they can read their statement or have someone else read their statement. As the victim makes their statement, the judge should acknowledge, listen to and validate the victim. Acknowledge the impact of the assault. Recognize that it may be hard for the victim to speak about the impact of their ordeal in front of others. If drugs or alcohol were involved, explain that it is not an excuse for the abusive behavior. Make sure the victim's statement is made part of the record.

3. Explain the sentencing possibilities to the victim

In sentencing the defendant, the judge should have a prepared statement that outlines minimums and maximums of the offense(s), as well as any aggravating or mitigating circumstances. The judge should explain all aspects of the sentence to the victim and give reasons for the sentence on the record. If probation is ordered, explain to the victim that if the defendant violates any condition of probation, the probation may be revoked.

X. Continued Support

A. Mandated reporting requirement from treatment providers

B. Make sure victim is aware of all resources available.

## FULL FAITH & CREDIT

Full Faith and Credit for protection orders rising from Indian country has been slow in receiving recognition by jurisdictions outside of Indian country. But with the continuous efforts by the Department of Justice and tribal leaders, tribal court protection orders are slowly being recognized by city, county and state court systems. Victims of domestic violence, whether Native American or not can now realize that they can be protected while they reside on an Indian reservation or off of the reservation.

However, as viewed by the tribal law enforcement, tribal officers will enforce a foreign protection order and ensure that the victims or individual is protected. It is the communication between tribal courts and tribal law and order that signify those domestic laws will be enforced,

keeping in mind that the due process of every individual is not violated and that it will be up to the tribal courts to make the final decision of its enforceability. Bridging the gap between the two branches of tribal government is crucial and involves the understanding of how a court will interpret the protection order.

I. VAWA, 18 USC SECTION 2265

A. Full Faith and Credit

Any protection order issued that is consistent with subsection (b) of this section by the court of one State or Indian Tribe (the issuing State or Indian Tribe) shall be accorded full faith and credit by the court of another State or Tribe (the enforcing State or Indian Tribe) and enforced as if it were the order of the enforcing State or Tribe.

B. Protection Order

A protection order issued by a State or Tribal Court is consistent with this subsection if:

1. Such court has jurisdiction over the parties and matter under the laws of such State or Indian Tribe; and
2. Reasonable notice and opportunity to be heard is given to the person against whom the order is sought sufficient to protect that person's right to due process. In the case of *ex parte* orders, notice and an opportunity to be heard must be provided within the time required by State or Tribal law, and in any event within a reasonable time after the order is issued, sufficient to protect the respondent's due process rights.

C. Cross or Counter Petition

A protection order issued by a State or Tribal Court against one who has petitioned, filed a complaint, or otherwise filed a written pleading for protection against abuse by a spouse or intimate partner, is not entitled to full faith and credit if:

1. No cross or counter petition, complaint, or other written pleadings was filed seeking such a protection order, or
2. A cross or counter petition has been filed and the court did not make specific findings that each party was entitled to such an order.

II. VAWA, 18 USC SECTION 2266

A. The VAWA provides the following definitions:

1. Bodily Injury

Bodily injury means any act, except one done in self-defense, that results in physical injury or sexual abuse.

2. Indian Country

Indian country has the same meaning as state in Section 1151 (25 USC?)

B. Protection Order

A protection order includes any injunction or other order issued for the purpose of

preventing violent or threatening acts or harassment against, or contact or communication with or physical proximity to, another person. This includes temporary and final orders issued by civil or criminal courts (other than support or custody orders). This can be whether it is obtained by filing an independent action or as a *pendente lite* order (order pending the litigation) in another proceeding, so long as any civil order was issued in response to a complaint, petition or motion filed by or on behalf of a person seeking protection.

C. Spouse or Intimate Partner

1. A spouse, a former spouse, a person who shares a child in common with the abuser, and a person who cohabits or has cohabited with the abuser as a spouse; and
2. Any other person similarly situated to a spouse who is protected by the domestic or family violence laws of the State in which the injury occurred or where the victim resides.

D. State

State includes a State of the United States, the District of Columbia, a commonwealth, territory, or possession of the United States.

Travel across state lines does not include travel across state lines by an individual who is a member of an Indian Tribe when such individual remains at all times in the territory of the Indian Tribe of which the individual is a member.

## POST-TRIAL ENFORCEMENT

A major impact the court will have is in the area of enforcement. The court must strictly enforce the protection order. If the court fails to strictly enforce a protection order, the perpetrator will perceive that future violations will also be tolerated. In essence, court tolerance of violations leaves the victim without protection. Below are some of the options you may already have available for enforcement.

I. Criminal Charges

Violation of a protection order may initiate the filing of new charges. Some jurisdictions have the criminal charge of Disobedience of a Lawful Order of the Court or a similar statute

allowing criminal prosecution for violation of court protection orders. It is important to treat these offenses with the same seriousness as the initial charge in order to send the message to the abuser that their abusive actions will not be tolerated within the court system.

## II. Contempt (Entire section on contempt used with permission of Judge Fred W. Gabourie, Sr.)

Violation of a protection order is contempt of court. The courts have inherent power to punish persons for contempt when they disobey orders of the court or disrupt judiciary proceedings. This is a necessary power because the court must have control of enforcement of its orders and perform judicial proceedings in a safe and peaceful setting.

"The power to punish for contempt is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders, and writs of the courts, and consequently to the administration of justice. The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed with this power." *Ex Parte Robinson*, 86 U.S. 505 (1873).

## III. Contemptuous Conduct

Any person who commits a contemptuous act or who willfully fails to obey a court order may be held in contempt: i.e. A party, an attorney for a party, a witness, or a juror for failure to obey orders of rules of the court

### A. Examples of Contemptuous Conduct

1. Any person who interferes with the jury;
2. rescues any person or property in the custody of an officer by virtue of a court order or process;
3. detains a witness or party;
4. is disorderly, contemptuous, boisterous, or insolent, breaches the peace, or causes a violent disturbance that tends to interrupt a judicial proceeding;
5. abuses the process or proceeding of a court;
6. falsely pretends to act under authority of an order or process of the court;
7. who unlawfully practices or holds himself out as entitled to practice law;
8. a ministerial officer for misbehavior in office;
9. and, an inferior tribunal, magistrate, or officer for disobedience of certain orders, judgments, or processes of the court.

## IV Attorneys

An attorney has the duty to protect the interest of his client. He has the right to press legitimate argument and to protest an erroneous ruling. *In Re Gallagher*, 192 P2d 905, (1948).

"Attorneys must be given a substantial freedom of expression in representing their clients. The public interest in an independent bar would be subverted if judges were allowed to punish attorneys summarily for contempt on purely subjective reactions to

their conduct or statements. The heat of courtroom debate, particularly where liberty is concerned, often gives rise to persistence on the part of counsel. If the words used by counsel are respectful and pertinent to the matter before the court, it is not unnecessarily burdensome to require the judge first to warn the attorney that his tone and facial expressions are offensive and tend to interrupt the due course of the proceeding. Otherwise, attorneys could be subjected to fines and jail sentences because of personal annoyances and pique on the part of trial judges; and these penalties could be rendered unassailable by lengthy recitals in the orders of contempt respecting the demeanor of the contemnor. There is nothing in the reported decisions or in the experience of our courts that makes necessary such an extraordinary authority on the part of the trial judge. Indeed, the recognition of such an authority would involve the surrender of a substantial amount of the independence of the bar, and in many instances would deprive the litigants of a fair hearing." *In Re Hallinan*, 71 C.2d 1179 (1969).

If counsel persists in arguing a matter to the court after the court has repeatedly ordered him to desist, the action amounts to disobedience of a lawful court order and disorderly behavior towards the judge and directly tends to interrupt the due course of the trial, and therefore is punishable as contempt.

Moreover, an attorney commits a direct contempt when he impugns the court's integrity by statements made in open court either orally or in writing. Insolence to the judge in the form of insulting words or conduct in court has traditionally been recognized as constituting grounds for contempt. The judge is within his rights in protecting his own reputation and integrity from groundless attacks. Even if he may be willing to forego the private injury, the obligation is on him, by his oath, to maintain the respect due to the court.

Where an attorney states in open court that, "This court obviously does not want to apply the law, it is in effect charging the judge with judicial dishonesty. That statement is contemptuous on its face; the judge does not have to warn the contemnor first.

A lawyer cannot attempt to disqualify a judge by stating false statements about the judge. An attorney cannot impugn the court's integrity.

An attorney cannot file an affidavit containing statements known to be false, or with disregard as to their truth or falsity, that is also contempt.

It is counsel's duty to present himself punctually to the court and continue with the trial he has undertaken, and to avoid delays for personal matters reasonably within his control. He must be present at the pronouncement of judgment and sentencing, prepare, appear at, and participate in pretrial conferences. An attorney must appear in court when called and stay until excused. If the attorney is late or absent, he must present the court with a valid excuse.

#### V. Acts Which Do Not Constitute Contempt

A. Disregarding an order to sit down or keep quiet: A lawyer has a right to remain on his feet at proper times during a trial even after admonition is given, *In re Shortridge*, 90 P 478, (1907).

B. Manner, attitude or tone of voice: If the occasion is proper, counsel's manner, attitude or tone of voice in making proper statements to the court do not alone support a

conclusion that such behavior is disorderly, contemptuous or insolent, unless the judge first warns him that his facial expressions, manner or tone of voice is offensive and tends to interrupt the due course of the proceedings, and the attorney persists in repeating such conduct.

C. Affidavit of disqualification: An affidavit of disqualification of judge for bias filed under statutory authority does not justify contempt proceedings if the manner of presentation is unobjectionable and no bad faith is shown, unless statements made are wholly irrelevant, immaterial, in bad faith, falsely stated with improper intent, or an attack on the integrity of the judge containing defamatory matter. *In Re Lamberson*, 91 P 100, (1907).

D. Good-faith conduct of counsel to protect client's interest: In determining whether the language used by counsel was contempt, it is usually held that each court must form its own judgment. But if counsel acts in good faith to protect his client's interests, he may be immune from contempt even if he is mistaken as to the law.

Counsel may even urge a possible erroneous interpretation of the law respectfully and in good faith, even though he may not expect to be successful, and he has a right to present legitimate argument and protest erroneous rulings; and to express opinion in argument and point out asserted inadequacies or error in the court's action; provided he does not resort to deceit or willful obstruction of the orderly processes and his language and behavior are not offensive or in contravention of the common rules of decorum and propriety. *Sacher v. United States*, 343 US 1, (1952).

A firm of lawyers cannot be held in contempt for the act or failure of an individual member.

#### VI. Witness

A prospective witness who has been ordered excluded from the courtroom while other witnesses are testifying may be punished for contempt if he disregards the exclusion.

Refusal of a witness to answer is contempt in a pending matter. Also, facts must be recited in the order showing the question is pertinent to the matter in issue. If it is claimed the answer may be self-incriminatory, the record must show a ruling that it would not be.

Before disobedience of an order for production of records can be contempt, it must be shown that the records, if produced, would contain material and competent evidence.

#### VII. Juveniles

The court has the power to punish a child for contempt, within the age group subject to the jurisdiction of the juvenile court. 77 ALR2d 1004. *Young v. Knight*, 329 SW2d 195 (1959) and *Application of Balucan*, 353 P2d 631 (1960).

#### VIII. Practice Pointers for Contempt Proceedings

A judge who is faced with handling a contempt matter should consider very early in the proceedings requesting the tribal attorney to complete research and prepare documents that may be required in the case. In the event the tribal attorney is not available, the judge may

consider using private counsel.

The judgment and orders in contempt are final and conclusive and therefore cannot be appealed. However, a higher court may nevertheless view such adjudication by certiorari. Also, a trial court that improperly dismisses a contempt proceeding may be compelled by mandate to proceed with it.

Contempt adjudication may also be reviewed by habeas corpus if the contemnor is imprisoned or otherwise restrained of his liberty in some way. The court should take note that if the contemnor has been released either on bail or on his own recognizance, technically he is restrained, and a Writ of Habeas Corpus is proper.

A trial court, acting without or in excess of its jurisdiction in a contempt proceeding, may be restrained from continuing to do so by a Writ of Prohibition.

Petitions for Writs of Habeas Corpus, Certiorari, Prohibition, and Mandate are usually filed in a superior court to review the contempt proceedings.

A proceeding to punish a defendant for contempt is, in its nature, a criminal proceeding. The charge, the findings thereon, and the judgment of the court are to be strictly construed in favor of the accused and no intendments or presumptions can be indulged against him. There is a strong presumption that a person is innocent of crime or wrong.

Appellate courts, although they cannot weigh the evidence, can review the legal determinations made by the trial court and the sufficiency of the findings and judgment.

## IX Exclusion

Some Tribal codes have statutes expressly providing relief of Exclusion from the Tribe's reservation. This may be a separate cause of action filed by either the Tribe or person with standing. Usually this action is brought by the Tribes or an individual with standing. Before hearing a case on an Exclusion issue be certain to consult your own statutes/codes and case law.



## MODIFICATION, TERMINATION, or RENEWAL of PROTECTION ORDERS

There may be instances where the court will be requested to modify, terminate or renew a protection order.

*Practice Pointer: You should consider having mandatory hearings on all issues involving modification, termination, or renewal of protection orders, even when the motion and order are presented to the court as an agreed order by the victim and perpetrator.*

There is always the possibility that intimidation is the basis of the modification. Without a court hearing it is not possible to ascertain whether the victim voluntarily moves for a modification or if there is some intimidation being suffered by the victim causing the victim to file the motion to modify. A court hearing on motions to modify, terminate, or renew protection orders will allow the court to examine the expressions and motivations of the parties through conduct, words and interactions.

### I. Modification or Termination of a Protection Order

Before granting a motion to modify a protection order the Court should inquire whether the victim is bringing the motion to modify voluntarily. The Court should inquire if the perpetrator, perpetrator's family, or others are coercing the victim into filing the motion to modify the protection order.

#### A. Batter's Treatment Program

The court may receive a motion to modify or terminate a protection order. The court should not modify or terminate the permanent protection unless it finds the perpetrator has, at a minimum, successfully completed a year-long certified batterer's treatment plan. For example, Washington State has a state-certified batterer's program that takes a minimum of one year to complete.

#### B. Volitional act by victim?

The court should ascertain whether the victim is bringing the motion to modify freely and voluntarily.

## MODIFICATION OF CRIMINAL NO-CONTACT ORDERS

After a guilty verdict and sentencing, a no-contact order issued at the pre-trial stage may need to be modified or adjusted in some way. Regardless of who is requesting the change, the Court should be cautious in evaluating the proposed changes.

The defendant/perpetrator often wants the order dropped completely or amended to permit contact with minor children. The Court should schedule a review hearing to determine the propriety and timeliness of any such requests by the defendant. Input should be gathered from the persons mentioned below.

- I. Probation Officers  
If available, to assess compliance with probation criteria.
- II Law Enforcement  
To determine if there are any new or pending violations.
- III. Any Treatment Providers  
Batterers' counselors, and/or alcohol and drugs counselors, to determine participation and prognosis.
- IV The Victim(s)  
Advocates, counselor(s), or attorney(s) working with the victim.  
Again, victim safety should be the court's primary goal at this stage of the post-trial process in order to assure that the victim is not being coerced or intimidated. Prior to termination of any no-contact order at this stage, the Court must be certain that safeguards are in place to prevent further episodes.  
Often the victim will not concur with termination of the no-contact order as to herself, but she may have no objection to visitation with children. The Court again should be very cautious and mindful of the disastrous effects of domestic violence on children. This should especially be considered prior to making changes which would put the children in danger or in the role of intermediary "messenger" between the parties.  
If any changes are made to the order, the Court should assure that all parties do receive a certified copy of the current order and also the amended order, especially law enforcement. If anyone has concerns regarding the issue of children please refer to Appendix B.

## POST-TRIAL CHECKLIST

### I. Enforcement of Orders

- Criminal charges should be filed by Tribal prosecutors when protection orders are violated.
- A civil show-cause motion for contempt can be made by any party.
- An Exclusion/Banishment petition may be filed by a person with standing to do so against a contemnor.

### II. Civil Modification, Termination, or Renewal of Protection Orders

- Who has burden of proof?
- Has the Perpetrator successfully completed Batter's Treatment Program?
- Is the victim's request to modify voluntarily?

### III Criminal Modification of Protection Orders

- Who is bringing the request to modify, defendant/perpetrator or victim?
- Is the probation department recommending the modification?
- Are there any new or pending violations?
- Has the perpetrator successfully completed the Batterer's Treatment program?
- Has the victim(s), including the children, voluntarily agreed and understood the consequences of the contemplated modification ?

**Appendix B**  
**DETERMINING WHETHER A TRIBAL COURT HAS JURISDICTION TO**  
**HEAR A CHILD CUSTODY OR CHILD SUPPORT CASE**

(Printed with permission of Judge Mary T. Wynne)

**TRIBAL COURT JURISDICTION IN CHILD CUSTODY**  
**AND SUPPORT CASES:**

A. The Basic Law Resources

Before determining whether or not a case should be heard in tribal court, consult with your tribal code, local codes, updated laws of the serving judges, or laws regarding jurisdiction of the court. There may be multi-tribal agreements on jurisdiction where parents and children have different tribal memberships. Also, check state codes and laws that strengthen the Indian Child Welfare Act (ICWA) and tribal jurisdiction and create mandates to state courts. This may pertain to Public Law 280 (P. L.280).

B. The Elements in Your Judicial Inquiry

A Tribal Judge, in determining whether to hear child support cases, must consider the following:

- The extent of jurisdiction provided by tribal law;
- Tribal membership status of the parties;
- The place of residence of the parties;
- Prior proceedings or orders in state or other tribal courts;
- Property on the reservation (Quasi-In Rem Jurisdiction);
- Other off-reservation contacts the parties may have had;
- Applicability of Public Law 280;
- Are there other local treaties, agreements, or statutes regarding Tribal jurisdiction;
- Existence of state-tribe, or tribe-tribe reciprocal enforcement agreements;
- Tribal Customs and tradition;
- Applicability of your State's Uniform Child Custody Jurisdiction Act;
- Indian Child Welfare Act; and
- Consider special contempt issues regarding the parties' courtroom conduct.

## I. Tribal Law and Jurisdiction

- What does your tribal code say regarding jurisdiction over general civil cases?<sup>15</sup>
- What does it say about jurisdiction over domestic relations?
- What does the Tribal code say regarding jurisdiction over child custody and child support enforcement?

Keep these sections of code in mind when you review the following questions.<sup>16</sup>

## II. Tribal Membership Status of the Parties

If either of the parties or the child is a tribal member, the tribe should have jurisdiction over the case. It is important to find out if the Court is of the same tribe as the parties. Non-member Indians are treated differently than member Indians for purposes of jurisdiction in civil cases.

A. Ask the parties if they are members of a tribe. Ask them exactly which tribe it is to which they belong.

B. If neither is a tribal member or non-member Indian, you most likely will not have the jurisdiction to hear this case.

The key to gaining jurisdiction over non-members relies on two factors:

1. A consensual contract relationship with the tribes or its members (marriage is a contract), example: employee of the Tribe?
2. Non-member conduct that threatens or directly affects the tribe's political integrity, economic security, health, or welfare.<sup>17</sup>

C. Where did the relevant facts occur?<sup>18</sup>

## III. Residence of the Parties

A. Do the parties reside on the reservation?

B. Do the parties reside on non-Indian owned land within the reservation?

C. Does one party reside on-reservation and the other off-reservation?

D. Have the parties spent substantial time on the reservation?

E. Has the child spent substantial time on the reservation?

F. Does the child or do the parties have significant ties to the reservation – friends, family, school, work, hobbies?

Jurisdiction is strongest if all parties are on the reservation. If one of them lives off the reservation, jurisdiction is weakened slightly, but not necessarily enough to divest the court of its power. If none of the parties are on the reservation but maintain significant

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<sup>15</sup> Your tribe may have a 'long-arm statute.'

<sup>16</sup> See Appendix A for selected Tribal Code provisions.

<sup>17</sup> *Strate v. A-1 Contractors, Case #95-1872, 117 S. CT. 1404 (1997); Montana v. U.S.* 450 US 544 (1981).

<sup>18</sup> Where was the child conceived, born and raised? If it was within the boundaries of the reservation, you have a strong case. The only problem would be if the occurrences were on a Federal or State granted Right of Way (highways, etc), or non-member owned reservation land. In *Strate* the U. S. Supreme Court upheld an 8<sup>th</sup> Circuit ruling that the tribe had no jurisdiction over non-member conduct on a Federal Right of Way. *Montana v. U.S.* limits Tribal regulation and jurisdiction over non-member land.

ties to the reservation, there may still be enough of a tribal interest to pursue jurisdiction.<sup>19</sup>

#### IV Prior Proceedings in Other Courts

- A. Is there another Tribal or State court already exercising jurisdiction over the parties? Consider the information you have already learned about the case and make a determination whether or not that other court has valid jurisdiction.
- B. Use great caution in attempting to divest another court of their case. If conflicting orders are issued the case could get appealed to Federal court.
- C. If the party is merely seeking enforcement of an order issued by a prior court, Tribes may want to give any legal order issued in another jurisdiction Full Faith and Credit as mandated by Congress, even though the Full Faith and Credit clause from the U.S. Constitution doesn't apply specifically to Tribal Courts. Respecting the decisions of other courts is the basis for the judicial tradition of comity.<sup>20</sup>
- D. Domestic Protection Orders are granted Full Faith and Credit by the Violence Against Women Act of 1994. A valid order must be enforced as though it were issued in your jurisdiction.
- E. Check to see if these proceedings fall under ICWA, 25 U.S.C. § 1902 et seq.
- F. Have there already been orders regarding these parties issued in your court?

If there is a proceeding already in State court, they will be examining these same concepts to see if there is a significant state interest in the case. Should a State Court find there is a strong State interest, the State court may attempt to gain exclusive jurisdiction over the case. Be sure to gain all information possible about any concurrent proceedings in State court in order to protect your Tribe's right to assume jurisdiction.

You should make sure that the orders that are already in place do not conflict with the issues at hand. It is not good to go against a valid order that has been issued by your own court. To rule contrary to a prior order breaks the *res judicata*, collateral estoppel, and Law of the Case rules<sup>21</sup> of giving respect to prior court rulings, and it may confuse the

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<sup>19</sup> The standards of minimum contacts are established in a series of Supreme Court Cases - notably *International Shoe v. Washington*, 326 US 310, (1945), and the "long arm statute" ruling in *Asahi Metal Industry Co. v. Superior Court*, 480 US 102, (1987). While the opinions of the high court have been somewhat confused, it can be generalized that a person may subject themselves to jurisdiction when they establish regular contacts, avail themselves of the benefits of the forum, and if it is reasonably foreseeable that they might be sued in that jurisdiction based on any of their activities therein.

<sup>20</sup> Comity is showing respect for the judgement of a foreign jurisdiction, often used as a method of cooperation between courts. It is recognized by the U.S. Supreme Court in *Hilton v. Guyot*, 159 US 113 (1895).

<sup>21</sup> *Res Judicata* - "Rule that a final judgement rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand, or cause of action." -Black's Law Dictionary 6<sup>th</sup> Ed.

When a court rules on a matter of law, on all issues or causes of action, that matter must be decided the same by subsequent courts when the same case is at issue.

case and leave it open to an appeal.

V. Property on the Reservation

A. Does the respondent have property on the reservation? If so, the petitioner may attach said property to the lawsuit at the commencement of proceedings, and secure that property as both a basis for personal jurisdiction and apply it towards the value of any judgement. This is known as *quasi in rem* jurisdiction.<sup>22</sup>

B. When property is used in this way to secure *quasi in rem* jurisdiction, any monetary award cannot be higher than the value of the property.

VI. Other off-reservation contacts the parties may have had

A. How much time do the parties spend off the reservation?

B. Where do they work, go to school, spend recreation time, visit relatives, etc.?

C. Do they attend social or political clubs off the reservation?

Compare their off-reservation connections to their on-reservation connections, contacts on the reservation or off the reservation, and use this as the basis of your decision.

VII PL 280

Public Law 280 (PL 280) provides concurrent jurisdiction for certain States over Tribal civil disputes. PL 280 does not necessarily apply to all reservations in the states where it is in effect.<sup>23</sup>

- Check the applicability of PL 280 to your specific Reservation.
- If PL 280 does affect your Tribe, make sure there are no proceedings already happening in State court.

VIII Other Tribe-State Agreements

Other treaties, agreements, or statutes may also grant jurisdiction over Indian cases to State court.

- Check to see if there is a retrocession agreement granting concurrent jurisdiction to the State (retrocession is where the State retrocedes or returns jurisdiction to a Tribe

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Collateral Estoppel - "When an issue of ultimate fact has been determined by a valid judgment, that issue cannot be again litigated between the same parties in future litigation."

Similar to *res judicata*, this involves findings of fact that must be held the same by later courts in the same case with regard to the same issue on cause of action.

Law of the Case - Not a required rule, but trial courts ignore it at their own peril. When an appellate court rules upon an issue, the lower court should follow the reasoning of the appellate court or chances are the ruling will be appealed and overturned.

<sup>22</sup>These issues are touched briefly again in Appendix E.

Quasi In Rem Jurisdiction - Quasi in rem jurisdiction is defined as

<sup>23</sup>See Appendix A for a list of PL 280 and retrocession's applicability to your tribe.

- in certain matters where the State had claimed jurisdiction).
- There may be agreements with other tribes granting you jurisdiction over their members.

## IX Reciprocal Agreements

- C. Some courts already have either formal or informal agreements regarding the enforcement of each other's orders.
- D. Many Tribal codes contain preexisting reciprocal agreements allowing judgements entered in other districts to be enforced in that jurisdiction.
- E. Your state may have adopted the version of the Uniform Child Custody Jurisdiction Act (UCCJA) that contains language granting Tribes the status of a State for purposes of evaluating whether or not to hear a case or enforce an order.<sup>24</sup>

X Applicability of your State's Uniform Child Custody Jurisdiction Act  
 Check to see if the UCCJA applies within your jurisdiction and was adopted by your tribe. Refer to the Department of Social and Health Services (DSHS) ESA State / Tribal Relations Unit Child Support Resource Material Index, Volume 1-- Federal & State Child Support Enforcement Programs, and Volume 2 -- State / Tribal Relations. The DSHS ESA reference manual has a list with individuals to contact regarding child support issues for each unit. Contact the help-line, as this information is beyond the cope of legislature covered by the Bench Book.

## XI Indian Child Welfare Act

ICWA is designed to maintain cultural connections for Indian children when agencies decide to end or reduce parental rights. In non-marital custodial disputes, in certain cases, the Tribes are granted exclusive jurisdiction under the Indian Child Welfare Act<sup>25</sup>.

According to ICWA, there are two situations in which the tribal court has exclusive jurisdiction over Indian child custody proceedings. First, if the child is Indian and "resides or is domiciled within the reservation" Tribal Court Jurisdiction is exclusive under this federal law<sup>26</sup>. An "Indian child" is defined by ICWA as a person under eighteen who is either enrolled in a tribe or eligible for enrollment.

Second, if the Indian child is a ward of the tribal court regardless of the residence or domicile of the child and subject to the court's orders, the tribal jurisdiction is also exclusive<sup>27</sup>. The State has no power to exercise jurisdiction over the proceedings.

Even if the Tribe does not have exclusive jurisdiction under either of the two situations

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<sup>24</sup> This is discussed in more detail in Appendix E

<sup>25</sup> ICWA - 25 USC 1901 et seq.

<sup>26</sup> 25 USC 1911(a)

<sup>27</sup> A child's domicile is generally considered to be the domicile of the child's parents. In other words, if the parent, permanently reside on the reservation, then the child is considered domiciled there as well. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 US 30 (1989)



discussed above, the Tribe has the right to intervene in on-going state court proceeding concerning child custody and to move to have the case transferred to tribal court. It is up to the tribal court to decide whether to accept the transfer.

## XII Contempt

Non-Indian lawyers who behave inappropriately in tribal court on the assumption that the court has no jurisdiction to administer contempt proceedings<sup>28</sup> over them are a problem unique to tribal courts. Civil contempt is where a party refuses to obey a court order, and criminal contempt is where the party is punished for directly violating the court's standards. Civil punitive sanctions are considered by the court to be criminal in nature, and this may present a jurisdictional difficulty for the court.

In order to exercise civil contempt jurisdiction over an offending non-Indian party, the court should immediately issue an order containing specific language about the acts the court wishes to be stopped. Violation of a standing court order becomes civil contempt, rather than criminal.<sup>29</sup> By practicing in Tribal court, an attorney does subject themselves to civil jurisdiction through their attorney's oath to the court.<sup>30</sup> This oath becomes a contract, with the attorney promising to abide by court procedure, and in exchange the court allows them the privilege of practicing law in the Court's forum. Punitive sanctions based on the violation of this contract and any specific court orders issued may be used by the court in securing the respectful behavior of attorneys appearing before the bench. Consider requiring the attorney to post a bond that will insure their continued cooperation, instead of a straight fine. Should this fail, the court may consider pursuing more extreme measures, such as disbarment or exclusionary orders.<sup>31</sup>

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<sup>28</sup> *Oliphant v. Suquamish Indian Tribe* (435 US 191; 1978) is the primary decision stating that the Tribes do not have the power to charge non-members engaging in criminal conduct.

<sup>29</sup> *Lichtenstein v. Lichtenstein*, 425 F2d 1111, 1113 (3<sup>rd</sup> Cir) (1970).

<sup>30</sup> *Montana*- tribes may exercise civil authority over "the conduct of non-members...relating to (1) the activities of nonmembers who enter consensual relationships with the tribe or its members and (2) nonmember conduct that threatens or directly affects the tribe's political integrity, economic security, health, or welfare." 450 US at 564-567. Practicing law before the court is a good example of a consensual relationship between the attorney and the court, a direct branch of the tribal government. Under this first branch of the test, the Tribal court should be able to press civil charges against non-cooperative advocates. While it is debatable, one may make an argument that by polluting the judicial process, contemptuous attorneys are threatening the tribe's political integrity.

<sup>31</sup> More detailed explanation of contempt issues are available in Appendix F.