

# **TRIBAL CRIMINAL COURT**

## **BENCHBOOK**

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National American Indian Judges Association, Inc.**

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## INTRODUCTION

In 1980, John W. Milne and Ralph W. Johnson authored two works entitled Criminal Procedure for Indian Courts and Criminal Law for Indian Courts. Both books were produced for the National American Indian Court Judges Association as part of a training program for tribal court judges. This benchbook is comprised of a combination of elements from both of those previous works, which is being offered as a practical guide for use in tribal criminal courts.

Although this benchbook relies on material in the previous publications by John W. Milne and Ralph W. Johnson, it contains information that has been revised, updated and supplemented. This benchbook is offered only as a guide and for suggested practices and should not be relied upon as an authoritative source upon which to base judicial decisions. Judges are advised to check with and follow tribal codes and local court rules. Federal Indian law, as well as criminal law and criminal procedure, are areas of the law that are constantly changing. Therefore, judges are advised to keep current with statutory and case law that may impact tribal courts.

As tribal courts continue to develop throughout Indian Country, it is important that tribal judges continue to develop judicial skills throughout their careers to keep up with the increasing responsibilities thrust upon tribal courts. In my opinion, being a tribal judge is the most difficult kind of judgeship a person can undertake. Federal and State courts are well developed, well funded, and rarely do those courts have to defend their judicial integrity. In addition, tribal judges are sometimes burdened with sorting through a jurisdictional maze, which is subject to change. Tribal judges must often contend with small budgets, dated codes and procedures, and a minimal number of support staff. If all of that were not enough, tribes and tribal courts are under the constant threat of having further civil and criminal jurisdiction eroded by federal court decisions.

Having the opportunity to serve a tribal community as a tribal court judge can also be one of a person's most rewarding experiences. Many tribal judges have the opportunity to be a part of a developing court system. The hard work and contributions made by those judges will lay the foundation for the operation of justice for an entire tribal community. Judges serving in established tribal courts have the opportunity to make improvements and, in some instances, expand the role of the tribal court for the benefit of the tribal community that they serve.

It is our hope that this benchbook will be of value to all tribal judges who preside over a criminal docket.

Randy A. Doucet

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# **CHAPTER 1**

## **INTRODUCTION**

- 1.1 Scope and Purpose
- 1.2 The Role of the Judge in Criminal Proceedings

### **1.1 Scope and Purpose**

This benchbook is designed to be a one-volume reference manual for the practice areas of criminal procedure and criminal law. It was written specifically for tribal judges who preside over criminal dockets. The benchbook is organized by chapters that follow the generally accepted chronological steps in the criminal justice process. It is further organized according to subject matter, with each topic covered in its own separate section.

This benchbook provides references to federal statutes and case law applicable to tribes, but it is not designed to provide tribal courts with substantive criminal law. It also contains suggestions for adjudicating criminal issues that tribal judges will likely encounter when presiding over a criminal docket. Of course, each judge is ultimately responsible for the methods and procedures used in his/her courtroom.

The challenge in writing a benchbook for use by tribal court judges is that each court system varies in its substantive law and procedural rules. This benchbook is designed as an aid to the sitting tribal judge. It is by no means intended to be the final authoritative source on any subject you might encounter. The field of criminal law and criminal procedure is ever changing, as is the field of Federal Indian Law, which when combined, makes this area of law dynamic and fluid, requiring tribal judges to keep current with the latest changes in the law.

### **1.2 The Role of the Judge in Criminal Proceedings**

In criminal cases, the judge is the arbiter of justice standing between the tribal government and the criminal defendant. Judges are expected to be well versed in the law and to have a firm grasp of the proper procedures for handling matters brought before the court. Judges are to keep order in the courtroom and manage the court docket with efficiency. This must be done while maintaining the proper judicial demeanor, meaning that judges should be firm, yet courteous and even tempered.

Judges are in charge of the courtroom and are responsible for the orderly conduct of all proceedings brought before the court. An atmosphere of respect and decorum should pervade over all hearings. The respect accorded to judges is a reflection of what the court represents to the community; the center of justice established by the tribe for the purpose of administering the tribe's laws.

Presiding over a criminal docket presents a judge with the opportunity to hear a variety of proceedings, which vary in complexity and length. The typical criminal case begins with the arraignment and proceeds through to a guilty plea or a trial. There may also be post-conviction hearings to review court ordered probation or requests for post conviction relief.

When handling arraignments, bail hearings, or accepting a plea, judges must be vigilant at each step of the process to insure that criminal defendants understand the nature of the proceeding and the consequences of any rights they may be waiving, even when they are represented by defense counsel. Legal paperwork should be carefully reviewed to insure it is properly completed before a judge signs the document. Although some matters may become routine to the court staff, it is anything but routine for the criminal defendant or victim proceeding through the criminal justice system. They have a high expectation that each case will be handled with care and competence.

The majority of a judge's time presiding over a criminal docket will consist of preliminary criminal hearings, and only a small percentage of cases will proceed to trial. The primary role of the judge in a criminal jury trial will be to act as the gatekeeper to decide on admission of evidence which may be heard by the jury. In the criminal bench trial, judges decide both the law and the facts in reaching the ultimate decision of guilt or innocence.

Finally, two important points that should be mentioned are docket management and case management. Docket management is controlling the flow of cases set on a specific day. Case management is controlling the progression of a single case as it proceeds through the criminal justice system. Poor management of either can be a source of frustration and dissatisfaction by the public. If the judge does not take control of the docket, the prosecutor and defense counsel certainly will. A well managed court docket will save valuable justice resources and the most important resource of all, the judge's time. A poorly managed docket reflects adversely on the integrity of the court, and wastes the time of the judge, clerks, prosecutors, defense counsel, police officers, victims, defendants and their families.

**\*\* Practice Pointer\*\***

**“Starting Court on Time”**

For most preliminary criminal matters, such as arraignments or pre-trial conferences, defense council may be meeting their clients for the first time, or they may have only received a plea offer that morning and need time to discuss their options. Judges who are aware of these realities may give the parties time to talk before starting the court session, sometimes delaying the start of court by 15 to 30 minutes after the scheduled time for the criminal docket to begin.

Consider starting court sessions promptly as scheduled. If the calendar begins at 9:00 a.m., make your appearance at the scheduled time and call the docket, if no cases are ready for resolution, advise the litigants that the court will take a short recess to allow the parties to discuss their cases among themselves. The parties are then put on notice that the Court is ready and the judge is waiting on them. This method also insures that everyone knows that your court starts at the scheduled time and they will be there on time. If parties learn that you do not start the 9:00 a.m. docket until 9:30 a.m., then some litigants will not show up until 9:30 a.m., thereby further delaying the docket.

## CHAPTER 2

### CRIMINAL JURISDICTION

- 2.1 Chapter Introduction
- 2.2 Jurisdiction Generally
  - 2.2.1 Subject Matter Jurisdiction
    - Personal Jurisdiction
- 2.3 Tribal Criminal Jurisdiction
  - 2.3.1 Tribal Members
  - 2.3.2 Tribal Members and Major Crimes
  - 2.3.3 Non-Tribal Indians
  - 2.3.4 Canadian Indians
  - 2.3.5 Non-Indians
- 2.4 Federal Criminal Jurisdiction in Indian Country
  - 2.4.1 Federal Crimes of Nationwide Applicability
  - 2.4.2 Federal Laws Applicable to Indian Country
    - 1. Indian Country Crimes Act (General Crimes Act)
    - 2. Assimilative Crimes Act
    - 3. Major Crimes Act
- 2.5 State Criminal Jurisdiction in Indian Country
- 2.6 Public Law 280
- 2.7 Checklist for Determining Criminal Jurisdiction
  - 2.7.1 Location of the Crime
  - 2.7.2 Is Public Law 280 Applicable?
  - 2.7.3 Is the Crime a Violation of a Federal Crime of Nationwide Applicability?
  - 2.7.4 Determine the Race of the Victim and Defendant
- 2.8 Criminal Jurisdictional Summary

#### **2.1 Chapter Introduction**

When speaking of criminal jurisdiction in Indian Country the terms “quagmire” or “jurisdictional maze” are often used. These terms are well deserved. With three sovereigns sharing some law enforcement authority over criminal matters in Indian Country, determining jurisdiction can be confusing. Determining whether the tribal court has proper criminal jurisdiction requires a consideration of a complex mixture of federal, state and tribal law. Federal, state and/or tribal courts, depending on factors such as race, location of the crime and the type of crime may assert criminal jurisdiction. Other factors which must be considered include whether any federal statutes apply; whether the state has jurisdiction pursuant to P.L. 280; and whether the offender and/or the victim is a tribal member, nonmember Indian or non-Indian.<sup>1</sup> To complicate matters further, appellate courts vary in their opinions and interpretations of the laws governing criminal jurisdiction in Indian country.

Generally, prior to charges being filed in the tribal court, the police and prosecutor will usually have determined whether the tribe has criminal jurisdiction over the person and the crime. However, when criminal jurisdiction is contested, the court

will make the final legal determination as to whether a tribe has criminal jurisdiction to allow for prosecution and punishment of the defendant.

Issues concerning jurisdiction may be brought to the attention of the court by a motion to dismiss filed by the defendant, or the court itself may recognize that it lacks jurisdiction and dismiss the case *sua sponte*, or on its own motion.

## **2.2 Jurisdiction Generally**

Jurisdiction is the authority of a court to enforce its judgments over persons, property or subject matter. In criminal cases it is the authority of the court to detain, conduct a trial and sentence (punish) the defendant for violating the law. A preliminary examination of whether criminal jurisdiction is proper in a tribal court might start with an examination of whether the court has subject matter jurisdiction and personal jurisdiction.<sup>2</sup>

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

Three factors determine whether a tribal court has subject matter jurisdiction in a criminal case:

- (1) Criminal jurisdiction - The tribal court must have legal authority to decide criminal matters. In some instances a particular tribal court may only have authority to decide civil matters, and
- (2) Race of the defendant - The court must have jurisdiction over the accused. Tribal courts have criminal jurisdiction over Native Americans, but tribal courts do not have criminal jurisdiction over non-Indians.<sup>3</sup> As a result, the race of the accused becomes a determining factor in whether a tribal court has jurisdiction, and
- (3) Type of offense - The court must have jurisdiction over the offense, or the actual crime committed. This means the court must have authority to try the accused for a particular crime. The tribe can only punish Native Americans for crimes defined in the tribal code and committed within the territorial jurisdiction of the court. If the tribal code does not specify that a certain offense is a crime, then the tribal court would not have subject matter jurisdiction to try the accused for that crime. For example, if the tribe does not define bigamy as a crime, then the tribal court would not have subject matter jurisdiction over that offense.<sup>4</sup>

### **2.2.2 Personal Jurisdiction.**

The tribal court must obtain personal jurisdiction over the accused. Personal jurisdiction concerns the process by which the accused is notified of the criminal charge and then commanded to appear before the court.<sup>5</sup>

## 2.3 Tribal Criminal Jurisdiction

### 2.3.1 Tribal members

The general rule is that tribes have criminal jurisdiction over crimes committed by tribal members within the territorial jurisdiction of the tribe.<sup>6</sup> A tribe's criminal jurisdiction over tribal members is based on the tribe's inherent authority to enforce criminal laws within the exterior boundaries of the tribe's reservation borders.<sup>7</sup>

### 2.3.2 Tribal Members and Major Crimes

Whether tribes have been divested of all authority to prosecute major crimes has not been finally decided. In the case of *Ex parte Crow Dog*, the U.S. Supreme Court affirmed that Indian tribes possessed exclusive jurisdiction over crimes committed by one tribal member against another tribal member in Indian country.<sup>8</sup> Shortly thereafter, and in response to the *Crow Dog* decision Congress enacted the Major Crimes Act.<sup>9</sup> The Major Crimes Act established fourteen enumerated crimes over which federal jurisdiction was assumed. The United States may prosecute any intra-tribal crime listed in the M.C.A. The MCA states as follows:

18 USC §1153. Offenses committed within Indian country

a) Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury (as defined in section 1365 of this title), an assault against an individual who has not attained the age of 16 years, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

(b) Any offense referred to in subsection (a) of this section that is not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.

The ultimate question has yet to be decided as to which government or governments can prosecute generally applicable federal offenses not specifically enumerated by the M.C.A. that are committed by one Indian against another on tribal lands. The federal circuit courts of appeals have differing interpretations on these issues.

The Second, Fourth, and Seventh Circuits are considered pro-tribal jurisdiction circuits. The Fourth Circuit denies federal jurisdiction for any crime not specifically

listed by the M.C.A. Jurisdiction of unlisted crimes is left to the tribes. The Second and Seventh Circuits allow federal jurisdiction over crimes not listed in the M.C.A., but only if they are "peculiarly federal."<sup>10</sup>

The Sixth, Eighth, and Ninth Circuits have ruled that the federal government has jurisdiction to prosecute any generally applicable federal criminal statute regardless of whether, or not, the crime occurred between Indians on tribal land.<sup>11</sup>

### **2.3.3 Non-Tribal Indians**

Tribes have the inherent power to exercise criminal jurisdiction over all Indians, regardless of tribal affiliation.<sup>12</sup> In 1990, the U.S. Supreme Court, in the case of *Duro v. Reina*, limited the authority of tribal courts to punish non-tribal Indians, Indians who are not members of that tribe.<sup>13</sup> Shortly after the *Duro* decision, Congress amended 25 U.S.C. 1301 to permit tribal courts to exercise "criminal jurisdiction over all Indians," not just member Indians.

### **2.3.4 Canadian Indians**

Depending on the location of a tribe, there may be cases where Canadian Indians violate the laws of a tribe within the boundaries of the tribe's reservation. The question is then raised as to which government has jurisdiction?

Canadian Indians are considered non-Indians for the purposes of criminal jurisdiction, because Canadian Indians are not "Indians" as defined by federal law. The Indian Civil Rights Act defines an Indian as "any person who would be subject to the jurisdiction of the United States as an Indian" under the MCA.<sup>14</sup> A person claiming to be an Indian for purposes of criminal jurisdiction must show (1) that he is an Indian in the racial sense, and (2) that he is enrolled or affiliated with a tribe that is recognized by the United States, and is individually subject to United States jurisdiction.<sup>15</sup>

### **2.3.5 Non-Indians**

Tribes do not have criminal jurisdiction to prosecute and punish non-Indians. In 1978, the U.S. Supreme Court decided that tribal courts do not have criminal jurisdiction over crimes in Indian Country committed by non-Indians.<sup>16</sup>

The following test has evolved for determining jurisdiction over criminal offenses committed by non-Indians against Indians: If a non-Indian commits a crime against an Indian within Indian country in a state not covered by Public Law 280 or a specific jurisdictional statute, and the crime is not one of general federal applicability, the federal district court has jurisdiction over the non-Indian and the offense.<sup>17</sup> Neither the state nor the tribe has jurisdiction. This federal jurisdiction is derived from one of two statutes. If the offense is a violation of a "general law of the United States" punishing behavior committed "in any place within the sole and exclusive jurisdiction of the United States" (that is, a federal enclave), the Indian Country Crimes Act grants jurisdiction.<sup>18</sup> If the offense is not a violation of a general federal enclave statute, the federal court can take jurisdiction under the Assimilative Crimes Act, which incorporates state substantive law.<sup>19</sup>



## 2.4 Federal Criminal Jurisdiction in Indian Country

### 2.4.1 Federal Crimes of Nationwide Applicability.

Federal criminal statutes of nationwide applicability are enforceable throughout the United States, including Indian Country. These crimes apply to all offenders regardless of race or tribal membership.<sup>20</sup> Federal legislation often applies generally to "Indians" and "Indian country," rather than to specific tribes or reservation territories.

The most recognizable federal crime of nationwide applicability in recent years pertains to the Violence Against Women Act. VAWA provides for federal crimes in the following areas:

- 1) Firearms, 18 U.S.C. Sec. 922(d)(8) and (g)(8);
- 2) Interstate Travel or Activity, 18 U.S.C. Sec. 2261(a)(1);
- 3) Causing the Crossing of a State Line, 18 U.S.C. Sec. 2261(a)(2); and
- 4) Interstate Violation of a Protective Order, 18 U.S.C. Sec. 2262.

Other examples of federal crimes that apply to Indian reservation include:

- 1) Controlled Substances – Distribution and Possession with Intent to Distribute, 21 U.S.C. Sec. 841(a)(1);
- 2) Felon in Possession of a Firearm, 18 U.S.C. Sec. 922(g);
- 3) Youth Handgun Safety Act, 18 U.S.C. Sec. 922(x)(2).<sup>21</sup>

### 2.4.2 Federal Laws Applicable to Indian Country

#### 1. Indian Country Crimes Act (General Crimes Act): 18 U.S.C.A. § 1152

The Indian Country Crimes Act, also referred to as the General Crimes Act has as its primary purpose to provide for prosecution of crimes by non-Indians against Indians and of non-major crimes by Indians against non-Indians.<sup>22</sup> The Act states that: Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country. This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.<sup>23</sup>

The General Crimes Act provides for the application of federal criminal statutes to activities in Indian country with the exceptions of "Indian v. Indian offenses" or activities performed pursuant to treaty stipulations. The Act's reference to "punish[ment] by the local law of the tribe" has been interpreted to allow concurrent jurisdiction by tribal courts.

The U.S. Supreme Court held in *United States v. McBratney* that the State of Colorado could assert jurisdiction in "non-Indian v. non-Indian" crimes.<sup>24</sup> The Court

reasoned that, because Colorado was not required to disclaim jurisdiction over Indian country upon its entry into the Union, the State could rightfully assert jurisdiction on the basis of the equal footing doctrine. The equal footing doctrine was later supplanted by the reasoning that neither the tribes nor the federal government had any interest in matters affecting only non-Indians in Indian country, except prior to there being a state government to handle such matters.

## **2. Assimilative Crimes Act: 18 U.S.C.A. § 13**

The Assimilative Crimes Act incorporates into federal law any state penal statutes where a federal enclave is located. Because it is a "general law," the Assimilative Crimes Act is made applicable to Indian country pursuant to the General Crimes Act, discussed above. Federal appellate courts have been divided on the extent of its application. For example, one area of dispute is whether the Assimilative Crimes Act incorporates into federal law state penal statutes that have a civil regulatory objective but impose criminal sanctions for noncompliance. Some courts focus on whether the underlying purpose of the state statute is to prohibit certain conduct or to regulate it, while other courts reject this distinction. The division among the lower courts stems from the difficulty in characterizing those statutes that involve "victimless" crimes or consensual behavior. In addition, certain statutes, such as fireworks statutes, fall into a "gray" area that is neither clearly regulatory nor prohibitory.<sup>25</sup>

## **3. Major Crimes Act: 18 U.S.C.A. § 1153.**

The Major Crimes Act provides for exclusive federal jurisdiction over specifically enumerated crimes occurring on the reservation, regardless of whether the victim and defendant are Indian.

The Major Crimes Act states:

- (a) Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury (as defined in section 1365 of this title), an assault against an individual who has not attained the age of 16 years, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.
  
- (b) Any offense referred to in subsection (a) of this section that is not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.<sup>26</sup>

Although the U.S. Supreme Court has not resolved the question, several federal courts have concluded that tribes may still exercise concurrent jurisdiction over cases, which are subject to federal jurisdiction pursuant to the Act.

## 2.5 State Criminal Jurisdiction in Indian Country

States may have criminal jurisdiction in Indian country when the offense involves a non-Indian and non-Indian victim, non-Indian victimless crime, or the state may have exclusive criminal jurisdiction pursuant to P.L. 280.

## 2.6 Public Law 280

In 1953, Congress enacted Public Law 83-280 (P.L. 280), codified at 18 U.S.C.A. §1162(a). It allowed California, Minnesota, Nebraska, Oregon and Wisconsin to exercise limited civil and extensive criminal jurisdiction over Indian country within their borders. In 1958, Alaska was also made a mandatory P.L. 280 state. The General Crimes Act and the Major Crimes Act are not applicable to Indian country crimes in these six mandatory states.

- (a) Each of the States or Territories listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:

The state or territories of Indian country affected by P.L. 280 are as follows:

1. **Alaska:** All Indian country within the State, except that on Annette Islands. The Metlakatla Indian community may exercise jurisdiction over offenses committed by Indians in the same manner in which such jurisdiction may be exercised by Indian tribes in Indian country over which State jurisdiction has not been extended.
2. **California:** All Indian country within the State.
3. **Minnesota:** All Indian country within the State, except the Red Lake Reservation.
4. **Nebraska:** All Indian country within the State.
5. **Oregon:** All Indian country within the State, except the Warm Springs Reservation.
6. **Wisconsin:** All Indian country within the State.

While sweeping in nature, P.L. 280 was not novel legislation. Kansas, Iowa, New York and North Dakota at different times have been granted varying levels of jurisdiction over crimes committed in Indian country located within their state borders.<sup>27</sup>

The U.S. Supreme Court held that P.L. 280 authorizes criminal jurisdiction only with respect to criminal-prohibitory, and not civil-regulatory laws.<sup>28</sup> The Court in

*California v. Cabazon Band of Mission Indians* reasoned that: [I]f the intent of a state law is generally to prohibit certain conduct, it falls within [P.L. 280]'s grant of criminal jurisdiction, but if the state law generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory and [P.L. 280] does not authorize its enforcement on Indian reservations. The shorthand test is whether the conduct at issue violates the State's public policy.

The *Cabazon* ruling prevents P.L. 280 states from applying state laws in Indian Country that interfere with tribal activities that are not prohibited in the state itself.<sup>29</sup>

## **2.7 CHECKLIST FOR DETERMINING CRIMINAL JURISDICTION**

To determine whether the tribal court has jurisdiction over a particular crime or defendant, the court should make the following determinations:

### **2.7.1. Location of the Crime.**

The tribal court must have jurisdiction over the territory where the offense was committed. Jurisdiction is the tribe's ability to exercise its authority over the territory.

Determine whether the crime occurred in Indian country. "Indian country" is defined by federal statute as (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.<sup>30</sup>

"Indian country" includes land owned by non-Indians, which is nonetheless within the exterior boundaries of a reservation. Within many reservations, large tracts of land are owned by non-Indians. Some even have whole incorporated towns within their boundaries. All such tracts and towns are considered Indian country under subsection (a) of the statute.<sup>31</sup>

A dependent Indian community is land, which is dependent on the federal government for assistance.<sup>32</sup> Lands established for use by tribes by the federal government are considered Indian Country. This may include trust land outside the reservation boundaries.

If the crime did not occur in Indian country, the appropriate state government has jurisdiction; the federal and tribal governments do not. This reflects the interest of protecting "the inherent right of the states to jurisdiction within their boundaries."<sup>33</sup>

If it is determined that the crime did occur in Indian country, then determine whether a federal statute has conferred jurisdiction to the state.

**NOTE:** There are instances when location may be an issue, even within the boundaries of an Indian Reservation or Indian country. For example; when a Native American commits a crime on fee land owned by a non-Indian within the boundaries of an Indian Reservation. In some instances states have argued that jurisdiction rested with the state on fee land within Indian country.

### **2.7.2. Is Public Law 280 applicable?**

In 1953, Congress enacted Public Law 83-280 (P.L. 280), which requires California, Minnesota, Nebraska, Oregon and Wisconsin to exercise limited civil and extensive criminal jurisdiction over Indian country within their borders. In 1958, Alaska was also made a mandatory P.L. 280 state. The General Crimes Act and the Major Crimes Act are not applicable to Indian country crimes in these six mandatory states. Congress also ceded federal jurisdiction to New York and Kansas in other enactments.<sup>34</sup> In "Public Law 280 states," plus New York and Kansas, the state governments have jurisdiction over every crime committed within Indian country; the federal government has no jurisdiction.

The Supreme Court has yet to decide whether tribes retain concurrent jurisdiction, although many scholars believe that concurrent jurisdiction is incompatible with the current jurisdictional regime in Public Law 280 states.<sup>35</sup> Thus, if the crime was committed in a Public Law 280 state, or New York or Kansas, the state has jurisdiction, while the federal government does not.

If the crime was not committed in a Public Law 280 state or equivalent, the inquiry continues to step three.

### **2.7.3. Is the Crime a Violation of a Federal Crime of Nationwide Applicability?**

The federal government retains exclusive jurisdiction over federal crimes that apply throughout the United States, including Indian Country.<sup>36</sup> Crimes such as mail fraud, treason, Organized Crime Control Act and the Racketeer Influenced and Corrupt Organization Act are examples of federal crimes that apply with equal force to all persons, regardless of race or location within the boundaries of the United States.<sup>37</sup> Tribes and states do not have jurisdiction over such offenses.<sup>38</sup>

### **2.7.4. Determine the Race of the Victim and Defendant.**

Race is a factor that must be considered in jurisdictional determination. If the person is a tribal member of the subject tribe, or Indian from another tribe, then the tribal court has criminal jurisdiction, unless preempted by federal statute. If the person is not an Indian, then the tribal court does not have criminal jurisdiction. Generally, the simplest means of determining who is an Indian includes anyone who is a member of a federally recognized tribe.

## **2.8 Criminal Jurisdictional Summary**

Tribes, states, and the federal government all share a portion of Indian criminal jurisdiction. The race of the offender and the victim is the final determinants of which court will have jurisdiction over the offense and the offender.<sup>39</sup> For the purposes of this jurisdictional summary, non-member Indians are categorized the same as tribal members. Also Public Law 280 is not considered in this summary.

- 1) Crimes committed by an Indian against another Indian  
Tribal courts have exclusive jurisdiction over these crimes. Federal courts have jurisdiction if the crime is enumerated under the Major Crimes Act or under laws of general applicability. Tribal courts have jurisdiction over crimes committed by an Indian against an Indian otherwise cognizable under the General Crimes Act. Whether tribal courts have jurisdiction concurrent with Federal courts over conduct constituting a major crime is undetermined.
- 2) Crimes committed by an Indian against a non-Indian  
State courts have no jurisdiction, except in Public Law 280 states. Federal courts have jurisdiction under the Major Crimes Act if the crime is one of the enumerated major crimes or the federal statute is one of general applicability. Federal courts also have jurisdiction under the General Crimes Act unless a tribal court has already punished the offender or treaty provisions grant exclusive tribal jurisdiction to a tribe. Tribal courts have concurrent jurisdiction with the United States for offenses cognizable under the General Crimes Act. Whether tribal courts have jurisdiction concurrent with the United States over conduct constituting a major crime is undetermined.
- 3) Crimes committed by a non-Indian against an Indian  
Federal courts have jurisdiction under the General Crimes Act and any federal statute of general applicability. Tribal courts have no jurisdiction over crimes committed by non-Indians.
- 4) Crimes committed by a non-Indian against a non-Indian  
State courts have jurisdiction. Federal courts have jurisdiction under the General Crimes Act or federal criminal statutes of general applicability. Tribal Courts have no jurisdiction.
- 5) Victimless crimes committed by Indians  
State courts have no jurisdiction. Federal courts likely have jurisdiction under the General Crimes Act, unless the alleged offender has already been punished or treaty provisions grant exclusive jurisdiction to a tribe, and clearly have jurisdiction under any statute of general applicability. Tribal courts have jurisdiction concurrent with the United States over offenses cognizable under the General Crimes Act. Whether tribal courts have jurisdiction concurrent with the United States over conduct constituting a major crime is undetermined.
- 6) Victimless crimes committed by non-Indians  
State courts have jurisdiction. Federal courts have jurisdiction concurrent with the state courts under the General Crimes Act or any statute of general applicability. Tribal courts have no jurisdiction.<sup>40</sup>

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<sup>1</sup> See Thorington, Nancy, "Civil and Criminal Jurisdiction Over Matters Arising in Indian Country; A Roadmap for Improving Interaction Among Tribal, State and Federal Governments," 31 McGeorge Law Review 973, (2000), p. 992.

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- <sup>2</sup> Felix S. Cohen, Handbook of Federal Indian Law (Washington: U.S. Government Printing Office, 1945), p. 358.
- <sup>3</sup> *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 55 L Ed 2d 209, 98 S Ct 1011 (1978).
- <sup>4</sup> John W. Milne and Ralph W. Johnson, Criminal Law for Indian Courts (National American Indian Court Judges Association, Inc., 1980), p. 1.
- <sup>5</sup> *Id.* at 2.
- <sup>6</sup> *Ex Parte Crow Dog*, 109 U.S. 556 (1883).
- <sup>7</sup> *Talton v. Mayes*, 163 U.S. 376, at 383-84 (1896).
- <sup>8</sup> *Ex Parte Crow Dog*, 109 U.S. 556 (1883).
- <sup>9</sup> 18 U.S.C.A. §1153.
- <sup>10</sup> See King, James Winston, “The Legend of Crow Dog: An Examination of Jurisdiction Over Intra-Tribal Crimes Not Covered by the Major Crimes Act,” 52 *Vanderbilt Law Review* 1479 (1999), p. 1508.
- <sup>11</sup> *Id.*
- <sup>12</sup> 25 U.S.C.A. 1301(2).
- <sup>13</sup> *Duro v. Reina*, 495 US 676, 109 L Ed 693, 110 S Ct 2053, (1990).
- <sup>14</sup> 25 U.S.C. § 1301(4).
- <sup>15</sup> *LaPier v. McCormick*, 986 F.2d 303(1993), p. 305-06.
- <sup>16</sup> *Oliphant v. Suquamish Indian Tribe*, 435 US 191, 55 L Ed 2d 209, 98 S Ct 1011, 1978.
- <sup>17</sup> See Cunningham, Larry, “Deputization of Indian Prosecutors: Protecting Indian Interests in Federal Court,” 88 *Georgetown Law Journal* 2187 (July 2000) p. 2195.
- <sup>18</sup> *Id.* at 2196.
- <sup>19</sup> *Id.*
- <sup>20</sup> Criminal Jurisdiction in Indian Country, BIA-Eastern District Law Enforcement, August 1999, BIA Office of Law Enforcement Services.
- <sup>21</sup> *Id.*
- <sup>22</sup> Canby, *supra* note 9, at 144.
- <sup>23</sup> 18 U.S.C.A. § 1152.
- <sup>24</sup> *United States v. McBratney*, 104 U.S. 621, 26 L.Ed. 869, (1882).
- <sup>25</sup> See Thorington, *supra* note 1, at 995.
- <sup>26</sup> 18 U.S.C.A. § 1153.
- <sup>27</sup> See American Indian Law Deskbook, 2d Ed., Conference of Attorneys General (University of Colorado Press, 1998), p. 95-96.
- <sup>28</sup> Thorington, *supra* note 1, at 999.
- <sup>29</sup> *Id.*
- <sup>30</sup> 18 USCA § 1151
- <sup>31</sup> Cunningham, *supra* at 2190.
- <sup>32</sup> *Id.*
- <sup>33</sup> *Id.*
- <sup>34</sup> *Id.* at 2191.
- <sup>35</sup> *Id.*
- <sup>36</sup> William C. Canby, Jr., American Indian Law: In a Nutshell, 3<sup>rd</sup> Ed., (West Group, St. Paul, Minn. 1998), p.142.
- <sup>37</sup> *Id.*
- <sup>38</sup> Cunningham, *supra* note 4.

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<sup>39</sup> **Id.**

<sup>40</sup> See American Indian Law Deskbook, 2d Ed.1998, p. 99.



## CHAPTER 3

### **ARREST, SEARCH AND SEIZURE, EXTRADITION**

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#### **3.1 Introduction**

The criminal process generally begins when a person has an encounter with a police officer. An encounter with law enforcement may be measured by varying degrees of intrusiveness. The encounter may be as simple and unintrusives as a conversation on a public street. Some encounters may result in an arrest, immediately followed by a search of the person incident to arrest. The following chapter discusses the issues that judges will likely have to decide when making decisions about the legality of police encounters with the public.

#### **3.2 Probable Cause**

Generally, the first decision that a judge will be called upon to make in a criminal case is to determine whether probable cause exists. Probable cause is the evidentiary burden that must be established to issue a warrant for an arrest or search. Shortly after a warrantless arrest takes place, a judge must determine if the officer had sufficient probable cause for the arrest. This is usually done at the arraignment or at a subsequent pre-trial motion hearing.

The requirement that tribal courts should make probable cause determinations is found in the Indian Civil Rights Act of 1968. The Act provides that no Indian tribe in

exercising powers of self-government shall violate the right of the people to be secure in their persons, homes, papers, and effects against unreasonable search and seizures, nor issue warrants, except upon *probable cause*, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized.<sup>1</sup>

The evidentiary burden is the same whether probable cause is being established for an arrest warrant or a search warrant. However, the facts and legal proofs required will differ depending on the type of warrant sought.

Probable cause to arrest exists where the facts and circumstances within the arresting officer's knowledge, and of which the officer has reasonably trustworthy information, are sufficient in themselves to warrant a person of reasonable caution in the belief that the person to be arrested has committed or is committing a criminal offense. The officer must have a reasonable belief that the person has committed the offense. Probable cause must be examined in light of the arresting officer's special expertise and training in identifying criminal behavior. Probable cause for arrest is measured by the particular facts known to the arresting officer at the time of the arrest. Information or evidence obtained after the arrest cannot be considered in evaluating the existence of probable cause. The finding of probable cause may be based on evidence that is hearsay in whole or in part.

Although, the legal standard for making a "probable cause" determination is not well defined, there are certain factors that should be considered. A judge should be reasonably satisfied that probable cause is based upon:

- 1) Reliable and trustworthy information, and
- 2) The information is relevant to the reasons stated for obtaining the warrant.<sup>2</sup>

Other considerations in making a determination of probable cause include:

- 1) The information relied upon must be more than mere rumor.
- 2) The test is an objective one, and the facts and circumstances must be based on reasonable and trustworthy information that would warrant a belief by a reasonable person that the person to be arrested has committed a criminal offense.
- 3) The officer must present more than mere suspicion, but does not need evidence sufficient to convict.
- 4) An officer's experience and expertise may be considered, in that an officer may be able to identify criminal activity or an illegal substance that a lay person would not.<sup>3</sup>
- 5) The evidence presented to establish probable cause, such as hearsay, need not be admissible as evidence at trial to be considered in a probable cause determination.<sup>4</sup>

Probable cause can be thought of as a decision, by a judge, that a person should be arrested, or a search conducted, because there is enough reliable evidence available to lead a reasonable person to believe the statements contained in the supporting affidavit are probably true.<sup>5</sup>

Consider the following when probable cause is to be established by information

supplied by an informant:

- 1) Hearsay will support a finding of probable cause, but the informant must be found credible and the basis for believing him/her must be shown and the basis of his/her information must be reliable.
- 2) “Totality of the circumstances” - The Court may make a practical common-sense decision whether, given all the circumstances before the judge, including the credibility of the informant and the basis of his/her knowledge, that probable cause exists. A strong showing in one area may compensate for deficiency in another.<sup>6</sup>

*\*\*Practice pointer* – If possible have the officer requesting the warrant and supplying the information present for questioning about the probable cause that the warrant is based upon.<sup>7</sup>

### **3.3 Arrest – Generally.**

An encounter with police may result in a person being arrested. The terms “taken into custody” or “seizure of the person” mean the same act. An arrest is taking someone into custody. Justification for the arrest may be based on information acquired by the police through an investigation that establishes probable cause to believe the suspect committed a crime. An arrest may take place when authorized in advance by an arrest warrant issued by a judge. However, the majority of arrests will take place without a warrant.

It is important to know when the moment of arrest takes place because, at that instant the encounter becomes involuntary for the suspect, and the police must recognize his/her rights. An arrest does not occur simply because a police officer approaches a person and asks a few questions. So long as a reasonable person would feel free to disregard the police and go about his/her business the encounter is consensual and no reasonable suspicion is required. The encounter will not trigger ICRA protections unless it loses its consensual nature.<sup>8</sup>

An arrest may be statutorily defined. A typical statute defining an arrest may read as follows “an arrest is the taking of one person into custody by another. To constitute an arrest there must be actual restraint of the person. The restraint may be imposed by force or may result from the submission of the person arrested to the custody of the one arresting him or her.”<sup>9</sup>

If the tribal code does not define when an arrest occurs, the following factors may be considered in determining whether an arrest occurred:

- 1) Mere police questioning does not constitute a seizure by merely approaching an individual on the street or in another public place, or by asking them if they are willing to answer some questions, or by putting questions to the person if they are willing to listen.

- 2) Whether a particular encounter constitutes a seizure, a court must consider all the circumstances surrounding the encounter to determine whether the police conduct would have communicated, to a reasonable person, that the person was not free to decline the officers' requests, or otherwise terminate the encounter.<sup>10</sup>
- 3) The arrest was performed with the intent of the police officer to affect an arrest and understood as such by the person arrested.
- 4) Mere words do not constitute an arrest. There must be an application of physical restraint by the police or a submission to authority.<sup>11</sup>
- 5) Whether a reasonable person would believe that he/she was not free to leave a confrontation with police.<sup>12</sup>
- 6) Only when the officer, by means of physical restraint or show of authority, has in some way curtailed the liberty of a citizen may we conclude that a "seizure" has occurred.

### **3.3.1 Arrest with a Warrant**

The preferred method of arresting a person takes place after issuance of an arrest warrant by the court based upon probable cause.

Most tribes have code provisions that provide that an arrest warrant is to be issued only when a person makes a signed written complaint. The complaint should be supported by oath or affirmation in the form of a sworn affidavit setting forth to the best of the complainant's knowledge the nature of the offense, date, time, location of the offense, identity of the victim and identity of the offender. If the judge can determine from the complaint and/or affidavits filed with the complaint that there is cause to believe that (1) there has probably been an offense committed and (2) that the defendant probably committed it, a warrant for the arrest of the defendant should be issued.<sup>13</sup>

When issuing arrest warrants, the judge should determine how the information in the complaint was obtained to insure that it is reliable and relevant to the offense as stated in the complaint.<sup>14</sup> The arrest will be held to be legal if the warrant is valid on its face and the police officer making the arrest had authority to act under the warrant.<sup>15</sup> The underlying facts establishing probable cause to arrest may be presented orally to the judge. However, all such oral presentations should be preserved in the record.

An officer's probable cause statement in support of a request for an arrest warrant should provide the following information to the court:

- 1) Identifying information of the defendant.
- 2) The charges being brought against the defendant.
- 3) Jurisdiction. Where did the crime take place?
- 4) Basis for the information in the probable cause statement?
- 5) Facts supporting each element of the crime(s) charged.
- 6) The probable cause statement should be signed under penalty of perjury.

### 3.3.2 Affidavits in Support of Warrants

- 1) Affidavit - Defined. An affidavit is a written, ex parte, statement made under oath before an officer of the court or a notary public. Preference is often given to affidavits because they provide a written record.
- 2) Every request for a warrant should be accompanied by an affidavit stating the probable cause for the warrant.
- 3) In every affidavit the officer should state the basis upon which the officer is relying for probable cause. The affidavit should address some basic questions that a judge will have, but should not be limited to the following:
  - a) Is there a witness statement?
  - b) Is the witness credible?
  - c) Was there an eyewitness or victims to the crime?
  - d) Did the officer witness the crime?
  - e) Is there any other reliable evidence linking the defendant to the crime.

### 3.3.3 Arrest Without Warrant

The Indian Civil Rights Act of 1968 provides in part that no Indian tribe in exercising powers of self-government shall violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon *probable cause*, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized.

The language in the ICRA regarding seizures of persons is almost identical to the Fourth Amendment to the United States Constitution. Therefore, it is instructive to see how the federal courts have interpreted similar language found in the Fourth Amendment.

A warrantless arrest takes place when an officer arrests a suspect without a warrant issued by the court authorizing the arrest before it takes place. A duly authorized law enforcement officer may make a warrantless arrest in a public place even though the officer had adequate opportunity to obtain a warrant after developing probable cause for arrest.<sup>16</sup>

The basis of a warrantless arrest must be based on probable cause. It is preferred that all arrests be made only after probable cause has been established before a neutral and detached judge. Of course, that is not always practical, and in some cases there may be statutory authority directing police officers to make an “on the spot arrest” based on the situation, for example domestic violence codes may require the abuser be arrested at the scene.

It is generally accepted that a warrantless arrest may be made in the following situations:

- 1) A misdemeanor committed in the presence of the arresting officer;<sup>17</sup> or
- 2) The arresting officer has probable cause that a suspect has committed an offense; or
- 3) The person to be arrested has committed a felony, although not in the presence of the officer.

If a complaint is made to police that someone may be committing a misdemeanor, a warrantless arrest should not be made, but the defendant should be cited to appear in court. If no breach of the peace or, the breach of peace, or offense is already completed, the defendant should be summoned to appear in court.<sup>18</sup>

### **3.3.4 Hearing After Arrest without Warrant**

The U.S. Constitution's 4<sup>th</sup> Amendment requires every State to provide prompt determinations of probable cause. Keep in mind the similarity of the ICRA provisions with the 4<sup>th</sup> Amendment provisions for search and seizure. Federal case law may provide persuasive authority for many of the issues that will arise under the ICRA.

After a person is arrested without a warrant they must be "promptly" brought before a neutral magistrate for a probable cause determination.<sup>19</sup> These hearings are commonly known by the Supreme Court case that decided the issue of prompt probable cause determinations as "*Gerstein Hearings*." In a later case, the Supreme Court defined "prompt" probable cause determinations as taking place within 48 hours of a warrantless arrest, including weekends.<sup>20</sup>

If an arrested person does not receive a probable cause determination within 48 hours, the burden of proof shifts to the government to demonstrate the existence of a bona fide emergency or other extraordinary circumstance, which cannot include intervening weekends or the fact that, in a particular case, it may take longer to consolidate pretrial proceedings.<sup>21</sup>

You may think of this as a similar procedure of establishing probable cause before the arrest and getting a warrant. Just as in the pre-arrest probable cause hearing for a warrant, the defendant's presence is not necessary.

## **3.4 Stop -And – Frisk**

The stop-and-frisk is an on the spot detention of a person by a police officer when the officer is acting without sufficient information to justify an arrest.<sup>22</sup> The significance in making a proper determination as to whether the police conducted a proper and legal stop-and-frisk is that if the police have acted improperly, then any evidence seized should be found inadmissible under the exclusionary rule.

The balance between a citizens right to not have his/her privacy intruded upon by police and the necessity for police to investigate crime was struck in *Terry v. Ohio*, when the U.S. Supreme Court held that the Fourth Amendment's protection against unreasonable searches and seizures applied to the stop-and-frisk.<sup>23</sup> However, the court also held that police may stop a person with less than probable cause for an arrest if the officer has specific articulated facts to suspect possible criminal activity and may frisk the person if the officer reasonably believes the person is armed and dangerous.

The Supreme Court struck a balance by holding that it is allowable to permit a reasonable search for weapons for the protection of the police officer, where the officer has reason to believe that the officer is dealing with an armed and dangerous individual, regardless of whether, or not, the officer has probable cause to arrest the individual for a crime. The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent person in the circumstances would be warranted in the

belief that the officer's safety or that of others was in danger. The officer must act reasonably under the circumstances, and weight must be given, to the specific reasonable inferences, which the officer is entitled to draw from the facts in light of the officer's experience.<sup>24</sup>

*Terry* does not provide that a suspect must answer questions. It provides for the pat down of the outer clothing of the person for a weapon. During the pat down, if the officer believes the person has a weapon, the officer may conduct a search for the weapon. If a weapon is found, the office may hold onto the weapon until it is determined whether to arrest the person or return the weapon.

The *Terry* stop should last no longer than is necessary and the investigative method employed by the police should be the least intrusive method to accomplish the purpose of the stop.<sup>25</sup>

### **3.5 Search and Seizure – Generally**

Evidence may be admitted or excluded based on the legality of a search and seizure. The Indian Civil Rights Act of 1968, provides that no Indian tribe in exercising powers of self-government shall violate the right of the people to be secure in their persons, houses, papers, and effects against *unreasonable search and seizures*, nor issue warrants, but upon probable cause, supported by oath or affirmation, and *particularly describing the place to be searched and the person or thing to be seized*.

In considering whether the warrant requirements have been met for search and seizures provided in the ICRA, determine the following:

- 1) Does the provision apply?
- 2) Does the defendant have standing to object to the search and seizure?<sup>26</sup>

The warrant requirement does not apply to the following:

- 1) Abandoned property,
- 2) Things exposed to public view, and
- 3) Acts by private citizens.<sup>27</sup>

In addition there are numerous exceptions to the warrant requirement for searches.

To be able to object a defendant must have standing. The following people would have "standing," or the legal right, to object to a search and seizure: the person possessing the thing seized; the person owning the thing seized; the person who owns or controls premises where the seizure occurred; or the person charged with possessing the thing seized.<sup>28</sup>

#### **3.5.1 Issuance of the Search Warrant**

Prior to issuing a search warrant a judge must first be presented with a sworn affidavit. The affidavit may or may not be attached to a complaint, whereas prior to issuing an arrest warrant there **MUST** be a sworn complaint. If the judge, upon examining the allegations of the affidavit, concludes that there is probable cause to

believe the execution of the warrant will uncover the specified evidence of criminal activity, then a warrant should be issued.

The police should provide the judge with a list and description of exactly what they are searching for and where it might be found before the judge can properly issue the warrant. A warrant should never be issued unless there is a finding by the judge that the search will probably uncover evidence of criminal activity.<sup>29</sup>

Before issuing a search warrant consider the following:

- 1) Are the items to be seized connected with criminal activity? What information leads the officer to believe that the contraband is connected with a crime?
- 2) Will the items to be seized be found in the place to be searched? What information leads the officer to believe the contraband is located at the place to be searched?

### **3.5.2 Execution of the Search Warrant**

An officer executing a search warrant is normally required to give notice by knocking and announcing his/her purpose before entry can be forced. Force may then be used if admission is refused or there is a failure to respond after a reasonable time.

The scope of the search is restricted to places to be searched and things to be seized described in the warrant. Persons can be named as well as places. If things other than those described in the warrant are seized the seizure must be justified as an exception to the warrant requirement.

### **3.5.3 Exceptions to the Warrant Requirement**

Searches may sometimes be permitted without a warrant. But these searches must be justified as exceptions to the ICRA warrant requirement.

- 1) **Exigent circumstances:** Certain factual situations require immediate action for personal safety or to prevent destruction of evidence before a warrant can be obtained. An officer may stop and frisk a suspect on the street if the officer has a “reasonable suspicion” that a crime may have been committed. No warrant is required if there is an imminent danger of the destruction of the evidence. Warrantless searches may also be made when officers are in hot pursuit of a criminal where a violent crime has occurred, or where emergency assistance requires entry into a building where there is a reasonable basis to believe that the persons inside may need assistance. And, finally, automobiles, because they are easily moved, may sometimes be subject to warrantless searches in special circumstances.<sup>30</sup>
- 2) **Plain view:** Objects which are in the plain view of an officer who has a right to be in the position to have the view are also subject to seizure.<sup>31</sup>



- 3) **Plain feel:** Police may seize non-threatening contraband detected through the sense of touch during protective pat down search so long as the search stays within the bounds marked by *Terry*.<sup>32</sup>
- 4) **Consent:** Consent to a warrantless search is based on the fact that any right can be waived. The person subject to the search or even another who has joint control (ownership) over the premises to be searched, can consent to the search. But the search is limited to the area covered by the consent.<sup>33</sup>
- 5) **Search incident to arrest:** A warrantless search is also permitted during the course of a lawful arrest.<sup>34</sup>

#### 3.5.4 Effect of an Illegal Search and Seizure

Evidence obtained as a result of an illegal search, usually obtained during a warrantless search not justified by any of the above exceptions, is NOT admissible and may not be used against the defendant at trial. Known as the *exclusionary rule*, this ban extends to all of the evidence seized in the illegal search.

All evidence obtained or tainted by the illegal search is also inadmissible based on the “fruit of the poisonous tree” doctrine. The prosecution bears the burden in this instance to prove that any evidence trying to be admitted can be separated from the initial illegal search and seizure.<sup>35</sup>

### 3.6 Extradition

Some tribes have authorized tribal courts to make extradition determinations. This section addresses only tribal court authority to decide extradition issues. Extradition involves complex issues ranging from sovereignty to criminal jurisdiction over different types of fugitives, and to the impact of illegal arrests on those extradited.<sup>36</sup>

Extradition is a request by another jurisdiction to remove a person to that jurisdiction to stand trial for a crime committed outside a reservation. Extradition can also occur when a tribe requests a person be brought from another jurisdiction to stand trial for crimes committed on the reservation.

The extradition process will generally begin with an arrest warrant from another jurisdiction being presented to the court for enforcement. If the tribal code provides for extradition procedures then it is a matter of complying with the procedures established in the code.

At a minimum the court will want to determine the following:

- 1) Verify the foreign warrant is valid and current;
- 2) Have the fugitive brought before the court for a hearing;
- 3) Determine if the request for extradition and accompanying documentation is facially valid;
- 4) Determine if the demanding jurisdiction has charged the accused with a crime;

- 5) Determine if the identity of the individual named in the extradition request is the same as the person arrested,<sup>37</sup> and
- 6) Provide notice to the demanding jurisdiction to make arrangements to pick-up the fugitive within a prescribed time or the fugitive will be released.<sup>38</sup>

### **3.7 Sample Code Provisions**

#### **3.7.1 Warrants to Apprehend**

The following provision is commonly found in tribal codes.

*Every judge of the Tribal Court shall have the authority to issue warrants to apprehend, such warrants may be issued only upon a showing of probable cause, and only after a written complaint has been filed bearing the signature of the complaining witness. Service of warrants shall be made by duly qualified officer. No warrant to apprehend shall be valid unless it bears the signature of a judge of the Tribal Court.*

#### **3.7.2 Arrest**

The following code language is representative of arrest provisions found in many tribal codes.

*No police officer shall arrest any person for any offense defined by this Code or by federal law, except when the offense shall occur in the presence of the arresting officer, or the officer shall have probable cause to believe that the person arrested has committed an offense, or the officer shall have a warrant commanding the officer to apprehend such person.*

### **3.8 Forms**

#### **3.8.1 Arrest Warrant**

[Caption]

ARREST WARRANT  
Case No. \_\_\_\_\_

TO ALL POLICE OFFICERS OF THE \_\_\_\_\_ TRIBE and any law enforcement officer authorized to execute this arrest warrant.

A criminal complaint has been filed in this court against (name of defendant & date of birth) charging that on or about (date), within the jurisdiction of the (Tribe), a criminal offense(s) was committed, to wit: (list criminal offense) in violation of Section \_\_\_\_\_ of the Criminal Code of the (Tribe).

I have found probable cause to believe that such offense(s) were committed and that the defendant named herein committed them.

THEREFORE YOU ARE COMMANDED to arrest the accused and bring him/her before this court to answer the charges. Defendant may be released on posting bail sufficient to secure his/her appearance in the amount of \$ \_\_\_\_\_ dollars.

DATE:

\_\_\_\_\_  
Judge

### CERTIFICATION OF EXECUTION

I certify that I received this Warrant of Arrest on (Date), and executed it by arresting the above-named accused at (Location), on (Date of Arrest) at \_\_\_\_\_ a.m./p.m. and presenting him/her before Judge \_\_\_\_\_ of the \_\_\_\_\_ Tribal Court on (Date) at \_\_\_\_\_ a.m./p.m.

Date:

\_\_\_\_\_  
(Name of Agency)

\_\_\_\_\_  
(Signature of Arresting Officer)

### 3.8.2 Search Warrant

[Caption]

### SEARCH WARRANT

TO: The Chief of Police and any Law Enforcement Officer authorized to execute this search warrant.

WHEREAS, upon the sworn complaint made before me and it appearing that there is probable cause to believe that on or about the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, within the jurisdiction of the \_\_\_\_\_ Indian Tribe, a criminal offense, to wit: \_\_\_\_\_ was committed upon the person or property of \_\_\_\_\_ and further that there is probable cause to believe evidence material to the investigation of said crime is presently concealed in, about and upon certain premises within the jurisdiction of the \_\_\_\_\_ Indian Tribe, and described below;

NOW THEREFORE, in the name of the \_\_\_\_\_ Indian Tribe, you are hereby commanded, with the necessary and proper assistance, to enter and search the following premises located at \_\_\_\_\_, and to search diligently for the following evidence: \_\_\_\_\_ and if the same or any part thereof, be found on such search, you are to seize such evidence and retain it in a safe and secure manner until such time as it may be disposed of according to law.

A copy of this search warrant shall be served upon the person or persons found at said address, and if no person is found at said address, a copy of this search warrant shall be posted upon any conspicuous place at or on the premises.

DATE: \_\_\_\_\_ at \_\_\_\_\_ a.m./p.m.

\_\_\_\_\_  
Judge

RETURN

RECEIVED THIS SEARCH WARRANT on \_\_\_\_\_, 20\_\_\_\_\_, and executed same on \_\_\_\_\_, 20\_\_\_\_\_, at \_\_\_\_\_ a.m./p.m. and seized the following property: \_\_\_\_\_.

Date: \_\_\_\_\_

\_\_\_\_\_  
Signature of police officer

**3.8.3 Extradition Warrant**

[Caption]

WARRANT TO ARREST  
FOR EXTRADITION

TO: Chief of Police

WHEREAS, a copy of valid arrest warrant issued by the \_\_\_\_\_ Court has been delivered to \_\_\_\_\_, and confirmed as such for the arrest of \_\_\_\_\_ having the date of birth of \_\_\_\_\_ for violation of laws of that jurisdiction, specifically \_\_\_\_\_ and it appearing to be in the interest of justice that the warrant be honored and enforced by this Court;

NOW THEREFORE, YOU ARE COMMANDED to apprehend said defendant and bring him/her before the \_\_\_\_\_ Tribal Court for hearing on the extradition request, in accordance with Chapter \_\_\_\_\_ of the \_\_\_\_\_ Tribal Codes.

Date: \_\_\_\_\_ at a.m./p.m.

\_\_\_\_\_  
Judge

CERTIFICATE OF SERVICE

I, \_\_\_\_\_, do hereby certify that I served the foregoing instrument and delivered \_\_\_\_\_ to the \_\_\_\_\_ Tribal Court as directed on \_\_\_\_\_, 20\_\_\_\_.

Date: \_\_\_\_\_

\_\_\_\_\_  
Signature of police officer

<sup>1</sup> Indian Civil Rights Act of 1968, 25 U.S.C.A §1302 (2).

<sup>2</sup> John W. Milne & Ralph W. Johnson, *Criminal Law for Indian Courts* (1980), pg. 97.

<sup>3</sup> *Texas v. Brown*, 460 U.S. 730, 103 S.Ct. 1535, 75 L.Ed.2d 502 (1983).

<sup>4</sup> *Draper v. United States*, 358 U.S. 307, 79 S.Ct. 329, 3 L.Ed.2d 327 (1959).

<sup>5</sup> *Id.*

<sup>6</sup> *Illinois v. Gates*, 462 U.S. 213 (1983).

<sup>7</sup> *Milne & Johnson*, *supra.* at 97.

<sup>8</sup> *California v. Hodari D.*, 499 U.S. 621, 111 S.Ct. 1547, 113 L.Ed.2d 690 (1991).

<sup>9</sup> La. Code of Crim. Proc. Art.201

<sup>10</sup> *Florida v. Bostick*, 501 U.S. 429, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991).

<sup>11</sup> *California v. Hodari D.*, 499 U.S. 621, 111 S.Ct. 1547, 113 L.Ed.2d 690 (1991).

<sup>12</sup> *Florida v. Royer*, 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983).

<sup>13</sup> *Milne & Johnson* at 98.

<sup>14</sup> *Id.* at 98-99.

<sup>15</sup> *Id.* at 99.

<sup>16</sup> *United States v. Watson*, 423 U.S. 411, 96 S.Ct. 820, 46 L.Ed.2d 598 (1976).

<sup>17</sup> The common law rule required that to arrest a person without a warrant for a misdemeanor required that the offense had to amount to a breach of the peace and be committed in the presence of the arresting officer, however a jurisdiction may authorize police to arrest or cite a person for all offenses taking place in their presence (including minor offenses). *See Atwater v. Lago Vista*, 532 U.S. 318 (2001).

<sup>18</sup> *Milne & Johnson*, *supra.* at 99.

<sup>19</sup> *Gerstein v. Pugh*, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975).

<sup>20</sup> *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991).

<sup>21</sup> *Id.*

<sup>22</sup> *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, (1968).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Florida v. Royer*, 460 U.S. 491, 103 S.Ct. 1319, (1983).

<sup>26</sup> *Milne & Johnson*, *supra.* at 104.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 105.

<sup>30</sup> *Id.*

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<sup>31</sup> Id. at 106.

<sup>32</sup> *Minnesota v. Dickerson*, 508 U.S. 366, 113 S.Ct. 2130, 124 L.Ed.2d 334, (1993).

<sup>33</sup> Id.

<sup>34</sup> Id.

<sup>35</sup> Id.

<sup>36</sup> Hon. Kerstin G. LeMaire & Mark D. Tallan, “Issues Involving Extradition and Their Impact on Tribal Sovereignty,” *University of Detroit Mercy Law Review*, (Spring 1999).

<sup>37</sup> Id.

<sup>38</sup> Id.

## CHAPTER 4

### PRE-TRIAL PROCEDURES

- 4.1 Introduction
- 4.2 Criminal Complaints
  - 4.2.1 Summons and Complaint
  - 4.2.2 Bill of Particulars
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- 4.6 Arraignment
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- 4.7 Discovery
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- 4.10 Double Jeopardy
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- 4.13 Sample Forms
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  - 4.13.2 Advisement of Rights – Checklist for Arraignments
  - 4.13.3 Conditional Release, Domestic Violence – Order
  - 4.13.4 Statement of Defendant on Plea of Guilty

#### **4.1 Introduction**

This chapter is designed to act as a guide to the issues that will arise prior to trial.

#### **4.2 Criminal Complaints**

The criminal court process begins when the prosecutor files a criminal complaint with the court. The criminal complaint is the official charging document prepared by the prosecutor’s office, after review of the police reports and evidence, which states the charges that the prosecutor expects to prove at trial. The complaint also provides notice to the defendant of the crimes he/she is alleged to have committed.

At a minimum the criminal complaint should consist of the following:

- 1) Identify the prosecuting jurisdiction;
- 2) Cite the criminal code section which is alleged to have been violated, and cite the ordinance and the maximum penalties;
- 3) Date and time of the alleged offense;
- 4) Cite the location of the offense (important for jurisdiction);
- 5) Give a brief fact description of the alleged offense;
- 6) Name and date of birth of the defendant;
- 7) Venue or location of the court;
- 8) Conclusion;
- 9) Signature of the prosecuting authority; and
- 10) If the summons and complaint are combined, then include the date and time of the required appearance and address of the court.

#### **4.2.1 Summons and Complaint**

Some jurisdictions combine a summons and complaint into one document, although the summons and complaint serve different purposes. The summons commands the defendant to appear before the court at a set date and time. The complaint notifies the defendant of the charges.

The summons and complaint serve two functions:

- 1) **Notice** – The defendant is placed on notice that he/she has been accused of having committed a certain crime and that they must appear in court to answer the charges at a set date and time; and
- 2) **Start of the Criminal Process** – Filing of the complaint initiates the criminal process for that particular crime and defendant. The specific date that a criminal complaint is filed may be important in determining whether a charge has been brought within the statute of limitations for a particular crime.

#### **4.2.2 Bill of Particulars**

On occasion the court may receive a motion requesting the court sign an order for a bill of particulars. (Note: The order should be submitted with the motion). The order will direct the prosecutor to provide defendant a bill of particulars. The purpose of the bill of particulars is to have the prosecutor state, specifically, the nature of the charge against the defendant, so that the defendant can prepare a defense to the charge. This helps to avoid surprises at trial. The judge has discretion in determining what the prosecutor must disclose in the bill of particulars.



### **4.3 Probable Cause Challenges**

The definition of probable cause and the use of probable cause for warrants were discussed in Chapter Three. This section concerns challenges to probable cause, which may be raised by the defendant after the prosecutor has filed charges with the court.

After charges have been filed and the defendant has reviewed the police reports and other discovery material, the defendant may challenge probable cause. This type of hearing is common in traffic related cases, when the defendant challenges the probable cause to make the initial traffic stop. The defense may cross-examine the police officer and other witnesses. The court must determine whether there was sufficient probable cause to make the traffic stop or arrest. Depending on the court's ruling, evidence may be excluded if probable cause is not upheld at the probable cause hearing.

### **4.4 Bail and Bail Hearings**

The Indian Civil Rights Act (ICRA) provides that no Indian tribe in exercising powers of self-government shall require excessive bail.<sup>1</sup> Bail is a legal process intended to compel a defendant to appear for court proceedings. When a defendant is within the jurisdiction of the court as the result of arrest and custody by tribal police, the court in its discretion may require the defendant to post an amount of money before release that would be forfeited if the defendant failed to appear for later proceedings. Minimum requirement of due process must be considered in bail procedures.<sup>2</sup>

The right of an accused to be released on bail pending trial is an attempt to find a middle ground between incarcerating all those accused of crime or letting them all go free without any restriction. To limit the freedom of a person accused of a crime is, in effect, a type of punishment. Loss of wages, separation from family, and the general hardship of detention can seriously and often permanently harm the accused. Pretrial punishment violates the fundamental principle that even an accused is presumed to be innocent until he/she is convicted after a full and fair trial. Therefore it is important that the accused persons be given as much freedom as possible before trial.<sup>3</sup>

Because the purpose of bail is to ensure that the defendant will appear for court proceedings, if there is no reason to suspect that the defendant will fail to appear, then the judge should consider releasing the defendant on his/her own recognizance. Sometimes called personal recognizance, this refers to a release based solely on the defendant's promise to appear at future hearings. In making bail determinations consider the following factors:

- 1) the likelihood that the accused will fail to appear;
- 2) the defendant's previous record of flight and criminal activity;
- 3) the defendant's ties with his family and the community;
- 4) the defendant's general reputation, and the statements of other reliable parties as to the defendant's assurances of not fleeing; and
- 5) the defendant's general financial circumstances.<sup>4</sup>

If release on the party's own recognizance does not seem justified, there are several other options open to the judge. The judge may release the accused to the custody of a responsible person or to an officer of the court, for example, the probation officer. The judge may also restrict the travel of the accused, or restrict his/her association with certain parties who might induce him/her to flee. The judge may permit the accused to work during the day while requiring confinement during the evening hours.<sup>5</sup>

Bail, in the form of money, should be used only as a last resort. It should not be used as a punishment or a fine, but should be used to insure that the defendant will appear for all future hearings. In determining the proper amount of bail, the judge should consider the facts of each case rather than a pre-determined bail schedule. If the accused has a little or no money, his/her right to bail must not be denied merely because of his/her inability to pay. However, the judge should take into consideration the financial status of the accused, and if the court's purpose will be served by requiring a small amount of bail in a particular case, judicial discretion should be exercised accordingly.<sup>6</sup>

For very minor offenses, such as minor traffic offenses, bail may be set in an amount equal to the amount of the fine which will be imposed if the accused is found guilty. This procedure allows an accused to forfeit the bail rather than appearing, in court, to answer the charge. The defendant may find it more convenient to pay the fine by simply forfeiting bail. This procedure should be used very sparingly as it encourages an accused to waive his/her right to a trial. A judge must protect the right of the accused to have a trial on the charges and should never, intentionally or inadvertently, pressure the accused into waiving that right.<sup>7</sup>

Where money bail is used to insure attendance at trial, the court should adopt a procedure, which eliminates use of the bail bondsman. To obtain a bail bond, a person usually must put up 10% of the amount of the bond in cash and frequently must put up some type of collateral for the balance. Thus, if bond is set at \$250, the defendant must pay the bail bondsman \$25 and may have to pledge his/her car or furniture as additional collateral. Even if the defendant appears when the case is called for trial and is found innocent, the defendant cannot get the \$25 back, the bail bondsman keeps it as payment for services. Thus the defendant has been "fined" \$25 even though the jury found that the defendant was innocent.<sup>8</sup>

The federal courts use the following procedure, if bond is set at \$250, the defendant deposits 10% (25\$) with the clerk of court. If the defendant appears when the case is called for trial, the money is returned to the defendant. If the defendant fails to appear when called, the \$25 is forfeited and he/she must pay the court the balance (\$225). The defendant may also be charged with non-appearance, or "jumping bail", which is a crime under most tribal codes. This procedure is just as effective in making the defendant appear in court when required as is the used of a bail bondsman, but the defendant is only punished if he/she fails to appear when required. If the defendant obeys the orders of the court, the money is refunded to the defendant.<sup>9</sup>

*\*\*Practice pointer* – When returning bail money, consider returning the bail money only to the person who posted the bail. This prevents the bail money from becoming "lost" before it reaches the person who posted the bail.

*\*\*Practice pointer* - Consider limiting defendants using tribal elders to sign pledges or bonds for defendants. In some instances elders may be pressured into doing something that they didn't really want to do. It also makes for a difficult situation for the Court to seek money from the elder if the defendant fails to appear or violates a condition of release.

## 4.5 Motion and Suppression Hearings

A common pre-trial motion is the motion to suppress or exclude evidence for use at trial. The basis will likely be that during the arrest or investigation of the crime the evidence was obtained in violation of the defendant's rights.<sup>10</sup> The challenge to admissibility of evidence may include exclusion of physical evidence, confessions, or inculpatory statements or identification testimony. The purpose of the motion to suppress is to avoid unnecessary trials and to prevent juries from hearing references to evidence that has been determined to be inadmissible.

### 4.5.1 The Exclusionary Rule

The exclusionary rule allows courts to keep evidence out of trial that has been obtained illegally or in violation of a defendant's rights. The reasoning supporting the exclusionary rule is that courts should not admit evidence illegally seized because to do so would put the court's stamp of approval on the illegal conduct.

### 4.5.2. "Fruit of the Poisonous Tree"

"Fruit of the poisonous tree" is evidence obtained based on information from an initial illegal conduct by police. For example, if a confession is obtained after an illegal arrest, or physical evidence is revealed by the defendant after an illegally conducted confession. The confession in the first example and the physical evidence in the second example are "fruits of the poisonous tree" and would be tainted by the illegal conduct and should be excluded as evidence.

The "fruit of the poisonous tree" rule can be overcome by two other rules:

- a) "**Independent source rule**" – This rule provides that the exclusionary rule is not applicable when the police learned of the evidence from an independent source.
- b) "**Inevitable discovery rule**" – This rule provides that evidence sought to be excluded due to illegal police conduct may be admissible if the police can show that the evidence would inevitably have been discovered lawfully.

## 4.6 Arraignment

The arraignment is the first formal court proceeding that a defendant will appear for. At the arraignment, the criminal complaint is read aloud in open court and the defendant is explained his/her rights and is given the opportunity to enter a plea. The defendant may waive the reading of the complaint. Some courts allow for defendant's

who are represented by an attorney or spokesperson to waive their appearance at the arraignment by having their defense attorney file a written waiver of arraignment, which also contains the defendant's plea. The defendant has four plea options at arraignment:

- 1) Not Guilty; or
- 2) Guilty; or
- 3) No Contest; or
- 4) Not Guilty by Reason of Insanity.

At a minimum the arraignment should include the following:

- 1) Identify the person charged as the defendant;
- 2) Make a preliminary jurisdictional determination (proper defendant and crime committed within the jurisdiction of the court);
- 3) Inform the defendant of the charges that have been filed against him/her;
- 4) Advise the defendant of his/her rights under the Indian Civil Rights Act or the Tribe's own constitution;
- 5) Enter a plea – guilty, not guilty, or no contest;
  - a) If defendant enters a plea of not guilty, or the court enters a plea for the defendant, - set the next court date, whether it be for a pre-trial hearing or trial.
  - b) If defendant enters a plea of guilty or no contest, the court should impose a sentence or set the matter for a sentencing date.
- 6) If a not guilty plea is entered, the court should determine if the defendant is entitled to pretrial release, if pretrial release is proper, the court should determine what, if any, conditions of release should be imposed and/or money bond set to sufficient to ensure the defendant's appearance at trial.
- 7) If a guilty or no contest plea is entered, determine whether the defendant is entitled to release prior to the date set for sentencing and if such release is proper, what conditions and/or money bond are necessary to ensure defendant's appearance on the date set for sentencing.
- 8) If the defendant refuses to enter a plea, the court should enter a not guilty plea on his/her behalf.

The arraignment may also accomplish one of the following:

- 1) Bail may be set at the arraignment, along with conditions for release;
- 2) Depending on the resources of the court, a public defender may be assigned at the arraignment.

#### **4.6.1 Arraignment Step-by-Step**

Begin by explaining the purpose of the arraignment and the steps that the defendants are about to go through. Then call the defendant before the bench by name and identify the defendant for the record. State the case number. Depending on the preference of the court, the judge or prosecutor can read the charges filed against the defendant. Ask the defendant if they would like the complaint read or waive reading of the complaint. If the defendant wants the complaint read, either the judge or the

prosecutor may read the complaint out loud for the defendant. The defendant then must enter a plea.

### **A. Opening Statement<sup>11</sup>**

Judge: “Ladies and Gentlemen, an arraignment is being held by the Court in order to read the charges against each defendant, to advise each defendant of their rights and to ask each defendant to enter a plea of guilty, not guilty, or no contest to these charges. Each defendant will be asked how he/she pleads to the charges. Each defendant’s name will be called and he/she will be asked to step before the Bench and will be asked what plea they wish to enter to the charges. If the defendant is not ready to enter a plea with the Court at this time, a continuance may be granted at the request of the defendant and in the discretion of the Court. If a continuance is granted, a later date will be set at which time the defendant will be required to appear before the Court and enter a plea.”

“The defendant may plead guilty, not guilty or, with the permission of the Court, no contest. If the plea is guilty, the defendant admits the charges contained in the complaint. In that case, the Court will either set a date for sentencing or impose a sentence immediately. If the plea is not guilty, the defendant denies the charges contained in the complaint. In that case, the Court will set a trial date. If the defendant makes no plea, the Court will enter a plea of not guilty for the defendant. In that case, the Court will set a trial date. If the plea is no contest, the defendant does not admit the charges contained in the complaint, but chooses not to defend himself/herself against the charges at a trial. In that case, if the Court accepts the no contest plea, the Court will set a date for sentencing or impose a sentence immediately the same as if the defendant had entered a plea of guilty.”

“Pending the next proceeding in the case, a defendant may be released on bail or on his/her personal recognizance. The court may set conditions of release whether the defendant is released on bail or on his/her personal recognizance.”

### **B. Appearance of the Defendant Before the Bench for Arraignment**

If several defendants are being arraigned at once, ask them all to stand and be identified. Explain their rights as indicated below. It is also recommended that a printed statement of a defendant’s rights be distributed to each defendant prior to the arraignment. As each individual case is called, ask the defendant, on the record, if they heard their rights as they were read, if they understand them and if they have any questions about their rights.

If only one defendant is being arraigned, call the case and ask the defendant to step before the Bench and be identified. After the identification, the complaint is read to the defendant and a copy of the complaint is given to the defendant. After the Court advises the defendant of the charges, and the possible penalty for the offenses charged, the following dialogue should take place:

Judge: “The Court will now explain your rights in further detail.

1. If you plead guilty, the Court will consider the facts of the offense, anything you want to say in your behalf, your background or reputation, and any past criminal record which you might have. From this information, the Court will impose sentence.
2. If you plead not guilty, your case will be set for trial at a later date.
3. If you want a continuance to consult counsel, you may have one upon request until a later date set by the Court.
4. If you are not sure how to plead, you should enter a plea of not guilty to the charge.
5. If you plead not guilty, the Court set the case for trial. You can request a jury trial.
6. You have a right to obtain counsel at your own expense.
7. Any witnesses against you will be required to appear and testify and you have the right to cross-examine them and ask them questions.
8. You have the right to a speedy and public trial. You have the right to trial by jury, which means by a Judge and six jurors, or if you give up your right to a jury trial, you may be tried by the Court, which means by a Judge alone.
9. You have the right to be informed of the charges against you.
10. You have the right to call witnesses in your own behalf and the tribal police will service the subpoenas issued by the Court notifying your witnesses to appear and testify at your trial.
11. At your trial, you may testify or you may remain silent. You cannot be compelled to testify because you have the privilege against self-incrimination. Neither the Court nor a jury can infer guilt from your silence, nor can the prosecution make any argument at your trial inferring your guilt from your decision to remain silent.
12. If you are found guilty, you have the right to appeal by filing a request as provided in the Tribal Code.
13. You have the right to file a writ of habeas corpus in the United States District Court if you feel your constitutional rights or your rights under the Indian Civil Rights Act have been violated.
14. If you are in custody, you have the right to be released on bail or on your own recognizance under conditions determined by the Court.
15. You have been advised of your rights. Do you understand them as they have been explained to you?
16. Do you have any questions? Do you want time to consult with an attorney prior to making a plea to the charges against you?
17. Are you now ready to make a plea to the charges against you or do you want a continuance?
18. If you wish a continuance, the Court will reset your arraignment for another date at which time you should be ready to enter a plea of guilty, not guilty or no contest at the new arraignment date.
19. If you are ready to make a plea to the charge, how do you plead, guilty or not guilty?”

### C. In Case of A Request for Continuance:

“In response to your request for a continuance, the Court will set the date for your arraignment at which time you must be prepared to enter a plea of guilty, not guilty or no contest.”

### D. In Case of a Plea of Not Guilty:

“Since you have entered a plea of not guilty, do you wish to be tried by this Court or do you wish a jury trial?  
You are entitled to a speedy and public trial, so I am setting a trial date of \_\_\_\_\_.”

“Will you be ready to defend yourself against the charges on the date set?”

To ensure your presence in this Court on the date set for trial, the Court has determined to release you from custody under the following conditions:  
(Select A, B, or C with D.)

- a. On your own recognizance.
- b. Posting of cash bail in the amount of \$\_\_\_\_\_.
- c. Post of a surety bond in the amount of \$\_\_\_\_\_.
- d. Other conditions of your release are: (Here, state any special conditions).

*\*\*Practice Pointer:* Sometimes defendants without representation will enter a plea of guilty at the arraignment. Consider advising the defendant to enter a not guilty plea. At the arraignment, the defendant often has only just heard what they are charged with and may not fully appreciate the implications of entering a guilty plea. Allowing the person to enter a plea of not guilty will give them time to review the criminal complaint and discovery. It is likely the defendant will end up entering a plea of guilty at a later date, but they will have had the opportunity to make an informed plea.

*\*\*Practice Pointer:* At the end of each hearing, have the clerk serve the defendant with a promise to appear for the next hearing. Have the defendant sign the promise that they received a copy. Also consider stating for the record that the defendant was served with a promise to appear for the next hearing and that will be their only notice of the date and time for the next hearing or trial date.

## 4.7 Discovery

Discovery is the process that the prosecution is obliged to disclose evidence to the defense that divulges the strengths and weaknesses of the prosecution’s case. The discovery process provides both sides the opportunity to gather information about the strengths and weaknesses of the other side’s case. This step is important to prepare for trial. It is also important for each side to assess its own cases and determine if a plea bargain would be advisable instead of trial.

Discovery is also intended to eliminate the unwarranted prejudice arising from surprise testimony. Generally, the defendant is entitled to know what evidence the prosecution plans to use at trial. Depending on whether the particular tribe has adopted rules for discovery, typically a motion requesting the prosecution to turn over discovery material might ask for the following:

- 1) All oral, written or recorded statements made by the defendant,
- 2) Police reports and witness statements,
- 3) Copy of defendants criminal arrest/conviction records,
- 4) Lab reports (opportunity to have an independent lab examine evidence),
- 5) Video tapes, pictures, recordings, etc.

Note that the U.S. Supreme Court held that suppression by the prosecution of evidence exculpatory to the defense violates due process when the evidence is material to guilt or punishment.<sup>12</sup>

#### **4.7.1 Discovery Request by the Prosecution**

The prosecution may demand information from the defendant that he/she intends to use at trial. In some instances the prosecution may request whether the defendant suffers from some type of mental disease or defect. On notifying the defendant of the specific date, time and location of the crime, the prosecution may request whether the defendant plans to offer an alibi, and if so, the name and addresses of witnesses intended be called to support that alibi.

### **4.8 Pre-Trial Hearing**

Local court rules will vary in setting matters for trial. In some instances trial dates are set at the arraignment. On the date of trial, the court might set aside time to take pleas and then have trials on all other matters.

Consider setting a docket day for pre-trial conferences between the arraignment and trial. This added step in the process allows the court to dispose of all guilty pleas prior to the trial date. Those cases that do not settle are placed on the trial docket, and the court and parties can expect those cases to be tried. This method saves the court time and resources. Disposing of cases prior to trial will also alleviate the necessity of issuing witness subpoenas for cases that no one ever intended to bring to trial. In some instances all cases will be settled by guilty pleas and negate the need for a trial docket.

#### **4.8.1 Plea Bargaining**

Plea negotiations between prosecutors and defendants or defendant's counsel are routine. Common arrangements in "plea bargaining" are: (1) pleading guilty to a lesser included offense; (2) dismissal of some of the charges in the complaint; and (3) recommendations by the prosecutor to the court as to the sentence the defendant should receive for committing the offense. Where sentence recommendations are used, the prosecutor, in return for a plea of guilty by the defendant, agrees to recommend to the



court a sentence favorable to the defendant. This recommendation could take the form of a shorter than usual sentence for the offense, a reduced fine, a recommendation for probation, or a suspended sentence or a combination of the above.

In sentence recommendations judges should be careful to see that the defendant receives the recommendation bargained for from the prosecutor. When the defendant pleads guilty to a lesser included offense, the court should be advised that this is what the prosecutor has recommended or agreed to and the court usually is allowed to accept or reject such a plea without being bound by the prosecutor's promise but the court in most instances certainly should give favorable consideration to the recommendation. Where a prosecutor agrees to dismiss some of the charges against the defendant in return for a guilty plea to the remaining charges, the prosecutor should move for dismissal of the charges as agreed by the defendant.

The defendant should enter a plea after the prosecutor has advised the court there is a disposition to be made in the case. Once the defendant has entered a plea the prosecutor should move for dismissal of the remaining charges and usually these charges should be dismissed as a matter of course.

If the prosecutor promises something over which he/she has no control, then he/she has induced a plea from the defendant and the judge should refuse to accept a guilty plea from such an individual. For example, if a prosecutor promises a defendant a suspended sentence without telling the defendant the judge is the only one who can set the penalty and all the prosecutor can do is recommend a certain sentence in a given case, the judge should refuse to accept the defendant's plea. Only if the prosecutor promises something within his/her control in return for a guilty plea, can the court accept the plea.

Both the prosecutor and the judge have a responsibility to deal with the defendant fairly in negotiating and accepting a guilty plea. As noted above, the prosecutor has limits on the type of promises that can be made to a defendant in return for a plea of guilty. Briefly it can be said that if: (1) the prosecutor makes a promise to do something which he/she does not have control over or (2) fails to keep the promise as the defendant believes it was made, the prosecutor has overstepped the limits, and a guilty plea tendered where such circumstances exist cannot be accepted by the judge as voluntary.

Other problems may confront a judge with regard to a guilty plea. Just as the prosecutor cannot induce a defendant to enter a plea of guilty, neither can the judge. It is a common practice in many jurisdictions to give persons pleading guilty lighter sentences than persons convicted by a court or jury. However, the judge should never try to influence a defendant to plead guilty in exchange for a lighter sentence than persons who are convicted by the court or a jury. The reasoning behind this prohibition is that in mentioning the possibility of a lighter sentence to the defendant the judge is putting a price on the right to a trial.

In a few jurisdiction it is common for the prosecutor to ask the judge what sentence a defendant might expect in a given case considering the defendant's acts and past record. If the judge promises the prosecutor to a certain term, given the facts in the case, he/she must give the defendant that sentence, or a shorter one, or withdraw the defendant's plea of guilty. In other words, if you promise a defendant a sentence in a given case if you change your mind for any reason you must withdraw the defendant's guilty plea and allow him/her to re-enter a plea in light of the changed circumstances. This principle also applies to the prosecutor. If the prosecutor's promise, or plea bargain,

made with the defendant changes, the defendant must be so informed and allowed to enter a plea again.<sup>13</sup>

## **4.9 Guilty/No Contest Pleas**

A plea of guilty may be entered at the arraignment, pre-trial hearing or prior to trial.

### **4.9.1 Pleas In General**

The U.S. Supreme Court has required that before a trial court can accept a guilty plea, the court must find that the plea has been made intelligently and voluntarily, which is evidenced on the record by an affirmative waiver by the defendant of his/her right against self-incrimination, his/her right to a jury trial and his/her right to confront the accusers.<sup>14</sup>

It is recommended that the trial judge taking the plea interrogate the defendant regarding the express waiver of the three specific rights. It is also advised that the defendant sign a written waiver which states the rights being waived. The defendant and his/her spokesperson should acknowledge this written waiver in open court. The court should also determine if the defendant read the waiver, or whether someone read it to him/her. It should be clear that the defendant understands the waiver before it is signed.

The defendant must be advised of the maximum penalty exposure for the charge to which he/she is entering the plea, even though the actual sentence may be less than the maximum penalty.

The defendant must be competent and have the mental capacity to understand the nature of the proceedings before a guilty plea may be entered. Judges should give careful consideration to intoxicated defendants and whether they have the mental capacity at that moment to appreciate the rights they are waiving by entering a guilty plea.

### **4.9.2 Accepting a Plea of Guilty or No Contest**

The following is provided to guide the court through acceptance of a guilty plea or plea of no contest.

JUDGE: “You have informed the Court that you want to make a plea of guilty (or no contest) to the charges against you. Before the Court can accept your plea, the Court will ask you some questions to determine whether you understand the rights you are waiving and consequences of your plea. If you do not understand what I am explaining to you, or you have questions about anything I am explaining to you, please let me know.”

JUDGE: (DEFENDANT UNREPRESENTED)

#### *WAIVER OF ATTORNEY AT OWN EXPENSE*

“The Indian Civil Rights Act provides that you have the right to retain an attorney at your own expense. You have the right to consult with your

attorney prior to entering a plea to the charges against you and to have your attorney represent you before this Court. Do you now waive your right to retain an attorney at your own expense?"

*WAIVER OF LAY COUNSEL IF PROVIDED BY TRIBAL CODE*

"Are you aware that you have the right to be represented by Lay Counsel under provisions of the Tribal Code? Do you now waive your right to be represented by Lay Counsel?"

JUDGE: "Do you understand that you have absolute rights:

- a) to a speedy and public trial by jury;
- b) to the assistance of an attorney at your own expense at all stages of the proceedings;
- c) to confront the witnesses who would testify against you;
- d) to present evidence on your own behalf in defense of the charges against you;
- e) to the privilege against self-incrimination;
- f) to have the court subpoena witnesses on your behalf?

And do you understand that by entering a plea of guilty you are waiving these rights?"

JUDGE: *IF TRIAL BY JURY IS PERMITTED FOR THE CRIMES CHARGED*

"Do you know what a jury trial is? Tell me what a jury trial is. Do you understand by entering a plea of guilty you are waiving your right to have your case decided by a jury? Do you give up your right to have your case decided by a jury trial?"<sup>15</sup>

JUDGE: "You have been charged with \_\_\_\_\_. Do you fully understand the charges that have been made against you?"

JUDGE: "The charge(s) carry a maximum penalty of \_\_\_\_\_. Do you understand that the Court does not have to follow the sentencing recommendations and can sentence you to the maximum penalty for each charge? Do you still want to enter a plea of guilty?"

JUDGE: "Has anyone threatened you or forced you to enter a plea of guilty? Has anyone pressured you to enter a plea of guilty? Are you making this plea voluntarily and of your own free will?"<sup>16</sup>

JUDGE: "Has anyone made any promises to get you to enter a plea of guilty, other than the prosecutor in the plea agreement?"<sup>17</sup>

JUDGE: “Are you pleading guilty because you are actually guilty? Did you commit the act or acts which are charged against you in the criminal complaint?”<sup>18</sup>

NOTE: If the defendant refuses to admit that he/she is guilty, but there is a factual basis for the plea, the Court should require the prosecutor to state for the record what facts exist which would be offered at trial to prove the defendant’s guilt.

***REJECTION OF THE GUILTY PLEA***

On occasion the Court may not be satisfied with the defendant’s responses to the questions or finds that the defendant does not understand the nature and consequences of the guilty plea. The court may reject the guilty plea. By rejecting the guilty plea, the defendant may then have time to confer with an advocate.

JUDGE: “The Court is not going to accept your plea of guilty, but will enter a plea of not guilty on your behalf for the following reasons \_\_\_\_\_.”

***ACCEPTANCE OF A GUILTY PLEA***

Once the Court is satisfied that the defendant is making a knowing, intelligent and voluntary waiver of their rights and wants to enter a guilty plea, the court should then accept the guilty plea.

JUDGE: “This Court finds that you are aware of the nature of the guilty plea which you have made and of the consequences of such a plea. The Court finds that you have made a knowing, intelligent and voluntary waiver of your rights and that a factual basis exists to support your plea of guilty. The plea of guilty which you have made will be accepted and this Court finds you guilty as charged.”

***SENTENCING***

If the Court is going to impose a sentence immediately after entry of the guilty plea, the Court may give the defendant or victim the opportunity to make a statement.

JUDGE: To Defendant: “Do you have anything to say in your behalf before the Court imposes the sentence on you? Are there any facts which you would like the Court to consider before sentence is imposed on you?”

To Prosecutor: “The Court now requests that the prosecutor come forward and state for the record those facts which would have been offered at trial to prove this defendant’s guilt had the defendant entered a plea of not

guilty. The prosecution shall also state any facts of aggravation, mitigation or relevant aspects of the defendant's background to assist the Court in imposing sentence in this case."

**Note:** The prosecutor should be allowed to make a statement. The court may question the prosecutor about any facts, which are relevant to the guilt of the defendant, or to the sentence which should be imposed. Thus, the record will contain the plea of the defendant and sufficient facts to justify the court's acceptance of the guilty plea. The court will also be provided with important facts to assist it in determining the appropriate sentence to be imposed.<sup>19</sup>

Judge: (Immediate Sentencing) "It is the judgment of this Court, considering all the facts and circumstances, that you be sentenced as follows: \_\_\_\_\_"

Judge: (Sentencing at a later date) "The Court sets the date of sentencing on \_\_\_\_\_ at which time you will be present in this Court and sentence will be imposed upon you."

**Release Conditions:**

Judge: a) "In the meantime, you shall remain in custody until the date set for sentence." Or

b) "In the meantime, your present release conditions will be continued until the date set for sentencing." Or

c) "The Court hereby establishes the following conditions for your release as follows:

- 1) On your own recognizance.
- 2) Posting of cash bail in the amount of \_\_\_\_\_
- 3) Posting of a surety bond in the amount of \_\_\_\_\_
- 4) Other conditions of your release area:

**Special Note about Guilty Pleas:**

The volunteering of the defendant's plea is the prime consideration in evaluating a guilty plea by a defendant. It must be noted that a guilty plea is not merely a confession but is equal in law to a conviction with all the ramifications of a conviction after a guilty verdict.

When looking at the voluntary entry of a guilty plea, the judge should consider the "totality of the circumstances" under which the plea was made. If the plea was induced by improper physical or mental pressure, or threats of the same, or, before entering the plea, the defendant was not fully aware of the consequences of the plea, the plea should not be accepted by the court.

When evaluating promises made to a defendant by the prosecutor, in any case where the promises were not performable, or were contrary to the defendant's understanding, not within the power of the prosecutor, or were disregarded once their purpose was accomplished, the defendant should not be allowed to enter a guilty plea

without reconsidering his/her position. This is because any plea made under these circumstances was induced or coerced illegally.

Before accepting a plea of guilty from a defendant, the judge must insure that the defendant understands the nature and consequences of the plea. The judge cannot merely ask whether the plea is understood and accept a “yes” answer. The judge must carefully explain what the plea means in practical terms and require that the defendant’s responses show an understanding of what is being done. In each case, the judge should compare the acts of the defendant with the elements of the crime to determine if a factual basis exists for the charges. The judge can get information regarding the defendant’s actions from the complaint or by questioning the defendant when he/she appears in court. Before the plea is accepted, the defendant should be informed, by the judge, of the maximum sentence that could be imposed if convicted and also whether or not probation is available upon conviction.<sup>20</sup>

Understanding the meaning of the plea requires that the accused fully comprehends the nature and meaning of the charge, what acts constitute guilt under that charge, and the consequences of pleading guilty. The judge must ask the accused whether he/she understands that, upon pleading guilty, he/she will lose the right to a jury trial and the right to inform the court of other facts which the defendant may want to make known.

Even if the accused is represented by counsel, the judge still must be satisfied that the defendant understands the charges and the consequences of a guilty plea. The presence of counsel does not eliminate the judge’s responsibility to make a full explanation to the defendant. In addition, if the accused desires to waive the right to counsel, the judge, before accepting the waiver, must make sure the defendant understands the nature and seriousness of the offense. Only then can the accused understand the importance of counsel and the effect of such a waiver. The judge must be personally convinced that there is a factual basis for the guilty plea. If the judge does not believe that the accused is guilty of the crime charged, the plea should not be accepted, even if the defendant admits to guilt.<sup>21</sup>

In sum, the defendant must:

- a. plead voluntarily;
- b. understand the nature of the charge and consequences;
- c. have the possible penalty clearly explained to him; and
- d. understand that the right to a jury trial is being waived.

Only literal compliance with the above procedure will carry out its two purposes to: (1) assist the judge in making certain that the guilty plea is truly voluntary; and (2) to develop a complete record to support the decision in a subsequent post-conviction attack on the judgment. A detailed record, kept at all arraignments, is the only way a judge can show, on appeal or in a later trial, that the defendant was fully informed of his/her rights and the crime with which he/she was charged, and that the judge fulfilled his responsibilities in protecting the rights of the accused. A simple form can be used - - filled out and signed by the judge or clerk - - which shows that each step has been followed and that defendant’s rights have been protected.

### **4.9.3 Withdrawal of a Guilty Plea**

The rule for deciding when to allow a defendant to withdraw a plea is usually expressed as a means of correcting a “manifest injustice.” A judge should order a defendant’s plea withdrawn or allow the defendant to withdraw the plea, even after a defendant has been sentenced, if it appears that the ends of justice would be better served by allowing the defendant a chance to reconsider the plea. Plea withdrawal will usually occur in cases where the court is presented with new evidence that: (1) the defendant did not commit the act; or (2) a bargain made by the prosecutor with the defendant was not kept.

The court may permit a guilty plea to be withdrawn anytime before the sentence is imposed. Once sentence is imposed, the plea may not be withdrawn unless:

- 1) The defendant was not properly *Boykinized*, or
- 2) A plea bargain was breached; or
- 3) The plea was entered contrary to the defendant’s rights making the plea invalid, or
- 4) Lack of evidence to support the charge.

There are usually not sufficient grounds to withdraw a guilty plea because the defendant is not pleased with the sentence imposed by the court.

### **4.10 Double Jeopardy**

The constitutional prohibition against double jeopardy does not apply to successive prosecutions of offenses by tribal, state and federal governments.<sup>22</sup> The Dual Sovereignty Doctrine provides that prosecution of a defendant under the laws of separate sovereigns does not subject a defendant to being put in jeopardy twice for the same offense. More than one sovereign may punish such a defendant. Technically, the defendant is not being twice punished for the same offense. By the defendant's actions, the defendant has committed two separate offenses, one offense against each sovereign.

Because state legislatures, the U.S. Congress, and tribes all promulgate their own laws, they each have an interest in seeing their own laws enforced. In Indian country, there arises the possibility that three governments may seek to enforce their laws against a defendant. In the double jeopardy context, successive punishment by separate sovereigns allows enforcement of laws that are inherently different, even though they may be worded alike, because the defendant’s criminal act has violated the criminal laws of each sovereign and is considered a separate offense. See 19 WTLR 655<sup>23</sup>

### **4.11 Habeas Corpus**

A habeas corpus writ is used when a defendant seeks to challenge his/her custody based on the grounds that he/she is being detained illegally. The federal courts have jurisdiction to hear a writ of habeas corpus from a person in tribal custody if he/she claims he/she is being held in violation of the Indian Civil Rights Act or the laws or

treaties of the United States.<sup>24</sup> The defendant must exhaust all available tribal remedies to be heard in federal court.<sup>25</sup>

## **4.12 Miscellaneous Matters**

### **4.12.1 Continuances**

A continuance is a delay or postponement of a hearing or trial that is granted by the court prior to the hearing or trial. The motion should be in writing and allege the specific grounds on which it is based. The defendant or his/her spokesperson must sign the motion. An oral motion is also permissible to continue a matter on the day of the hearing or trial if the facts, causing the need for a continuance, were unexpected and are a genuine surprise to the defendant and his/her spokesperson.

The court may also allow a joint motion to continue, in writing or orally, brought by the prosecutor and defendant. In some instances the parties may have determined that they need more time to prepare, or that more time is needed to supply information to the other party which may allow for a dismissal of the charges or a plea at a later date. It is also common for a joint motion to continue be made to give the defendant time to complete a condition by the prosecutor which may then result in a dismissal or reduced charge.

If the parties are not in agreement to the motion for continuance, the court should hear arguments from both sides and determine whether a continuance should be granted. A common claim by a defendant, seeking a continuance, is that his/her lawyer has not had sufficient time to prepare the case. The court should consider whether the preparation time was so minimal as to cast doubts on the basic fairness of the proceedings. There is no specific time in which to prepare a case, the spokesperson must have time to confer and consult with the client and prepare a defense. The defense should have a reasonable time to prepare his/her defense and must make diligent efforts toward preparation in the time allotted, and the lack of opportunity to prepare must be prejudicial to the defendant.

Another area in which a motion for continuance may be requested is when a witness fails to appear. When a witness fails to appear, the court should make the following inquiry to the party with the absent witness:

- 1) What are the facts which the absent witness is supposed to testify to, the materiality of the facts and the necessity that he/she be present as a witness;
- 2) Facts showing the witness will be available on the date to which the trial is continued; and
- 3) Facts showing due diligence in trying to obtain the witness' presence.

Should a request for a continuance be made for an ill defendant, the court should make the following inquiry to determine whether a continuance should be granted:

- 1) Request medical reports, including an independent examination if necessary, to verify the illness;
- 2) Evidence of the defendant's activities while ill;



- 3) Possible measures to minimize the health risk at trial (half-days for trial, etc.);
- 4) Whether the accused will be better able to stand trial at a later date;
- 5) What injury would be caused to the public interest by delay;
- 6) The effect of the accused's illness on the ability to exercise his/her rights at trial; and
- 7) The fact that the defendant is, at that point, presumed to be innocent of the charge.

#### **4.12.2 Failure to Appear**

When a defendant fails to appear the court may be requested to take action to have the person appear. If the defendant has been personally served with a notice giving a date and time to appear, the court may order a bench warrant be issued for the person's arrest and detention until the next hearing date. If the person has not been personally served, then it may be more appropriate to issue an order to show cause why a bench warrant should not be issued for their failure to appear. Bench warrants should only be issued if the defendant has been personally served with a notice providing the date and time they are to appear.

#### **4.12.3 Contempt**

Judges are responsible for the orderly conduct of all proceedings brought before the court. To assist in maintaining the respect and order which the court demands, the judge has the power to charge individuals with contempt of court. It should be noted that the contempt power is not a shield to protect the judge from criticism that he/she may find personally offensive. Contempt of court, as the name indicates, refers to actions which are directed to the court itself or the members of the court in their official capacity. Contempt, in the broad sense, may be defined as conduct which brings discredit to the authority of the court, either by physical or verbal attacks on the judge or anyone else in the courtroom by disrupting the conduct of the trial, or by refusing to obey an order of the court, such as an order to appear before the court or pay a fine. The purpose of the contempt power of the judge is to help maintain control over the proceedings and to enforce the orders and directives of the court.

##### **A. Limitations**

There are limitations to exercising the contempt power. Judges cannot, for example, charge a newspaperman with contempt merely because of an article that is critical of the judge. The freedom of speech and the press can be restricted only when it interferes with the administration of justice.

While the judge must maintain control of the court, the control is not for his/her convenience, but for the orderly adjudication of the rights of the parties. The judge must, for example, allow the parties' representatives some freedom to present their case. However, where the tactics of a lawyer cause delay or disruption, or are unprofessional, the judge may use the threat of contempt to control the lawyer's behavior.

The tribal court does possess the power to punish by way of contempt any person, Indian or non-Indian, who disrupts the court. An attorney, by practicing in tribal court, agrees to the authority of the court to be punished for abusive, disrespectful, or disruptive conduct.

## **B. Notice**

Since contempt of court must be intentional before it can be punished, the judge should, whenever possible, warn the party of the potential consequences of his/her conduct. Of course, there are times when a warning is unnecessary. For example, if a party assaults an officer of the court during the course of a trial, the assailant may be cited with direct criminal contempt and immediately sentenced to imprisonment or assessed a fine.

As a general rule, the judge should try to use the least drastic measures to control the court. Thus, if a warning and explanation of the consequences of an act can deter the party's conduct, the judge should first try to restrain the conduct in that way. Removal from the court may be used in the case of spectators before there is a need for a contempt citation. The charge of contempt of court should be used only as a last resort when nothing else can be done to enforce compliance with the rules of the court.

## **C. Notice and Types of Contempt**

There are two types of contempt, direct and indirect.

- 1) Direct contempt.** Direct contempt is committed in the actual presence of the judge. Under these circumstances the judge knows the facts surrounding the incident, and there would be no reason to call a hearing to gather the evidence of the contempt charge. However, the person is entitled to orally offer a defense or mitigation.

By allowing the court to impose immediate punishment for contempt in the presence of the court, the judge is able to bring order back to the proceedings. In most cases, the person held in contempt was warned by the judge that the conduct or refusal to act is contemptuous, thereby offering the person a chance to repent before being found in contempt.

- 2) Indirect contempt.** Indirect contempt occurs outside the presence of the judge. For example, a party may make a public statement that the judge decided a case against him/her because the judge has accepted a bribe. To cast such a charge at the court is a contemptible offense. But the judge must make sure that the statement was made and that the elements of contempt were present. In this situation the judge must hold a hearing to determine whether the person was actually guilty of contempt.

An order to show cause is the proper procedure in bringing someone before the court to answer for an indirect contempt. The action may be initiated by the judge on his/her own motion or by the tribal prosecutor alleging the facts of the contempt.

Where the contempt is directed at the judge, or where the judge is personally involved in the conflict with the party charged with contempt, the judge should, if at all possible, seek another judge to hear the contempt case. This prevents the impression that the judge is out to get the party. When the judge is personally involved, he/she may not be able to give an impartial judgment on the facts of the case.

#### **D. Punishment**

Just as the judge has a great deal of discretion in dealing with disrespectful conduct, he/she also has discretion in the punishment, once the contempt has been proved. The punishment for contempt of court may be established by a tribal ordinance. It is usually limited to a fine or imprisonment. Imprisonment for criminal contempt must be limited to one year in jail under applicable provisions of the Indian Civil Rights Act. On occasion, the judge may find that some other punishment is sufficient. For example, an apology may be sufficient punishment for someone who has insulted an officer of the court. In all situations the judge should attempt to tailor the punishment to the offense committed.

Civil contempt, as distinguished from criminal contempt, is the willful refusal of a party to comply with an order of the court. For example, if the court orders one party to pay another party a sum of money or return certain property to the other party, and the party refuses to do so, that party can be held in contempt of court and may be put in jail until there is compliance with the order. Since the defendant has the "keys to the jail," meaning he/she can get out whenever a decision is made to obey the court's order, the entire jail sentence does not have to be served. The party must be released as soon as there is compliance with the court's order or when compliance is no longer possible. To be guilty of civil contempt, a party must be able to comply with the order. If, for example, the party has no money he/she cannot be held in contempt for failure to pay the other party. Similarly, if the property to be returned has been lost or destroyed, the party cannot be held in contempt for failing to return it. Thus a hearing will always be necessary before holding a party in civil contempt for failing to obey a court order as it must be shown that the party could obey the order, but deliberately refuses to do so.<sup>26</sup>

**4.13 Sample Forms**

**4.13.1 Criminal Complaint**

[Caption]

**CRIMINAL COMPLAINT**

Case No. \_\_\_\_\_

I, [name of prosecutor], Tribal Prosecutor for the [tribe name] Tribe, in the name and by the authority of the [tribe name] Tribe, do accuse the [name of defendant and date of birth] with the crime of **Aggravated Assault**, [code section] of the [name of tribal code] Tribal Code, committed as followed:

That the defendant, in the [tribe name] Tribe jurisdiction, on or about: [date of offense], did use a deadly weapon to commit an assault, to wit: [brief description of facts], contrary to the [name of tribal code] Tribal Code and against the peace and dignity of the [tribe name] Tribe.

**Maximum Penalty:** 6 months confinement and/or \$500.00 fine, plus court costs.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 2000.

I certify, under penalty of perjury, that I have reasonable grounds to believe, and do believe, that the above named Defendant committed the offense as stated in this criminal complaint, contrary to law.

\_\_\_\_\_  
Tribal Prosecutor

**4.13.2 Advisement of Rights – Checklist for Arraignment**

**ADVISEMENT OF RIGHTS - ARRAIGNMENT**

[Tribe name] v. \_\_\_\_\_, Case # \_\_\_\_\_

Charge(s): \_\_\_\_\_

1. Defendant’s legal name: ( ) same as above, or \_\_\_\_\_.

2. ( ) Pro-se ( ) Represented by : \_\_\_\_\_.

3. Jurisdiction. ( ) Within boundaries of [Tribe name] Reservation.  
( ) tribal member, ( ) non-member Indian – tribal affiliation: \_\_\_\_\_.

4. “The purpose of this hearing is to (1) inform you of the charges filed against you, (2) advise you of your rights in this court, (3) allow you to enter a plea to the charge(s).” If you plead “guilty” you are admitting that you did what the criminal complaint alleges. If you plead “not guilty” you are denying the charges filed against you. You may plead “no contest” at the discretion of the court, which means you do not contend the charges filed against you. A no contest plea is equivalent to a plea of guilt.

- 5. ( ) Defendant read rights: YOU HAVE THE RIGHT TO ...
  - a) be informed of the charges against you.
  - b) remain silent; anything you say may be used against you in Court.
  - c) testify in your own behalf.
  - d) to be represented by an attorney or spokesperson at your own expense.
  - e) a speedy and public trial.
  - f) call witnesses, whom the Court will subpoena for you.
  - g) cross-examine those witness who testify against you.
  - i) appeal the result of your trial,
  - j) file a Writ of Habeas Corpus if you believe you are being unlawfully detained.
- 6. ( ) Defendant served with criminal complaint and discovery.
- 7. ( ) Informed of the crimes charged and maximum penalties.
- 8. ( ) Defendant waived reading of complaint. ( ) Complaint read to Defendant.
- 9. Plea entered: ( ) not guilty ( ) guilty -refer to guilty plea form ( ) no contest
- 10. ( ) Conditional Release. ( ) PR ( ) Bail: \$ \_\_\_\_\_
- 11. ( ) Set for pre-trial. ( ) Set for motions. ( ) Continued - hearing will be requested

DONE IN OPEN COURT this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

\_\_\_\_\_  
 JUDGE

**4.13.3 Conditional Release, Domestic Violence - Order**

[Caption]

Order – Conditional Release  
 Domestic Violence  
 Case No. \_\_\_\_\_

TO: LAW ENFORCEMENT AGENCIES, and  
 \_\_\_\_\_ Jail / Juvenile Detention Center

This matter having come before the Court by motion of the Defendant for release from custody pending ARRAIGNMENT / PRE-TRIAL / TRIAL on charge(s) of :

\_\_\_\_\_ and the Court having heard arguments and recommendations from the Defendant and the Tribal Prosecutor, now makes the following:

**ORDER**

**IT IS ORDERED** that the Defendant shall be released upon his/her:

\_\_\_\_\_ Personal Recognizance                      \_\_\_\_\_ Cash Bail set at \$ \_\_\_\_\_  
\_\_\_\_\_ OTHER: \_\_\_\_\_

**CONDITIONS**

- \_\_\_\_\_ Shall not commit or threaten to commit acts of domestic violence against the alleged victim or other family or household members.
- \_\_\_\_\_ Shall not contact, harass, annoy, telephone, or otherwise communicate with the alleged victim, either directly or indirectly.
- \_\_\_\_\_ Shall vacate and/or stay away from the residence of the victim.
- \_\_\_\_\_ Shall not possess or consume any alcohol or illegal drugs.
- \_\_\_\_\_ Shall not possess or use any firearms or other weapons \_\_\_\_\_ and shall cause any firearms or weapons to be turned over to the police for safekeeping.
- \_\_\_\_\_ No contact with \_\_\_\_\_
- \_\_\_\_\_ OTHER: \_\_\_\_\_

**VIOLATION OF THIS ORDER IS A CRIMINAL OFFENSE AND WILL SUBJECT A VIOLATOR TO ARREST. YOU CAN BE ARRESTED EVEN IF ANY PERSON PROTECTED BY THE ORDER INVITES OR ALLOWS YOU TO VIOLATE IT. YOU HAVE THE SOLE RESPONSIBILITY TO FULLY COMPLY WITH ALL OF THE ORDER'S PROVISIONS. ONLY THE COURT MAY CHANGE THE ORDER.**

DATE: \_\_\_\_\_ JUDGE \_\_\_\_\_

Acknowledged and Agreed: Defendant \_\_\_\_\_ Tribal Prosecutor \_\_\_\_\_

**4.13.4 Statement of Defendant on Plea of Guilty**

[Caption]

Statement of Defendant on  
Plea of Guilty  
Case No. \_\_\_\_\_

1. My true name is \_\_\_\_\_ and I am an enrolled member of the  
\_\_\_\_\_ Indian Tribe.

2. I am \_\_\_\_\_ years old and went through the \_\_\_\_\_ grade.

3. My address is \_\_\_\_\_.

4. I HAVE BEEN INFORMED AND FULLY UNDERSTAND THAT:

a) I have the right to legal representation at my own expense. My legal counsel is \_\_\_\_\_.

b) I have been charged with and I am pleading guilty to the following charges:

**(List the charges to which you are pleading guilty)**

OFFENSE	Statutory Maximum Penalties
a) _____	<b>MAX</b> Jail Time _____ Fine \$ _____

b) _____	<b>MAX</b> Jail Time _____ Fine \$ _____
----------	--

c) _____	<b>MAX</b> Jail Time _____ Fine \$ _____
----------	--

TOTAL EXPOSURE RESULTING FROM PLEA:	Jail Time _____	Fine \$ _____
	Add Mandatory Court Costs	\$ _____
		Total \$ _____

5. I HAVE BEEN INFORMED AND FULLY UNDERSTAND THAT I HAVE THE FOLLOWING IMPORTANT RIGHTS, AND I GIVE THEM UP BY PLEADING GUILTY.

- a) The right to a speedy and public trial.
- b) The right to remain silent before and during trial, and the right to refuse to testify against myself.
- c) The right at trial to hear and question witnesses who testify against me.
- d) The right at trial to have witnesses testify for me. These witnesses can be made to appear at no expense to me.
- e) The right to a jury trial by a jury of my peers living on the \_\_\_\_\_ Indian Reservation, if a conviction of the crime with which I am charged may result in jail time and I am an adult.
- f) I am presumed innocent until the charge is proven beyond a reasonable doubt or I enter a guilty plea.
- g) The right to appeal a determination of guilt after a trial through the Tribal Appellate Court.

6. IN CONSIDERING THE CONSEQUENCES OF MY GUILTY PLEA, I UNDERSTAND THAT:  
(Please circle the appropriate answer)

- a)  YES;  NO; I am admitting that I committed the offense(s) to which I am pleading guilty.
- b)  YES;  NO; I will have to tell the judge what I did that makes me guilty of the charges.
- c)  YES;  NO; I will have a criminal record.
- d)  YES;  NO; If on probation/parole, a guilty plea may result in a probation/parole violation.
- e)  YES;  NO; I may have to pay restitution to victim(s) of the crime(s) to which I plead guilty.
- f)  YES;  NO; If I hold public office or a government job, I may lose my office or job.
- g)  YES;  NO; If I am on probation with a suspended sentence on another case, a guilty plea to the present charge will be sufficient grounds for the judge to revoke my suspended sentence.
- h)  YES;  NO; This guilty plea may result in suspension of my driving privileges.

7. REGARDING THIS GUILTY PLEA ANSWER THE FOLLOWING:

- a)  YES;  NO; Are you making this plea freely and voluntarily?
- b)  YES;  NO; Has anyone threatened harm to you or anyone to force you to make this plea?
- c)  YES;  NO; Has anyone made you any promises of any kind to cause you to enter this plea?
- d)  YES;  NO; Have you received a copy of the criminal complaint and police reports?

8. List any charges the prosecutor has agreed to recommend for dismissal:

Case Number	Charge
_____	_____
_____	_____
_____	_____

9. The tribal prosecutor agrees to make the following recommendation to the Judge:

Days in jail \_\_\_\_\_, Days suspended \_\_\_\_\_; Fine \_\_\_\_\_, Fine Suspended \_\_\_\_\_;  
 Probation \_\_\_\_\_ months; Courts Costs \_\_\_\_\_; Driving Suspended for \_\_\_\_\_ days;  
 Community Service hours \_\_\_\_\_; Report to Compliance Officer \_\_\_\_\_ per \_\_\_\_\_;  
 Obtain and Comply with a Drug and Alcohol Evaluation;  Commit no criminal law violations while on probation;  abstain from alcohol and non-prescribed drugs.

OTHER: \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

YES;  NO; I understand the Judge does not have to follow anyone's recommendation as to sentence. The judge is completely free to give me any sentence up to the maximum authorized by law no matter what the tribal prosecutor or anyone else recommends.

10. The following statement in my own words is a true and correct account of what I did that makes me guilty of this crime. This is my statement:

\_\_\_\_\_

11. I have read or have had read to me this guilty plea statement and fully understand the consequences of this guilty plea.

_____	_____
Prosecuting Attorney	Defendant
_____	_____
Spokesperson for Defendant	Parent/Guardian/Custodian for Juvenile

FINDINGS AND CONCLUSIONS OF LAW

- 1)  YES;  NO; The foregoing statement was read by or to the defendant and signed by the defendant in the presence of his or her spokesperson and the undersigned judge in open court.
- 2)  YES;  NO; The defendant's plea of guilty was made knowingly, intelligently and voluntarily.
- 3)  YES;  NO; Defendant informed of the nature of the charges and the consequences of the plea.
- 4)  YES;  NO; The Court has personal and subject matter jurisdiction to hear this case.
- 5)  YES;  NO; There is a factual basis for the plea.
- 6)  YES;  NO; The defendant is guilty of the charge(s).

DONE IN OPEN COURT THIS \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

\_\_\_\_\_  
 Judge



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<sup>1</sup> 25 U.S.C. 1302 (7).

<sup>2</sup> See John W. Milne & Ralph W. Johnson, Criminal Procedure for Indian Courts, p. 101-102.

<sup>3</sup> Id.

<sup>4</sup> Id. at 102-103.

<sup>5</sup> Id. at 103.

<sup>6</sup> Id. at 103-104.

<sup>7</sup> Id. at 104.

<sup>8</sup> Id. at 104-105.

<sup>9</sup> Id. at 105.

<sup>10</sup> It may be argued that evidence was obtained in violation of the tribe's constitution or the Indian Civil Rights Act.

<sup>11</sup> These steps are from the NAICJA Criminal Court Procedures Benchbook.

<sup>12</sup> See *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

<sup>13</sup> See Milne & Johnson, *supra.* at 128-131.

<sup>14</sup> *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed. 2d 274 (1969).

<sup>15</sup> *Ibid.* The Supreme Court required that a defendant must personally and expressly waive his right to trial by jury. The court must determine the waiver was intelligent and with the understanding of the consequences.

<sup>16</sup> See *McCarthy v. U.S.*, 394 U.S. 459, 22 L.Ed.2d 418, 89 S.Ct. 1166, (1969).

<sup>17</sup> See *Brady v. U.S.*, 397 U.S. 742, 25 L.Ed. 747, 90 S.Ct. 1463 (1970) and *North Carolina v. Alford*, 400 U.S. 25, 27 L.Ed.2d 162, 91 S.Ct. 160 (1970). When a plea is entered based on a plea agreement, the terms and conditions of the plea agreement should be fully disclosed to the Court and for the record.

<sup>18</sup> See *North Carolina v. Alford*, 400 U.S. 25, 27 L.Ed.2d 162, 91 S.Ct. 160 (1970). A guilty plea was upheld even though the defendant refused to admit his guilt where a factual basis for the plea existed.

<sup>19</sup> Milne & Johnson, *supra.* at pg. 122.

<sup>20</sup> Id. at 125.

<sup>21</sup> Id. at 126.

<sup>22</sup> See *United States v. Wheeler*, 435 U.S. 313, 317-18 (1978).

<sup>23</sup> Radtke, Derek P., "State Encroachment Into Tribal Sovereignty by Means of the Assimilative Crimes Act," 19 *Whittier Law Review* 655, (Spring 1998), p. 661-663.

<sup>24</sup> 28 U.S.C. § 2254.

<sup>25</sup> Id.

<sup>26</sup> See Milne & Johnson, *supra.* "Criminal Procedure for Tribal Courts" pages 68-72.

## **PART II**

### **CHAPTER 5**

#### **TRIAL**

- 5.1 Introduction
- 5.2 Pre-Trial Conference
- 5.3 Criminal Trials Generally
  - 5.3.1 Introduction
  - 5.3.2 Opening the Trial
- 5.4 Presenting the Case
  - 5.4.1 Rules on Examining Witnesses
  - 5.4.2 Motion to Dismiss
  - 5.4.3 The Defense Case
  - 5.4.4 Rebuttal and Closing Arguments
- 5.5.1 Trial Verdicts
  - 5.5.1 Bench Trial Verdicts
  - 5.5.2 Jury Verdicts
  - 5.5.3 Rejection of the Verdict by the Court
- 5.5.2 Post Trial Proceedings
  - 5.6.1 Right to Appeal
  - 5.6.2 Stay of Execution of Sentence

#### **5.1 Introduction**

Presiding over a trial is the ultimate forum that brings together all of a judge's training and experience. The judge will be looked to as both a leader and manager. As a leader, the judge will set the tone of the trial and maintain order while at the same time insuring dignity is preserved during the proceedings. As a manager, the judge will insure that courtroom administrative matters are handled with competence and efficiency. The following chapter is designed to provide the trial judge with information to assist in presiding over a trial.<sup>1</sup>

#### **5.2 Pre-trial Conference**

In chapter four pre-trial hearings were discussed for the purposes of resolving cases by plea bargain. For cases that survive the initial pre-trial hearing, consider setting a second pre-trial conference between the judge, prosecutor, and defense attorney. This second pre-trial conference should be seriously considered for jury trials, because a pre-jury trial conference may save the court time and resources, and prevent inconveniencing potential jurors when a case settles the day of trial. The judge should play a central role in this proceeding and both the prosecutor and defense should also take an active role in the conference. This conference should narrow the issues and resolve any outstanding matters. It will reduce any last minute arguments, or motions, that may arise because of

surprises. The trial can then begin, as scheduled, and proceed smoothly. The purpose of the pre-trial conference should be to accomplish the following objectives:

- 1) Narrow and simplify the issues to be tried;
- 2) Obtain admissions of fact which will avoid unnecessary proof;
- 3) Exchange the names and addresses of prospective witnesses;
- 4) Examine and identify proposed exhibits;
- 5) Rule on motions or other requests then pending and find out whether any additional motions or requests will be made at trial;
- 6) Discuss any other matters that may expedite pretrial proceedings and trial; and
- 7) Submission and review of jury instructions (for jury trials).

Pre-trial conferences are an effective mechanism to further dispose of cases short of trial, especially jury trials that are likely to settle on the day of trial. Consider any opportunity to save jurors from having to attend court unnecessarily, especially in smaller jurisdictions that have difficulty drawing a sufficient jury pool.

In addition to expediting pre-trial proceeding and trial, the pre-trial conference might also be viewed as an opportunity for the parties to attempt to settle the case before trial. In a criminal case, the judge and counsel might confer as to any plea bargains to which the prosecutor and defense may have tentatively agreed. Judicial encouragement and subsequent approval of a plea bargain at this point would eliminate the need for trial.

The pre-trial conference is not compulsory, and the court might make scheduling pre-trial conferences routine, or by application of counsel. The conference might be formal, or extremely informal, taking place in either the judge's chambers or open court. The judge may choose whether to play an active or inactive role in seeking to narrow the issues or achieve a pre-trial settlement. Counsel should be required to make a full and fair disclosure of their views as to what the primary issues at trial will be. However, the entire proceeding is aimed at reducing the impending trial to its simplest terms consistent with the protection and preservation of the litigants' basic rights and positions.

Following the pre-trial conference, the judge makes an order reciting agreements, stipulations, or other actions taken at the proceeding. This order, unless subsequently modified, controls the later course of the case.

## **5.3 Criminal Trials Generally**

### **5.3.1 Introduction**

In a criminal trial, the prosecution must prove each and every element of the offense charged in the criminal complaint beyond a reasonable doubt. The prosecution carries the burden of proof, meaning it is the duty of the prosecutor to convince the finder of fact that the defendant has committed the crime as charged. Failure to meet this burden, as to any element of the offense, will mean a failure of the prosecution's case, resulting in the defendant's acquittal. The defense has no burden and is not required to present a case at all.

The fact finder in a bench trial is the judge. The fact finder in a jury trial is the jury. Both bench trials and jury trials give both the prosecution and the defense the opportunity to present evidence for the fact finder to make a determination as to whether the accused committed the charged offense. Each side tells their respective stories through the testimony of witnesses and/or by the presentation of exhibits.

The generally accepted order of trial is as follows:

- Opening Statements
- Prosecution puts on their case
- Defense puts on their case
- Prosecution rebuttal
- Defense rebuttal
- Prosecution closing statement
- Defense closing statement
- Prosecution rebuttal

From time to time, circumstances arise which may require modification in the order of the trial. In that instance the judge has discretion to change the order of proof in a particular trial and is not subject to review on appeal, except for a gross abuse of that discretion. For example, a witness may be taken out of order if they are only available at a certain day or time during the trial.

### **5.3.2 Opening the Trial**

#### **A. Rules Governing Opening Statement**

Opening statements are not evidence, and the court should so instruct the jury. The opening statement is an outline of the evidence counsel hopes to produce.

Counsel ordinarily is given considerable latitude in the opening statement, but there are limits to what can, or should, be allowed at this time. For example, counsel should not be permitted to discuss proof that would clearly be incompetent and objectionable if offered as evidence. Nor should he/she be permitted to make a statement for the purpose of creating prejudice or bias in the minds of the jury. Counsel ordinarily may not discuss any anticipated defense unless it appears on the record in some way. Counsel can discuss the principles of law that are deemed applicable to the facts if the judge, in his/her discretion, believes this is appropriate.

The opening statement of defense counsel follow that of the prosecution unless the court grants permission for the defense to reserve his/her opening statement until he/she begins the presentation of the defendant's case. The limits on opening statements also apply to the defendant. If counsel goes beyond these limits in the opening statement, such conduct may call for a word of caution or even a reprimand. After the opening statements of counsel, the prosecution begins presenting its evidence.

## **B. Opening Statement by the Court**

The judge should begin both bench and jury trials with an opening statement identifying the case and asking the parties if they are ready for trial. The following is a sample opening statement by the court:

“The case of \_\_\_\_\_ Tribe v. \_\_\_\_\_, Defendant, criminal case No. \_\_\_\_\_ of this Tribal Court. The record will show the defendant and the prosecution are present.”

“Is the prosecution ready for trial?  
Is the defendant ready for trial?  
Are there any preliminary matters that need to be heard before we proceed?”

If the parties are not ready, ask them if they can be ready after a brief recess or if there are valid reasons to postpone the trial. If there are no valid reasons, the Court may order the trial to proceed.

If the case is a bench trial, begin with opening statements. If the case is a jury trial, begin jury selection. After the jury has been chosen and sworn, it is customary for the judge to give a few preliminary instructions to the jury. These remarks should briefly explain the nature of the trial proceeding, the order of trial, and the basic nature and function of the jury itself.

## **C. Opening Statements by the Prosecution and Defense**

The opening statements should include a brief outline of the case. This gives the jury an idea of the case, and allows them to better understand the evidence as it is presented. It also helps the jury understand what the parties are attempting to prove with each witness and the evidence presented. The opening statement is less important where the case is being tried only to a judge, since the judge probably has gained some familiarity with the facts from the charge and preliminary hearings. However, for a jury, an opening statement is important because the jury comes to the case fresh, with no previous knowledge of the facts.

Both the prosecution and defense are allowed opening statements, which should be clear and concise statements of the evidence that each side intends to present. These opening statements create a first impression in the minds of the jurors. It is a tremendous aid for the jurors as they piece together the components of the trial, especially since it is often impossible to present the evidence in a logical and chronological order. Sometimes a witness is late, or fails to appear, and another witness must be called out of turn. This could be confusing. However, if a proper opening statement has been made, the jury will get a basic understanding of the case and make necessary adjustments in its thinking.

## 5.4 Presenting the Case

### 5.4.1 Rules on Examining Witnesses

The prosecution begins the presentation of evidence by calling the first witness. A party calling a witness is allowed to conduct a direct examination of that witness. Direct examination of a witness generally should cover all the points that the party, calling the witness, wants to establish. Cross-examination takes place when questioning adverse witnesses. The purpose of cross-examination is not to establish new facts; but to test the truthfulness, bias, or memory of a witness in connection with what was said on direct examination. Consequently on cross-examination almost any reasonable question, which might elicit a reply affecting the credibility of the witness, will be allowed.

Leading questions are generally not permitted on direct examination. A leading question tends to suggest the answer desired by the examiner. In a practical sense, the test of whether a question is “leading” is whether an ordinary person would get the impression that the questioner desired one answer over another. An example of a leading question is: “You were going less than 30 mph, weren’t you?” Questions requiring a yes or no answer may also be leading because they imply to the witness the answer desired. For example, it would ordinarily be “leading” for the defendant’s lawyer to ask a defendant charged with speeding “Were you really traveling terribly fast?” The defendant would obviously know he/she should say “no”. But no hard and fast rule can be stated here. It depends on the context in which the question is asked, the inflection and tone of voice of the questioner, and other facts. Thus the judge must decide the propriety of such questions based on experience and sound discretion.

There are circumstances when leading questions are allowed during direct examination. In order to save time, leading questions may be permitted for preliminary matters, such as residence, occupation, and other facts not in controversy.

Leading questions are also usually permitted where the purpose is to test the credibility of the witness on cross-examination and during the examination of a hostile witness. A hostile witness may be illustrated as follows: Defendant is charged with drunken driving. Two policemen were present at the arrest, but the Tribe calls only one to testify. Defendant believes the second policeman may testify more favorably toward him/her and calls this witness to the stand. Under such circumstances it may be proper for the defendant to ask this witness leading questions, e.g., “It’s true, isn’t it, that the day after defendant’s arrest, you admitted to the defendant that he/she wasn’t really intoxicated?” Also, in some cases, at the careful discretion of the judge, a leading question may be appropriate to help a witness recall an event that has momentarily slipped his/her recollection.

In a criminal case, the defendant ordinarily will attempt to show that the events did not occur exactly as claimed by the Tribe. There may even be an attempt to prove that the defendant had nothing to do with the events and it is a case of mistaken identity. When the defendant has completed his/her case by presenting all his/her witnesses and documentary proof, he/she announces that the defense rests.

The Tribe is now entitled to another turn. The tribal prosecutor may present evidence in rebuttal. At this stage, the Tribe is not entitled to present witnesses who merely give further support to the facts presented in the Tribe’s original case. Rebuttal

evidence should be limited to testimony and documents designed to answer defenses that were presented by defendant in his/her case. Assume, for example, that defendant claims in his/her case that he/she did not commit the burglary because he/she was at a pool hall with friends at the time. On rebuttal, the Tribe might want to present witnesses to show that the pool hall was closed that night, or that the defendant was not there.

In this, as in other stages, the witnesses may not only be examined, but also cross-examined and re-examined. When the Tribe's case in rebuttal is finished, the prosecutor closes his/her case. If the Tribe brought out new points in this rebuttal evidence, the defendant may meet them by further evidence. For example, in the burglary illustration noted above, defendant may put on evidence to show that although the pool hall was not open to the general public on the night in question, he/she and his/her friends were permitted by the owner to use it for a private party. If, however, the defendant does not have any new evidence to present at this stage, which is often the case, then he/she closes his/her case at once. When both parties have announced they have closed, the hearing on the facts comes to an end and the trial proceeds with the closing arguments of counsel and the court's instructions to the jury.

At this point, the parties cannot, without permission of the court, offer further evidence. The entire case is "closed" and no more witnesses are allowed to testify. The court is ready for closing arguments and submission of the case to the jury.

The final stage of the trial, beginning with closing arguments, should proceed as follows:

- (1) Closing arguments of counsel to the jury;
  - a) First, by the Tribe;
  - b) Second, by the defendant;
  - c) Third, rebuttal by the Tribe.
- (2) The jury is given their instructions.
- (3) The jury is sent to the jury room to decide the case.

#### **5.4.2 Motion to Dismiss**

At the close of the prosecution case, it is common for the defendant to make a motion to dismiss. The purpose of the motion is to challenge the prosecution's case and whether the prosecution has met its burden of proving each and every element of the crime charged beyond a reasonable doubt. It is appropriate whenever the prosecution, which has the burden of proof, has presented all of its evidence. Normally the judge hearing the motion will assume, for the purpose of deciding that motion, that all of the evidence introduced by the prosecution up to that point is valid and believable. Of course, defendant's witnesses will not have rebutted any of it at this point. If, with this liberal interpretation in its favor, the prosecution's evidence still falls short of proving the case, then the charge should be dismissed.

However, the judge naturally will want to be sure his/her decision is correct, and if there is any doubt in his/her mind of the sufficiency of the evidence, he/she should deny the motion and allow the trial to go forward with the defendant's evidence. After all, there is always the possibility that more complete evidence might be extracted from the defendant's witness when they testify, and that still more might be obtained from the

prosecution's evidence in rebuttal. In general, motions to dismiss made at the end of prosecution's case are promptly denied. Often they are made in a perfunctory manner by attorneys, more for the benefit of their client than the judge, and are, therefore, denied as a matter of course, having served little purpose.

In a few cases, the judge will find that a vital element of the prosecution's case is lacking, and simply is not going to be supplied by additional evidence. In such event the motion to dismiss the prosecution's case should be granted.

One purpose of the motion to dismiss at the end of the prosecution's case (even where the defendant expects it to be denied) is to give the defense counsel an opportunity to direct the court's attention to specific weaknesses of the prosecution's case. The defense counsel may want to pursue these weaknesses with greater emphasis later in the trial. It is the first opportunity that defense counsel has to comment upon the prosecution's evidence.

If the motion to dismiss is obviously without merit then the judge, without stating the reasons, may deny it. However, if the motion has merit the judge should give reasons for denying it.

### **5.3.3 The Defense Case**

#### **A. Presenting the Evidence**

The defendant presents his case at the end of the prosecution's case unless the court has granted a defendant's motion for dismissal. The defendant usually starts his/her case with an opening statement, unless it was made at the beginning of the trial.

The defendant's opening statement is subject to the same rules that applied to the prosecution's opening statement as previously discussed. To recapitulate, the opening statement may not be used to argue either law or facts. Its purpose is to outline the defendant's forthcoming evidence, and is especially useful in a jury trial to assist a jury in understanding that evidence. The jury should, of course, be instructed that the opening statement represents only the views of counsel about the evidence and is not evidence itself. If actual testimony and exhibits do not support the opening statement, the jury is likely to think less of defendant's case.

Following his opening statement, the defendant presents his/her witnesses. Defendant's presentation of evidence is subject to the same rules outlined in the proceeding discussion as applicable to the prosecution's case. One major difference is that defendant need not personally testify, and if he/she chooses to remain silent, then neither the court nor the prosecution can comment to the jury about his/her silence. Under the Indian Civil Rights Act no inference of guilt can be drawn from a defendant's refusal to testify on his/her own behalf.

#### **B. Defense Witnesses**

The defendant may call witnesses who were not witnesses for the prosecution. For example, if a defendant was charged with burglary, he/she might present new witnesses who would testify they saw him/her in another city on the night of the burglary. Also, the defendant might recall witnesses who had earlier testified for the prosecution.



This should only be done, however, when new testimony is to be presented by the witnesses, i.e., testimony not covered when the witness was on the stand for the prosecution.

Thus, in the above burglary example, assume that a police officer testified for the prosecution that he/she found some of the stolen property in an abandoned shed located near the defendant's home. Later, during the defense case, the defense might call the same officer to testify to new facts, e.g., that he/she also found in the abandoned shed two radios that has been stolen in two other burglaries, and that he/she knew these other burglaries had been committed by another person who had no connection with the present defendant. Assuming this testimony had not been brought out when the officer testified for the prosecution (or on cross-examination at that time) the defense might want to call him/her as a witness.

Often it is difficult to present the facts of a case in perfectly chronological and logical order. Witnesses are sometimes not available at the best time to put them on the stand. For example, Witness A may be the logical witness to put on the stand next, to tell defendant's story, but because of a job, or some emergency, Witness A may not be available at that time. Thus, Witness B is put on the stand. Witness B's testimony may now appear unrelated to the case because Witness A's testimony has not been presented first to explain it. In this instance, the prosecuting attorney might object to Witness B's testimony claiming that it is irrelevant to the case. But the judge might admit the testimony "subject to connection" if the defense can explain how the testimony will be relevant after connecting it with the testimony of Witness A.

As an illustration, the defendant, in the previous hypothesis, charged with burglary might want two witnesses, Friend and Doctor (a medical doctor) to testify on his/her behalf. Friend would testify that on the night of the burglary defendant was visiting his/her sick mother 300 miles away, and that Friend had seen defendant enter his/her mother's house in the early evening. Doctor will testify that the defendant's mother became seriously ill on the afternoon before the alleged burglary and that he/she personally telephoned the defendant to tell him/her of this illness about 3:00 PM in the afternoon. Now assume that Friend's car breaks down and he/she is unable to get to the courtroom to testify before Doctor, thus the defendant puts Doctor on the witness stand first. Doctor's testimony (about defendant's mother becoming ill, and about telephoning defendant) now appears unrelated to the case; the jury does not yet know that the defendant will claim he/she went to visit his/her sick mother that night.

If the prosecutor objected to Doctor's testimony at this time, on the grounds of irrelevance, the court might admit it "subject to connection" by other later evidence. The judge, in his/her discretion, can do this on the basis of the assertion by the defense that the evidence will be connected later, or the judge might ask both defense and prosecution to approach the bench (or go into another room, out of the hearing of the jury) where he/she might ask the defense to explain how he/she intends to connect up this evidence; the judge can then rule whether to admit it.

Sometimes a court needs to make sure that a witness testifies to facts rather than to conclusions. As an example, Tuffguy is charged with assaulting Whitecloud. At trial, Witness Johnson, who knows Tuffguy and Whitecloud, is asked if Tuffguy intended to hurt Whitecloud. Such as question is objectionable, as would be Johnson's answer if he/she gave one because the witness was asked to state a conclusion, rather than merely

the facts. The proper approach would be to ask Johnson if he/she had heard Tuffguy say anything about Whitecloud. Johnson might then answer “Yes”, and on further questioning could explain “about two weeks ago I heard Tuffguy say he/she disliked Whitecloud and intended to bust his nose/her some day”. This is a statement of fact, something that Johnson actually heard, and is not merely a statement of his/her personal opinion or conclusion about Tuffguy.

As another example, Hardcore is charged with selling dangerous drugs on the reservation. Witness Hawkeye is asked whether Hardcore is a “seller of drugs.” The question is improper, as would be the answer. Instead, Hawkeye should be asked about facts concerning Hardcore. These facts might be, for example, that Hawkeye actually saw Hardcore exchange some white pills for money with X on January 8, 1978, or that on a certain date he/she heard Hardcore say “I made \$500.00 last month selling the hot stuff.” These are facts about which Hawkeye can testify, not his/her conclusions drawn from those facts.

Another problem might arise when witnesses speak too fast and give long rambling answers to questions posed by counsel. Several kinds of evidence, such as hearsay or irrelevant evidence, are generally not admissible at trial. But, if a witness who is testifying rambles on and on or speaks very quickly, the opposing attorney has no way of objecting to, or keeping out, the improper evidence. As an example, Speedy is charged with driving 60 miles per hour in a 30-mile per hour zone and causing an accident. Witness Fasteye is on the stand, and is asked whether he/she saw defendant driving on the day of the accident. Fasteye says yes, he/she saw defendant driving 50 or 60 miles per hour two blocks before the accident. But then Fasteye continues talking to say that “Speedy often talks about driving fast; his/her friend told me the other day that Speedy frequently drives too fast; everyone knows that Speedy doesn’t have any sense of responsibility about driving.” These latter statements are not admissible and could be kept out of evidence. But it is difficult for the other attorney (or the judge) to keep them out if the witness simply rambles on. The attorney has no way of knowing in advance what the witness is about to say. The best thing for the trial judge to do in such a situation is to interrupt the witness and instruct him/her to wait until a particular question is asked, and then to answer that question, and wait until the next question is asked. Further, if the opposing attorney anticipates an objectionable answer, he/she can object at the time the question is asked, and the judge can rule on the objection before the witness answers.

#### **5.3.4 Rebuttal and Closing Arguments**

Defendant closes his/her case when he/she has presented all his/her evidence. The prosecution then presents rebuttal evidence. If new issues are raised here (in theory they should not be, but sometimes are) then the defendant may present further evidence on these new issues. The judge should exercise discretion about (1) whether to allow new issues to be raised here, and (2) how much new or cumulative evidence to permit to be introduced at this point.

Before jury instructions, the prosecution and defense make their closing arguments. Here they attempt to sum up the evidence and argue their case most convincingly to the jury. Usually the person making the closing argument (counsel or

party) is allowed considerable latitude. Courts generally depend on the jury's own memory and judgment to evaluate closing arguments and determine whether the evidence supports those arguments. It is appropriate for the trial judge to instruct the jury that the closing arguments are merely the views and opinions of counsel (or the parties) about the evidence, and that they are not evidence; thus the jury should listen to and weigh these arguments, but should make up their minds on the basis of the testimony and evidence actually presented in the case. It is in the discretion of the trial judge whether to give this instruction prior to the closing arguments, after the closing arguments, or both.

When both sides have completed their cases, and have "rested," defense counsel will often renew his/her motion to "dismiss," which in most cases was made earlier at the end of the prosecution's case. If this motion is denied then the judge will give his/her instructions to the jury.

## **5.5 Trial Verdicts**

### **5.5.1 Bench Trial Verdicts**

Following the completion of a non-jury trial, the court renders its decision as to the guilt or innocence of the defendant. This decision is called a verdict and is made based upon the facts and applicable law in the case. The judge, in determining guilt or innocence, uses the reasonable doubt standard. If the verdict is "not guilty", the defendants, held in custody, should be released immediately. If the verdict is guilty, the judge may immediately impose sentence or defer sentencing to a later date. Deferring sentencing for a pre-sentence investigation is customary.

### **5.5.2 Jury Verdicts**

Following a jury trial in a criminal case, the jury deliberates and returns a verdict as to the guilt or innocence of the defendant. The verdict of the jury is rendered (given) in open court with both parties present. The verdict may be given in several ways. The foreman may state the finding of the jury. Once the verdict is given, either party to the case may demand a polling of the jury whereby each juror is asked by the judge to give his/her verdict.

If the jury reaches its verdict at a time when court is not in session, or able to be in session, the verdict of each juror is written down and placed in a sealed envelope. It is then opened at the next session of court when the jury is to give their verdict. Usually the foreman will open the sealed verdict and read it to the court. The reason for sealing the verdict is to protect the verdict reached by jury. Once the verdict is reached and the jurors leave, not to come back until court is reconvened, something might influence one or more of them to change their mind in the intervening period. The sealed verdict is to prevent this changing of minds. If this procedure is used the jury must be told not to discuss their verdict until it is announced in court.

If the verdict is "not guilty," the court should announce the verdict and state; "The finding of the jury being not guilty, the defendant is ordered released from custody." If the verdict is "guilty", the court should announce the verdict and then dismiss the jury thanking them for their participation in the trial. After dismissing the jury, the court can

impose sentence immediately or set a later date for sentencing. If a later date is set for sentencing, the defendant may continue to be held in detention until that time, or may be released under conditions established by the court.

After the verdict has been delivered, the judge should question each member of the jury to make sure the verdict represents the majority (or unanimous) vote of the jury. If the judge disagrees with the result he/she may tell the jury as long as he/she does so politely and courteously. The judge must not criticize or belittle the members of the jury for reaching a verdict that he/she finds unacceptable. The jury is entitled to courteous treatment at all times, even when the judge is disappointed in the result or when the verdict requires a new trial.

If the jury announces that it is unable to reach a verdict, the judge may require them to return to the jury room and continue their deliberations. The judge should not prolong useless deliberations in an effort to avoid a divided or “hung” jury. Where there is an indication that additional time may break the deadlock and avoid the necessity of a new trial, he/she may direct the jury to continue their deliberations. But “hung juries” are exceedingly rare in tribal courts that accept majority verdicts from the jury. Most American courts require unanimous verdicts although there is a strong trend towards six-person juries and majority verdicts, at least in civil cases.

### **5.5.3 Rejection of the Verdict by the Court**

As a general rule, the judge is bound by the verdict rendered by the jury. If the judge could accept or reject the verdict of the jury he/she would be substituting his/her judgment for that of the jury, and the purpose of a jury trial would be destroyed. Jury verdicts are not merely advisory opinions that the judge can accept or reject. Jury verdicts are binding on the judge unless there are no facts that would support the verdict, or the size or amount of the verdict shows that the jury was biased or prejudiced.

But occasionally verdicts are rendered which are totally unacceptable to the court. The most frequent example of an unacceptable verdict is one that is clearly in opposition to facts presented during the trial. It is the function of the jury to decide disputed facts and to give their verdicts based on the facts as they see them. However, they cannot make up facts nor reject clear, convincing and undisputed evidence. When the jury has arbitrarily disregarded the facts, the judge may render a judgment opposite to the jury’s verdict, or simply set the verdict aside. This is called a judgment notwithstanding the verdict. This special judgment is reserved for those cases where the jury clearly has not rendered its decision in accordance with the instructions on fact and law that the judge has given them. A judgment notwithstanding the verdict can be used only when there is substantial error in the jury’s verdict, and can only be given in favor of the defendant in a criminal case. Errors in the form of the verdict, such as mistakes in spelling, grammar, obviously misunderstood legal terms, etc., cannot give rise to a judgment notwithstanding the verdict.

The verdict cannot be rejected because one or more jurors later tell the judge that they misunderstood the instructions, or that their vote was not properly counted, or that they have changed their minds. If such changes were allowed it would subject the jurors to strong outside pressures to change their decision after the verdict has been rendered and after the court has adjourned. Jurors cannot, therefore, impeach or reject their own

verdict. Once filed and accepted, the verdict cannot be changed, unless there is strong evidence of fraud or bribery.

The defendant might also file a motion for a new trial based upon errors or mistakes by the court, or on the basis of newly discovered evidence. The motion should be granted only if the errors or mistakes substantially affected the case or prejudiced the defendant, or if the newly discovered evidence would result in an acquittal.

## **5.6 Post-Trial Proceedings**

### **5.6.1 Right to Appeal**

Following conviction, the defendant should be advised of his/her right to appeal to a higher court. The defendant must be told the length of time within which to file the appeal. The burden to perfect this right of appeal to a higher court by a timely filing is then on the defendant.

### **5.6.2 Stay of Execution of Sentence**

While an appeal is pending, the court may grant a Stay of Execution of any sentence imposed by the court and order the defendant released on his/her own recognizance, or under conditions established by the court. The court may also order that the defendant remain in custody pending the appeal.

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<sup>1</sup> This chapter is a revision of materials related to the topics covered in this chapter from the work by John W. Milne & Ralph W. Johnson, (1980) *supra*. at pg. 163-209.

## **CHAPTER 6**

### **Jury Trials**

- 6.1 General
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#### **6.1 General**

The right to a jury trial in criminal cases has been held by the United States Supreme Court to be fundamental to the American justice system and thus required in state criminal proceedings by the “due process” requirements of the Fourteenth Amendment. The Indian Bill of Rights, 25 U.S.C. – 1302, follows the same pattern as that for the states. A defendant accused of a criminal offense, punishable by imprisonment, is entitled to request a trial by jury of not less than six persons.

The judge in jury trials has multiple responsibilities. He/she must select the jury, insure they are qualified, instruct them as to the applicable law, and even set aside their verdict when necessary. The judge presiding over a jury trial must exercise patience, possess knowledge of the law, have knowledge of the rules of evidence and other procedural rules, as well as leadership.<sup>1</sup> A judge should consider that the jurors may be overwhelmed by the process in which they find themselves as the ultimate decision makers. Judges should also consider that the attorneys or spokespersons, although having diligently prepared, may not have considered all contingencies, and should therefore be considerate of the role of the attorneys/spokesperson.<sup>2</sup>

## **6.2 Demand for Jury Trial**

The Indian Civil Rights Act requires a jury trial, upon request, for all persons facing imprisonment if they are convicted as accused.<sup>3</sup> In all cases (unless the tribal council or tribal court has rules providing for a jury trial as a matter of right or in the discretion of the tribal court) the party who desires a jury trial must request one. In civil cases, in the absence of a demand for a jury trial, it is usually considered that both parties waive their right to a jury trial, and agree to a trial before the judge. In criminal cases, the judge must inform the defendant at arraignment, as previously noted, of his/her right to a trial by a jury.

## **6.3 Waiver of Jury Trial**

Subsection 10 of the Indian Civil Rights Act requires that, in a criminal case, only the defendant can waive a jury trial, which should be agreed to by the court and the prosecution. Their agreement is not a requirement, but should be taken into consideration. The defendant's waiver must be specific and not implied or inferred from the acts and words of the defendant or his/her attorney. There must be an express waiver, by written stipulation to the court, or by an oral waiver in court by the defendant or through his/her attorney in the defendant's presence. It should be clear to the judge that the defendant understands that by waiving his/her right to trial by jury he/she submits his/her case to the judge who is to determine the truth of the facts presented during the trial and apply the law to these facts.

As a general rule, once a waiver has been given, it cannot be withdrawn except as provided by law, by rules of court procedure, or in absence of these, in the discretion of the court.

The procedure for withdrawing a waiver for jury trial should be based upon circumstances of each individual case. The procedure should involve the following: (1) the prosecution's agreement to the withdrawal; (2) the court's agreement to the withdrawal; (3) the withdrawal request is based upon valid reasons; (4) the withdrawal request is made before the other party has acted in detriment to its case; and (5) the request is made with sufficient time to select a jury and still allow the trial to proceed as scheduled.

Local court rules will determine the withdrawal of waivers providing the procedures to be followed.

In Federal Rules of Criminal Procedure, 23 (a), all cases required to be tried by jury must be tried accordingly unless the defendant waives his/her right to trial by jury in writing, approved by the court, and consented to by the prosecution. Once the waiver is made, withdrawal of the waiver is ordinarily within the discretion of the court. The facts and circumstances will very often determine whether withdrawal is allowed. The tribal court should also consider the facts and circumstances of each case when a withdrawal is requested.

In civil and criminal cases not involving possible imprisonment, trial by jury is not a matter of right, unless local law provides otherwise. When trial by jury is not a matter of right, it is incumbent upon the party, desiring trial by jury, to demand a trial by

jury. In the absence of a demand, the court considers that both parties have waived any right to trial by jury.

Rule 38(d) of the Federal Rules of Civil Procedure provides that unless the parties to the case demand a trial by jury in accordance with the procedures for demand, the right to trial by jury will be considered waived.

## **6.4 Jury Selection**

### **6.4.1 General**

The Anglo-American tradition of trial by jury, both in civil and criminal cases, requires an impartial jury drawn from a cross-section of the community. This is often a challenge to tribal judges. Indian communities are often small and it is common that most, or all, of the members selected for jury duty will know the parties and witnesses, as well as have heard something about the case. This does not mean that the defendant cannot receive a jury trial. It does, however, make the task of the judge more challenging in selecting an impartial jury.

Some tribal codes may provide for procedures to exclude close relatives of a defendant, witnesses or spokespersons. It is important to remember that the juror must be impartial. The court should seek to exclude those persons who believe they cannot be impartial due to their relationship to someone involved in the case, or due to their having formed an opinion based on what they may have heard in the community or some other reason.

The procedures used to select a jury will vary according to the size of the court and the number of jurors needed. However the basic procedures used in all jurisdictions are generally quite similar. There are generally four stages in jury selection: 1) establishing the jury list; 2) selecting a jury panel; 3) filling the jury box; and 4) examination of the prospective jurors.

### **6.4.2 Establishing the Jury List**

The first step in jury selection is the most time-consuming because it involves drawing up a list of prospective jurors. The list should be made far in advance of the time a jury will be needed for trial. The method used for selecting names must insure that the list contains a cross section of all members of the community within the jurisdiction of the court. While a minimum age must be established, it is not proper to exclude groups because of income, religion, or gender. In state and federal courts, jury lists are usually based on voter registration or tax rolls, but most tribal courts use tribal membership rolls.

One simple way of selecting a jury list is to estimate the number of jurors who will be needed during the next year or two and establish a ratio between the number of jurors needed and the number of adults on the tribal rolls. If, for example, the court anticipates twenty jury trials during the next two years and a panel of twenty is needed for each trial, a jury list of 400 names will be required. If the tribe has 4,000 members, but half are children or live off reservation, one out of every five eligible members will be selected for the jury list. The court clerk or jury commissioner must then go through the rolls and select every fifth name for the jury list. This selection process must be done



in such a manner that there is no opportunity for anyone to manipulate the selection process; the clerk MUST NOT attempt to pick persons whom he/she feels will be good jurors. The clerk MUST pick every fifth name.

Depending on the tribe, non-members living within the boundaries of a reservation and tribal members living off reservation may be included on the jury lists. This is a policy matter that should be decided by the tribal council. Should tribe decide to implement a policy to include non-members then the policy should be adopted into the tribal code.

### **6.4.3 Selecting a Panel**

Once the jury list has been completed, panels may be selected from the list whenever they are needed. The panel is a smaller group of potential jurors from which the final jury of six will be chosen. The panel is selected by drawing names at random from those on the original list. Experience will determine how many potential jurors should be called to get the six who will hear the case. One might start by calling 20-25; the number then can be increased or decreased as required. An easy method is to write the name of each person on the jury list on a separate slip in a box. The clerk can draw out the required number of names for each panel.

Although the actual selection of jury lists and panels is an appropriate job for the court clerk, the trial judge is responsible to see that the jury is properly chosen and that it represents a cross section of the community. The judge will also have to rule on all requests to be excused from jury duty.

### **6.4.4 Filling the Jury Box**

The court clerk must estimate the number of jurors to be called, or summoned, in order to assure enough are left after all excuses to be exempt from jury duty have been approved and preemptory challenges and challenges for cause have been made. In making such an estimate, the clerk will have to consider the type of the case to be tried, who the parties are, how long the trial may last, if either or both sides are represented by attorneys, and how much publicity there has been about the case in the community. Where the tribal code provides for a six-member jury with three preemptory challenges per side, the clerk may want to call 20-25 jurors.

The jurors should meet with the clerk at least 30 minutes before the case is called for trial. In this way the clerk can see how many people have failed to appear. He/she can also check to insure that each is qualified, and if any seek to be excused, that request can be taken to the judge.

The jurors are then taken to the courtroom and seated in the spectator section (an area should be reserved for them so they will not come in contact with any of the parties, witnesses, their relatives or attorneys). The case is called for trial and the examination is begun.

## 6.5 Voir Dire (Jury Examination)

### 6.5.1 Generally

Before a juror can be selected to hear a case, he/she must be questioned to determine whether he/she is competent (mentally and physically capable of serving on the jury) and impartial. The examination of prospective jurors takes place before any of the matters of the trial are discussed in court. Normally the examination is referred to as the “voir dire” of the jury. “Voir dire” means “to speak the truth”, and in practice refers to the process of examination of a jury panel in order to select a qualified and unbiased trial jury. The general purposes of the *voir dire* examination are:

- (1) To determine whether the jurors meet the qualifications for jury service set out in tribal ordinances (for example, that the juror is an Indian and is not a minor);
- (2) To determine whether any grounds exist for challenges for cause; and
- (3) To provide the parties with sufficient information that they may intelligently exercise their right to make preemptory challenges.

Jurors should be excused on a challenge for cause if they have a relationship to a party, a witness or one of the attorneys/spokespersons by blood or marriage, or business ties such that partiality could be presumed. A juror should also be excused on a challenge for cause in any situation where he/she admits to bias or prejudice concerning the merits of the particular case before the court.

Whether these grounds exist is usually developed by the answers of the juror through the questions on *voir dire* examination. Sometimes a juror will admit to some past or present connection with the party, or to having overheard information about the case or having read a newspaper about it and formed an opinion on it. The juror can then be asked whether he/she can disregard the prior experience and decide the case according to the law and the evidence presented at the trial. Even though an affirmative answer is given to such a question, he/she may still be challenged. Whether or not to sustain the challenge rests within the sound discretion of the judge. In ruling on these challenges, the judge will need to review all the answers of the juror to determine, if taken as a whole, they indicate bias or prejudice. Each side ordinarily has an unlimited number of challenges for cause.

Judges have discretion in establishing procedures for questioning jurors during voir dire. During voir dire, the prospective juror can be asked questions: 1) solely by the judge; 2) solely by the tribal prosecutor and defense attorney; or 3) in order by all three parties. It is in the judge’s discretion to decide what procedure to follow.

In some federal courts the judge asks all questions, although the parties or their attorneys may submit questions for the judge to ask. Regardless of which method is used, the judge must make sure that the questions are proper and are used only to determine the juror’s ability to be impartial. The “voir dire” examination should never be used as a means of convincing the jury that either party should prevail. Be on guard to prevent attorneys or spokespersons from advocating their client’s case during voir dire.

The method used by federal courts insures that the questioning will be proper and will not be used as an opportunity for the attorneys to present their sides of the case

before the trial begins. Under this method the judge draws up a list of questions designed to discover whether the jurors will be biased. He/she tells the parties or their attorney what questions he/she will ask and gives them a chance to submit additional written questions that they feel are necessary to obtain an impartial jury. If the judge finds that the questions are proper he/she adds them to his/her list.

### **6.5.2 The Judicial Role in Voir Dire**

Before the judge questions the jury panel, he/she should explain the importance of jury duty and the great responsibility given to them. Judges should explain the problems involved in the case before the court, and in a general way familiarize the jury with a brief summary of the case so that the juries can put the testimony and evidence in context of the entire case once the trial begins. After these preliminary matters, the judge asks the panel specific questions which pertain to possible bias. Such as opinions of the case that they may have formed in advance, relationships to the parties or counsel, a similar experience in their own lives which would influence their judgment, or a financial relationship with any of the parties. What has been said previously about the impartiality of the judge applies equally to the impartiality of the jury. The judge by his/her questions must try to uncover any factors that might lead to a biased judgment by a member of the jury.

The following procedure is suggested if the judge wants to begin the general or specific questioning of the prospective jurors.

Immediately after court has been called into session, and the judge has determined that the parties are ready for trial, he/she should make some brief introductory remarks to the assembled jury panel.

The following is suggested:

“Good morning (or afternoon), Ladies and Gentlemen of the jury panel. Today we will hear the case of \_\_\_\_\_ Tribe vs. \_\_\_\_\_, defendant. You jurors have been selected for the jury panel and from your number there will be chosen six (or some other number) persons to hear this case. The prosecution and defense will have an opportunity to ask you some specific questions to determine if you should sit in this case, but before this is done I will direct some general questions to all of you. First, please rise and you will be sworn concerning the answers you will give to the questions to be asked of you.”

“Do you solemnly swear that you will truthfully answer any questions concerning your qualifications to serve as jurors during the present term of this court SO HELP YOU GOD.”

The judge must then instruct the court clerk to draw six names from the jury list. Prior to this, all names have been placed on slips of paper and put into a box. The judge at this point says:

“When your name is drawn and called, please take a seat in the jury box.”

After six names have been called, the judge will then proceed as follows.

“Ladies and gentlemen who have taken a seat in the jury box, please listen closely to the following questions. The others of you who are on the jury panel should also pay close attention, because the same questions may be asked of you.

1. The defendant on trial today is charged with (state the offense and briefly described the charge by referring to the complaint). Have any of you heard anything about the case, or do you have any prior knowledge of it?
2. The defendant has pled not guilty to this charge. Throughout the trial he/she is presumed to be innocent until his/her guilt is proven beyond a reasonable doubt. The prosecution or the tribe has the burden of proving this guilt. Do you understand that the defendant has these rights and do you agree with them?
3. Is there anything in the type or kind of charge involved that would make you prejudiced against the defendant, or difficult to decide the case in a fair and impartial manner?
2. I will now read the name of the defendant and a list of witnesses. (Read the name of the defendant and the names of the witnesses to be called by both parties.) Are any of you closely related to the defendant or anyone on the witness list?
3. The Tribe is represented by \_\_\_\_\_ and the defendant is represented by \_\_\_\_\_. Are any of you closely related to either attorney?
4. Is there anything that you can think of which would make it impossible for you to give the defendant a fair and impartial trial?”

### **6.5.3 Prosecution and Defense Examination of Jurors.**

After the judge has asked the questions listed above and any others he/she may have, counsel for prosecution and defense usually have the opportunity to conduct a *voir dire* examination of the six prospective jurors in the box by asking questions. Counsel for each side is limited to asking questions that relate to the juror’s ability to be fair and impartial in judging the case.

The kinds and types of questions the prosecution and defense may ask on *voir dire* examination should be limited to obtaining information to determine a juror’s ability to be fair and impartial. The judge must exercise common sense in determining the nature of the questions he/she should or should not permit. In ruling on these questions

he/she should be guided by the legal proposition that the purpose of *voir dire* questioning is to obtain fair and impartial jurors without any bias or prejudice for or against either side.

To assist both sides in selecting a jury, each has an unlimited number of challenges for cause. Thus, if a particular juror is partial, biased or prejudiced, he/she would be challenged for cause on the ground he/she is not fair and impartial. In a challenge for cause the judge is being asked to excuse or disqualify that juror. In ruling on these challenges, the judge will need to review all the answers of the juror to determine, if taken as a whole, they indicate a bias or a prejudice.

If both sides are not represented by counsel the judge must assume a greater role in the *voir dire* examination in order to see that only fair and impartial jurors are selected.

## **6.6 Exercise of challenges**

When the prosecution and defense have completed their *voir dire* questioning of the six prospective jurors, the judge should ask each side to approach the bench to exercise their challenges. The exercise of challenges should be done in a low tone of voice so that it is outside the hearing of the jury. The normal procedure is that the judge asks both sides if they have any challenges for cause, and if so, to state them. As the challenge is made to the specific juror, the judge will rule on it by either allowing or denying the challenge. If either side is not represented by counsel, the judge will have to exercise the challenge for cause for that side.

In almost all courts the defense and prosecution have what are called preemptory challenges. These may be exercised without the necessity of having to state the grounds or reasons for such challenge. In other words, absolutely no reason at all need be given for the exercise of a preemptory challenge. It may be that the party challenging the juror does not like the way the juror is dressed. his/her reasoning can be arbitrary, but should not be discriminatory. The number of preemptory challenges for each side should be set by the rules of the court. If this has not been done, it is suggested that a total of three preemptory challenges per side are adequate.

If either side is not represented by counsel, the prosecuting or complaining witness and the defendant should be informed of the right to exercise preemptory challenges, the number available, and the method by which they are exercised.

After the first six jurors in the box have been questioned by the judge, the prosecution and defense, and preemptory challenges and challenges for cause have been exercised; those jurors left in the box will constitute a part of the trial jury. New prospective jurors will fill the remaining seats when the judge instructs the clerk to call the required number of names. The same process of jury selection will begin again and continue until six jurors have been chosen. If none of the original six were challenged, they would, of course, compose the jury. All remaining jurors who have not been selected should be told that they are excused until a later date.

## 6.7 Jury Control

Once the jury has been selected, it must be sworn. The oath given to the jury should be administered in a solemn way to impress upon them the importance of their role in the administration of justice. The oath is administered by the court clerk or judge, and could be as follows:

“Do you solemnly swear that you will truly and fairly try this case between the \_\_\_\_\_ Tribe and the defendant, so help you God?”

This simple ceremony sets the tone for the entire trial in the minds of the jurors. The judge must then instruct the jury on their responsibilities both in and out of court. He/she has to explain that once they leave the courtroom they cannot talk about the matters of the trial until the trial is completed. If a flagrant violation should arise, the judge may use the contempt power to discipline a delinquent juror. The jurors are officers of the court as long as they are in the process of hearing a case. As officers, they fall under the direct supervision and control of the judge.

To preserve the integrity of the jury during the trial, there should be a jury room available that is reserved for their use alone. Unless such a room is available it will be nearly impossible for the judge to prevent the jury from coming into contact with persons or information which might affect their deliberations.

The unique feature of the jury system is that laymen who are not familiar with legal principles may be called on to decide some very complicated cases. To accomplish this purpose, they must receive legal assistance from the judge. At the outset of the trial he/she is called on to explain their duties, and to give them an initial lesson in the legal terminology which they will need to understand the proceedings. Some judges prefer that this orientation be given orally in a very informal manner. While this has the advantage of not frightening the jury by a formal presentation, it may not be as accurate, or as complete, as desirable in a difficult case. For this reason some courts use a written juror handbook or information sheet for jurors. The handbook outlines the responsibilities of the juror, some of the legal principles the juror must deal with, and any other matters that the court feels will aid the juror in his/her deliberations.

During the course of the trial some jurors may want to take notes to aid them in following the facts which are presented. In the past, this practice was forbidden because only a few members of the jury could write, and it was thought that written notes would unduly influence the other members of the jury. However, today most courts encourage jurors to take notes so long as they do not try to record everything that happens during the trial. The court may want to furnish notepads and writing instruments to the jurors.

Occasionally it becomes necessary for the jury to view the scene of an event or a piece of evidence that cannot be brought to the court. Such views are left at the discretion of the judge and, if conducted at all, must be handled carefully. When the jury leaves the court the judge should direct the bailiff to see that no one talks to them and that they do not engage in conversation or question anyone else. The area to be viewed by the jury should be carefully prepared in advance to insure that the site has not changed since the event took place.

Several times, during the course of the trial, a juror will want to ask a question that he/she feels is important to his/her decision. While such questions are sometimes allowed under certain circumstances, it is a practice that should not be encouraged, and if permitted, should be carefully controlled. Questions from the jury are often improper or pertain to matters that are outside the scope of examination. While the questions may reflect a sincere attempt on the part of the juror to get at the truth, they may also undermine the legal protections that are given to the parties during the trial. The judge should never permit a juror to ask any questions directly to a witness. Questions should be submitted by the juror in writing so that the judge has an opportunity to review the question before it is asked. If it is an improper question, the judge can reject it without the necessity of one of the parties objecting to the question in open court – a situation which would undoubtedly prejudice at least the questioning juror, if not the entire panel.

Ordinarily the judge does not give explanations of the law until the end of the trial when the formal instructions are presented to the jury. If something should arise during the course of the trial that needs an explanation, it may be done at that time. However, since this would tend to break the continuity of the trial, it should be done only where the lack of an explanation might adversely affect the rights of the parties.

## **6.8 Responsibilities of a Jury**

Jury conduct during the trial is closely guarded so that both parties will receive a fair and impartial trial. The jury must remain open-minded throughout the trial, free from outside influences and able to base their judgment solely upon the facts presented and the law as it is told to them by the judge.

The following are basic rules for jurors to abide by during the trial and during all recesses:

- 1) Not to discuss with any other juror or anyone else any subject concerning the case being tried before them;
- 2) Not to allow any other juror, or anyone else, to discuss with them any subject concerning the case being tried before them;
- 3) To tell the judge of anyone, another juror or anyone else, who talks to them concerning the case being tried before them;
- 4) A juror cannot under any circumstances, or for any reason, talk to counsel/spokesperson for the prosecution or the defense;
- 5) Not to talk to any witness about any matter whatsoever;
- 6) Not to have any information about the trial before them except that information given to them in court while the trial is in session;
- 7) Not to try to learn any facts concerning the case which are not presented during the trial;
- 8) Not to read any newspaper, magazine or other articles about the trial or about the law and facts affecting the case;
- 9) Not to listen to radio or television broadcasts concerning the case, facts, or law involved in the trial, and

- 10) Not to form an opinion on the case except based upon all the evidence presented and in light of the law as told to him by the judge. The verdict must be based upon all the evidence presented during the trial and that evidence only.

## 6.9 Jury Instructions

In a trial by jury, the jury decides questions of fact (whether confiscated fishing nets owned by the defendant were placed in the river on Thursday), but they must apply the law that the judge gives them (no fishing nets may be placed in the river on Thursday). The explanation of the law is given to the jury by way of “jury instructions.” There is no particular form required for proper instructions although model instructions are available for different types of cases. If the judge uses these model or pattern instructions, he/she must be careful that the law upon which the instruction is based applies in his/her court and that there is a factual basis for the instruction. Instructions should only be given when (1) they accurately state the law in that jurisdiction; and (2) there is a factual basis – some evidence - to support the instruction. For example, a defendant in a criminal case is not entitled to the standard “self-defense” instruction unless under existing tribal law self-defense is a proper defense to the charge AND there is some substantial evidence that the defendant may have acted in self-defense. No instruction should be given simply because it is “good law” – it must be relevant to the particular case.

Although instructions are generally given to the jury orally, they should be prepared by the judge in advance. Because of the importance of a proper understanding of the law by the jury, the judge should take the time and effort to write his/her instructions. He/she should then read them to the jury in a conversational tone. A minor error can create an inaccurate picture of the law in the mind of a juror. If both sides are represented by attorneys, it is perfectly proper for the judge to ask both attorneys to submit proposed instructions so that he/she can choose those that seem to be the best. Written instructions avoid such misunderstandings. (See 5.2 Pre-trial Conference, when attorneys may be required to submit jury instructions in advance of the trial.)

There are two things that are present in all good instructions. First, they must be an accurate presentation of the law. Second, but equally important, the law must be presented in a way that the jury can understand. The judge does not write instructions for himself or for others with legal training. He/she must remember that the jury cannot be presumed to know anything about the law. The most precise statement of the law is useless if the jury does not understand it. Legal terminology should be used only where absolutely necessary and then carefully explained to avoid misunderstanding.

While the form of the instruction is left to the judge, good instructions include the following elements. First, the judge should caution the jury to stay within its legally defined limits in reaching a decision, that is, to stay with the law he/she gives them. Second, the judge should briefly present those contentions of each side, which have been substantiated with proper evidence. He/she should tell the jury where the burden of proof rests and what each side must prove in order to win. Finally, he/she should explain to them the applicable law in terms that they will understand.



The importance of proper jury instructions cannot be overemphasized. It is through the jury instructions that the law and the facts are brought together in the minds of the jury so that they can reach a proper decision. Only with good instructions can the jury system operate with maximum effectiveness.

## **6.10 Jury Deliberations**

Deliberation is the discussion by the jury, once the case has ended. They will discuss matters of fact, determine the truth of these facts and, in light of the law applicable to the case and issues involved, and reach a verdict as to the innocence or guilt of the parties involved.

After receiving the instructions on the law from the judge, the judge directs the bailiff to take the jury to the jury room for deliberation. Once in the jury room, the jurors are to select a foreman who is to preside over the proceedings while in the jury room. Once the foreman is selected the deliberations among the jurors may begin.

The jurors are to discuss with each other for the first time the evidence and law presented to them during the trial. They discuss thoroughly their opinions and feelings in relation to the facts and the law of the case. Each juror must examine the issues in the case, the evidence presented and the law. He/she must listen to the opinions of the other jurors, respect them if possible and look at them impartially. He/she must, with an open mind, be aware that his/her opinion may be wrong and that others who don't hold his/her same view could be right. He/she must consider every aspect of the trial and the deliberations as fairly and reasonably as possible so that his/her final decision is fairly and correctly made by himself and not by others around him. Each juror's final decision must be his/her own based upon the trial, the issues, the law, the deliberations and his/her own true belief.

## **6.11 Post-Trial Jury Instructions**

Following the completion of a jury trial, the judge must give instructions to the jury. These remarks briefly reiterate the nature of the jury's function to resolve the issues of fact presented by the prosecution and the defense, to apply these findings of fact to the law applicable to the criminal charge, and to deliver a verdict of guilty or not guilty. The following is an example of basic instructions given to the jury at the end of a criminal trial:

“MEMBERS OF THE JURY:

Now that you have heard the evidence and the arguments, it becomes my duty to give you the instructions as to the law to be applied in this case. It is your duty as jurors to follow the law as stated in the instructions to be given to you, and to apply these rules to the facts as you find them from the evidence in this case. You are not to single out one instruction alone as stating the law, but must consider all of the instructions taken together as a whole.

You should not be concerned with the wisdom or purpose of any rule of law. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty to base a verdict upon any other view of the law than that

which is given in the instructions of the court. It would also be a violation of your sworn duty as judges of the facts to base a verdict upon anything but the evidence received during the trial of this case.

Justice through jury trial must always depend upon the willingness of each individual juror to seek the truth as to the facts from the same evidence presented to all the jurors, and to arrive at a verdict by applying the same rules of law as given by the court.

You have been chosen and sworn as jurors in this case to try the issues of fact presented in the complaint and the denial made by the “not guilty” plea of the accused. You are to perform this duty without bias or prejudice as to any party. You are not to be governed by sympathy, prejudice or public opinion. Both the accused and the public expect that you will carefully and impartially consider all of the evidence in the case, follow the law as stated by the court and reach a just verdict regardless of the consequences.

It is important that, upon entering the jury room for your deliberations, you refrain from expressing a fixed opinion or a determination to hold out for a certain verdict. Each of you must decide the case for yourself, but should do so only after an open-minded discussion of the evidence and instructions with the other jurors.

Once you have reached a conclusion, you should not change it merely because other jurors disagree with you, or merely because you want to render a unanimous verdict. However, if in your deliberations you are convinced that you have reached a wrong conclusion, do not hesitate to change that opinion and then vote for a verdict according to your final conclusion. Remember, you are not advocates or proponents of either side in this case. You are impartial judges of the facts.

You shall now retire and select one of your numbers to act as foreman, who will preside over your deliberations. In order to reach a verdict, a majority must agree to the decision. As soon as a majority have agreed upon a verdict, you shall have it dated and signed by your foreman and then shall return with it to this room.”

## **6.12 Reaching a Verdict**

It is important to have a jury room for jury deliberations. The room should provide surroundings that enable them to concentrate their entire energies on the verdict, without any outside influence or distractions. Occasionally, the trial may last for several days. If the judge feels that returning home for the evening might influence the jury, he/she may order them to be sequestered or kept away from all outside contact. This is done by having the court furnish accommodations for the jury during the trial. This will seldom, if ever, occur in most tribal courts. However, the court may frequently have to make arrangements for the jury to take their meals together, or have their meals brought to them in the jury room. It is imperative that the judge instructs the bailiff, clerk, or other officers of the court to see that no one tries to influence the members of the jury while they are out of court.

The jury may request certain items be taken into the jury room with them. What goes with the jury is left to the discretion of the judge. Ordinarily notes that a juror has taken during the trial may be used in the jury room. Depositions or sworn statements of a witness, which have been taken out of court, generally may not be taken to the jury room because they may be given greater weight than the testimony which is left to their own

recollection. In the case of exhibits or photographs used during the trial, the questions become more difficult and the judge must decide each case individually. On the one hand he/she must try to give the jury access to as much information as possible. On the other hand, he/she must not allow one piece of evidence to unnecessarily attract the attention of the jury, and thereby unduly influence their decision.

## **6.13 Forms**

### **6.13.1 SAMPLE OPENING STATEMENT BY COURT TO JURY**

LADIES AND GENTLEMEN:

What I will say now is intended to serve as an introduction to the trial of this case. I will also give your further instructions on the law and the evidence, which has been presented in this case at the close of the case, before you retire to consider your verdict.

This is a criminal case brought by the \_\_\_\_\_ Indian Nation, which I may sometimes refer to as the prosecution, and sometimes as the Tribe, against \_\_\_\_\_. The case is based on a complaint, which reads as follows: [Judge reads the complaint].

You must understand that the complaint is simply a charge, and it is not, in any way, evidence that the defendant committed this crime or any other crime.

The defendant has entered a plea of not guilty to the complaint. The prosecution, therefore, has the burden of proving all of the essential elements of the complaint beyond a reasonable doubt. The purpose of this trial is to determine whether the prosecution can meet this burden.

The charge is based on Section \_\_\_\_\_ of the \_\_\_\_\_ Tribal Code, which provides, in part, as follows: (The Court should also give the jury a general instruction as to the essential elements of the offense charged.)

The trial will proceed in the following order:

First: The prosecution and the defendant have the opportunity to make a short opening statement which has the purpose of introducing you, the members of the jury, to the evidence which the party expects to produce. The prosecution will make its opening statement at the beginning of the case, and the defendant may make his/her opening statement following the prosecution, or he/she may defer the making of an opening statement until after the prosecution has completed its case. Neither party is obliged to make an opening statement. What is said in the opening statement is not evidence and shall not be considered by you in reaching your verdict.

Second: The prosecution will introduce evidence in support of the charges contained in the complaint.

Third: After the prosecution has presented its evidence, the defendant may also present evidence, but is not obliged to do so. The burden is always on the prosecution to prove every element of the offense beyond reasonable doubt. Law never imposes on the defendant, in a criminal case, the burden or responsibility of calling any witnesses or introducing any evidence in his/her behalf.

Fourth: At the conclusion of the evidence, each party may present oral argument in support of his/her case. As in the opening statement, what is said in closing argument is not evidence and shall not be considered by you in reaching your verdict. The arguments are designed to present what the parties contend the evidence has shown and what inferences they contend may be drawn from the evidence. The prosecution may both open and close the argument.

Fifth: I will instruct you on the applicable law and you will then retire to consider your verdict. Your verdict must be by two-thirds majority (as to every party and on every count).

Your purpose, as jurors, is to find and determine the facts; you alone are the sole judge of the facts. If, at any time, I make a comment regarding the facts you may disregard my comments completely. It is especially important for you to perform your duty of determining the facts fairly and honestly for, generally, there is no way to correct an erroneous determination of the facts made by a jury.

On the other hand, and with equal emphasis, I instruct you that the law, as given by the court, constitutes the only law for your guidance. It is your duty to accept and follow it even though you may disagree with it.

You are to determine the facts only from the testimony you hear and the other evidence introduced in court. It is up to you to draw whatever inferences you feel may be proper from the evidence presented in this trial.

The parties or their attorneys may sometimes object to some of the testimony or other evidence; this is entirely proper, and you should not be prejudiced by a party or an attorney who makes objections. If I sustain such objections and direct that you disregard certain testimony or other evidence, you must not consider that testimony or evidence in any way in reaching your verdict. You must also not consider anything you may have read or heard about this case outside of the courtroom, either before or during this trial.

In considering the value of the testimony of any witness, you may take into consideration the appearance, attitude and behavior of the witness, the interest of the witness in the outcome of the case, if any, the relationship of the witness to any party in the suit, the inclination of the witness to speak truthfully or not, the probability or improbability of the witness's statement, and all other facts and circumstances in evidence in this case. Thus, you may give the testimony of any witness just such weight and value as you believe the testimony of the witness is entitled to receive.

No statement, ruling, remark, comment, expression, or other mannerism which I may make during this trial is intended to indicate my opinion as to how you should decide the case, or to influence you in any way in making your determination of the facts. At times I may ask questions of witnesses for the purpose of bringing out matters which I feel should be brought out, but again this is not to indicate that those facts should be given special weight or value. If I find it necessary to rebuke the parties or their lawyers, you should not show prejudice to the party because I have found it necessary to be critical of them.

Once you have returned your verdict, if it is a verdict of guilty, it is my responsibility to determine what sentence should be imposed on the defendant. You should not concern yourself in any way with the sentence that the defendant might receive if you should find him guilty. Your function is solely to decide whether the defendant is guilty or not guilty of the charges against him. If and only if, you find him

guilty of one or more of the charges, will it become the duty of this court to pronounce sentence.

Until this case is concluded and submitted to you for your determination, you must not discuss it with anyone, including your fellow jurors. After it has been submitted to you for decision, you must discuss it only in the jury room and only with your fellow jurors. It is very important that you keep an open mind and not decide any issue in the case until the entire case has been presented and you have received the instructions of the court.

### 6.13.2 Jury Verdict

[Caption]

#### JURY VERDICT

We, the jury, being first duly impaneled and sworn to try the above-entitled matter, do hereby find the Defendant, guilty / not guilty, of the charge of \_\_\_\_\_.

Date: \_\_\_\_\_ Jury Foreperson: \_\_\_\_\_

<sup>1</sup> The Judge's Book, Second Edition, American Bar Association and The National Judicial College, 1994. Pg. 205.

<sup>2</sup> Id.

<sup>3</sup> This chapter is a revised and updated version of Milne & Johnson, Criminal Procedure Tribal Courts, Pg 133-161.

## CHAPTER 7

### SENTENCING

- 7.1 General
- 7.2 Pre-Sentence Investigation
- 7.3 Pronouncement of Sentence
- 7.4 Sentencing Alternatives
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#### **7.1 General**

Many people view the sentencing phase of the criminal justice system as the time when justice is administered. Both the victim and defendant will look to the judge to dispense justice in a fair manner by taking into consideration the facts and circumstances of each case, as well as the particular circumstances of the defendant.

There is perhaps no greater judicial responsibility than that of sentencing and corrective penalization. This is exclusively a judicial function that cannot be shared or delegated, however pre-sentence reports may be requested by the court. Proper sentencing practice requires a fundamental knowledge of human nature and common sense. Although there have been legislative attempts to produce fair and consistent sentences through sentencing guidelines, no such guidelines can take the place of a well trained and experienced judge who, having heard the evidence, is in the unique position to fashion a sentence that will meet the objectives of sentencing. The sentencing process must be applied on a case-by-case basis, and the lessons must be learned from experience.

Sentencing comes into play after a plea of “guilty” or after a finding of “guilty” by either the court or the jury. Proper sentencing requires the application of penalization or corrective actions to the particular individual before the court. Uniform penalties and tribal deterrent factors are also involved, but the prime emphasis should be placed upon finding an appropriate sentence or penalty for each individual violator within the limits set by code or ordinance.

In most jurisdictions the judge is solely responsible for sentencing the defendant. In a few jurisdictions the court is authorized by statute to impose an indeterminate sentence for the maximum period defined by law. This sentence can then be terminated at any time after the service of the minimum time, if there is any, by a parole board or other agency.

It would be well to keep in mind the purposes of sentencing. This could be stated as the minimum amount of custody or confinement, which is consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the

defendant. You should also be aware that the maximum sentences provided for in your tribal code are for use in only very few cases. Most defendants will require a much less severe sentence to accomplish the purpose of sentencing.

If your tribal code does not provide for a ranking of the various crimes with regard to their seriousness, you should make such a ranking yourself. A possible way to order crimes in relation to seriousness of the offense would be to categorize all crimes in one of the following categories: (1) protection of persons; (2) protection of property; and (3) protection of the community peace, social and moral order.

It is suggested that crimes in the first category should be considered more serious than those in the other two categories and persons committing such crimes should be dealt with more severely than persons committing crimes against property or the community's social or moral values.

## **7.2 Pre-sentence Investigation**

Once a judge has accepted a guilty plea from a defendant he must then sentence the defendant. Some jurisdictions have probation officers available to conduct pre-sentence investigations ("PSI") and then prepare a pre-sentence report ("PSR") for the court. If available the judge should have a PSR report prepared prior to sentencing. The purpose of the PSI and PSR are to provide the court with information about the defendant to allow the court the opportunity to make an informed decision about the appropriate sentence. It is common for the PSR to include a sentencing recommendation that the court may follow, or the court may impose a sentence without regard to the PSR.

The PSR will generally be one of three types:

- 1) A minimal report consisting of the defendant's previous court and driving records;
- 2) A full social history; or
- 3) Psychological/mental health reports.

If a PSR has been prepared prior to the defendant entering a plea of guilty the judge should not examine the PSR until after the plea is taken. A PSR will likely contain intimate and confidential information about the defendant and, therefore, should be kept confidential and viewed only by officials of the court, probation officials, and the defendant.

Before a defendant is sentenced on the basis of a PSR, he should have an opportunity to review the PSR and rebut the information in the PSR. For example, if a defendant has entered a plea of guilty to a traffic offense and the judge notices the defendant has numerous prior convictions, the judge should tell the defendant that his past record is not favorable and give the defendant a chance to explain his conduct. Such a statement by the defendant may tend to lessen or "mitigate" the severity of the offense to which he has just pleaded guilty and the judge should consider this in sentencing the defendant. After pleading guilty, every defendant should have an opportunity to make a mitigating statement before the judge imposes a sentence.

### 7.3 Pronouncement of Sentence

After a guilty plea or a finding of guilt the judge should prepare to pronounce the sentence. If there is a PSR available, it may contain a sentence recommendation. In any event, judges must choose a sentence that will accomplish the purposes and goals of sentencing. The two most conventional punitive measures used in sentencing are confinement to jail for a fixed term and imposing a fine on the defendant or both. In addition, there are, or at least should be, sentencing alternatives available to the court.

Confinement may be of two types, total, where the defendant serves a set term without being allowed any liberty; and partial, which can have several variations. Partial confinement would be where the defendant is allowed to keep his job while serving time. This can be accomplished in two ways, by allowing the defendant to work his normal hours and requiring him to return to jail in his off-hours or by allowing the defendant to serve his sentence on his days off or weekends.

When using a fine to punish a defendant either by itself or in conjunction with some type of confinement, the judge should consider the following:

1. What are the financial resources of the defendant in light of other financial obligations? (For example, a fine of \$20.00 to a person making \$200.00 a month and having a family to feed, clothe and care for is a substantial penalty. However, a fine of \$20.00 to a person earning \$600.00 a month would apt to be a far less severe penalty);
2. Is the defendant able to pay a fine on an installment plan? (It is becoming much more common to allow this type of payment rather than sentencing a person to \$10.00 or 10 days);
3. Will you affect the defendant's ability to pay a fine if you have ordered the defendant to make restitution for property destroyed or stolen?
4. The purpose of a fine is to make the defendant sacrifice and hopefully he will then think about what he has done. Never impose a fine simply to raise revenue.
5. If the imposition of a fine will put the defendant in a worse socio-economic position - - try to find a sentencing alternative.

Whenever judges have occasion to sentence a defendant on more than one charge, the sentence may run concurrently or consecutively. Concurrent sentencing is having the defendant serve two or more sentences at the same time. For example, if a defendant is guilty of two counts of battery and is sentenced to serve 30 days in jail on each count to run concurrent, then the defendant must serve a total of 30 days. Consecutive sentencing provides that a defendant must complete one sentence then serve another. For example, if a defendant is guilty of two counts of battery and is to serve 30 days on each count to run consecutively, then the defendant must serve a total of 60 days. Judges should give a defendant credit on any sentence imposed for time he has served awaiting an opportunity to enter a plea and be sentenced.



Based on the PSR, if a defendant is a first time offender or the charge is minor, the court may consider deferring sentencing by placing the defendant on probation. If the defendant complies with the terms and conditions of probation, the court can set aside the finding of guilt and dismiss the proceedings against the defendant. The utilization of this procedure should depend on the severity of the charge and the individual's background as shown in the PSI. If the defendant violates any of the terms or conditions of probation or is convicted of a new offense committed within any period of probation, the court may then revoke any suspended portion of the original sentence.

Another commonly used measure in sentencing is the use of probation. Probation should be available for most defendants coming before the court. Probation should be used as a rehabilitative measure to help the defendant by providing him with supervision and counseling over an extended period of time. Just as the judge must specify the length of the term the defendant is to serve if confined, he should specify explicitly the conditions upon which probation is granted and for how long it is to run. There will probably be few instances where probation should run for longer than a one-year period. The defendant should be warned that if he violates his probation he might be punished for this as well as the original crime.

#### **7.4 Sentencing Alternatives**

The judge should familiarize himself with other possible sentencing alternatives that are available. One commonly used alternative is to sentence the defendant to work for the tribe for a given period of time. There may also be many educational and vocational institutions which defendants can attend, some free of charge. Another alternative in traffic cases would be driver improvement courses. In some cases it may be best for the court to request hospitalization of the defendant for physical or mental health reasons as a sentencing measure. One crime where this is especially true is public drunkenness. Unlike many crimes, habitual drunkenness is more of a disease than a crime and should be treated as such and it is by many tribes. It would be wise for the judge to encourage development of programs to help alcoholics such as Alcoholics Anonymous and public and private treatment for alcoholics in health institutions.

Courts may use a variety of sentencing alternatives or a combination to meet the sentencing objectives of the court such as:

- 1) **Probation.** The defendant is released after agreeing to follow conditions set by the court, which are then supervised by a probation officer.
- 2) **Suspended Sentence.** The court imposes a sentence, then the defendant is allowed to remain free of serving any jail time or imposed fine, provided the defendant complies with conditions imposed by the court. For example: A defendant may be sentenced to serve 30 days with 30 days suspended, credit for time served, provided the defendant does not commit any criminal law violations for a six-month period.
- 3) **Deferred Sentence.** The sentence is deferred for a period of time set by the court, which may be later dismissed depending on whether the defendant complies with conditions imposed by the court.

- 4) **Restitution.** The defendant is required to pay for the damages incurred by the victim. (Note: Unless the defendant agrees to the amount of restitution owed to the victim, the court may set a restitution hearing to determine the amount of restitution owed.)
- 5) **Community Service.** The defendant is required to perform a certain amount of volunteer work for the community, approved by the court, in lieu of serving jail time or paying fines. If community service is chosen as an appropriate sentencing alternative, consider excluding violent offenders and juveniles unless supervised by an adult. Some defendants are capable of completing community service with little or no supervision. However, in some instances the judge should consider supervision to prevent further mischief from taking place with the defendant is completing community service.
- 6) **Work Release.** The defendant is allowed to attend work, but spend nights and weekend in jail until their sentence is complete.
- 7) **Electronic Monitoring.** The defendant is restricted to their home and work which is monitored by an electronic monitoring device worn around the ankle of the defendant.
- 8) **Treatment or Counseling.** For defendants who have an alcohol or drug problem they may be required to obtain a drug and alcohol evaluation and then be ordered to follow any treatment recommendations. For violent offenders, they may be required to attend anger management or some other form of counseling depending on the defendants particular circumstances.

## **7.5 Post-Trial Proceedings**

### **7.5.1 Right to Appeal**

Following conviction, the defendant should be advised of his right to appeal to a higher court. The defendant must be told the length of time within which to file the appeal. Then the burden is on the defendant to perfect this right of appeal to a higher court by a timely filing.

### **7.5.2 Stay of Execution of Sentence**

While an appeal is pending, the court may grant a Stay of Execution of any sentence imposed by the court and order the defendant released on his own recognizance, continued in detention or released under conditions established by the court.

**7.6 Forms**

**7.6.1 Criminal Judgment**

[Caption]

**CRIMINAL JUDGMENT**

THIS MATTER HAVING come before the undersigned Judge in open court and the above-named defendant having been found guilty of the following offense(s):

\_\_\_\_\_.

IT IS HEREBY ORDERED THAT DEFENDANT SHALL:

\_\_\_\_\_ Serve \_\_\_\_\_ day(s) in jail, with \_\_\_\_\_ suspended, credit \_\_\_\_\_ days served  
\_\_\_\_\_ Pay \$ \_\_\_\_\_ fine, with \$ \_\_\_\_\_ suspended, pay \$ \_\_\_\_\_ court costs

**CONDITIONS OF SUSPENDED SENTENCE**

- \_\_\_\_\_ Pay all fines and court costs within \_\_\_\_\_ days of judgment date.
- \_\_\_\_\_ Complete an Alcohol & Drug Evaluation within \_\_\_\_\_ days and file a copy with the Court. Comply with recommended treatment and aftercare plans.
- \_\_\_\_\_ Abstain from alcohol and non-prescribed drugs. Defendant shall be required to submit to a random urine analysis by the probation officer.
- \_\_\_\_\_ Obtain anger management / domestic violence evaluation within \_\_\_\_\_ days, and comply with recommendations.
- \_\_\_\_\_ NO DRIVING within the \_\_\_\_\_ Reservation boundaries for \_\_\_\_\_ days from the date of this order. \*\* Note: Occupational Driving Waiver May Apply
- \_\_\_\_\_ Complete \_\_\_\_\_ hours of community service.
- \_\_\_\_\_ Report to the Probation Officer \_\_\_\_\_ time(s) per \_\_\_\_\_.
- \_\_\_\_\_ Probation period shall end on \_\_\_\_\_. Any criminal law violations by Defendant during the probation period will be considered a probation violation.
- \_\_\_\_\_ OTHER: \_\_\_\_\_

**FAILURE TO COMPLY WITH CONDITIONS, SATISFY JUDGMENT OR ANY PROBATION VIOLATIONS MAY RESULT IN REVOCATION OF ANY SUSPENDED SENTENCE.**

**DONE IN OPEN COURT** this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

\_\_\_\_\_  
JUDGE

**7.6.2 Prisoner Release Order**

[Caption]

**PRISONER RELEASE ORDER**

TO: \_\_\_\_\_ Jail / Detention Facility

**YOU ARE HEREBY ORDERED** to release from your custody:

\_\_\_\_\_ DOB: \_\_\_\_\_

on the following charges:

\_\_\_\_\_

\_\_\_\_\_ conditional release applies  
to appear in the \_\_\_\_\_ Tribal Court on the  
\_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_, at the  
hour of \_\_\_\_\_ am/pm.

**THUS DONE AND SIGNED IN OPEN COURT** this \_\_\_\_\_ day of  
\_\_\_\_\_, \_\_\_\_\_.

\_\_\_\_\_  
Judge

**7.6.3 Order for Pre-Sentence Investigation and Report**

[Caption]

**Order for Pre-Sentence  
Investigation and Report**

The above named defendant having pled guilty, no contest, or having been found guilty of the charges of \_\_\_\_\_, the court now orders the following:

**ORDER**

IT IS HEREBY ORDERED that:

- 1) The defendant shall submit himself/herself to a pre-sentence interview with the Probation Officer on \_\_\_\_\_, \_\_\_\_\_ at \_\_\_\_\_ am/pm.
- 2) The Probation Officer shall conduct a pre-sentence interview with the defendant, and conduct a pre-sentence investigation, which shall consist of a criminal background

check in all jurisdictions, current and past treatment programs, and any other relevant information that will assist the Court in determining an appropriate sentence.

- 3) The Probation Officer shall submit to the Court and to the defendant, or his/her spokesperson, a Pre-Sentence Report that shall contain sentencing recommendations based upon the pre-sentence interview and investigation. The Pre-Sentence Report shall be provided to the defendant or his/her spokesperson at least five (5) working days prior to the sentencing hearing.
- 4) The sentencing hearing shall be set for \_\_\_\_\_ at \_\_\_\_\_ am/pm.

**IF THE DEFENDANT FAILS TO APPEAR AT THE PRE-SENTENCE INTERVIEW OR SENTENCING HEARING, A WARRANT FOR HIS/HER ARREST WILL BE ISSUED.**

SO ORDERED THIS \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

\_\_\_\_\_  
JUDGE

**CHAPTER 8**  
**POST-CONVICTION RELIEF, PROBATION  
AND HABEAS CORPUS**

- 8.1 Introduction
- 8.2 Post-Conviction Relief
- 8.3 Post-Trial Motions
- 8.4 Probation
- 8.5 Parole
- 8.6 Compliance and Revocation Hearings
- 8.7 Habeas Corpus
- 8.8 Forms
  - 8.8.1 Petition for Order to Show Cause –Revocation of Suspended Sentence
  - 8.8.2 Motion and Order Closing Criminal Case – Satisfactory Completion of Probation
  - 8.8.6 Petition for Writ of Habeas Corpus
  - 8.8.7 Order – Writ of Habeas Corpus
  - 8.8.8 Writ of Habeas Corpus

**8.1 Introduction**

**After the court has rendered a sentence, it is essential that the court have a system in place to monitor the defendant’s compliance with the court’s judgment. Failure to properly monitor judgments will have the ultimate effect of eroding the credibility of the court system. If defendants are not held accountable for compliance with the terms of their sentence, word will quickly spread that the court does not have the ability to enforce its sentences and it will be difficult to get compliance with any court orders.**

There are at least two methods the court can use to insure compliance with criminal judgments. First, for those courts that have the resources, a probation officer will provide the best method of insuring compliance. Second, for those courts that lack the resources for a probation officer, there is the option of court monitoring of criminal judgments through periodic compliance hearings.

This chapter also identifies a variety of post-conviction proceedings. These proceedings include post-trial motions, petitions for writs of *habeas corpus*, and parole/probation proceedings.

**8.2 Post-Conviction Relief**

A petition for post-conviction relief is a petition filed by a person in custody after being sentenced and seeking to have the conviction and sentence set aside or vacated. “Custody” means detention, confinement or being placed on probation.

A petition for post-conviction relief must be in writing and should contain the following:

- 1) Name of the person in custody and the place of custody;
- 2) Name and description of the custodian for example, “Chief of Tribal Police”;
- 3) A statement of the grounds for relief specifically and sufficiently setting forth a factual basis for the relief requested;
- 4) A list of any prior petitions for writs of habeas corpus or post-conviction relief filed on behalf of the petitioner and a list of all errors known or discoverable by the exercise of due diligence; and
- 5) Petitioner’s signature on an attached affidavit attesting to the truthfulness of the allegations with a copy of the judgment of conviction and sentence attached.

The court may conduct an evidentiary hearing depending on the validity of the claimed errors. The burden of proof rests with the petitioner to establish whether he is entitled to relief. The usual grounds offered for post-conviction relief include, but are not limited to, the following:

- 1) The conviction was obtained in violation of a tribal constitution or Indian Civil Rights Act;
- 2) The court exceeded its jurisdiction;
- 3) The conviction or sentence subjected the defendant to double jeopardy;
- 4) The time limitations for institution of prosecution had expired; and
- 5) The conviction or sentence constituted ex post facto application of law in violation of a tribal constitution or the Indian Civil Rights Act.

Post-conviction relief petitions may be dismissed if the issue raised in the petition has already been litigated in an appeal or in a prior petition for post-conviction relief. The court may also consider dismissing a petition if the issue raised was one that could have been raised in earlier proceedings but the petitioner failed to do so without good cause.

### **8.3 Post-Trial Motions**

There are a number of possible post-trial motions that may be brought by a defendant. Below are common post-trial motions.

- 1) **Motion to Set Aside the Verdict.**  
The defendant may file this motion if he believes that the verdict of the jury was contrary to the law or the evidence presented at trial. Generally only in extreme cases will the court set aside the verdict of a jury. In those cases, the court must find there was insufficient evidence to support the verdict and there was a reasonable doubt as to the defendant’s guilt as a matter of law.

- 2) **Motions for a New Trial.**  
The defendant may file a motion for a new trial based upon errors or mistakes by the court or on the basis of newly discovered evidence. These motions are generally granted only if the errors or mistakes substantially affect the case or prejudiced the defendant or if newly discovered evidence would result in acquittal.
- 3) **Motions for Correction or Reduction of Sentence**  
This motion is a plea for leniency based on grounds such as age of the defendant, defendant's health, hardship to the defendant's family, a change in law since the imposition of the sentence, or a mistake of fact or law. This motion can also be based on grounds that the sentence was imposed illegally (the sentence exceeded the maximum allowed by the Indian Civil Rights Act or the tribal code), the sentence constituted double jeopardy, or the tribal court did not have jurisdiction to impose the sentence.
- 4) **Motions for Withdrawal of Guilty Plea**  
This motion requires a high burden on the defendant in order to have a court permit the withdrawal of a guilty plea.
- 5) **Motion for a Stay of Execution of Sentence**  
While an appeal is pending, the defendant may request a stay of execution of any sentence imposed by the court. The court may also order the defendant released on his own recognizance, continued in detention or released under conditions established by the court.

#### **8.4 Probation**

Probation is a sentencing alternative in which the defendant is released to the supervision of a probation officer. Prior to such a release, the defendant must agree to follow conditions set by the court, such as obtaining a drug and alcohol evaluation and/or not committing any further criminal law violations. The defendant is generally required to report periodically to the probation officer and to maintain good behavior for a specified period of time. The court may also impose additional conditions, such as requiring the defendant to maintain a job, avoid drugs or alcohol, or to ask permission from the probation officer before traveling outside the area. If the defendant does not follow the conditions of his probation, then the probation may be revoked and the original sentence or another sentence imposed. Usually, probation is not revoked until after a hearing is held on the revocation of the probation. Probation procedures, including the procedures for revocation of probation, vary among court systems.



## **8.5 Parole**

Parole is the conditional release of a prisoner from jail. The prisoner is released from jail prior to the completion of his entire sentence under certain terms or conditions that are established by the court or a parole board. The prisoner is usually required to maintain good behavior for a specified period of time. There may also be additional terms and conditions which the prisoner must follow. If the prisoner does not follow conditions of his parole, then the parole may be revoked and the convict is usually returned to serve the unexpired time. Generally, however, the parole is not revoked until after a hearing is held on the revocation of the parole.

## **8.6 Compliance and Revocation Hearings**

For those jurisdictions that do not have a probation officer, consider making compliance hearings a regular part of your docket. For example, if someone is sentenced to DUI, with conditions of a suspended sentence, the compliance hearing will give the court the opportunity to periodically bring the defendant before the court to see if the defendant is complying with the conditions of his probation and suspended sentence. A variation may be to have the defendant submit reports, evaluations or community service hours to the prosecutor to monitor compliance.

## **8.7 Habeas Corpus**

Habeas corpus is a remedy available to defendants who seek release from “unlawful” detention. A petition seeking a writ of habeas corpus may be sought at anytime by a defendant and is not necessarily considered post-conviction relief. A defendant’s petition for habeas corpus may seek release from a tribal court, police officer, or other tribal office. It is most often used in criminal cases when a defendant is in jail and believes that his rights have been violated in some manner. Such violations of rights include being denied a right to bail, denied a speedy trial or jury trial, denied a right to counsel, arrested illegally, convicted by use of an illegal confession, given cruel and unusual punishment, etc.

The federal courts have jurisdiction to hear petitions for writs of habeas corpus from persons held in tribal custody. A petition for a writ of habeas corpus can be made to the federal district court or tribal court if the tribal code so provides. The petition must be in writing and signed by the person for whose relief it is intended or by someone acting on his behalf. The petition must state the facts concerning the person’s commitment or detention and the cause or reason why the detention is illegal. The petition must be verified, that is, it must be made under oath.

The judge deciding the petition for the writ must either grant it or issue an order directing the person(s) alleged to be detaining the petitioner to show cause why the writ should not be issued. Generally the only exception to this procedure is where it is obvious from the application that the petitioner is not entitled to release.

Issuing the writ does not entitle the petitioner to immediate release. Instead, it merely orders that the petitioner be produced before the court so that the legality of his detention can be determined.

An order to show cause can be used to determine whether the writ should be issued or a preliminary hearing held. The writ of habeas corpus or the order to show cause is served on the person(s) alleged to have custody of the petitioner. The person(s) to whom the writ or order is directed must make a return certifying the true cause for detention. The petitioner or a person on his behalf can deny the facts set out in the return. Then the court generally holds a hearing on the matter.

**8.8 Forms**

**8.8.1 Petition for Order to Show Cause –Revocation of Suspended Sentence**

[Caption]

PETITION FOR ORDER  
TO SHOW CAUSE -  
REVOCATION OF  
SUSPENDED SENTENCE

COMES NOW THE \_\_\_\_\_Tribe, through its probation officer, and requests that the above named defendant be made to appear to show cause why the suspended sentence in the above stated case should not be revoked, thereby having the above named defendant serve out any suspended jail time.

I, \_\_\_\_\_, Probation Officer, under penalty of perjury of the laws of the \_\_\_\_\_Tribe now state that I have reviewed the above named defendant’s criminal file under this case number and have found the following:

- 1) The probation period under this case number ends on \_\_\_\_\_,  
\_\_\_\_\_.
- 2) The Defendant has failed to satisfactorily comply with the Judgment Order dated \_\_\_\_\_,to-wit:  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_.
- 2) The charge(s) for which the defendant was found guilty was/were :  
\_\_\_\_\_  
\_\_\_\_\_.
- 3) Attached are documents in support of this petition, to wit:  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_.

Therefore, the \_\_\_\_\_ Tribe requests that defendant be ordered to show cause why his suspended sentence should not be revoked for non-compliance with the judgment order under this case number.

DATED THIS \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

\_\_\_\_\_  
Probation Officer

BASED ON the above petition and supporting documentation, the Court now enters the following:

**ORDER**

THE CLERK OF COURT shall issue an Order to Show Cause commanding the above named defendant to appear on a regularly scheduled court date, to then and there show cause why his suspended sentence should not be revoked.

IT IS FURTHER ORDERED that the Clerk of Court shall attach a copy of the Petition for Order to Show Cause along with copies of all supporting documents.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

\_\_\_\_\_  
Judge

**8.8.2 Motion and Order Closing Criminal Case – Satisfactory Completion of Probation**

[Caption]

MOTION AND ORDER  
CLOSING CRIMINAL CASE-  
SATISFACTORY COMPLETION  
OF PROBATION

COMES NOW THE \_\_\_\_\_ Tribe, through its probation officer and now makes the following motion to close the above-entitled criminal case. The defendant in this case has satisfactorily completed all the requirements of the Judgment Order issued by this Court under the above-entitled case number.

DATED THIS \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

\_\_\_\_\_  
Probation Officer

**ORDER**

The Court hereby orders as follows:

- 1) The above entitled case be and is hereby closed.
- 2) The above named defendant is relieved of all-further obligations and sentences.
- 3) The Clerk of Court shall archive this file one (1) year from the date of this order.

SO ORDERED this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

\_\_\_\_\_  
Judge

**8.8.3 Petition for Writ of Habeas Corpus**

[ Caption ]

PETITION FOR WRIT OF  
HABEAS CORPUS

NOW INTO COURT, through undersigned counsel, comes petitioner,  
\_\_\_\_\_, a resident of the full age of majority of \_\_\_\_\_,  
\_\_\_\_\_, who respectfully represents as follows:

1.

Defendant is a citizen of the United States and a resident of the \_\_\_\_\_  
\_\_\_\_\_.

2.

Defendant is now actually, unjustly and unlawfully imprisoned and restrained of his liberty and detained under color of the authority of the \_\_\_\_\_ in the physical custody of \_\_\_\_\_, \_\_\_\_\_ of \_\_\_\_\_ Tribe, pursuant to detention with the \_\_\_\_\_.

3.

On or about \_\_\_\_\_, \_\_\_\_\_, defendant was arrested and incarcerated in the \_\_\_\_\_, where he is still incarcerated.

4.

On \_\_\_\_\_, defendant pled guilty to the charges of \_\_\_\_\_ in violation of \_\_\_\_\_. Defendant was sentenced to \_\_\_\_\_.

At the time of this plea defendant had served \_\_\_\_\_ days and should have been released within a reasonable time.

5.

As of this date, the defendant, \_\_\_\_\_, has served \_\_\_\_\_ days, which is \_\_\_\_\_ days in excess of his required statutory time to be served under his sentence.

WHEREFORE, PETITIONER PRAYS that:

This Honorable Court issue a Writ of Habeas Corpus addressed to \_\_\_\_\_, directing them to have the defendant,

\_\_\_\_\_, brought forthwith before the Court and at that time defendant be discharged from further custody.

For the purpose of informing the Court defendant states that \_\_\_\_\_ is the Tribal Prosecutor of \_\_\_\_\_ Tribe, \_\_\_\_\_, in charge of this prosecution and her address is \_\_\_\_\_.

**8.8.4 Order – Writ of Habeas Corpus**

[ Caption ]

**ORDER**

Considering the allegations of the foregoing petition,

IT IS ORDERED that a writ of habeas corpus issue herein, commanding \_\_\_\_\_, to produce the defendant, \_\_\_\_\_, before this Court on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, at \_\_\_\_\_ o'clock \_\_\_\_\_m. and to state then and there their authority for continued custody.

Dated this the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

\_\_\_\_\_  
**JUDGE**

**8.8.5 Writ of Habeas Corpus**

[ Caption ]

**WRIT OF HABEAS CORPUS**

To: \_\_\_\_\_

\_\_\_\_\_  
And  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

YOU ARE HEREBY COMMANDED to produce the defendant, \_\_\_\_\_, before the Honorable \_\_\_\_\_, Judge of the \_\_\_\_\_ Tribe, on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, at \_\_\_\_\_ o'clock \_\_\_\_\_m.

BY ORDER of the Honorable \_\_\_\_\_, the \_\_\_\_\_ Tribal Court.

\_\_\_\_\_  
**CLERK OF COURT**

## **PART III**

### **CHAPTER 9**

#### **JUVENILE JUSTICE**

- 9.1 Introduction
- 9.2 Juvenile Court Function
- 9.3 Juvenile Court Jurisdiction
- 9.9 Juvenile Court Procedure
- 9.10 Adjudication
- 9.11 Due Process in Juvenile Cases
- 9.12 Jury Trial and Appeal
- 9.13 Disposition
  - 9.8.1 Probation and Continuance Under Supervision
  - 9.8.2 Probation Violations Under a Delinquency - Procedures
  - 9.8.3 Commitment

#### **9.1 Introduction<sup>1</sup>**

Juvenile proceedings can provide an opportunity for judges to make a significant impact on a juvenile's life. As a result, many tribal codes allow judges great latitude and discretion in handling juvenile matters. However, decisions should be made on a case by case basis after considering all of the facts and circumstances particular to that juvenile.

Judges may encounter a wide range of conduct from juveniles. Yet the court must attempt to match an appropriate response for each juvenile based on the unique circumstances of each case. For example, a juvenile may be before the court for an alcohol or drug related offense. The court must determine if this is a one-time incident, which may be curtailed by an admonishment, or whether there is a problem developing, which needs evaluation and treatment.

When available, juvenile courts should call upon probation, social services and other resources to help guide juveniles during their tumultuous adolescent phase of life. The tribal juvenile court is one of the institutions on the reservation established to provide this guidance for the well-being of the Indian child and the community. The alternative is dealing with juveniles in tribal adult court. Tribal adult courts seldom provide the special guidance and support a juvenile needs in the maturing process to become a responsible adult in the Indian community. This chapter addresses juvenile delinquency matters when juveniles have violated tribal law.

#### **\*\*Practice Pointer\*\***

Consider instructing court staff, probation officers, etc., to be on guard against placing themselves in situations in which they are alone one-on-one with a juvenile. Judges should also have another adult, such as a clerk or parent, in chambers with them should a judge find it necessary to talk with a juvenile in chambers. This will safeguard court staff from accusations of inappropriate conduct with a juvenile.

## **9.2 Juvenile Court Function**

The purpose and function of juvenile courts is to determine why a minor has acted contrary to law and then to attempt to reform the juvenile. Juvenile courts should attempt to reform and rehabilitate rather than punish. Although, depending on the circumstances, punishment may also have a role when administered in a manner designed to reform or rehabilitate a juvenile. Juvenile courts attempt to guide juveniles back onto the path of being good members of the tribal community. As juvenile court judges, the objective is to balance the best interests of the child with the best interests of the community.

Tribal codes generally allow tribal judges broad discretion in handling juvenile cases.

Judges may hear and determine cases in private, in an informal manner. In lieu of punishment the juvenile court may place a juvenile under supervision of a responsible person, institution, or organization selected by the Court, under provisions set by the Court. The idea has been that the court can do the right thing for each child if there are fewer rules and fewer formal procedures hindering the judge's ability to find out what is wrong and correct the situation.

However, in recent years it has been seen that the juvenile courts have taken on a very large and difficult responsibility in trying to diagnose and treat children differently from adults under the law. It is well to remember that the juvenile court is first a court of law. Its legal responsibilities come before its responsibilities to help the child change the way he lives. Even though the same judge may hear adult and juvenile cases, he must be especially careful with children. Children are less able than adults to take care of themselves in court as well as in the community. Fairness is the most importance part of the character of a juvenile court.

## **9.3 Juvenile Court Jurisdiction**

Tribal governments create tribal juvenile courts for their tribes. The juvenile court will then have power to hear all cases that involve any juvenile members of the tribe and their conduct within the reservation. The tribal code will set out the jurisdiction of the tribal juvenile court. Generally, jurisdiction attaches from the time the juvenile (under 18 years old) is taken into custody and when one or more of the following elements are present:

1. Violation of Federal or tribal law; or
2. Beyond reasonable and lawful control of parents/guardian; or
3. Behavior or condition likely to endanger self or others; or
4. Abandoned, not being provided support, education, medical care, attention; or
5. Run away; or
6. Repeated absence from school without good cause; or
7. Violation of law enacted by the tribe, governing actions of such children.

If the juvenile is a "child" under tribal or federal law, and if his/her conduct seems to fall in any of these broad kinds of charges, then the juvenile court can take jurisdiction

and hear the case. Any of these charges, if found by the court to be true, would mean that child is “delinquent,” rather than “guilty” of “criminal” conduct. The court will go on to decide how to help the child not to get into trouble again, or how to help the child’s family do a better job of raising him.

The juvenile court may have a juvenile court judge assigned to hear only juvenile and family matters, but this is not necessary. If the court does not have a specific person assigned as juvenile court judge, then the trial judge will likely sit as the juvenile court judge. The court should have separate dockets set especially for juvenile matters. Many tribal codes provide for closed hearings for juveniles. Therefore, the court should make provisions for handling juvenile matters one at a time.

Although, tribal juvenile courts derive jurisdiction under a tribal grant of authority, there are rights which children have guaranteed to them, to the same degree or, sometimes, to a lesser degree than to adults. The United States Supreme Court has made decisions that set some constitutional rules for procedures in juvenile courts. A tribal juvenile judge must follow the rules set forth in the ICRA which are almost as strict. If there is no special tribal law for juveniles, then the juvenile must still get these rights, which will be set out in this section.

Each tribe can decide at what age a “child” becomes an “adult”, so long as the classification is reasonable and is set forth in a special tribal law on juveniles. The age is usually 18 years. A person over that age cannot come before a juvenile judge except as may be provided in the juvenile code. A person under the age of 18 usually cannot be brought before an adult court, unless authorized by the tribal code for specific circumstances. If there is no special tribal law, then federal regulations set the age at 18.

At common law, a person under 7 years of age can not be guilty of anything. A person 7 to 14 could be guilty only if the judge decided that the particular child had the experience and understanding to know his conduct was wrong, and be able to benefit from being punished for it. When a child is charged with a very serious unlawful act, the juvenile court must use this test as a basis of consideration. In extreme cases, the juvenile court may “transfer” the child’s case to the adult court. The judge will often do this when he believes that the child, although under 18 years of age, is mature and is unable to be helped by the special rules of the juvenile court.

#### **9.4 Juvenile Court Procedure**

To begin a “delinquency” action in tribal court, the prosecutor should file a delinquency petition. Generally the petition should contain the following:

1. Name of child and date of birth.
2. Name of parent(s)/guardian(s).
3. Address of child and parent(s)/guardian(s).
4. Statement that the child is or appears to be within the jurisdiction of the Court.
5. Factual statement alleging with specificity that the child has violated a title of the tribal code or may be subject to a delinquency action under the juvenile code.
6. Signature of person filing the petition certifying that allegations are true.



The Petition should be filed with the court along with a request for a hearing. The petition and summons should be personally served upon the child and parent(s) or guardian(s) of the child.

The court should then set an adjudicatory hearing. This is fact-finding hearing. The procedure is similar to what is required for adult “criminal” matters. The adjudicatory hearing is used to decide the following questions:

1. Does this court have jurisdiction?
2. Are there legal grounds for not releasing a child in official custody?
3. Should this child’s case be transferred to an adult court?
4. Did this child commit these acts as charged against him in the petition?
5. Has this child violated a condition of his probation?
6. Whether the interests of the child or public require further action?

Generally, juvenile proceedings are closed to the public, unless the child or their parent(s)/guardian(s) requests otherwise, or the judge determines a person has a proper interest in the case to be present.

The adjudicatory hearing is held to determine whether the alleged facts meet the requirements of a delinquency. If the court finds that the charges are true or that certain action may be taken, then the court moves to the next step, which is to hold a dispositional hearing. The judge determines what caused the child to misbehave and then decides how the court can best help the child. This might be compared to the pre-sentence investigation and sentencing phases of adult court.

Formal adjudicatory procedure must meet almost all of the same standards as adult criminal procedure. Informal dispositional procedure may depart from these higher standards so long as it guarantees each child fair treatment and at the same time honors the best interests of the child and of the whole community.

During both the adjudication and the disposition, the judge will face the problem of how to treat the child and his parents or guardians as a family and still as a separate persons. The child is the center of the court’s attention, the petition is in the child’s name, and the court may apply the law against the wishes of the parents.

## **9.5 Adjudication**

Formal adjudicatory procedures must be used whenever there is a judicial hearing which could result in a final judgment which might curtail the child’s liberty or greatly affect any of his other protected rights or interests.

It is sometimes said that a delinquency petition is “in the interest of” a child, but that an adult charge sets the government against the accused defendant. This is because the juvenile court’s job is to help a child straighten out his life. However, the Supreme Court recognizes that a juvenile proceeding presents the child and the court with the same kind of questions as a regular criminal trial until formal findings are made and the child is judged to be “delinquent,” or until the petition is dismissed.

## 9.6 Due Process in Juvenile Cases

Formal procedures are governed by the “due process” clause of the Fourteenth Amendment. Section 1302 (8) of the Indian Bill of Rights also has this procedural requirement or “due process” clause. The Supreme Court has held onto the belief that there is a special relationship between the child and the community and that the juvenile courts should not be held to all the same standards as adult courts. The Supreme Court recognizes that the juvenile court is a special kind of court with a special kind of legal task to perform. The Supreme Court has approved seven requirements that formal procedures in juvenile court must meet and which should serve as guidelines for tribal courts.

1. The “essentials” of “due process” must be guaranteed equally to adults and to children. “Fundamental fairness” is the constitutional standard for juvenile courts. To protect the innocent, there must be caution in how the court finds facts. Fundamental fairness requires enough legal protections so that a child innocent of charges in the petition is not judged to be “delinquent” under the law. In this way the child feels that he has been treated fairly by the law and owes it great respect.
2. Notice must be given to the child and to his parents in advance of scheduled court proceedings. Notice must give the child reasonable opportunity to prepare for the court proceeding. It must state the alleged misconduct with “particularity,” that is it must specify the charges or specific issues to be considered at the hearing. The charges cannot be so broad or vague that a person cannot prepare to defend himself.
3. The child has a right to a legal advocate at his own expense at every “critical stage” of the proceedings. “Critical stage” would be whenever the child’s liberty might come into issue. The child and his parents must be notified of the child’s right to be represented at such a proceeding by a lawyer hired by him or his parents. If the child or his parents are unable to afford a legal representation, the judge may appoint legal representation if the child requests and the tribal code so provides. The legal advocate should be allowed at the child’s first appearance before the court, when the child is charged and an admission or confession might be made, and at all other critical stages from arrest to adjudication and disposition.

The judge must examine any waiver the child might make of the right to counsel. The judge must be certain that the child does not give up any rights that are not fully understand, and that the child does not give up any rights because of ignorance, fear, or pressure from family members. Neither a probation officer nor a member of the child’s family nor the judge should represent the child unless requested by the child. Children have great need for legal representation during adjudication because a child is less likely than an adult to know how to help himself/herself, to

understand what is happening, and to appreciate what might happen as a result of the judicial proceeding.

4. The child has the right to introduce evidence and to make arguments to the court. The juvenile court judge usually has discretion to amend the charges if the evidence appears to support a finding of delinquency, but not a finding under the specific original charges. If this occurs, the child will have a right to reasonable continuances to have time to prepare a defense in relation to the amended charges.
5. The child has a right to meet, test, and cross-examine the evidence and the witnesses. Evidence and testimony must come into court through sworn witnesses. Only a valid confession overcomes this requirement. A child's confession is to be examined very carefully to see if it is fully knowing and voluntary. The judge may decide to accept no admission or confession unless the evidence and witnesses in court would be able to uphold the petition without the admission or confession.
6. The child has a right against self-incrimination, which is, against having any of his/her own words used to prove him/her delinquent. Any admission or confession by a child must be examined with special care to be certain that they are "fully knowing and voluntary." The admission or confession must not be demanded by parents or other persons, or the result of ignorance of what the consequences might be, and not the result of fear or suggestion.

The judge must be satisfied by sworn testimony that the child has been warned effectively of the right to remain silent and that the child understands that anything said may be used against him/her in court. Any evidence of statements received by anyone in violation of the child's rights must be rejected by the judge.

In juvenile matters, the court comes across many problems of incrimination, because it usually happens that the child will talk honestly with persons who say they are trying to help. When a probation officer, doctor, or court worker wants to testify about what a child said, the judge will want to watch for matters that are "privileged." Because children are open and candid with adults and persons in authority, it may be necessary to allow no statements by the child which are not made in court. The court must be certain that any statement made in court is not the result of the child's having already made an earlier statement.

7. The charges against the child must be proved "beyond a reasonable doubt," the same standard of proof required to prove criminal charges against adults.

## 9.7 Jury Trial and Appeal

In 1971 the Supreme Court ruled on a juvenile's right to a jury trial, a matter which had previously been the cause of some dispute.<sup>2</sup> The Court held that if a state does not require a jury trial by statute in a juvenile case, it is not required by the Constitution. In other words, a government does not have to provide a jury trial in juvenile cases to meet due process requirements. The Supreme Court based its reasoning on the belief that a judge is just as qualified as a jury to be the fact-finder and a jury adds too much formality to a procedure, which should be more informal. If a tribe's juvenile code has a jury trial provision, the juvenile is entitled, by law, to a jury trial at the adjudication phase. Only if there is no juvenile code provision will the *McKeiver* case be applied.

Juvenile defendants have recourse both to appellate hearings and the writ of habeas corpus. Most tribal courts do not provide court reporters to write down the testimony given in the hearing. Since a juvenile has the right to appeal any decision considered unfair, the lack of a written transcript is a problem. Most appellate tribal courts handle this by hearing the case *de novo*. This means presenting the entire case again, including all the witnesses and evidence, to the appellate court.

A child in custody has the right to use the writ of habeas corpus to obtain a Federal Court review of hearings in tribal court. If the Federal Court determines that the juvenile was denied due process of law in the adjudication phase of the hearing, the juvenile's case must be readjudicated completely. If the Federal Court determines that only the juvenile's disposition was illegal, the juvenile must be given a new legal disposition. However, the juvenile would not have to be completely retried.

## 9.8 Disposition

After the adjudication phase and the child has been determined to be "delinquent" the court may use informal procedures for disposition. The disposition hearing is to determine what action should be taken which is in the child's best interests. If the court sets the disposition hearing for another date, then the parties should be advised that they should use the time between the adjudicatory hearing and dispositional hearing to consult necessary health care professionals, etc. and to bring all reports, witnesses or other material relating to the child's mental, physical, and social history to the disposition hearing. The disposition hearing may immediately follow if the Court finds there is enough information available to make a proper disposition.

It is at this stage of a juvenile case that the paternal role of the court comes into play. Here the formal rules of procedure are relaxed, although the procedure must still be fair. The judge cannot act on the basis of information which is probably unreliable or untrue, or which gives only a one-side story behind the child's conduct, or which is unfair to the child to reveal.

Juvenile court judges should seek the assistance of professional persons or persons experienced in helping children. Often the judge will order or receive a "social report" from a family service agency or juvenile probation officer. It is a good idea for the judge to ask some person trained or experienced in helping children to study the information about the child and to put together a "treatment plan" for the child. This plan

will consider the likely source of the child's problems, and based upon this, it will suggest action that the judge might take to reach certain goals for the child.

In addition to the report, the court may hear testimony from the child, the family, or a responsible adult to help the court decide what is in the best interests of the child. The judge will want an accurate and wide-ranging view of the child's past life, of his family, schooling, and so forth, in addition to learning about the facts which resulted in the child being found "delinquent."

Generally, the juvenile court will have authority to take the following action:

1. Place the child on probation or under protective supervision;
2. Place the child under the legal custody of a relative, or in a Court approved foster home;
3. Set down requirements to be observed during the probation period, including but not limited to restrictions on visitations by child's parents; restrictions on child's associates, and on activities, and may require the child to report to an appointed counselor;
4. Order restitution or community service;
5. Place the child under the supervision of a responsible person, institution or organization, or take any other action deemed necessary, as may be beneficial; and
6. Have the child tried as an adult.

The judge should rely on his/her own judgment in deciding on the final disposition. The judge is responsible to make certain that the information in the reports was prepared in a manner that was fair and reliable. The judge should also inquire to the person preparing the treatment plan whether they had sufficient time and information to fully prepare the plan and whether all treatment alternatives were considered and recommended. Finally, judges must be assured that the child has respect for and an interest in the plan so that he/she will want to cooperate with it.

### **9.8.1 Probation and Continuance Under Supervision**

The disposition ordered by the judge will very often call for a period of probation for the child. Probation is a way that the court can watch over the child and give guidance. Many times it is not in the best interests of a child to send him/her to a place where his freedom is severely restricted, at least not until after the child has had a chance or two to change his/her behavior. Often, the child needs guidance and help that can best be given while he/she is living with his/her own family or someplace in or near his/her own community.

Where a statute or tribal code allows it, juvenile courts can place a child under continuing supervision, a kind of probation, before he/she has been found to be delinquent. The court will make findings of fact, under the formal procedure of adjudication, and then hold off on actually adjudicating the child a delinquent. Instead, the court may place the child under the supervision of a probation worker if the child and

his/her parent/guardians agree. The court's order continuing the child under supervision shall be known as a consent decree, which usually remain in force for six months.

Usually, however, the court will make findings, adjudicate the child a delinquent, and then place the child on probation. Then, a probation worker, who meets regularly with the child, can help the child to live in a way that keeps him/her out of trouble and helps order his/her life. If there are no official probation workers, the judge may place the child under the supervision of some responsible person, or return the child to his/her family.

After the disposition hearing, the judge usually decides on "conditions for conduct" during probation to help the particular child. For example, these conditions might require some or all of the following:

1. That the child get remedial education;
2. That the child stay away from a particular place and/or people;
3. That he help with certain family work;
4. That he earn money to pay for damage he has done; and
5. That he obeys the laws of his community.

The child on probation must report regularly to the probation officer, or to whomever the judge has selected to supervise him/her. If the child is charged with violating the conditions of probation, this can be grounds for new charges of delinquency or revocation of probation. The court should review the probation regularly, probably every six months or so, in a hearing. The court will end the probation when the child appears to be in control of a law-abiding way of life, usually after not more than two years, or after the child reaches his eighteenth year. During the probation, at a formal review hearing, the court may want to change conditions of conduct.

The delinquency action will terminate upon the happening of one of the following:

1. Court dismissal.
2. Child remanded for trial as an adult.
3. Child's 18th birthday.

### **9.8.2 Probation Violations Under a Delinquency - Procedures**

When a child placed on probation under a delinquency judgment violates a condition of that probation the following procedures should be considered:

1. Upon motion of the prosecutor or probation officer, the delinquent child is summoned or ordered to appear before the court to answer for the alleged probation violation. The parent(s) / guardian(s) must be notified of the action and summoned to appear.

2. The Tribe has the burden of showing noncompliance. The delinquent child has the burden of showing that the noncompliance was not a willful refusal. If the court finds that the violation was willful, the court may revoke any suspended sentence and impose further conditions that are in the best interest of the child.
3. The delinquent child is entitled to legal representation.

### **9.8.3 Commitment**

If the child is not returned to his home, placed with another family or put on probation, the judge may commit him to a special place for children. The judge may be limited by what kinds of places there are for a child in the area of the court. In some areas there may be a group home for children, a supervised work program, a job program, a training program, or a special school where the child could be sent to live. In other places, or for very serious delinquent acts, the judge may commit the child to a special juvenile institution. The court will have wide power to place the child where the judge feels the child can best learn a better way of life. But this power can be used only after the child has been found to be delinquent under the procedure required for an adjudication, and his/her placement is made under conditions prescribed by the tribal code.

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<sup>1</sup> See Milne, John W. and Johnson, Ralph W., *Criminal Law for Indian Courts*, (National American Indian Court Judges Association, Inc., 1980), pgs. 108-142.

<sup>2</sup> *McKeiver et.al. v. Pennsylvania*, 403 U.S. 528 (1971).

## **CHAPTER 10**

### **TRAFFIC AND HUNTING & FISHING VIOLATIONS**

- 10.1 Introduction
- 10.2 Traffic Violations
- 10.3 Hunting and Fishing Violations
- 10.4 Sample Rules for Adjudication of Civil Infractions
- 10.5 Forms
  - 10.5.1 Judgment – Natural Resources Violation

#### **10.1 Introduction**

This chapter will discuss non-criminal law violations, which are sometimes referred to as “civil infractions” or simply “infractions.” These types of regulatory violations do not subject the offender to the rigors of a full-blown criminal prosecution, because the penalties for committing an infraction do not include the possibility of a jail sentence. As a result, the burden of proof is usually lower for the prosecution going from “beyond a reasonable doubt” to “proof by a preponderance of the evidence,” or “clear, satisfactory and convincing evidence.”

Persons committing infractions are entitled to due process and an opportunity to dispute the infraction before a neutral and detached judge. Typical infractions include speeding tickets and hunting and fishing violations. The typical penalty for having been found to be in violation of an infraction is a fine. However, some codes may provide for suspension of certain privileges, such as suspension of hunting or fishing privileges for serious violations, or for repeated violations. Because a tribal member’s livelihood may be based on his ability to hunt or fish, infraction hearings have the potential to become highly contested.

#### **10.2 Traffic Violations**

Although there are traffic violations that are criminal, such as a DUI, many traffic violations are minor civil infractions, such as driving with a headlight out. Judges should consider striking a balance when presiding over infraction cases. The balance is between being benevolent and being tough on crime. Anyone who drives has the potential to make a mistake and run afoul of the traffic laws. Often community members may have their first and only experience with the justice system by way of a traffic ticket. Judges should keep in mind that the majority of people contesting traffic tickets are NOT “criminals”, but people who made a mistake, maybe even an innocent mistake. Judges should also take into consideration that it is sometimes common to see repeat offenders on the traffic docket, or persons who have acted recklessly and endangered the lives of others.

Consider having a separate docket for traffic infractions. This will allow the judge to explain the civil infraction procedures one time after the calendar is called. Often times the person cited simply wants to explain to the judge what happened. Usually they will admit to the infraction, and attempt to explain the mitigating



circumstances. For example, "Yes, I was speeding, but I was late for work." Judges usually have broad discretion in dealing with traffic offenses, from reducing the fine to dismissing the traffic ticket depending on the circumstances.

### 10.3 Hunting and Fishing Violations

The legal issues of Indian hunting and fishing are exceptionally complicated. Not only is the right to hunt and fish a form of tribal property, but it also involves an activity that calls for complex regulations and policing. This is especially so when the tribal members may engage in commercial fishing, pursuant to a treaty. All of the problems of conflicting jurisdiction that exist in the general criminal law field also occur in hunting and fishing violations. Jurisdiction may depend on whether an Indian, or non-Indian, does the hunting and fishing, whether it takes place in or out of Indian country and whether a treaty modifies the usual jurisdictional rules.<sup>1</sup> This section concerns violations of tribal hunting and fishing regulations that come before tribal courts.

As a matter of inherent sovereignty, tribes have exclusive civil jurisdiction over their members in Indian country, subject to the plenary power of Congress. This includes adoption and enforcement of tribal hunting and fishing regulations. Indian tribes have the authority to regulate Indian hunting and fishing on their reservations.<sup>2</sup> Tribal power to regulate extends to hunting and fishing by Indians on non-Indian fee lands within the reservation.<sup>3</sup> The tribe also has the power to regulate Indian hunting or fishing conducted off-reservation pursuant to treaty.<sup>4</sup>

In *Montana v. United States*, the Supreme Court "considered the sources and scope of the power of an Indian tribe to regulate hunting and fishing by non-Indians on lands within its reservation owned in fee simple by non-Indians."<sup>5</sup> *Montana* involved an attempt by the Crow Tribe to regulate all hunting and fishing on non-Indian owned land within the borders of the reservation. The Supreme Court limited the jurisdiction of tribes to regulate non-Indian hunting and fishing within the boundaries of reservations when the Court held "that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe."<sup>6</sup>

The Court held that where there was no showing that tribal interests were affected, a tribe lacked inherent power to regulate hunting and fishing by non-Indians on non-Indian-owned land within its reservation.<sup>7</sup> The Supreme Court further held that the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation."<sup>8</sup>

The Supreme Court in *Montana* conceded that there were limited times when a tribal court might have jurisdiction over a non-member, but in order for such jurisdiction to be triggered, the controversy must fall into at least one of two categories. First, tribes are allowed to regulate "the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements."<sup>9</sup> Second, tribes are also allowed to exercise civil jurisdiction over non-members on Indian property inside the reservation borders when their conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."<sup>10</sup> In applying this test to the *Montana* facts, the Court determined that non-Indian hunting and fishing on non-Indian fee land bore no clear relation to tribal

self-government or internal relations and, consequently, tribes were not authorized to regulate hunting and fishing on land owned by non-Indians but on the reservation.<sup>11</sup>

It is suggested that tribal courts use procedures similar to the procedures provided below for non-criminal regulatory hunting and fishing violations. Some tribal codes provide for mandatory suspension of tribal hunting and fishing privileges for serious or multiple violations. Therefore, judges should give notice to persons contesting hunting and fishing violations that they may want to seek legal representation. Finally, when there are mandatory minimum license suspension requirements, the court should explain, beforehand, that if a person admits to having committed a hunting or fishing violation requiring a mandatory minimum sentence, that the court must impose the mandatory minimum sentence no matter what mitigating circumstances may exist.

#### **10.4 Sample Rules for Adjudication of Civil Infractions**

The following are sample rules that may be adopted for use in tribal courts for the adjudication of all civil infractions. Please note that if you choose to adopt these procedures, you should review the tribal code to make sure these procedures are consistent and not in conflict with any existing tribal code provisions.

### CHAPTER 1. GENERAL PROVISIONS

#### 1.1 - SCOPE AND PURPOSE OF RULES

(a) Scope of Rules. These rules govern the procedure for all cases classified as civil “infractions.” Infractions are non-criminal violations of law defined by the \_\_\_\_\_ Judicial Code.

(b) Purpose. These rules shall be construed to secure the just, speedy, and inexpensive determination of every civil infraction case.

#### 1.2 - DEFINITIONS - For purposes of these rules:

(a) Notice of Infraction. “Notice of Infraction” means a document initiating an infraction case when issued and filed pursuant to the \_\_\_\_\_ Judicial Code and these rules.

(b) Defendant. “Defendant” means a person named in a notice of infraction and who is accused of violating a non-criminal law defined by the \_\_\_\_\_ Judicial Code.

(c) Judgment. “Judgment” means any final decision in an infraction case, including, but not limited to, a finding entered after a hearing governed by these rules or after payment of a monetary penalty in lieu of a hearing.

(d) Citing Officer. “Citing Officer” means a law enforcement officer or other official authorized by law to issue a notice of infraction.

(e) Plaintiff. “Plaintiff” means the \_\_\_\_\_ Tribe issuing the notice of infraction.

### CHAPTER 2. PRELIMINARY PROCEEDINGS

#### 2.1 NOTICE OF INFRACTION

(a) Civil Infraction Form. Civil infraction cases shall be filed on a form entitled “Notice of Infraction.”

(b) Contents. The notice of infraction shall contain the following information on the copy given to the defendant:

- (1) The name, address, and phone number of the \_\_\_\_\_ Tribal Court;
- (2) The name, address, date of birth, sex, physical characteristics, and, for a notice of traffic infraction, the operator's driver's license number;
- (3) For a notice of traffic infraction, the vehicle make, year, model, style, license plate number, and state in which issued;
- (4) The infraction which the defendant is alleged to have committed and the accompanying statutory citation or ordinance number, the date, time, and place the infraction occurred, the date the notice of infraction was issued, and the name and, if applicable, the number of the citing officer;
- (5) A statement that the defendant must respond to the notice of infraction within fourteen (14) days of issuance;
- (6) A space for the defendant to sign a promise to respond to the notice of infraction within the time required in one of the ways provided in this chapter;
- (7) A space for entry of the monetary penalty which respondent may pay in lieu of appearing in court;
- (8) A statement that a mailed response must be postmarked on the day the response is due;
- (9) A statement that the notice represents a determination that the person named in the notice has committed a civil infraction and the determination shall be final unless contested as provided in this chapter;
- (10) A statement that a civil infraction is a non-criminal offense for which imprisonment may not be imposed as a sanction;
- (11) A statement of the options provided in this chapter for responding to the notice and the procedures necessary to exercise these options;
- (12) A statement that at any hearing to the contest the determination the Tribe has the burden of proving, by a preponderance of the evidence, that the infraction was committed; and that the person may subpoena witnesses including the officer who issued the notice of infraction;<sup>12</sup>
- (13) A statement that at any hearing requested for the purpose of explaining mitigating circumstances surrounding the commission of the infraction the person will be deemed to have committed the infraction and may not subpoena witnesses.

## 2.2. INITIATION OF INFRACTION CASES.

- (a) Generally. An infraction case is initiated by the issuance, service, and filing of a notice of infraction in accordance with this rule.<sup>13</sup>
- (b) Who May Issue. A notice of infraction may be issued, upon certification that the issuer has probable cause to believe, and does believe, that a person has committed an infraction contrary to law:
  - (1) By an enforcement officer. The infraction need not have been committed in the officer's presence, except as provided by statute;
  - (2) By the prosecuting authority.

- (c) Service of Notice. A notice of infraction may be served either by:
- (1) The citing officer serving the notice of infraction on the person named in the notice of infraction at the time of issuance;
  - (2) The citing officer or the prosecuting attorney filing the notice of infraction with the court, in which case the court shall have the notice served either personally, or by mail, on the person named in the notice of infraction at his or her address. If a notice of infraction served by mail is returned to the court as undeliverable, the court shall issue a summons.
- (d) Filing the Notice. When a notice of infraction has been issued, the notice shall be filed with the Tribal Court. The notice must be filed within 48 hours after issuance of the notice, excluding Saturdays, Sundays and holidays. A notice of infraction not filed within the time limits of this section may be dismissed without prejudice.<sup>14</sup>

### 2.3 RESPONSE TO NOTICE

- (a) Generally. A person who has been served with a notice of infraction must respond to the notice within 14 days of the date the notice is personally served or; if the notice is served by mail, within 10 days of the date the notice is mailed.
- (b) Alternatives. A person may respond to a notice of infraction by:
- (1) Paying the amount of the monetary penalty, in which case the court shall enter a judgment that the defendant has committed the infraction; or
  - (2) Contesting the determination that an infraction occurred by requesting a hearing; or
  - (3) Requesting a hearing to explain mitigating circumstances surrounding the commission of the infraction.
- (c) Method of Response. A person may respond to a notice of infraction either personally or by mail. If the response is mailed, it must be mailed postmarked on or before the day the response is due.<sup>15</sup>

### 2.4 FAILURE TO RESPOND

If the defendant fails to respond to a notice of infraction, the court shall enter an order finding that the defendant has committed the infraction, and shall assess any monetary penalties provided for by law.<sup>16</sup>

### 2.5 SCHEDULING OF HEARING

- (a) Contested Hearings.
- (1) Upon receipt of a response submitted pursuant to rule 2.3(b)(2) above, the court shall schedule a hearing to determine whether the defendant committed the infraction. The hearing shall be scheduled for not less than 14 days nor more than 90 days from the date of written notice of the hearing date, unless otherwise agreed by the defendant in writing.<sup>17</sup>
  - (2) The court shall send the defendant written notice of the time, place, and date of the hearing within 14 days of the receipt of the request for a hearing. The

notice of the hearing shall also include statements advising the defendant of the defendant's rights at the hearing, how the defendant may request that witnesses be subpoenaed, and that failure to appear will result in the court entering a judgment against the defendant finding that the defendant has committed the infraction by default and assessing any monetary penalties provided by law.

(3) The court may schedule the hearing on a contested infraction for the same time as the hearing on another infraction alleged to have been committed by the defendant. The court may schedule the hearing on a contested infraction for the same time as the trial on a misdemeanor arising out of the same occurrence as the infraction.

(b) Mitigation Hearings.

(1) Upon receipt of a response submitted pursuant to rule 2.3(b)(3) above, the court shall schedule a hearing to determine whether there were mitigating circumstances surrounding the commission of the infraction. The hearing shall be scheduled for not less than 14 days nor more than 90 days from the date of written notice of the hearing date, unless otherwise agreed by the defendant in writing.<sup>18</sup>

(2) The court shall send the defendant written notice of the time, place, and date of the hearing within 14 days of the request for a hearing. The notice shall also include statements advising the defendant of the defendant's rights at the hearing and stating that failure to appear will result in the court entering a judgment against the defendant finding that the defendant committed the infraction and assessing against the defendant any monetary penalties provided by law.

(3) The court may schedule the mitigation hearing for the same time as the mitigation hearing on another infraction alleged to have been committed by the defendant. The court may schedule the hearing on a mitigation infraction for the same time as the trial on a misdemeanor arising out of the same occurrence as the infraction.

## Chapter 3. PROCEDURE AT HEARING

### 3.1 CONTESTED HEARING - PRELIMINARY PROCEEDINGS

(a) Subpoena. The defendant and the plaintiff may subpoena witnesses necessary for the presentation of their respective cases. The subpoena may be issued by a judge, court clerk or by a party's lawyer. If a party's lawyer issues a subpoena, a copy shall be filed with the court. If the subpoena is for a witness outside the Tribe's jurisdiction, a judge must approve the subpoena.

(b) Witness List. The prosecutor, upon request of the defendant 14 days prior to a contested hearing, shall at least 7 days prior to the hearing provide the defendant or defendant's spokesperson with a list of witnesses the prosecutor intends to call at the hearing.

(c) Amendment of Notice. The court may permit a notice of infraction to be amended at any time before judgment if no additional or different infraction is charged, and if substantial rights of the defendant are not thereby prejudiced. A continuance shall be granted if the defendant satisfies the court that the additional time is needed to defend against the amended notice of infraction.

(d) Sufficiency. No notice of infraction shall be deemed insufficient for failure to contain a definite statement of the essential facts constituting the specific infraction which the defendant is alleged to have committed, nor by reason of defects or imperfections which do not tend to prejudice substantial rights of the defendant.

### 3.2 FAILURE TO APPEAR

(a) Entry of Judgment. If the defendant fails to appear at a requested hearing the court shall enter judgment against the defendant finding that the defendant has committed the infraction and assessing against the defendant any monetary penalties provided by law, including witness fees if the defendant caused a witness to appear by subpoena.

(b) Setting Aside Judgment for Failure to Appear. For good cause shown and upon terms the court deems just, the court may set aside a judgment entered upon a failure to appear.

### 3.3 PROCEDURE AT CONTESTED HEARING

(a) Generally. The court shall conduct the hearing for contesting the notice of infraction on the record in accordance with applicable law.

(b) No right to Jury Trial. A hearing held for the purpose of contesting the determination that an infraction has been committed shall be without jury.

(c) Representation by Spokesperson. At a contested hearing, the plaintiff shall be represented by the prosecuting authority. The defendant may be represented by a spokesperson at the defendant's own expense.

(d) Rules of Evidence. The \_\_\_\_\_ Rules of Evidence shall apply to contested hearings.

(e) Factual Determination. The court shall determine whether the plaintiff has proved by a preponderance of the evidence that the defendant committed the infraction. If the court finds the infraction was committed, it shall enter an appropriate order on its records. If the court finds the infraction was not committed, it shall enter an order dismissing the case.

(f) Admissibility of Notice of Infraction. The court may consider the notice of infraction and any other written report made under oath submitted by the officer who issued the notice or whose written statement was the basis for the issuance of the notice in lieu of the officer's personal appearance at the hearing. The person named in the notice may subpoena witnesses, including the officer, and has the right to present evidence and examine witnesses present in court.

(g) Disposition. If the court determines that the infraction has been committed, it may assess a monetary penalty against the defendant and suspend any licenses or privileges provided by the Tribe in accordance with applicable law. The monetary penalty assessed may not exceed the monetary penalty provided by law. The court may waive or suspend a portion of the monetary penalty, or provide for time payments, or in lieu of monetary payment provide for the performance of community service as provided by law. The court has continuing jurisdiction and authority to supervise disposition for not more than one (1) year.

(h) Costs and Attorney's Fees. Each party to a civil infraction case is responsible for costs incurred by that party. No costs or attorney fees may be awarded to either party in a civil infraction case. However, witness fees may be assessed against a defendant who fails to appear at a hearing after having caused a law enforcement officer to be subpoenaed for the hearing.

### 3.4 HEARING ON MITIGATING CIRCUMSTANCES

(a) Generally. The court shall conduct the hearing concerning mitigating circumstances in accordance with applicable law.

(b) Procedure at Hearing. The court shall hold an informal hearing that shall not be governed by the rules of evidence. Subject to the other provisions of these rules, all relevant evidence is admissible which in the opinion of the judge, is the best evidence reasonably obtainable, have due regard for its necessity, availability and trustworthiness. The defendant may present witnesses, but they may not be compelled to attend.

(c) Disposition. The court shall determine whether the defendant's explanation of the events justifies reduction of the monetary penalty. The court shall enter an order finding the defendant committed the infraction and may assess a monetary penalty and suspend any licenses or privileges provided by the Tribe in accordance with applicable law. The court may not impose a penalty in excess of the monetary penalty provided for by law. The court may waive or suspend a portion of the monetary penalty, or provide for time payments, or in lieu of monetary payment provide for the performance of community service as provided by law. The court shall have continuing jurisdiction and authority to supervise disposition for not more than one (1) year from the time of the hearing.

## Chapter 4. APPEALS

4.1 Generally. A defendant may appeal a judgment entered after a contested hearing finding that the defendant has committed the infraction. A defendant may not appeal from a mitigation hearing where the defendant has admitted to having committed the infraction.

4.2 Procedure for Appeals. The procedures for appeal shall be the same for appeals in civil cases provided for in this code.

**10.5 Forms**

**10.5.1 Judgment – Natural Resources Violation**

[Caption]

Case No. \_\_\_\_\_

**JUDGMENT - NATURAL  
RESOURCES VIOLATION**

**FINDINGS**

The above-named defendant was found to have committed the following offense(s):

\_\_\_\_\_.

The above-named defendant received proper notice and a hearing was scheduled to determine this matter. Defendant was found to have committed the above described offenses by way of :

- \_\_\_\_\_ Admitting the infraction occurred and explaining the circumstances.
- \_\_\_\_\_ Contested Hearing based on the police reports and defendant’s testimony.
- \_\_\_\_\_ Trial.
- \_\_\_\_\_ Default. The defendant failed to appear, and did not contact the court for a continuance.

**IT IS HEREBY ORDERED THAT DEFENDANT SHALL:**

\_\_\_\_\_ Pay a fine in the amount of \$ \_\_\_\_\_ with \$ \_\_\_\_\_ suspended.

\_\_\_\_\_ The defendant’s hunting and fishing privileges are **suspended for \_\_\_\_\_ days**, in consecutive days beginning with the first legal opening in the management period for the harvest of the species that was associated with the original violation, which in this case is : \_\_\_\_\_.

\_\_\_\_\_ **All** hunting and fishing privileges are **suspended for \_\_\_\_\_ days**.

\_\_\_\_\_ Defendant shall immediately surrender Commercial Fishing Identification Cards or Hunting permits and tags to the Court, until such time as the penalty is completely satisfied. Failure to surrender I.D. cards, permits or tags is a criminal offense.

**CLERK OF COURT:** You shall give notice of this judgment to the Tribal Accounting Department, Department of Natural Resources and Natural Resources Enforcement. You shall also give notice to these departments when I.D. Cards, permits or tags are returned to the defendant and judgment is satisfied.

**DONE IN OPEN COURT** this \_\_\_\_\_ day of \_\_\_\_\_, 200\_\_\_\_.

\_\_\_\_\_  
JUDGE



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<sup>1</sup> Canby, William C., Jr., *American Indian Law: In A Nut Shell*, 3<sup>rd</sup> Ed., (West Group, St. Paul, Minn. 1998) pg. 419.

<sup>2</sup> *United States v. Jackson*, 600 F.2d 1283 (9<sup>th</sup> Cir. 1979).

<sup>3</sup> *Lower Brule Sioux Tribe v. South Dakota*, 711 F.2d 809, 827 (8<sup>th</sup> Cir. 1983).

<sup>4</sup> *Settler v. Lameer*, 507 F.2d 231 (9<sup>th</sup> Cir. 1974).

<sup>5</sup> *Montana vs. U.S.*, 450 U.S. 544 (1981).

<sup>6</sup> *Id.* at 565.

<sup>7</sup> *Id.* at 566.

<sup>8</sup> *Id.* at 564.

<sup>9</sup> *Id.* at 565.

<sup>10</sup> *Id.* at 566.

<sup>11</sup> *Id.*

<sup>12</sup> Each tribe may have a different standard of proof. Check your own tribal code.

<sup>13</sup> The term “notice of infraction” refers to the same document as a “ticket” or “citation.”

<sup>14</sup> These are general procedures, refer to your own tribal code for notice procedures and time limitations.

<sup>15</sup> Note that some courts require that the response be received by the court date.

<sup>16</sup> Failure to appear after proper notice is considered a default, because this is a civil infraction with no jail time provided as a penalty.

<sup>17</sup> Check the time limits set by your tribal code.

<sup>18</sup> Check the time limits set by your tribal code.

## CHAPTER 11

### **HANDLING HIGH PROFIL CASES**

- 11.1 Introduction
- 11.2 Media/Pretrial Publicity
- 11.3 Preparing for the High Profile Case
- 11.4 Television in the Courtroom
- 11.5 Cameras In the Courtroom
- 11.7 Gag Orders and Placing Documents Under Seal
  - 11.6.1 Gag Order
  - 11.6.2 Protective Orders
  - 11.6.4 Sealing Court Records
- 11.7 Closing the Courtroom

#### **11.1 Introduction**

As a tribal judge you may have had the occasion to drive up to the court building and see a large number of cars in the court parking lot. This phenomenon is usually accompanied by a large number of people standing outside the court building because the courtroom is packed. This is a good indication that you will soon be taking part in a high profile case. It has been my experience that in addition to the litigants being judged in a high profile case, the judge and the tribal court will also be judged by the tribal community. Be on notice that every word and action by the judge and court staff will be closely scrutinized from beginning to end.

If you serve as a tribal judge for any length of time, you will have the opportunity to preside over what may be characterized as a high profile case. The case may be high profile because of the parties involved, for example a tribal council member arrested for domestic violence. A particularly heinous crime or crime spree may gain public attention. There may also be a particular victim that may cause the tribal community to show interest in the case.

The court should be prepared for handling high profile cases. With the proper planning and a well-trained staff, the court should view the occasional high profile case as an opportunity to show the community how well the court system operates.

#### **11.2 Media/Pretrial Publicity**

Allowing the media access to the courtroom is one of the chief standards of an open and fair trial. For that reason, reporters are not outsiders who have no business in the court, but are, in effect, the eyes and ears of the general public. As with other spectators, the press must follow the rules of court.

Most courts prohibit the taking of photographs or the use of sound recording equipment in the courtroom while the trial is in progress. While this would allow many members of the general public to witness what goes on, it would also distract the participants. It must always be remembered that the courtroom is a place for the

dispensation of a most precious commodity - - justice. It is not a theater or a sound stage for exploitation by the press or other reporters.

A different but related problem might arise as to what is reported outside the courtroom. Sometimes in this country, different constitutional rights come into conflict. Such a conflict occurs with the public's constitutional right to know, as guaranteed by the First Amendment's "freedom of the press." The public has a right to know what is going on. However, a defendant is entitled to have his case tried in the courtroom, not in the newspaper. The Indian Bill of Rights guarantees defendants in tribal courts these same rights.<sup>1</sup>

Thus the judge has the responsibility to protect the defendant from pre-trial publicity which might make it impossible for him to obtain a fair trial. The judge is thus caught in a dilemma of making the trial public while not allowing the information to so prejudice the public that the defendant is denied his right to a fair trial. The judge may compromise by distinguishing between public and private records. The public record is that information which is contained in the official court documents: the charge sheet, arrest warrant, etc. This information is open to the public and can be published in the newspapers. However, information disclosed in the hearings, evidence which is suppressed, discussions in chambers between the judge, prosecution and the defendant, are matters of a private nature. This information is not part of the official record and the judge may deny public access to it and may enjoin the media from using it.

To protect the defendant from prejudicial publicity, the judge may also maintain tight control over officials of the court - - for example, the clerk or bailiff - - who may have access to private information. No matter how carefully the judge protects the defendant's rights, all his efforts may be undone by a clerk who talks too much.

When matters are closed to public view, as in the case of certain sex crimes or juvenile matters, the judge has the additional duty to see that the court records are "sealed" and are not made public. The lives of innocent people may be forever harmed through the action of a careless court official or an inattentive judge.<sup>2</sup>

### **11.3 Preparing for the High Profile Case**

If you anticipate a high profile case, be sure to instruct court staff of the importance of confidentiality. Also, be careful to avoid ex-parte communications, especially in cases involving tribal officials. Familiarize yourself with the tribal code rules concerning ex parte communications. It is not uncommon for tribal officials to want to talk to a judge privately about their case. The tribal official may not understand the constraints that judges are under with regard to talking to parties involved in a case before the court. Also, instruct court staff, who might take a phone call from a party, that the judge cannot speak with that party due to the case pending before the court. Be aware that even casual contact in a context outside the role of judge and litigant, could open the court and judge up to attack as having been an ex parte contact.

Be sure to instruct the court staff to strictly follow all court procedures. Any procedures not followed that may be in the slightest favor of one litigant over another in a high profile case can and will be construed by someone as unfair bias on the part of the court.

Prepare for a high profile case before there is a high profile case. Prepare a brief biography of the judge(s), which can be handed out by the clerks. You may also consider preparing an information sheet about the tribal court system that answers some basic questions about how the court operates, the jurisdiction of the court, how judges get appointed or elected to the bench and other information that will be asked by the press. Instruct court staff in advance of your expectations of them if the court should have to handle a high profile case. Also, it does not hurt to tidy up the courthouse and courtroom.

#### **11.4 Television in the Courtroom**

The judge has the ultimate authority to make the decision to allow television cameras into the courtroom. The right of the press to access court proceedings does not include a right to use cameras in the courtroom. If television coverage or reporting is authorized, be sure to establish guidelines in consultation with the prosecutor and defendant. These guidelines should closely control the placement of equipment and be designed to avoid physical distractions.

The United States Supreme Court has enumerated several reasons why televising a trial could cause unfairness:

1. It could impact the jurors by distracting them and making the case appear a cause celebre;
2. It could impact witnesses and decrease the quality of testimony received;
3. It could impact the judge by adding to his responsibilities and by subjecting him to greater political pressure; and
4. It could impact the defendant because it would be distracting to him and might reduce the effectiveness of his attorney's representation.<sup>3</sup>

The Supreme Court has also addressed the issue of electronic media and still photography of public criminal proceedings over the objection of the defendant.<sup>4</sup> The Supreme Court found that there was no empirical data sufficient to establish that the mere presence of the broadcast media inherently has an adverse impact on that process. The *Chandler* trial court had allowed electronic media only after establishing carefully crafted guidelines. The guidelines included restrictions on the type and manner of equipment used and was designed to minimize distractions. There was also a prohibition against filming the jury members.

#### **11.5 Cameras in the Courtroom**

The judge has authority to regulate the use of cameras and electronic recorders in the courtroom. The adult defendant has no absolute right to prevent video or photographic coverage of his or her trial, unless he can show that such coverage would prejudice him. Many tribal codes provide that juvenile proceedings shall be closed to the public, this would include closure of juvenile proceedings to all forms of media.

## **11.6 Gag Orders and Placing Documents Under Seal**

### **11.6.1 Gag Order**

In some circumstances, a court may issue a "gag order," which restrains the speech of participants in the proceeding, including parties and counsel. The gag order must be justified by a compelling interest to protect against a serious threat of harm and the gag order must be limited and be no greater than is necessary to protect the compelling interest.

Before issuing a gag order, the court must make a detailed finding of fact that identifies the compelling interest that will be served by the gag order and demonstrate that there are no other reasonable, less restrictive alternatives to the gag order.

### **11.6.2 Protective Orders**

Nonpublic records disclosed to a defendant pursuant to pre-trial discovery might be subject to a protective order prohibiting their public disclosure. The party who seeks a protective order has the burden of making a sufficient showing that disclosing particular items of discovery would injure some person or party. Protective orders are designed for the unusual case in which the granting of discovery will work to the injury of the person whose material is to be discovered or to the injury of some third person.

### **11.6.3 Sealing Court Records**

Sealing records means the act of keeping some or all of the papers, documents or exhibits from a case separate and unavailable for public inspection without a court order. Docketed materials may be sealed when justice so requires and upon a showing of good cause. Before court records are sealed there should be a request in writing, supported by affidavit, and describing the materials sought to be sealed with particularity and the duration of time said records should be sealed. The order sealing court records must be made only upon written findings of good cause, and must specify the material to be sealed and the duration of time said records must be sealed.

In some instances, tribal code provisions may require that juvenile court records be sealed. Consider establishing written procedures that identify sealed records and that protect against accident disclosure of such records.

## **11.7 Closing the Courtroom**

The defendant has a right to a public trial.<sup>5</sup> Therefore, the trial cannot be closed over his or her objection. However, even where the prosecution and the defendant agree to closure, the press and the public have a historic and, therefore, presumptive rights of access that is enforceable under the Indian Civil Rights Act. Assuming that the provisions in the ICRA would be interpreted the same as such provisions in the First Amendment.<sup>6</sup>

Some tribal codes require that trials of sex-related crimes with minor victims be closed except to persons who have a direct interest in the case. When the judge has discretion he should determine on a case-by-case basis whether closure is necessary to protect the welfare of a minor victim. In determining whether closure is necessary the judge should consider the age, maturity and wishes of the complainant, the nature of the alleged crime and the interests of the complainant's parents and relatives. The judge must find that an "overriding interest" is "likely to be prejudiced" by an open trial, and that closure is narrowly tailored to protect that interest.

Some guidelines that a tribal judge may consider before closing a trial include:

1. The party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced;
2. The closure must be no broader than necessary to protect that interest;
3. The judge must consider reasonable alternatives to closing the proceeding; and
4. The judge must make findings adequate to support the closure. The findings also must be particularized and supported by the record.

Any violation of the defendant's right to a public trial requires automatic reversal of the conviction without any showing of prejudice. However, the court has the authority to exclude spectators whose presence intimidates witnesses.

**\*\*Practice Pointer\*\***

Judges are prohibited from public comment about a pending or impending proceeding in any court.<sup>7</sup> Court staff should not refer any media person to the judge for any purpose, including for giving background information. If a judge has occasion to have a conversation with the media unrelated to a pending or impending case, be cautioned that nothing is "off the record." Expect that anything you say to the media will be published. When talking with reporters, speak in simple and concise statements, then prepare to be misquoted.

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<sup>1</sup> 25 U.S.C. § 1302 (6).

<sup>2</sup> Milne and Johnson, *Criminal Procedure for Tribal Court*, (1980) pgs. 66-68.

<sup>3</sup> *Estes v. Texas*, 85 S.Ct. 1628, (1965).

<sup>4</sup> *Chandler v. Florida*, 101 S.Ct. 802, (1981).

<sup>5</sup> Indian Civil Rights Act, 25 U.S.C.A. §1302 (6).

<sup>6</sup> *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575-77, (1980).

<sup>7</sup> Canon 3 (A)(9) – Model Code of Judicial Conduct.

## **CHAPTER 12**

### **DOMESTIC VIOLENCE ISSUES**

- 12.1 Introduction
- 12.2 Domestic Violence in Tribal Communities
  - 12.2.1 Victims in Tribal Communities
  - 12.2.2 Batterers in Tribal Communities
- 12.3 Enforcement of Protection Orders - Full Faith and Credit Laws
  - 12.3.1 Violence Against Women Act
  - 12.3.2 Tribal Domestic Violence Laws
  - 12.3.3 Tribal Court Protection Orders
- 12.4 Criminal Jurisdiction in Indian Country
  - 12.4.1 Indian Civil Rights Act of 1968
  - 12.4.2 Major Crimes Act
  - 12.4.3 Non-Native Americans
  - 12.4.4 Tribal Exclusion
- 12.5 Child Custody and Visitation Issues
- 12.6 State and Tribal Courts Working Together
- 12.7 Sample Tribal Domestic Violence Code—Child Custody Presumptions
- 12.8 Forms
  - 12.8.1 Order to Enforce Protection Order
  - 12.8.2 Certification of Protection Order Compliance with VAWA
  - 12.8.3 Order for Protection – Domestic Violence

#### **12.1 Introduction**

The purpose of this chapter is to assist judges in responding to domestic violence cases in tribal courts. This chapter provides general information, as well as laws concerning domestic violence that may be helpful when encountering domestic violence cases involving tribal members and tribal court protection orders.

#### **12.2 Domestic Violence in Tribal Communities**

##### **12.2.1 Victims in Tribal Communities**

There are commonalities that are present for all victims of domestic violence regardless of race. However, there are certain unique conditions present in Native American communities that are worth identifying. In February 1999, the U.S. Department of Justice, Bureau of Justice Statistics (BJS) completed a study of American Indians and Crime.<sup>1</sup> Data was gathered from a variety of sources, including the Bureau of Justice Statistics, the FBI, and the Bureau of Census. BJS also collected data from Native American crime victims on how they were affected by the victimization and about who victimized them. The study provides statistical information about domestic violence in Native American communities nationwide. However, due to a lack of statistical

reporting and gathering procedures for tribal justice systems, the survey has limited information on victims and batterers using tribal courts.

Domestic violence crimes account for about 9 percent of all violent victimizations experienced by Native Americans, which is about the same percentage as found among all victims of violence.<sup>2</sup> However, there are differences between Native American victims and non-Native victims. Generally, tribal communities have existed in roughly the same geographical area for centuries. The familiarity created by this long-term proximity of families has benefits for victims of domestic violence because they can receive assistance from family members. The downside is that victims may be reluctant to seek assistance from tribal victim service agencies because of a concern that their situation may become known to the community. There is also a reluctance to utilize non-Indian sources of support and help.<sup>3</sup> There is a strong cultural pressure not to betray family members who are often the perpetrators of violent crime.<sup>4</sup> To help overcome the reluctance of Native American victims to seek assistance, some reservations have implemented accessible on-reservation assistance programs that have increased the reporting and cooperation of victims of violent crime.<sup>5</sup> These programs provide victim assistance, as well as provide valuable cultural and statistical information about the Native American communities that they serve.

There is a significant difference in the racial composition of offenders to Native American victims in domestic violence incidents. The BJS survey classified domestic violence related incidents as either intimate violence or family violence.<sup>6</sup> Among victims of all races, about 11 percent of intimate victims and 5 percent of family victims reported the offender to have been of a different race. However, among American Indian victims of violence, 75 percent of the intimate victimizations and 25 percent of the family victimizations involved an offender of a different race.<sup>7</sup> The significance of the high number of non-Native offenders to Native American victims relates to tribal authority over non-Native American offenders in criminal matters. Tribes lack criminal jurisdiction to prosecute non-Natives.<sup>8</sup> Therefore, tribes must rely on non-tribal law enforcement to prosecute non-Native perpetrators of crime within Indian country.

### **12.2.2 Batterers in Tribal Communities**

For the purposes of tribal enforcement of protection orders, there are two classifications of batterers found in Native American communities: Native Americans and non-Natives. Tribal courts have criminal jurisdiction over tribal members and other Native Americans.<sup>9</sup> Therefore, tribal courts have the authority to issue and enforce civil and criminal protection orders against any Native American by means of arrest and prosecution for violation of protection orders.

Tribal enforcement of civil protection orders involving non-Native respondents can present complicated jurisdictional issues. Tribal courts do not have criminal jurisdiction over non-Natives. Therefore, non-Natives may not be prosecuted and jailed by tribal authorities.<sup>10</sup> If a tribal court were to issue a civil protection order against a non-Native, enforcement by tribal authorities for violations through arrest and prosecution probably could not be accomplished. However, tribal law enforcement does have the authority to stop and detain non-Natives for state authorities.<sup>11</sup>

Both Native American and non-Native victims perceive a high rate of alcohol and drug use by domestic violence offenders.<sup>12</sup> Alcohol plays a significant role in domestic



violence among Native Americans. An estimated three out of four Native American victims of family violence reported that they perceived the offender to have been intoxicated at the time of the offense.<sup>13</sup>

### **12.3 Enforcement of Protection Orders - Full Faith and Credit Laws**

The following scenarios illustrate some of the difficulties that victims may encounter when trying to have protection orders enforced across tribal and state jurisdictions. However, the passage of federal and state full faith and credit laws may help to alleviate some of the jurisdictional problems victims must overcome to find protection.

*A Native American woman living within the boundaries of a local Indian reservation is assaulted by her non-Native American boyfriend. When she seeks a protection order in the tribal court, she is told that she must travel to the state court to seek a protection order. Once she has obtained the state protection order, she is advised to register the protection order with the tribal police. The tribal police inform her that since the offender is a non-Native American, the tribal police can only detain him if he violates the order. She will have to call the sheriff's department to have him arrested and prosecuted if he violates the protection order.*

*A tribal court issues a protection order to a Native American victim against her Native American ex-boyfriend. She travels off the reservation to a local shopping center. Upon returning to her car she notices a note placed under her windshield wiper. When she looks around to see who might have left the note, she finds her ex-boyfriend sitting in a car watching her. She immediately calls the local police. A city police officer arrives, reviews the protection order and informs the victim that the city police department does not enforce tribal protection orders due to liability reasons.*

*A non-Native American woman living on a reservation obtains a protection order in the state court against her non-Native American ex-husband. When her ex-husband arrives at her home intoxicated and demanding entry, she calls 911. The dispatcher notifies a sheriff's deputy to respond who is twenty minutes from the scene. The tribal police are only five minutes away.*

These hypothetical scenarios illustrate some of the jurisdictional problems associated with enforcement of protection orders between tribes and states. These issues should be of mutual concern to tribal and state officials. Jurisdictional issues on reservations are complex. Determining who has jurisdiction often depends on location of the incident, type of crime, whether the protection order is civil or criminal, and whether the offender is Native American or non-Native American. The jurisdictional maze that is found on many reservations often prevents effective law enforcement. In emergency situations, there is little time to work through complex jurisdictional issues. Further, as a result of a lack of effective communication, procedures, and agreements between tribal and local governments, there are instances when authorities having jurisdiction may not be the nearest law enforcement agency, while closer law enforcement agencies may not be called to respond because they lack jurisdiction. At present, many tribal judges recommend that tribal members also obtain a protection order in state court, to avoid the possibility that the tribal protection order may not be enforced outside the boundaries of the reservation, especially if the batterer is a non-Indian.

### **12.3.1 Violence Against Women Act**

The 1994 Violence Against Women Act, (VAWA) 18 U.S.C. 2265, directs that states, U.S. territories, and Indian tribes enforce valid civil and criminal protection orders issued by sister states, territories, and tribes as though they had been issued by the non-issuing, enforcing state or tribal court. VAWA does not require prior registration or pre-certification of an order of protection in an enforcing state in order to receive full faith and credit. The only requirement for interstate or interjurisdictional enforcement of a protection order is that the foreign order be valid as defined by the VAWA.<sup>14</sup>

The purpose and rationale is simple: Women who receive protection from any court, be it tribal or state, ought to be entitled to protection throughout the United States and Indian country.<sup>15</sup> Whether a victim of domestic violence is crossing state or reservation lines for business, pleasure, or fleeing from her batterer, she is entitled to the protections afforded by the original state or tribal protective order.<sup>16</sup>

VAWA did not provide for enforcement procedures. Establishing procedures for enforcement of foreign orders of protection has been left to the states and tribes. Since Section 2265 was enacted in 1994, a majority of states have addressed the issue of enforcement of out-of-state protection orders by amending their state domestic violence codes or statutes.<sup>17</sup>

### **12.3.2 Tribal Domestic Violence Laws**

Tribes vary in their progress toward adopting Domestic Violence Codes. Some tribes have explicit codes while other tribes rely on general criminal statutes to address the issue.

Most tribal domestic violence codes require that tribal law enforcement provide for the safety of victims and family members by arresting the primary physical aggressor and by confiscating any weapons that may have been used to perpetrate domestic violence. Some codes provide that the tribal police are to assist the victim obtain transportation to a shelter or medical facility. Finally, police are to provide the victim with notice of the rights of the victim and remedies and services available. Examples of similar provisions for advising victims of their rights and providing transportation can be found in the Spokane Tribal Code, Puyallup Tribal Code, and Quinault Tribal Code.

### **12.3.3 Tribal Court Protection Orders**

Procedures for issuing civil protection orders for domestic violence vary among jurisdictions. Generally, an action for a tribal court protection order is started by the victim filing a petition with the court. The petition should be supported by a signed statement or affidavit by the petitioner. If the petitioner requests an immediate ex-parte hearing before the court, the petitioner will be sworn in to give the specific facts and circumstances of the alleged domestic violence and the necessity for immediate issuance of a protection order. If the judge determines that an emergency does exist, a temporary order of protection may be issued that same day.

A hearing with the respondent on a temporary ex-parte order usually takes place within 7-10 days. The temporary ex-parte order usually expires on the day set for the hearing. In some tribal jurisdictions a hearing on an ex-parte order will be scheduled within three days if the petitioner requests temporary custody of children, or has requested possession of a shared residence or vehicle.

Service on a respondent living on the reservation is usually accomplished by the tribal police. For respondents living off the reservation, the petitioner will likely use either the sheriff's department or a private process server.

After the respondent has been given notice and the opportunity to be heard, the court may issue an order of protection for an extended period of time.<sup>18</sup> In some jurisdictions the order may be valid for one year or more. The court may review, rescind, or modify the order.

Common relief provisions include:

- Restraining the perpetrator from committing further acts of domestic violence;
- Excluding the respondent from the residence of the petitioner;
- Making temporary custody and visitation provisions or restraining the respondent from interfering with child custody or removal from the jurisdiction of the court;
- Ordering the respondent to stay away from the victim's school or place of employment;
- Ordering respondent to receive substance abuse evaluations, attend treatment, seek mental health assessment, attend counseling, anger management, or other programs to include parenting classes, if needed;<sup>19</sup> and
- Requiring the respondent to sign a release of information enabling the court to monitor the respondent's compliance with treatment or counseling as ordered.<sup>20</sup>

## **12.4 Criminal Jurisdiction in Indian Country**

Domestic violence may involve crimes being committed that result in both major and less serious crimes to persons or property. It is important to understand the authority by which tribes enforce criminal statutes.

### **12.4.1 Indian Civil Rights Act of 1968<sup>21</sup>**

In 1968 Congress passed the Indian Civil Rights Act (ICRA). The ICRA provided for civil rights for all persons who are subject to the jurisdiction of tribal governments. The ICRA also placed limits on the maximum penalties that tribal courts could impose for each criminal offense. The maximum penalty for any one offense is limited to one (1) year in jail, and/or a fine of \$5000.

### **12.4.2 Major Crimes Act<sup>22</sup>**

The penalty limitation placed on tribes by the Indian Civil Rights Act does not mean that felony class crimes go relatively unpunished. The Major Crimes Act provides that any Indian committing a felony against the person or property of another Indian or other person, namely, murder, manslaughter, kidnapping, maiming, a felony under Chapter 109A, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury (as defined in Section 1365 of Title 18), assault against an individual who has not attained the age of 16 years, arson, burglary, robbery, and a felony under Section 661 of Title 18 within Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States. These crimes are investigated by the FBI and referred to the U.S. Attorney's Office for prosecution in federal district court. Tribes will prosecute cases when the U.S. Attorney declines to prosecute.

### **12.4.3 Non-Native Americans**

Tribes have no general criminal jurisdiction over non-Native Americans.<sup>23</sup> However, tribal police have been held to have authority to stop and detain non-Native American law violators within the boundaries of reservations for state authorities.<sup>24</sup>

### **12.4.4 Tribal Exclusion**

Tribes have a unique remedy they may exercise against non-members of the tribe known as exclusion. Often guaranteed by treaty, this remedy permits tribes to exclude unwanted persons from their reservations. The power of exclusion might be viewed as quasi-criminal, and can be exercised against non-members of the tribe.<sup>25</sup> Tribes do not have authority to exclude from their reservations federal officials engaged in carrying out their duties. Non-members may be excluded from within the exterior boundaries of reservations for violating tribal law or for felony convictions in state or federal court. However, owners of non-trust land may not be excluded from the land they own. Persons to be excluded are given notice and the opportunity for a hearing before the tribal court. An unfavorable decision may be appealed by the person to be excluded to the Tribal Court of Appeals. Those persons excluded who refuse to obey the order may be referred to the United States Attorney.

## **12.5 Child Custody and Visitation Issues**

Child custody and visitation issues make for complex problems when issuing and enforcing domestic violence protection orders. The difficulty and confusion lies in conflicting orders between jurisdictions. When child custody or visitation is an issue in a protection order request, judges should question the parties about whether there is a custody or visitation order from another court. At minimum judges should note the existence of the previously issued custody or visitation order in the protection order.

Generally, law enforcement officers should not remove a child from his or her current placement unless:

- There is a writ of habeas corpus to produce the child issued by a court having jurisdiction; or
- There is probable cause to believe the child is abused or neglected and the child would be injured or could not be taken into custody if it were necessary to first obtain a court order.

Some tribal domestic violence codes provide for temporary child custody arrangements to be made through protection orders.

## **12.6 State and Tribal Courts Working Together**

Tribes and states should work to implement agreements to resolve jurisdictional conflicts, which may occur during the enforcement of protection orders pursuant to the Federal Violence Against Women Act. Such agreements are positive steps toward cooperation, which will assist victims of domestic violence in navigating through the jurisdictional maze and get protection from further acts of domestic violence. After agreements are reached, the next step is for the various jurisdictions to cooperate in establishing procedures for enforcement and to educate court staff. Some of the difficulty of enforcement often takes place at the level of local law enforcement because they may not be familiar with the current laws, or because there are no established procedures when they encounter protection orders from foreign jurisdictions. While others are concerned about incurring liability for false arrest. There is an opportunity for judges from both state and tribal jurisdictions to show leadership in this area by initiating a dialogue between the jurisdictions for the safety of the victims needing protection from their batterers.

Tribes and states are mutual sovereigns that share contiguous physical areas and some common citizens. Tribal members are both tribal and state citizens, while non-Indian residents of the reservation are only state citizens.<sup>26</sup>

Tribal-state agreements vary from tribe to tribe. Working agreements may be made between a county/parish and tribe. State and tribes often find themselves in the position of construing and implementing federal policy and law that was drafted on a national level, and whose specific contours may not be clear at the state and tribal level, such as the VAWA.<sup>27</sup>

In 1990 the Washington State Forum to Seek Solutions to Jurisdictional Conflicts between tribal and state courts issued its final report. The report made recommendations to improve the dialogue between state and tribal court systems.

They recommended the tribes of Washington and state agencies should, to the extent the resources and subject matter permit, work with local and state agencies to create agreements resolving and reducing jurisdiction conflicts between the parties.<sup>28</sup> There should be joint training for tribal and state judicial officers. The payoff is improved communications of substance and increased appreciation of each other as people who share similar job challenges, rewards, and frustrations. The report suggested that resolution of jurisdictional conflicts between state and tribal courts is often

accomplished by interpersonal contact between judges of the courts. “This can be a practical and expedient method, and usually occurs when judges are familiar with each other and their respective court systems.”<sup>29</sup> Cooperation and mutual respect and collaboration between state and tribal courts can mean the difference between life and death for victims trying to escape domestic violence.

## **12.7 Sample Tribal Domestic Violence Code—Child Custody Presumptions**

- (a) In every proceeding where custody or visitation of a child is in dispute, a determination by the court that domestic violence has occurred raises a rebuttable presumption that it is detrimental and not in the best interest of the child to be placed in sole custody, joint legal custody or joint physical custody with the perpetrator of domestic violence.
- (b) In every proceeding where custody or visitation of a child is in dispute, a determination by the court that domestic violence has occurred raises a rebuttable presumption that it is in the best interest of the child to reside with the parent who is not a perpetrator of domestic violence, in the location of that parent’s choice.

When determining child custody and visitation, this sample domestic violence code also provides for factors the court should take into consideration when domestic violence has been present.<sup>30</sup>

The following are factors used in determining custody and visitation:

- (a) In addition to other factors that a court must consider in a proceeding where custody or visitation of a child is in dispute, and the court has made a finding of domestic violence, the court shall also consider:
  - (1) That the safety and well being of the child and of the parent who is the victim of domestic violence is the primary concern.
  - (2) The perpetrator’s history of causing physical harm, bodily injury, assault, or causing reasonable fears of physical harm, bodily injury or assault to any other person.
- (b) If a parent is absent or relocates because of an act of domestic violence by the other parent, the absence or relocation shall not be a factor that weighs against the parent in determining custody or visitation.

This domestic violence code sample provides for conditions of visitation in cases involving domestic violence.

- (a) A court may award visitation by a parent who committed domestic violence only if the court finds that adequate provision for the safety of the child and the parent who is a victim of domestic violence can be made.

- (b) In a visitation order, adequate provision for the safety of the child and the parent who is a victim of domestic violence may include but is not limited to an order that:
  - (1) Exchange of a child is to occur in a protected setting.
  - (2) Visitation is to be supervised by another person or agency.
  - (3) The perpetrator of domestic violence is to attend and complete a program of counseling for perpetrators of domestic violence, or some other designated counseling, to the satisfaction of the court, and as a condition of the visitation.
  - (4) The perpetrator of domestic violence is to abstain from possession or consumption of alcohol or controlled substances during the visitation and for twenty-four (24) hours preceding the visitation.
  - (5) The perpetrator of domestic violence is to pay a fee to defray the costs of supervised visitation.
  - (6) Overnight visitation is prohibited.
  - (7) The perpetrator of domestic violence is to post bond for the return and safety of the child.
  - (8) The perpetrator of domestic violence is to comply with any other condition that is deemed necessary to provide for the safety of the child, the victim of domestic violence, or any other family or household member.
- (c) Whether or not visitation is allowed, the court may order the address of the child and the victim to be kept confidential.
- (d) The court may refer, but shall not order, an adult who is a victim of domestic violence to attend counseling related to the victim's status or behavior as a victim, either individually or with the perpetrator of domestic violence as a condition of receiving custody of a child, or as a condition of visitation.
- (e) If a court allows a family or household member to supervise visitation, the court shall furnish clear guidelines to those persons related to their responsibility and authority during supervision. In this way they are better able to protect the child should the perpetrator engage in violent or intimidating conduct toward the child or adult victim in the course of visitation.

**12.8 Forms**

**12.8.1 Order to Enforce Protection Order**

[Caption]

**ORDER TO ENFORCE  
PROTECTION ORDER**

TO THE CHIEF OF POLICE AND OFFICERS:

The Petitioner in the above-entitled action has requested that the \_\_\_\_\_ Tribal Court issue an Order to Enforce a Protection Order issued by \_\_\_\_\_ State Court. This Court having reviewed the files and records herein and being fully advised in the premises, and presuming the said order to be valid and enforceable pursuant to the Violence Against Women Act, 18 U.S.C. 2265, now therefore:

**It is Hereby Ordered, Adjudged and Decreed** that the attached Protection Order shall be and is hereby accorded full faith and credit in this Court and shall be enforced by this Court and the Law Enforcement Agencies within the jurisdiction of this Court.

It is further ordered that the Petitioner shall immediately inform this Court in writing should the foreign protection order be terminated, modified or extended.

**CLERK’S ACTION.** The clerk of the court shall forward a copy of this order to Tribal Law Enforcement, who shall enter this order into any computer-based criminal intelligence system available to the Tribal Police for the purpose of listing outstanding warrants and registration of protection orders. A copy of this order shall be given to the Petitioner. **(A law enforcement information sheet must be completed by the Petitioner and provided with this order before this order will be entered into the computer system.)**

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 200\_\_.

\_\_\_\_\_  
Judge



**12.8.2 Certification of Protection Order Compliance with VAWA**

[Caption]

CERTIFICATION OF  
PROTECTION ORDER  
COMPLIANCE WITH  
VAWA

It is hereby certified that the attached is a true and correct copy of the protection order entered in the above captioned action on \_\_\_\_\_ (date) and that the judge whose signature appears thereon duly executed the original of the attached order. The order expires on \_\_\_\_\_ (date).

The order is: [ ] a civil protection/restraining order OR  
[ ] a civil temporary ex-parte protection/restraining order.

It is further certified that:

- (a) The issuing Court determined that it had jurisdiction over the parties and the subject matter under the laws of the \_\_\_\_\_ Tribe.
- (b) The defendant was given reasonable notice and opportunity to be heard sufficient to protect the defendant’s right to due process before this order was issued or if the order was issued ex-parte, the time required by the law of this jurisdiction, and in any event within a reasonable time after the order was issued, sufficient to protect the defendant’s due process rights.
- (c) The order was otherwise issued in accordance with the requirements of the Full Faith and Credit Provisions of the Violence Against Women Act: Title IV, Subtitle B, Chapter 2 of the Violent Crime Control and Law Enforcement Act of 1994. 18 U.S.C. 2263.

The attached order shall be presumed to be valid and enforceable in this and other jurisdictions.

SIGNED this the \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

\_\_\_\_\_  
Judge

CERTIFIED this the \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

\_\_\_\_\_  
Clerk, \_\_\_\_\_ Tribal Court

**12.8.3 Order for Protection – Domestic Violence**

[Caption]

Order Expiration Date: \_\_\_\_\_

\_\_\_\_\_,  
Petitioner,

v.

\_\_\_\_\_,  
Respondent

Case No.

**ORDER FOR PROTECTION-  
DOMESTIC VIOLENCE**

- TEMPORARY (expires 10 days)
- PERMANENT (expires 1 year)
- MODIFICATION

**FINDINGS**

- Jurisdiction. This court has determined that jurisdiction is proper over the parties and subject matter under the Laws of the \_\_\_\_\_ Tribe.
- Ex-parte Order. The petitioner appeared and requested an ex-parte order.
- The respondent appeared at the hearing for a  temporary  permanent order.
- Respondent received notice through personal service and failed to appear for a hearing on a permanent protection order.
- The court has made a factual determination that issuance of this protection order is warranted to prevent further acts of domestic violence and to provide protection to the petitioner.

**OTHER PERSONS ENTITLED TO ALL PROTECTIONS OF THIS ORDER:**

	NAME	AGE	RELATION TO RESPONDENT
(a)	_____	_____	_____
(b)	_____	_____	_____
(c)	_____	_____	_____
(d)	_____	_____	_____

**ORDER**

**RESPONDENT SHALL:**

- 1. Not commit or threaten to commit further acts of domestic violence, and shall not cause petitioner physical harm or bodily injury.
- 2. Not contact, harass, annoy, telephone or otherwise communicate with the petitioner; and others to be protected under this order, either directly or indirectly.
- 3. Immediately leave the petitioner’s residence.

( ) 4. Stay away from the petitioner's residence, school, place of employment:

\_\_\_\_\_  
( ) 5. WEAPONS: Not possess or use any firearm or other weapon specifically \_\_\_\_\_, and shall turn these weapons into law enforcement for safekeeping.

**TEMPORARY CHILD CUSTODY AND VISITATION:**

- ( ) 6. Petitioner shall have temporary custody of minor children.
- ( ) 7. Respondent's visitation with the minor children is suspended.
- ( ) 8. Respondent shall not remove the children from \_\_\_\_\_ for the duration of this order.
- ( ) 9. Respondent shall immediately cause the transfer or surrender of custody of the below named minor child(ren) to Petitioner (or designee).
- ( ) 10. [ ] **Petitioner** [ ] **Respondent** shall be the custodian of the parties' minor child(ren), solely for the purpose of complying with all other Tribal, State and Federal statutes requiring such a designation.
- ( ) 11. This order applies to the following children:

Name	Age	Birthday	Sex
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

**LAW ENFORCEMENT SHALL:**

- ( ) 12. Law enforcement officers shall assist Petitioner in obtaining transfer or surrender of custody of the above named children.
- ( ) 13. Assist the petitioner in obtaining possession of petitioner's residence and/or personal property.
- ( ) 14. Confiscate weapons from respondent if he/she is prohibited from possessing or using them, and hold and store those weapons until ordered otherwise by this court.
- ( ) 15. Tribal Police shall personally serve respondent a copy of this order at the address of \_\_\_\_\_ and shall promptly complete and return to this Court proof of service.

**CLERK OF COURT SHALL:**

- ( ) 16. Forward a copy of this order to Tribal Police, who shall enter this order into the appropriate law enforcement information system.
- ( ) 17. Send a copy of this order to:

\_\_\_\_\_

**IT IS FURTHER ORDERED that:**

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

If this is a **Temporary Order**, this order shall be valid only until the hearing scheduled on

\_\_\_\_\_, \_\_\_, at \_\_\_\_\_ am/pm, at the Tribal Court.

SO ORDERED this \_\_\_ day of \_\_\_\_\_, \_\_\_\_.

\_\_\_\_\_  
JUDGE

EX PARTE RELIEF REQUIRING HEARING WITHIN 3 DAYS

If this order removes respondent from a shared residence, grants petitioner possession or use of a shared automobile, or other essential shared property, or gives petitioner temporary custody of children, respondent is entitled to a hearing within three (3) days of the issuance of this order.

NOTICE TO THE PETITIONER

**Modification or Termination of this Order:** If this order is modified or terminated by issuance of another court order, you are responsible for notifying any other state or tribal jurisdiction where you registered this order.

If this order protects you at your place of work or school, you may want to consider providing a copy of this order to your supervisor or school officials so they may take appropriate action if this order is violated at work or school.

**NOTICE TO THE RESPONDENT**

VIOLATION OF THE PROVISIONS OF THIS ORDER WITH ACTUAL NOTICE OF ITS TERMS IS A CRIMINAL OFFENSE AND WILL SUBJECT YOU TO ARREST AND MAY RESULT IN IMPRISONMENT AND THE REQUIREMENT TO PAY A FINE. A POLICE OFFICER MAY ARREST YOU AND TAKE YOU INTO CUSTODY IF THERE IS PROBABLE CAUSE TO BELIEVE THAT YOU VIOLATED THIS ORDER. VIOLATORS MAY ALSO BE FOUND IN CONTEMPT OF COURT AND SUBJECT TO PENALTIES FOR CONTEMPT.

YOU CAN BE ARRESTED EVEN IF INVITED TO VIOLATE THE PROHIBITIONS OF THIS ORDER BY THE PERSON(S) OBTAINING IT—THEY CANNOT WAIVE OR SUSPEND THE PROHIBITIONS OF THIS ORDER—ONLY THE COURT CAN MODIFY IT UPON WRITTEN APPLICATION.

THIS ORDER IS ENFORCEABLE IN ALL 50 STATES, THE DISTRICT OF COLUMBIA, ALL TRIBAL LANDS, AND ALL U.S. TERRITORIES, AND SHALL BE ENFORCED AS IF IT WERE AN ORDER OF THAT JURISDICTION.

VIOLATIONS OF THIS ORDER ARE SUBJECT TO STATE AND FEDERAL CRIMINAL PENALTIES. IF YOU TRAVEL ACROSS STATE OR TRIBAL

BOUNDARIES WITH THE INTENT TO VIOLATE THE ORDER (INCLUDING WITH INTENT TO INJURE THE PLAINTIFF) AND THEN COMMIT A VIOLATION OF THE ORDER (INCLUDING COMMITTING A CRIME OF VIOLENCE CAUSING BODILY INJURY), YOU MAY BE CONVICTED OF A FEDERAL OFFENSE UNDER VAWA (sec. 2261[a][1]). YOU MAY ALSO BE CONVICTED OF A FEDERAL OFFENSE IF YOU CAUSE THE PETITIONER TO CROSS A STATE OR TRIBAL BOUNDARY FOR THIS PURPOSE (sec. 2262[a][2]).

IF A PERMANENT ORDER IS ENTERED AGAINST YOU AFTER THE HEARING, EVEN IF YOU DID NOT ATTEND, YOU MAY BE PROHIBITED FROM POSSESSING, TRANSPORTING OR ACCEPTING A FIREARM UNDER THE 1994 AMENDMENTS TO THE GUN CONTROL ACT. 18 U.S.C. 922(g)(8). A VIOLATION OF THIS PROHIBITION IS A FEDERAL CRIME.

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<sup>1</sup> Greenfeld and Smith, *American Indians and Crime*, U.S. Department of Justice, Bureau of Justice Statistics, (BJS) (February 1999) (Hereinafter BJS Study).

<sup>2</sup> *Id.* at p. 16.

<sup>3</sup> Daniel Kamkoff, *Crime Victim Services in Indian Country. Lummi Victims of Crime Program, 1997.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> The BJS study defines intimate violence as victimizations involving current and former spouses, boyfriends, and girlfriends. Family violence refers to victimizations involving family members.

<sup>7</sup> *Id.* at p. 16.

<sup>8</sup> *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

<sup>9</sup> 25 U.S.C. 1301.

<sup>10</sup> *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

<sup>11</sup> *State v. Schmuck*, 121 Wash. 2d 373, 850 P.2d 1332, cert. denied, 510 U.S. 931 (1993).

<sup>12</sup> *Id.* at p. 18. Alcohol-involved incidents included only those incidents in which the victim felt that he/she could determine whether the offender had been using drugs or alcohol.

<sup>13</sup> *Id.* at p. 19.

<sup>14</sup> 18 U.S.C.A. § 2265.

<sup>15</sup> Byron R. Johnson and Neil S. Websdale, editors. Full Faith and Credit: Passport to Safety. (Reno, NV: National Council of Juvenile and Family Court Judges, 1997), p. 88.

<sup>16</sup> *Id.*

<sup>17</sup> Seema Zeya, Battered Women's Justice Project. *Progress Report on Full Faith and Credit Enabling Legislation and Implementation Procedures.*

<sup>18</sup> See Appendix VII of this chapter for an example of a tribal court protection order.

<sup>19</sup> Puyallup Tribal Code, 7.04.160 (7).

<sup>20</sup> Quileute Domestic Violence Prevention Ordinance, 1.6(d).

<sup>21</sup> 25 U.S.C.A. § 1301-03

<sup>22</sup> (18 U.S.C.A. § 1153)

<sup>23</sup> *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

<sup>24</sup> *State v. Schmuck*, 121 Wash. 2d 373, 850 P.2d 1332, cert. denied, 510 U.S. 931 (1993).

<sup>25</sup> William C. Canby, Jr. American Indian Law in a Nut Shell, Third Edition (St Paul,

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Minn.: West Group, 1998), p. 165.

<sup>26</sup> Frank Pommersheim. Tribal-State Relations: Hope for the Future? *South Dakota Law Review*, Vol.36, at 249 (1991).

<sup>27</sup> *Id.* at 265.

<sup>28</sup> CCJNCC Final Report, *supra*, at 6.

<sup>29</sup> *Id.* at 7.

<sup>30</sup> Lummi Nation Code of Laws Domestic Violence Code, 5A.060.

