

Tribal Domestic Violence Laws

Tribal Legal Code Resource: Domestic Violence Laws

Guide for Drafting or Revising Victim-Centered Tribal Laws Against Domestic Violence

A product of the Tribal Law and Policy Institute

Revised and Updated February 2015

This initial citation was supported by Grant No. 2003-WT-BX-K001, Grant No. 2004-WT-AX-K045, and Grant No. 2006-MU-AX-K028 awarded by the Office on Violence Against Women, U.S. Department of Justice. Points of view in this document are those of the authors and do not necessarily represent the official position or policies of the U.S. Department of Justice.

This revised edition (2015) was supported by Grant No. 2009-IC-BX-K004 awarded by the Bureau of Justice Assistance. The Bureau of Justice Assistance is a component of the Office of Justice Programs, which also includes the Bureau of Justice Statistics, the National Institute of Justice, the Office of Juvenile and Delinquency Prevention, the Office for Victims of Crime, the Community Capacity Development Office, and the Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering and Tracking. Points of view or opinions in this document are those of the author and do not necessarily represent the official position or policies of the U.S. Department of Justice.

Primary Authors

Sarah Deer, *Mvskoke*, Victim Advocacy Legal Specialist, Tribal Law and Policy Institute
Maureen White Eagle, *Métis*, Tribal Advocacy Legal Specialist, Tribal Law and Policy Institute
Kelly Stoner, Victim Advocacy Legal Specialist, Tribal Law and Policy Institute
Carrie A. Martell, Legal Assistant, Tribal Law and Policy Institute
Hallie Bongar White, Executive Director, Southwest Center for Law and Policy

Contributors

Bonnie Clairmont, *Ho-Chunk*, Victim Advocacy Specialist, Tribal Law and Policy Institute
Jerry Gardner, *Cherokee*, Executive Director, Tribal Law and Policy Institute
Heather Valdez Singleton, Deputy Director, Tribal Law and Policy Institute

Administrative Assistant

Terrilena Dodson, *Navajo*, Office Assistant, Tribal Law and Policy Institute

Special Thanks

Patricia Sekaquaptewa, *Hopi*, Executive Director, Nakwatsvewat Institute

VIOLENCE AGAINST NATIVE WOMEN RESOURCES

COMMUNITY BASED LEGAL DEVELOPMENT

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

Tribal Legal Code Resource: Domestic Violence Laws. Primary Authors: Sarah Deer, Maureen White Eagle, Kelly Stoner, Carrie Martell, and Hallie Bongar White. (Revised February 2015). This resource was developed by TLPI in cooperation with OVW and BJA. This victim-centered approach to domestic violence against Native women resource guide includes exercises, examples, and discussion questions to help tribes customize their laws to meet the needs of their community. This resource was revised and updated in 2012 and in 2015, to include the Tribal Law and Order Act (TLOA) (2010) and the Violence Against Women Act Reauthorization of 2013 (VAWA 2013).

Tribal Legal Code Resource: Tribal Laws Implementing TLOA and VAWA 2013. Primary Authors: Maureen White Eagle, Melissa Tatum, and Chia Halpern-Beetso. (February 2015). This guide is designed to be a resource for tribes interested in implementing the Tribal Law and Order Act sentencing enhancement provisions and/or VAWA 2013's Special Criminal Domestic Violence Jurisdiction. The resource focuses on the tribal code and rule changes that may be needed should a tribe elect to implement the increased tribal authority in either or both statutes. It discusses the concerns and issues that need resolution in implementation and provides examples from tribal codes and tribal court rules.

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

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

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

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

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

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

Listen to the Grandmothers Video and Video Discussion Guidebook

Listen to the Grandmothers is designed to assist tribal programs with incorporating cultural traditions into contemporary responses to violence against Native women. The *Listen to the Grandmothers* video features Native elders speaking to the problem of violence against Native women. The video provides a historical overview of violence against Native women, traditional responses, and an analysis concerning the incorporation of cultural traditions into contemporary responses to violence against women.

Sharing Our Stories of Survival: Native Women Surviving Violence

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

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

www.TribalProtectionOrder.org is a website designed to provide tribal and nontribal entities with a clearinghouse of information and resources pertaining to the issuance and enforcement of tribal protection orders.

TABLE OF CONTENTS

1. INTRODUCTION	1
2. GENERAL PROVISIONS.....	15
3. JURISDICTION	25
A. Criminal Jurisdiction.....	27
B. Civil Jurisdiction.....	42
4. CRIMINAL DOMESTIC VIOLENCE STATUTES	53
A. Defining Domestic Violence.....	57
B. Role of Law Enforcement	63
C. Role of Tribal Prosecutors	73
D. Role of Courts.....	79
E. Evidence.....	84
F. Victims' Rights in Criminal Proceedings	89
G. Sanctions.....	99
5. PROTECTION ORDERS	121
A. Developing Civil Protection Orders.....	122
B. Violating Protection Orders	168
C. Full Faith and Credit	177
6. FAMILY LAW AND CHILD CUSTODY	201
7. EDUCATION AND BATTERER INTERVENTION	209
GLOSSARY.....	221

Part 1

INTRODUCTION

All governments should be very concerned about domestic violence against Native women. Tribal governments across the United States are creating programs to improve response to violent crime. As sovereign governments, tribes can assert jurisdiction in criminal and civil actions involving assaults against Native women.

In recent years, many American Indian and Alaska Native governments have started domestic violence programs to provide greater protection for tribal women and children. The Office on Violence Against Women (OVW) has been providing funding and training to tribal governments since 1995.

As sovereign governments, many tribes have asserted concurrent or exclusive criminal and/or civil jurisdiction in domestic violence cases. A key piece of responding to domestic violence is to draft or revise tribal domestic violence laws.

This resource guide was developed to provide a starting point for drafting or revising tribal laws on domestic violence. It is written with a philosophy that tribal laws should reflect tribal values. In addition, writing a tribal law usually requires careful consideration of how state and/or federal laws might apply in the community.

This resource guide includes examples from a variety of tribal codes and discussion questions that are designed to help tribal community members decide on the best laws for your community.

The examples may not be appropriate for every community. We hope you will consider all of the options before making final decisions.

The main goal of this resource guide is to offer suggestions on how tribal laws can be drafted in a way that provides safety and support for the survivors of domestic violence.

What This Resource Guide Can Do

The goal of this resource guide is to assist tribal governments in drafting laws that address the safety of Native women and their children.

This resource guide was designed for nonattorneys. It assumes that tribal governments already have the ability to draft their own laws. Tribal beliefs, cultures, and language already include good words about protecting women and children. Tribal leaders and community members are usually the best people to decide what is needed in the laws. Attorneys can be important to the process but are not always required. However, with the enactment of the Tribal Law and Order Act in 2010 (TLOA) and the Violence Against Women Act Reauthorization of 2013 (VAWA 2013), the interplay between these two federal laws and tribal law becomes increasingly complex and may require the services of an attorney in the drafting process.

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

Point of Discussion: What questions should our community ask?

Comprehensive laws are often viewed as such because they answer six important types of questions:

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

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

What This Resource Guide Cannot Do

This resource guide does not teach about the dynamics of domestic violence. The exercises and language assume that you have a basic understanding of abuse, power, and control. If you do not have training in the dynamics of domestic violence, we strongly encourage you to contact one or more of the following organizations for information and training:

[Tribal Law and Policy Institute](#)

8235 Santa Monica Blvd, Suite 211
West Hollywood, CA 90046
323-650-5467

[National Indigenous Women's Resource Center](#)

515 Lane Deer Ave.
PO Box 99
Lane Deer, MT 59043
406-477-3896

[Mending the Sacred Hoop](#)

202 East Superior Street
Duluth, MN 55802
888-305-1650

[Southwest Center for Law and Policy](#)

475 S. Stone Avenue
Tucson, AZ 85701
520-623-8192

A Few Words of Caution

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

This resource guide is not a model code. Your tribal community is the best judge of what language will work best for your people. There are advantages and disadvantages to certain kinds of legal language, and not every tribal government has the same needs or resources. Most importantly, the sample language in this guide is not necessarily consistent with every tribe's culture and traditional practices. The exercises and discussion questions are provided to help you design a code that fits your community.

How Should We Proceed?

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

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

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

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

Consider the resources in your community, including:

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

A Note on Terminology

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

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

- A general dictionary, such as *Merriam-Webster's Collegiate Dictionary*
- A law dictionary, such as *Black's Law Dictionary*
- A law dictionary for nonlawyers, such as *Law Dictionary for Non-Lawyers* by Daniel Oran

This resource guide also includes a glossary at the back. Words in bold in this text can be found in the glossary.

Point of Discussion: English language and tribal law

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

How to Use This Resource Guide

There are seven main sections:

- I. Introduction
- II. General Provisions
- III. Jurisdiction
- IV. Criminal Domestic Violence Statutes
- V. Protection Orders
- VI. Family Law and Child Custody
- VII. Education and Batterer Intervention

Each of these sections (except this introduction) has five main parts:

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

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

The *tribal code examples* provide language from existing tribal codes. Whenever possible, we have included laws that other tribes have written to address domestic violence.

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

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

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

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

Who Should Write the Laws?

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

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

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

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

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

Ten Tips for Working as a Team

Writing or revising a tribal law usually does not happen quickly or easily. Code-writing involves a great deal of time, effort, and cooperation. There is no one “right” way to research and draft laws. The tips below come from successful efforts of other tribal nations.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

9. Consider traditional/culturally appropriate strategies.

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

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

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

Domestic Violence Code Development Dos and Don'ts

DO . . .	DON'T . . .
Select code development members with various viewpoints who have demonstrated interest, expertise, or experience in addressing the safety of women.	Select code development members based only on their position within the tribal judicial system or elsewhere.
Incorporate the perspective of survivors of sexual assault and stalking.	Disregard the importance of traditional beliefs and customary law.
Proceed in phases with set time frames, including a study phase in which issues are identified before drafting recommended provisions.	Devote resources to drafting before a consensus is reached concerning priority issues and recommendations.
Design a process that invites broad-based participation in identifying issues and making recommendations.	Incorporate federal, state or model codes into tribal codes without careful scrutiny and discussion of consequences.
Assign manageable tasks to team members or subcommittees to be accomplished within established time frames.	Delay too long before dividing the work of the committee into tasks that can be accomplished within the time frames established.
Emphasize creative solutions to jurisdictional issues that avoid compromising the safety of women.	Emphasize jurisdictional limitations.
Emphasize person-to-person communication and education to address difficult issues.	Seek to address difficult issues solely through large-scale change in the law or legal system.

Before You Begin . . .

As you sit down together to begin the process of developing domestic violence statutes for your tribe, keep your main goal in mind.

Point of Discussion: What is our goal?

Consider writing down your ultimate goal and reviewing it at the beginning of each meeting. Example: *Write laws that support the safety of Native women and reflect our community's cultural, legal, and spiritual needs.*

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

It is also important to evaluate what domestic violence laws are already in place in your community. Be sure to analyze the strengths and weaknesses in any current laws. Be sure to consider drafting laws that address the protection of victims' rights.

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

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

Point of Discussion: What documents should we review?

Consider creating a binder for all team members that includes:

- Tribal constitution and/or bylaws;
- Current tribal laws;
- Traditions, customs, and stories (if appropriate); and
- Copies of any tribal court opinions your tribe has issued on domestic violence or full faith and credit.

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

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

Be prepared to remove or edit entire sections as necessary.

NOTES

Part 2

GENERAL PROVISIONS

OVERVIEW

A domestic violence code can contain some introductory sections that define and explain the problem. These laws are sometimes referred to as *general provisions*. These introductory sections explain the purpose and meaning for the domestic violence laws. Tribal judges may look to these general provisions when they have to decide a case. These general provisions may also help provide guidance to a tribal appellate court if the protection order or criminal conviction is appealed.

Tribal statutes are usually developed to address or prevent problems in the community. One of the first steps in developing an effective, victim-centered code addressing domestic violence is to assess and describe the problem. What problems is the code going to try to address? What is the current rate of domestic violence in the community? What kinds of challenges have arisen from domestic violence?

Answers to these questions can be included within the code as a preliminary statement called *findings*. The laws and statutes that follow will then be interpreted in context with the challenges you are trying to address. You may want to include your research on domestic violence and sexual assault statistics in this section. Although they are difficult to document, these statistics are important in recognizing the violence and setting forth the law to help deal with it. However, this section is optional and does not need to be included.

A second preliminary statement, *purposes*, is an opportunity to articulate the goals of the domestic violence laws. You do not have use these formal legal terms to define the sections and can simply refer to them as “Challenges” and “Goals” sections.

Point of Discussion: What kinds of foundational laws should we consider?

- Findings,
- Purposes, and
- References to traditional (unwritten) laws.

TRIBAL CODE EXAMPLES

Findings and Purposes

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

Fort Mojave Indian Reservation Law and Order Code

Article XIII, Ch. A, Sec. 1301

Findings

The Fort Mojave Tribal Council finds that:

- a) All persons have the right to live free from domestic violence;*
- b) Domestic violence in all its forms poses a major health and law enforcement problem on the Fort Mojave Indian Reservation;*
- c) Domestic violence can be reduced and deterred through the intervention of law; and*
- d) There is a need to provide the victims of domestic violence with the protection which the law can provide.*

Hopi Family Relations Ordinance

Subchapter 1, Sec. 3.01

Findings

The Hopi Tribal Council finds that:

- a) Many persons are subjected to abuse and violence within the family and clan setting;*
- b) Family members are at risk to be killed or suffer serious physical injury as a result of abuse and violence within the family and clan setting;*
- c) Children suffer lasting emotional damage as direct targets of abuse and violence, and by witnessing the infliction of abuse and violence on other family and clan members;*
- d) The elderly Hopi residents are at risk for abuse and violence, the lack of services available for these citizens and the changing family structure indicates that laws are necessary to insure the protection of elders within the family and clan setting, and in their caretaking settings;*
- e) All persons have the right to live free from violence, abuse, or harassment;*
- f) Abuse and violence in all its forms poses a major health and law enforcement problem to the Hopi Tribe;*
- g) Abuse and violence can be prevented, reduced, and deterred through the intervention of law;*
- h) The legal system's efforts to prevent abuse and violence in the family and clan setting will result in a reduction of negative behavior outside the family and clan setting;*
- i) Abuse and violence among family and clan members is not just a "family matter," which justified inaction by law enforcement personnel, prosecutors, or courts, but an illegal encounter which requires full application of protective laws and remedies;*
- j) An increased awareness of abuse and violence, and a need for its prevention, gives rise to the legislative intent to provide maximum protection to victims of abuse and violence in the family and clan setting; and*
- k) The integrity of the family, clan, Hopi culture and society can be maintained by legislative efforts to remedy abuse and violence.*

Northern Cheyenne Indian Reservation

Title VII, Section 7-5-10, Sec. 1

PURPOSE

A. The Northern Cheyenne Tribal Council recognizes that existing laws do not adequately protect victims of domestic violence.

B. The Tribal Council declares that the official response to cases of domestic violence in the Community shall be that violent behavior is not to be tolerated or excused.

For these reasons, the Tribal Council hereby enacts Title: VII, Section 7-5-10 Domestic Abuse of the Northern Cheyenne Tribal Code to promote safety, respect and honor of all elders, adults and children in families throughout the community.

Oglala Sioux Tribe Domestic Violence Code

Sec. 99.2, Ch. 1, Sec. 101

Section 101. Purpose

The Oglala Sioux Tribe Domestic Violence Code is construed to promote the following:

1. That violence against family members is not in keeping with traditional Lakota values. It is the expectation that the criminal justice system respond to victims of domestic violence with fairness, compassion, and in a prompt and effective manner. The goal of this code is to provide victims of domestic violence with safety and protection.

2. It is also the goal to utilize the criminal justice system in setting standards of behavior within the family that are consistent with traditional Lakota values and, as such, the criminal justice system will be utilized to impose consequences upon offenders for behaviors that violate traditional Lakota values that hold women and children as sacred. These consequences are meant as responses that will allow offenders the opportunity to make positive changes in their behavior and understand “wolakota.”

3. The prevention of future violence in all families through prevention and public education programs that promote cultural teachings and traditional Lakota values so as to nurture nonviolence within Lakota families and respect for Lakota women

Tulalip Tribal Code

Chapter 4.25 DOMESTIC VIOLENCE

4.25.010 Purpose.

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

It is the intent of the Tulalip Tribes that the official response of domestic violence and family violence shall stress the enforcement of the laws to protect the victim and to hold the perpetrator accountable, which will in turn communicate the Tribes’ policy that violent behavior against intimate partners or family members is criminal behavior and will not be excused or tolerated. This in turn will promote healing of families and the Tribes where possible, and promote cultural teachings and traditional Tribal values so as to nurture nonviolence and respect within families. This chapter shall be interpreted and applied to give it the broadest possible scope to carry out these purposes. [Res. 2013-379; Ord. 117 § 1.1, 11-5-2001 (Res. 2001-365)].

4.25.020 Legislative findings.

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

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

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

The Tribes further recognizes that there is a distinction between intimate partner domestic violence and family member violence. Domestic violence involves an intimate partner relationship and dynamics of power and control are overwhelmingly present in the action. Family violence is committed against all other family or household members. Both are reprehensible actions that require specialized recognition and enhanced provisions than what might be otherwise available to victims of crimes, or remedies available in civil actions. [Res. 2013-379].

TRIBAL CODE COMMENTARY

Although national statistics can be useful in identifying a problem, they may not reflect the individual challenges faced by every tribal government. Remember that this is an optional section and is not necessary to a domestic violence code.

Fort Mojave and Hopi laws combine the reasons for passing the code and their goals. The Hopi Code recognizes the seriousness of the threat of violence. It states the importance of protecting children and elders who are harmed by witnessing or being the victims of domestic violence. The Hopi Code also points out that the law can help to prevent these crimes.

You should carefully review the *purposes* section to make sure that this section is culturally relevant and community specific. As the other laws are analyzed and revised, you may want to revisit this introductory provision to make sure that it includes all of the appropriate language.

The purposes section of the Northern Cheyenne Code recognizes the problem and the fact that the current system is inadequate for dealing with domestic violence. It also plainly states that the official tribal response to domestic violence is zero tolerance.

The purposes section of the Oglala Sioux Code provides guidance for the court in interpreting the law, including a clear statement that violence against family members is not in keeping with traditional Lakota values and statements concerning the goals of the law.

The purposes section of the Tulalip Code recognizes domestic violence and family violence as serious crimes against society, the tribes, and the family. It stresses the need to provide the victims of domestic violence or family violence the maximum protection from further violence that the law. Tulalip tribes recognize that the strength of the tribes is founded in healthy families. The Tulalip Code's legislative findings stress that domestic violence and family violence imperils the very subsistence of the tribal community and the residents of the reservation. Note that the Tulalip Tribes were a part of a pilot project implementing Special Domestic Violence Criminal Jurisdiction as described in VAWA 2013. Further information on developing tribal laws to implement VAWA 2013 is available in the TLPI resource, Tribal Code Resource: Tribal Laws Implementing TLOA and VAWA 2013.

EXERCISES

The following exercises are meant to guide you in writing the findings and purposes sections of the tribal domestic violence code.

STEP 1: Examine the Problem

Make a list of the challenges that domestic violence victims face in your community.

Gather any statistics about the rates of violence in your community. What do you know about the rate of domestic violence in your tribe? Has any research been done? Is data available from law enforcement?

Point of Discussion: What kind of data might be helpful?

- Victimization surveys
- Number of law enforcement calls, arrests, and investigations
- Prosecution and conviction statistics
- Advocacy program statistics

STEP 2: Establish the Vision for the Future

Brainstorm a list of reasons why your tribal government should pass laws that protect victims of domestic violence. Consider reasons that reflect the unique cultural and spiritual beliefs of your community. Write your thoughts in the space below.

Point of Discussion: Why do we want to have strong laws on domestic violence?

- What do you expect that victims of domestic violence will gain from this tribal code?
- How do you expect the new laws to impact your community?

STEP 3: Drafting Law

Use your answers to Steps 1 and 2 to draft or revise findings and purposes sections for your tribal code.

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

FINDINGS

- ☐ Statistics
- ☐ Challenges
- ☐ Current situation

PURPOSES

- ☐ Cultural and traditional values
- ☐ Vision of safety and accountability
- ☐ Goals of domestic violence laws

ADDITIONAL RESOURCES

BOOKS:

Sarah Deer, Bonnie Clairmont, Carrie A. Martell, and Maureen L. White Eagle. *Sharing Our Stories of Survival: Native Women Surviving Violence*. Lanham, MD: AltaMira Press, 2008.

ARTICLES:

Karen Artichoker and Verlaine Gullickson, “Raising Public Awareness of Domestic Violence in Indian Country,” National Resource Center on Domestic Violence (2003).

Gloria Valencia-Weber and Christine P. Zuni, “Domestic Violence and Tribal Protection of Indigenous Women in the United States,” *69 Saint John’s Law Review* 69 (1994).

WEBSITES:

Bureau of Justice Statistics
www.ojp.usdoj.gov/bjs

Tribal Court Clearinghouse
www.tlpi.org

Part 3

JURISDICTION

OVERVIEW

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

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

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

This section on jurisdiction is divided into two major subsections: Criminal Jurisdiction and Civil Jurisdiction.

Criminal jurisdiction refers to the power of a court to prosecute a crime. If a person is found guilty of a crime, the penalty may be incarceration. The state, tribe, or United States is the party prosecuting a criminal proceeding or action. **Civil jurisdiction** generally refers to the power of a court to handle lawsuits or actions between two private persons or parties. In domestic violence cases, a victim may bring a civil action by petitioning for a protection order against her offender or suing the offender for damages. Criminal jurisdiction and civil jurisdiction can be very important to a survivor of domestic violence.

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

1. *Personal Jurisdiction*

Power of a court over a specific person.

2. *Territorial Jurisdiction*

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

3. *Subject Matter Jurisdiction*

Power of a court to deal with the general subject involved in the action. This may include considering whether the offender is Indian or non-Indian.

You will be reviewing your tribe's current jurisdiction laws (if they exist) to decide if you need revisions.

A. CRIMINAL JURISDICTION

Criminal Jurisdiction Overview

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

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

Point of Discussion: Do we have authority to prosecute?

Personal Jurisdiction

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

Territorial Jurisdiction

Where did the crime occur?

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

Subject Matter Jurisdiction

What was the crime?

The court must determine whether it has subject matter jurisdiction over a case. For tribal communities, this depends on the type of crime, where the matter arose, whether the offender was Indian or non-Indian and whether the victim was Indian or non-Indian. (See the jurisdiction charts on pages 33 and 35.)

Two Important Limitations

The U.S. Supreme Court decision *Oliphant v. Suquamish*, 435 U.S. 191 (1978) limits the ability of tribal governments to try and punish non-Indians. Therefore, tribal governments cannot criminally prosecute an offender who is not considered “Indian.” However, tribes may still issue a civil protection order against a non-Indian under some circumstances.

Some U.S. attorney’s offices have also reached agreements with tribal prosecutors (Rosebud Sioux Tribe is one example) allowing tribal prosecutors to use federal authority to prosecute non-Indians for federal crimes in federal court. The tribal prosecutors are appointed special U.S. attorneys to prosecute minor crimes and crimes not subject to tribal authority such as non-Indian domestic violence. This is encouraged under the Tribal Law and Order Act (TLOA).¹

TLOA also enhances the Special Law Enforcement Commissions that allow the deputization of tribal police officers to enforce federal laws in Indian country. Tribal law enforcement with the special commissions may arrest non-Indians on federal crimes. The Bureau of Indian Affairs (BIA) has the authority to issue the Special Law Enforcement Commissions. Memorandums of understanding are required to guarantee that the tribal officers are treated as federal officers.²

The Indian Civil Rights Act³ (ICRA) limits a tribe’s ability to incarcerate for any one crime to one year in jail and/or a \$5,000 fine unless certain conditions are met. If a person is convicted of more than one crime (domestic violence and kidnapping, e.g.), federal law allows up to one year for each offense. TLOA amended ICRA, thus increasing tribal court authority to incarcerate for up to three years and/or fine up to \$15,000 for one offense.⁴ However, if a tribal court orders incarceration for more than one year, it must

- Provide licensed legal counsel for an indigent defendant at tribal expense (The defense attorney must be licensed to practice law by a tribe, state, or federal government in a manner that ensures professional competence and responsibility.);
- Ensure that tribal court judges are law trained and licensed;
- Publish criminal laws, rules of evidence, and procedure; and

¹ Pub. L. No. 111-211.

² 25 U.S.C. § 2804 (Pub. L. No. 101-379), 25 C.F.R. 12, and TLOA (Pub. L. No. 111-211).

³ 25 U.S.C. §§ 1301-03.

⁴ 25 U.S.C. § 1302.

- Maintain an audio or video record of the criminal trial.⁵

Incarceration for more than a year also requires that the defendant either was previously convicted of the crime or that the crime is one that would carry a penalty of more than a year if prosecuted in a state or federal court. The TLOA also allows for the defendant to be convicted of more than one offense at a time, allowing incarceration for up to nine years.⁶

In addition, VAWA 2013 amended ICRA allowing certain domestic violence crimes committed by non-Indians against Indians within Indian country to be prosecuted in tribal court should the tribe decide to exercise "Special Domestic Violence Criminal Jurisdiction" (SDVCJ) over non-Indians. Since perpetrators in domestic violence and sexual assault cases are more often non-Indian SDVCJ is a significant tool to help tribes protect Native women and a significant step forward in reaffirming full tribal sovereignty. In order for a tribe to exercise "special domestic violence criminal jurisdiction", the tribe must meet certain requirements prior to the exercise of this special jurisdiction.

If your tribe is considering implementing TLOA's enhanced sentencing or SDVCJ, TLPI's *Tribal Code Resource: Implementing TLOA and VAWA 2013* may prove helpful for a greater discussion on these requirements and examples of tribal code.

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

Point of Discussion: Tribal inherent authority

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

⁵ 25 U.S.C. § 1302(b),(c).

⁶ 25 U.S.C. § 1301 (a)7D.

Concurrent Jurisdiction

Concurrent jurisdiction means that more than one government can prosecute an offense. Although, tribes possess inherent independent sovereign authority, in many cases of serious domestic violence, your tribe may exercise jurisdiction at the same time as either the federal (U.S.) government or the state government.

Point of Discussion: Double jeopardy?

If the state or U.S. government prosecutes a person for an act of domestic violence such as or similar to “assault resulting in serious bodily injury” under the Major Crimes Act,⁷ this does not eliminate the authority of the tribe. Because a tribe is considered to be an independent sovereign, the laws against double jeopardy do not apply.⁸

Example:

Joe, a Native man, attempts to murder his wife on the reservation. The U.S. government files charges against him in federal court under the Major Crimes Act. The tribal prosecutor files separate charges in tribal court based on tribal code. In this case, there could theoretically be two trials. (However, it will likely be important for the federal prosecutor and the tribal prosecutor to coordinate their efforts.)

Federal Jurisdiction

Federal (U.S.) courts have concurrent jurisdiction over violent cases committed by Indians in Indian country under the Major Crimes Act in many tribal communities. This includes very serious cases of domestic violence.

The Major Crimes Act⁹ currently refers to the following crimes:

- Murder,
- Manslaughter,
- Kidnapping,
- Maiming,

⁷ 18 U.S.C. § 1153.

⁸ U.S. v. Wheeler, 435 U.S. 313 (1978); U.S. v. Lara, 541 U.S. 193 (2004).

⁹ 18 U.S.C. § 1153.

- Felonies under chapter 109A (includes sex crimes),
- Incest,
- Assault with intent to commit murder,
- Assault with a dangerous weapon,
- Assault resulting in serious bodily injury,
- Assault of a person under the age of 16,
- Felony child abuse or neglect,
- Arson,
- Burglary,
- Robbery, and
- Felonies under § 661 (stealing property worth more than \$1,000).

Through the Indian Country Crimes Act, more commonly known as the General Crimes Act, 18 U.S.C. § 1152, criminal jurisdiction over general federal offenses is extended to Indian country when the offenses are between Indians and non-Indians committed in Indian country. Non-Indians could be prosecuted by the federal government for crimes against Indians, under this law for general federal crimes. This law also incorporates the Assimilative Crimes Act, 18 U.S.C. § 13, the federal law that allows for the use of state law in federal courts where there is no federal criminal statute in place. The General Crimes Act does not extend to Indian against Indian crimes or Indian against non-Indian crimes if the tribe already prosecuted the offense or a treaty stipulated that the power to prosecute members was exclusively reserved to the tribe.

It should also be noted that, absent treaty provisions to the contrary, the state would have criminal jurisdiction of a non-Indian versus non-Indian crime in Indian country. See *United States v. McBratney*, 104 U.S. 621 (1882) and *Draper v. United States*, 164 U.S. 240 (1896).

The United States also has jurisdiction in Indian country when it comes to federal crimes that apply throughout the United States. There are a number of federal crimes that significantly impact domestic violence. Among these important crimes is 18 U.S.C. § 117, Domestic Assault by a Habitual Offender. The law makes it a federal crime when any person, who was previously convicted of at least two prior offenses in tribal, state, or federal court, commits domestic assault in Indian country. The previous offenses need to qualify under federal law as assault, sexual abuse, an offense under Chapter 110A, or a violent felony against a spouse or intimate partner. A conviction as a “habitual offender” under this statute can result

in imprisonment for up to five years and that could be increased to ten years if there is serious bodily injury.

The VAWA, enacted in 1994, and amended in 1996, 2000, and 2006, has a number of general crimes that give the United States jurisdiction in Indian country as well as other U.S. territories. Interstate domestic violence,¹⁰ interstate stalking,¹¹ and interstate violation of a protection order¹² apply to all persons who cross state or tribal boundaries to commit or attempt to commit domestic violence, stalk, or violate a protection order. Domestic violence, stalking, and protection orders are defined in the statutes.

Additionally, the U.S. firearms laws are of great importance to the elimination of domestic violence in Indian country. The firearms statutes are discussed in more detail in the section on law enforcement in this resource.

¹⁰ 18 U.S.C. § 2261.

¹¹ 18 U.S.C. § 2261A.

¹² 18 U.S.C. § 2262.

Criminal Jurisdiction in Indian Country Where Public Law 280 Does Not Apply

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

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

** If listed in the Major Crimes Act, there is federal jurisdiction, exclusive of the state, but probably not of the tribe. If the listed offense is not otherwise defined and punished by federal law applicable in the special maritime and territorial jurisdiction of the United States, state criminal law is used in federal courts. If not listed in the Major Crimes Act, there is federal jurisdiction, exclusive of the state, but not of the tribe, under the General Crimes Act. If the offense is not defined and punished by a statute applicable within the special maritime and territorial jurisdiction of the United States, state criminal law is used in federal courts under 18 U.S.C. § 13. The United States can prosecute an Indian for a non-Major Crimes Act crime, provided the tribe has not prosecuted.

***If a tribe participates in the 'Special Domestic Violence Criminal Jurisdiction' under VAWA 2013, a participating tribe may have jurisdiction over some non-Indians in some domestic violence situations.

Note: There is federal jurisdiction in Indian country for all federal crimes of general applicability.

Public Law 280

In 1953 the U.S. Congress passed a law that substantially affected criminal jurisdiction in Indian country. Public Law 280 (PL 280) transferred federal jurisdiction over crimes occurring in Indian country to certain states. Six states (California, Minnesota, Nebraska, Oregon, and Wisconsin with certain exempted reservations and then Alaska upon statehood) were required to accept the transfer of jurisdiction. The other states were given the option of asserting jurisdiction.

Dissatisfaction with PL 280 has led to the partial or full **retrocession** (return of jurisdiction from the state to the federal government) of 31 reservations once covered by PL 280. In addition, concerns that some states and local governments were not addressing crimes on reservations in PL 280 states, led to an amendment to PL 280 in Section 221 of TLOA.¹³ The amendment allows tribal governments in PL 280 states to request that the federal government exercise concurrent jurisdiction over reservation crimes. This is different than retrocession as the state continues to have jurisdiction as well. The requests require approval by the U.S. Attorney General. Some tribes have submitted requests to the Attorney General.

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

¹³ 25 U.S.C. § 1321(a)(2).

Criminal Jurisdiction for Indian country Where Public Law 280 Applies

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

* Under the TLOA, a tribal government may request federal concurrent over crimes in PL 280 states, subject to approval of the Attorney General.

**If a tribe participates in the 'Special Domestic Violence Criminal Jurisdiction' under VAWA 2013, a participating tribe may have jurisdiction over some non-Indians in some domestic violence situations.

Note: There is federal jurisdiction in Indian country for federal crimes of general applicability.

Special Domestic Violence Criminal Jurisdiction

A federal statute reaffirms tribal jurisdiction over certain crimes committed by non-Indians against Indian victims in Indian country. See Section 904 of VAWA 2013, Special Domestic Violence Criminal Jurisdiction.¹⁴ If a tribe chooses to use this statute as a tool to combat violence, it must meet certain requirements in exercising the jurisdiction.

Section 904 requires that the non-Indian offender have sufficient connections to the tribe by either:

- residing in Indian country of the participating tribe, or
- being employed in Indian country of the participating tribe; or
- being the spouse, intimate partner or dating partner of a tribal member, or
- being a spouse, intimate partner or dating partner of an Indian who resides in Indian country of the participating tribe.

Additionally, section 904 sets forth the elements of the crimes related to this special domestic violence criminal jurisdiction to include:

- dating violence,
- domestic violence, or
- violation of a protection order

Tribes are required to provide a number of rights to defendants if they choose to participate in the SDVCJ. They need to provide:

- Effective assistance of counsel equal to at least that guaranteed by the U.S. Constitution.
- A licensed indigent defense attorney.
- Sufficiently trained judge to preside over the SDVCJ case.
- Tribal criminal laws that are made available to the public
- Record of the criminal proceedings,
- Trial by an impartial jury that ensure that the jury pool reflects a fair cross-section of the community
- Timely notification of the defendant's rights to include the right to habeas corpus review.¹⁵

¹⁴ Section 904 of VAWA 2013 amended ICRA, 25 U.S.C. § 1304.

¹⁵ 25 U.S.C. § 1304(d).

The chart provides a comparison between the due process protections required by the TLOA and VAWA 2013.

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

TRIBAL CODE EXAMPLES

Criminal Jurisdiction

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

Tribes and Concurrent Federal Jurisdiction

Poarch Band of Creek Indians

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

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

White Mountain Apache Criminal Code

Sec. 1.2 (2000)

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

Tribes Exercising Special Domestic Violence Criminal Jurisdiction Pursuant to VAWA 2013 Section 904

Tulalip Tribes

4.25.040 Special domestic violence criminal jurisdiction.

(1) The Tulalip Tribes hereby exercises “special domestic violence criminal jurisdiction” as a “participating tribe,” as defined within 25 U.S.C. 1304 (2013), subject to applicable exceptions defined therein, in the Tulalip Tribes Domestic Violence Court.

(2) In all proceedings in which the Tribal Court is exercising special domestic violence criminal jurisdiction as a participating tribe, all rights afforded by Chapter 2.25 TTC shall apply and those enumerated in the Indian Civil Rights Act, 25 U.S.C. 1302 to all defendants. Should there be any inconsistency between Chapter 2.25 TTC and 25 U.S.C. 1302, those of 25 U.S.C. 1302 shall apply.

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

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

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

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

(4) The Tulalip Tribes hereby declares its special domestic violence criminal jurisdiction over any person only if he or she:

(a) Resides within the jurisdiction of the Tulalip Tribes; or

(b) Is employed within the jurisdiction area of the Tulalip Tribes; or

(c) Is a spouse, intimate partner, or dating partner of:

(i) A member of the Tulalip Tribes; or

(ii) A member of another Indian tribe who resides within the jurisdiction of the Tulalip Tribes. [Res. 2013-379].

4.25.050 Special jurisdiction – Criminal conduct applicable.

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

(1) Domestic Violence and Dating Violence. An act of domestic violence or dating violence that occurs within the jurisdiction of the Tulalip Tribes.

(2) Violations of Protection Orders. An act that occurs within the jurisdiction of the Tulalip Tribes, and:

(a) Violates the portion of a protection order that:

(i) Prohibits or provides protection against violent or threatening acts of harassment against, sexual violence against, contact or communication with, or physical proximity to the person protected by the order;

(ii) Was issued against the defendant;

(iii) Is enforceable by the Tulalip Tribes; and

(iv) Is consistent with 18 U.S.C. 2265(b). [Res. 2013-379].

Tribes and Concurrent State Jurisdiction

White Earth Band of Chippewa Judicial Code

Title 1, Ch. 2, Sec. 1

The jurisdiction of the Tribal Court shall extend to:

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

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

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

Ho-Chunk Nation Code

1 HCC § 1

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

TRIBAL CODE COMMENTARY

Each of the examples comes from a general criminal jurisdiction law. These laws are not specific to domestic violence, except the example of the Tulalip Code.

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

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

The Tulalip Code seeks to exercise special domestic violence jurisdiction pursuant to section 904 of VAWA 2013 over non-Indians that commit certain crimes against Indians in Indian country. It specifically describes the situations in which the tribal court would have SDVCJ.

The White Earth Band of Chippewa Judicial Code acknowledges concurrent jurisdiction with a state (Minnesota), as it is currently a tribe affected by PL 280. It also spells out its territorial jurisdiction and account for future additions to its reservation. The tribe has a broad statement of jurisdiction over all persons.

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

B. Civil Jurisdiction

Civil Jurisdiction Overview

Civil jurisdiction over domestic violence cases is important in protection order cases and family law cases. Civil law is not primarily concerned with punishing offenders, like criminal law, but rather is concerned with the legal relationship between two parties. Because the tribe has somewhat broader powers over non-Indians in civil proceedings, it is important to fully understand civil jurisdiction.

U.S. law has placed some limits on tribal civil jurisdiction, but the limitations are different than those for criminal jurisdiction. When drafting the civil jurisdiction section, tribes can assert the inherent powers of the tribe with strong, broad language.

Jurisdiction is one of the most confusing aspects of tribal law. Domestic violence victims can fall through the “cracks” if tribal law does not strongly assert tribal sovereignty. Remember, if the tribal government has not been specifically divested of authority over a legal matter, the authority still exists pursuant to inherent sovereign authority.

Limitations on Civil Tribal Jurisdiction

Two United States Supreme Court cases from the 1980’s and 1990’s directly address tribal court civil jurisdiction over non-citizens/members and over non-Indian defendants. *Montana v. United States*, 450 U.S. 544 (1981), held that tribal courts have no civil regulatory authority over non-Indian defendants on fee land owned by non-Indians that is located within a reservation unless one of the following factors apply: 1) the parties had entered into a consensual relationship with the tribe or its members through commercial dealing, contracts, leases or “other arrangements” or 2) the conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. This two-pronged test is referred to as the *Montana* test. Either of the two prongs would be sufficient to support tribal civil jurisdiction over non-members in Indian country.

Subsequently, *Strate v. A-1 Contractors*, 520 U.S. 438 (1997) held that a tribe had no civil adjudicatory jurisdiction over non-members involved in a traffic accident that occurred on non-Indian fee land (a state right-of-way running through the reservation). The Court further held that absent congressional direction enlarging

tribal court jurisdiction, the civil authority of Indian tribes and their courts over non-Indian fee lands generally does not extend to the activities of non-members of the tribe. Therefore, if neither of the two Montana factors listed above apply, tribal courts may not exercise civil jurisdiction over non-members on fee lands.

Recently, the federal district court in the Western District of Washington in *Martinez v. Martinez*, LEXIS 104300 (W.D. Wash. 2008), decided that a tribe does not have civil jurisdiction to issue a protection order for a nonmember Indian living on fee land against a non-Indian. The federal district court considered the *Montana* test and concluded that the tribe's jurisdiction does not extend to nonmembers unless there is a consensual relationship or a threat to the health, welfare, political integrity, or economic security of the tribe.

The federal court found that even though both parties availed themselves of the tribal court that did not constitute a consensual relationship. The court also found that the second *Montana* prong, a threat to the tribe's health, welfare, and economic security, required a showing that the non-Indian conduct "menaces" a tribe's political integrity, economic security, or health and welfare. Because the parties were both nonmembers and resided on fee land, the court found the second prong was inapplicable. Although this case is not a federal appellate case, it does cause concern that tribes may be issuing protection orders involving nontribal members that will not be enforced by states, as they may not be recognized as valid orders.

Recently, 18 U.S.C. 2265(e) (updated 2013) addressed the civil jurisdictional issue of *Martinez* by setting forth the following:

For purposes of this section, a court of an Indian tribe shall have full civil jurisdiction to issue and enforce protection orders involving any person, including the authority to enforce any orders through civil contempt proceedings, to exclude violators from Indian land, and to use other appropriate mechanisms, in matters arising anywhere in the Indian country of the Indian tribe (as defined in section 1151) or otherwise within the authority of the Indian tribe.

Despite the VAWA 2013's clarification of tribal court's civil jurisdiction to issue protection orders over any person (Indian and non-Indian) regarding matters arising in Indian country, tribes should still consider making findings regarding the Montana test for matters arising outside of Indian country. If the tribal protection order case involves nonmembers (including non-Indians) with a cause of action

arising on fee land, the tribe should make findings to meet the Montana exception. The subject matter jurisdictional issue is crucial as orders issued without subject matter jurisdiction are void.

Note that non-Indian abusers who are subject to valid protection orders can be held civilly accountable in tribal courts under some circumstances. Some examples of civil remedies include contempt of court, exclusion from the reservation, fines and fees, restitution, attorney's fees and court costs, batterer reeducation programs, community service, forfeiture, and loss of licensure or other privileges. Your tribe may develop other suitable civil remedies.

TRIBAL CODE EXAMPLES

Civil Jurisdiction

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

Salt River Pima-Maricopa Indian Community
Domestic Violence Code, Art. 1, Sec. B. (1997)

The Salt River Pima-Maricopa Indian Community shall exercise original jurisdiction over, and the provisions of this Chapter shall extend to, all areas and persons, and shall exercise jurisdiction over all persons within the territorial jurisdiction of the Salt River Pima-Maricopa Indian Community. Nothing in this Chapter shall be construed or read to diminish the jurisdiction of the Salt River Pima-Maricopa Indian Community.

Sault Ste. Marie Tribal Code
Sec. 34.102 Jurisdiction

The Tribal Court shall have jurisdiction to issue personal protection orders and injunctions as provided in this Chapter in any case in which either the petitioner or respondent resides within tribal territory at the time the petition is filed unless both the petitioner and respondent are not Indians.

Turtle Mountain Band of Chippewa Indians Domestic Violence Code
Sec. 5000, Jurisdiction for Civil Protection Orders

- A. The Turtle Mountain Tribal Court shall have jurisdiction:*
When the petitioner or respondent is domiciled or found on the Turtle Mountain Indian Reservation;
When any act of domestic violence occurs within the exterior boundaries of the Turtle Mountain Indian Reservation;
When the Court is being asked to recognize and enforce a valid Protection Order of another court of competent jurisdiction; and
Over any petition for Protection Orders under this Domestic Violence Code.
- B. The Court shall construe this section liberally to exercise maximum jurisdiction.*
- C. This Section is not exclusive of the situations in which the Court may exercise jurisdiction.*

Ninilchik Village Ordinance No. 99-01
Domestic Violence Section 3. Jurisdiction

The personal and subject matter jurisdiction of the Tribal Court of Ninilchik Village under this ordinance is based on the Tribe's inherent authority over its members, Tribal internal affairs and those who enter into consensual domestic relationships with Tribal members. The Court's jurisdiction extends to all persons residing within the tribe's geographic service area for the delivery of federal programs who are Tribal members of Ninilchik Village. The Court's jurisdiction also extends to any other person who resides within the Tribe's geographic service area who consents to the jurisdiction of the court. Persons who on or after the date this ordinance is adopted enter into or remain in a marriage or other similar consensual, personal relationship with a tribal member shall be deemed to have consented to the Court's jurisdiction under this ordinance as long as they reside within the Tribe's geographic service area. As used in this ordinance, the Tribe's geographic service area does not necessarily describe "Indian country." Instead, the term "geographic service area" is used in this ordinance to further define those persons over

whom the Tribal Court asserts personal and subject matter jurisdiction because of their domestic relations as or with tribal members and the Tribe's inherent authority to control its internal relationships even outside "Indian Country."

TRIBAL CODE COMMENTARY

The Salt River Pima-Maricopa Indian Community's law says the tribe has power over *all* domestic violence cases on its land. This law does not require that the victim or the perpetrator actually live on the land.

The Sault Ste. Marie Tribal Code allows the issuance of civil protection orders and injunctions of Indian or non-Indian individuals who live on the reservation. It does require that at least one of the parties is a resident of land over which the tribe has territorial jurisdiction and that at least one of the parties is Indian.

The Turtle Mountain Band of Chippewa Indians Code provides extensive civil jurisdiction over the issuance and enforcement of protection orders. They assert their jurisdiction over anyone domiciled or found in their territory. **Domiciled** generally has a little different meaning than "resides." It means a person's legal home, his or her permanent residence. A residence is generally where one is living or staying. A person can have more than one residence, but only one domicile. A vacation home is a residence, but is probably not a domicile. The Turtle Mountain Band asserts jurisdiction over individuals found on the reservation and any domestic violence act that occurs within the reservation. The code can be interpreted as including jurisdiction over non-Indians who commit acts of domestic violence against Indians on the reservation.

The Ninilchik Village is not located in "Indian country" as defined by federal law, so refers instead to its "service area." It asserts tribal sovereignty by stating that it has civil jurisdiction over tribal members and anyone in a consensual domestic relationship with a tribal member in their geographic service area, defined by Ninilchik as adoptions, marriages, or similar personal relationships. It requires that parties reside within the service area.

EXERCISES

The following exercises are meant to guide you in writing the jurisdiction section of the tribal domestic violence code.

STEP 1: Determine Existing Tribal Law

Does your tribal code already contain laws concerning criminal jurisdiction?

☐ Yes (If yes, write the citation here)

☐ No

Point of Discussion: Are our criminal jurisdiction laws sufficient?

Are our current laws broad enough to cover the domestic violence cases the tribe is seeking to prosecute?

What changes should be made?

Does your tribal code already contain a statute concerning civil jurisdiction?

☐ Yes (If yes, write the citation here)

☐ No

Point of Discussion: Are our civil jurisdiction laws sufficient?

Are our laws broad enough to cover cases that may arise as the result of domestic violence?

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

STEP 2: Determine Concurrent Jurisdiction

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

- ☐ Federal (U.S.) government
- ☐ State government under PL 280
- ☐ State government under another federal law

Point of Discussion: Concurrent jurisdiction

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

STEP 3: Drafting Law

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

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

CRIMINAL

- ☐ Personal jurisdiction
- ☐ Territorial jurisdiction
- ☐ Subject matter jurisdiction

CIVIL

- ☐ Personal jurisdiction
- ☐ Territorial jurisdiction
- ☐ Subject matter jurisdiction

ADDITIONAL RESOURCES

BOOKS:

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

Jessup Newton, Nell, ed., *Cohen's Handbook of Federal Indian Law* (Newark, NJ: Lexis-Nexis, 2005).

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

Tatum, Melissa, Miriam Jorgensen, Mary E. Guss, and Sarah Deer, *Structuring Sovereignty, Constitutions of Native Nations*, (Los Angeles, CA: American Indian Studies Center, 2014).

ARTICLES:

Christopher B. Chaney, "The Effect of the United States Supreme Court's Decisions During the Last Quarter of the Nineteenth Century on Tribal Criminal Jurisdiction," 25 *Brigham Young University Journal of Public Law* 173 (2000).

Robert N. Clinton, "Criminal Jurisdiction over Indian Lands: A Journey through a Jurisdictional Maze," 18 *Arizona Law Review* 504 (1976).

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

Kevin Meisner, "Modern Problems of Criminal Jurisdiction in Indian Country," 17 *American Indian Law Review* 175 (1995).

Frank Pommersheim, "The Crucible of Sovereignty: Analyzing Issues of Tribal Jurisdiction," 31 *Arizona Law Review* 329 (1989).

Amy Radon, "Tribal Jurisdiction and Domestic Violence: The Need for Non-Indian Accountability on the Reservation," 37 *University of Michigan Journal of Law Reform* 1275 (2004).

Melissa L. Tatum, “Civil Jurisdiction: The Boundaries between Federal and Tribal Courts,” 29 *Arizona State Law Journal* 705 (1997).

Hallie Bongar White, Kelly Gaines Stoner and James G. White, “Creative Civil Remedies Against Non-Indian Offenders in Indian Country”, 44 *Tulsa L. Rev.* 427 (2008).

Part 4

CRIMINAL DOMESTIC VIOLENCE STATUTES

OVERVIEW

Prosecuting persons who commit domestic violence can be an effective method of intervention. When domestic violence is defined as a crime, then offenders can be arrested, charged, convicted, and punished for their actions. Under many traditional belief systems, there were strong sanctions for hurting women and children. This section of the workbook is designed to assist you in developing or strengthening your tribe's ability to hold offenders accountable.

This part is divided into seven subsections:

- A. Defining Domestic Violence
- B. Role of Law Enforcement
- C. Role of Tribal Prosecutors
- D. Role of Courts
- E. Evidence
- F. Victims' Rights in Criminal Proceedings
- G. Sanctions

All tribal nations have a responsibility to try to stop the high rates of assault against Native women. Making sure that your tribal code defines domestic violence as a *crime* is one way (but not the only way) to respond to domestic violence.

Point of Discussion: Why have a criminal domestic violence law?

Why should we have a tribal criminal law against domestic violence?

1. It sends a message that we do not tolerate domestic violence.
2. It gives tribal law enforcement the power to arrest suspects.
3. It gives tribal prosecutors the power to prosecute suspects.
4. It gives tribal judges the power to punish people who commit domestic violence.

The federal government has limited tribal sovereignty by restricting who tribes can punish criminally and how much punishment they can impose. Tribes cannot prosecute non-Indians unless the tribe meets the requirements set forth in section 904 of VAWA 2013 and codified in ICRA. However, it is possible for tribal law enforcement officers and tribal prosecutors to arrest non-Indians on federal charges and prosecute in U.S. Court under some circumstances. TLOA enhances the Special Law Enforcement Commissions that allow the deputization of tribal police officers to enforce federal laws in Indian country. Tribal law enforcement with the special commissions may arrest non-Indians on federal crimes. The BIA has the authority to issue the Special Law Enforcement Commissions. Memorandums of understanding are required to guarantee that the tribal officers are treated as federal officers.¹⁶

Tribes cannot impose more than a one-year sentence or a \$5,000 fine for each tribal criminal violation, unless they meet the requirements specified in the TLOA. TLOA increases tribal court authority to incarcerate for up to three years and/or fine up to \$15,000 for one offense. However, if a defendant is charged with a crime that could result in incarceration for more than one year, the tribe must:

- Provide the defendant with an attorney, if he cannot afford one;
- Ensure that the tribal judge hearing the case is law trained and licensed;
- Publish criminal laws, rules of evidence, and procedure; and
- Maintain an audio or video record of the criminal trial.

¹⁶ 25 U.S.C. § 2804 (Pub. L. No. 101-379), 25 C.F.R. 12, and TLOA (Pub. L. No. 111-211).

Incarceration for more than a year also requires that the defendant either was previously convicted of the crime or that the crime is one that would carry a penalty of more than a year if prosecuted in a state or federal court.¹⁷

Point of Discussion: Limitations on prosecutions

Limitations on tribal criminal response:

1. Cannot prosecute non-Indians unless tribe meets the requirements of section 904 of VAWA 2013.
2. Generally cannot sentence to more than one year (per offense) and/or \$5,000 fine. Is it possible to expand your tribal authority by meeting the requirements of the TLOA?

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

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

Point of Discussion: Tribal prosecution rights

All federally recognized tribes have the right to prosecute some domestic violence cases—even if they aren't doing it right now.

¹⁷ 25 U.S.C. § 1302.

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

Point of Discussion: Why prosecute?

Why prosecute domestic violence if the federal or state government also has the power?

1. Tribe may be able to act more quickly.
2. Tribe may have a higher priority to protect citizens.
3. Tribal sovereignty: women's safety is important to our tribe's future.

This section focuses on the drafting of a criminal domestic violence law. Having a law is just the beginning. The ability to enforce and prosecute is very important. Cooperation and sharing information and evidence between jurisdictions is vital. Agreements and protocols with other tribes, states, and the federal government may also be necessary.

A. DEFINING DOMESTIC VIOLENCE

Defining domestic violence is the first step in developing a strong prosecutorial response to the crime. If you expect domestic violence to be defined as simply physical violence between family members, the criminal definition may be different than your expectation.

In the most general terms, the crime of domestic violence is forbidden conduct in the context of a designated relationship between the parties.

Forbidden Conduct
In the Context of a
Designated Relationship between the Parties
Equals
Domestic Violence Crime

A federal law makes domestic violence in Indian country committed by a habitual offender a federal crime. 18 U.S.C. § 117 allows for the punishment of any person who commits domestic violence and who has two prior federal, state, or tribal convictions for offenses that would, if subject to federal jurisdiction, qualify as assault, sexual abuse, an offense under Chapter 110A, or a violent felony against a spouse or intimate partner. The person could be incarcerated for up to five years, and if the assault resulted in substantial bodily injury then up to ten years. In this statute the designated relationship is defined as an assault committed by

- A current or former spouse, parent, child, or guardian of the victim;
- A person with whom the victim shares a child in common;
- A person who is cohabitating with or has cohabitated with the victim as a spouse, parent, child, or guardian; and/or
- A person similarly situated to a spouse, parent, child, or guardian of the victim.¹⁸

The exercises in this section are designed to help define both the forbidden conduct and the offender/victim relationship. Keep in mind that the definition of *domestic violence* in the criminal code may also be used to determine whether a particular person is eligible for a protection order in the civil proceedings (see Part 5).

¹⁸ 18 U.S.C. § 117.

TRIBAL CODE EXAMPLES

Defining Domestic Violence

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

Laundry List

Makah Tribal Law and Order Code

Title 11, Ch. 1, Sec. 11.1.04

e. “Domestic violence” means any one of the following when occurring between family or household members:

- 1. Commission of an act that constitutes a crime under Makah Law and Order Code, Title 5, Chapter 1, as now or hereafter amended.*
- 2. Commission of a crime listed under the Major Crimes Act, 18 U.S.C. Sec. 1153, as now or hereafter amended.*
- 3. Physical harm, bodily injury, assault, sexual assault, property damage, or injury to household pets or the infliction of reasonable fear of physical harm.*

“Domestic violence” also means:

- 4. Violation of a restraint provision contained in an order entered under this Title or of a comparable provision contained in an order accorded full faith and credit by the court under MLOC 11.7.03, and of which the person had notice at the time of the alleged violation.*

“Domestic violence” does not include acts of self defense or in defense of another reasonably taken in response to acts of domestic violence:

g. “Family or household members” means any one of the following:

- 1. Spouse.*
- 2. Former spouse.*
- 3. Persons who have a child in common or who are expecting a child in common, regardless of whether they have been married or have lived together at any time.*
- 4. Persons eighteen years of age or older who are related by blood or marriage.*
- 5. Persons eighteen years of age or older who are presently residing together or who have resided together in the past.*
- 6. Persons sixteen years of age or older who have or have had a dating relationship.*
- 7. Persons who have a biological or legal parent-child relationship including stepparents and stepchildren and grandparents and grandchildren.*
- 8. Physically or mentally disabled persons and their caregivers.*
- 9. Elders sixty years of age or older and their caregivers.*

Inclusive

Oglala Sioux Tribe Domestic Violence Code Ch. 1, Sec. 103

1. “Domestic violence/abuse” means the occurrence of one or more of the following acts by a family or household member, but does not include acts of self-defense:

- (a) Attempting to cause or causing physical harm to another family or household member,
- (b) Placing a family or household member in fear of physical harm,
- (c) Causing a family or household member to engage involuntarily in sexual activity by force, threat of force, or duress.

2. “Family or household members” include:

- (a) Adults or minors who are current or former spouses,
- (b) Adults or minors who are dating or who have dated,
- (c) Adults or minors who are engaged in or who have engaged in a sexual relationship,
- (d) Adults or minors who are related or formerly related by marriage as recognized by Western or Lakota tradition,
- (e) Persons who have a child in common,
- (f) Minor children of a person in a relationship that is described in paragraphs a through e above.

Colville Law and Order Code Chapter 5-5 Domestic and Family Violence Code

5-5-3 Definitions and Requirements

(a) “Advocate” means an employee of, or a volunteer for, a program for victims of domestic violence who:

- (1) Has a primary function of giving information, referrals, counseling or assistance to victims of domestic violence, supervising the employees or volunteers of the program, or administering the program; and
- (2) Has undergone 30 hours of training as an Advocate for victims of domestic violence and continues to receive ongoing training as available and deemed necessary by the program.

(b) “Child Welfare Agency” means the Tribal governmental agency to which the Court grants custody of minors when the Tribe intervenes in a family’s life.

(c) “Court” means all courts of the Confederated Tribes of the Colville Reservation.

(d) “Domestic Violence” means the occurrence of one or more of the following acts by a family or household member, but does not include acts of self-defense or culturally appropriate discipline of a child:

- (1) Attempting to cause or causing physical, mental or emotional harm to another family or household member;
- (2) Placing a family or household member in reasonable fear of physical harm to him- or herself or another family or household member. This fear may be produced by behavior which induces fear in the victim, including, but not limited to, harassment, stalking, destruction of property, or physical harm or threat of harm to household pets;
- (3) Causing a family or household member to engage involuntarily in sexual activity, which includes, but not limited to, through coercion, intoxication, force, threat of force, or duress; or
- (4) Attempting to commit or committing any criminal offense under Colville Tribal law against another family or household member.

(e) “Dominant Aggressor” means the person whose actions are primarily responsible for initiating or triggering the domestic violence throughout the course of the relationship.

(f) “Ex Parte” in this Chapter means that only the requesting party is heard by the Court, and that notice and an opportunity to contest the facts are not available to the party adversely affected at that hearing.

(g) “Family or Household Members” include:

- (1) Persons who are current or former spouses;
- (2) Persons who live together or who have lived together;
- (3) Persons who are dating or who have dated;

- (4) Persons who are engaged in or who have engaged in a sexual relationship;*
- (5) Persons who are related by blood or adoption;*
- (6) Persons who are part of the extended family of the victim or abuser and who commonly interact with the victim or abuser;*
- (7) Persons who have a child in common, regardless of whether they have been married or lived together;*
- (8) Persons who have a biological, legal, or step parent-child relationship;*
- (9) Indian Custodians; or*
- (10) Minor children, either biological, legal, or step of a person in a relationship that is described in subparts (1) through (9) above.*

- (h) "Perpetrator" means a person who commits a crime.*
- (i) "Public Official" means a person elected, appointed or hired who has discretionary authority to carry out some portion of a government's sovereign powers for a fixed period.*
- (j) "Shelter" means a safe home/shelter home that provides temporary refuge and adequate food and clothing offered on a twenty-four (24) hour, seven (7) day per week basis, to victims of domestic violence.*

TRIBAL CODE COMMENTARY

A broad definition of *domestic violence* will allow the tribe to take action in more kinds of cases. You may want to consider writing a law that will allow as many victims to be protected as possible.

However, it is important to also discuss where you want to limit your definition. For example, the Makah definition of *domestic violence* may include a fight between a brother and sister. The Oglala and Colville definitions require a more specific kind of “intimate partner” relationship.

The Oglala Sioux have a very broad definition of *forbidden conduct* that includes sexual violence and fear of physical harm. The Makah specifically laid out, in a laundry list style, forbidden conduct as any criminal act between family members that is already defined in their criminal code, as well as other offenses. Both codes distinguish between self-defense and domestic violence, which prevents victims who are defending themselves against attackers from being arrested.

The definition of domestic violence in the Oglala Sioux and Colville codes include a variety of relationships, including dating couples, traditional marriages, and adopted children. It is hard to imagine a relationship that is not covered by these two codes. The openness of words like “family member or household member” allows for the multiple kinship ties that Lakota people have with each other, beyond the traditional Western idea of the “husband and wife” relationship.

Note the lack of gender-specific pronouns. The Oglala Sioux Code does not assume that the perpetrator is a man. It also does not assume that the victim is a woman. This definition also allows for protection of persons who are “two-spirit” or involved in a same-gender relationship.

Points of Discussion: What is important to define?

- What kind of behavior should be against the law?
- What kind of relationships are we targeting?
- Should we distinguish between domestic violence and self-defense?

B: Role of Law Enforcement

Role of Tribal Law Enforcement Overview

Tribal law enforcement officers are usually the first people to respond to cases of domestic violence. Given this special role, it is often important to have codes or statutes that provide guidelines for law enforcement.

Your code can mandate that officers responding to a domestic violence call perform certain duties and can hold officers harmless for the good-faith performance of those duties. This means that if the officer acts faithfully in his or her duty or obligation, he or she will not be held liable for his or her actions.

Many tribal codes contain a “mandatory arrest” section. The goal of a “mandatory arrest” law is to require law enforcement to make an arrest if there has been a case of domestic violence. Sometimes these laws were passed because police officers were treating domestic violence as a “private family matter” and not making arrests.

However, many “mandatory arrest” laws have been used as an excuse to arrest women who were acting in self-defense. For this reason, many laws include the term *predominant aggressor* in order to stress the importance of not arresting victims.

The following explanation comes from the Southwest Center on Law and Policy:

“Predominant aggressor” is a term often used as shorthand by law enforcement officers and professionals within the field of domestic violence to identify the person who used “more substantial” force when two or more people have used physical force against one another. Generally, law enforcement and professionals within the field of domestic violence make the determination based upon the larger context of the history and relationship between the parties. The following are some of the relevant factors:

- *The person most likely to inflict injury*
- *The person least likely to be afraid*
- *What led up to the violent episode*
- *Comparison of the type, location, and severity of injuries (offensive and defensive injuries or wounds)*

- *Who has injuries that do not appear to be consistent with statements made*
- *Who could not make a legitimate claim for self-defense*
- *Use of force and intimidation used by each party*
- *History of domestic violence*
- *Comparable size, strength of the parties*
- *Character evidence or known propensity for violence*
- *Plausibility of statements from parties, witnesses, etc.*
- *Who has access to or control of resources*
- *Who has the history of help-seeking behaviors*
- *Who has attempted to change her/his behavior to stop the abuse*
- *Who has access to or threatened use of weapons*
- *Likelihood of future harm*¹⁹

Predominant aggressor provisions can assist in assuring that victims of domestic violence are not arrested for acting in self-defense. Usually, domestic violence theory holds that there is one abuser and one victim. However, at a domestic violence scene, both parties may claim to be the victim and both may appear to have injuries. The code can require the officer to make a determination as to which party was the “predominant aggressor” and which party acted in self-defense. The goal of these laws is to lessen the likelihood of law enforcement mistakenly arresting a victim who was acting in self-defense.

The possession of a firearm makes it six times more likely that a batterer will commit lethal abuse. Women who have been previously threatened or assaulted with a firearm or other weapon are 20 times more likely than other women to be murdered by their abuser.²⁰ The federal government, many states, and some tribes have passed laws that prohibit the abuser from purchasing or possessing firearms. Some laws direct law enforcement to confiscate and/or search for firearms when directed by a protection order or at certain times during a domestic disturbance.

Under federal law, persons convicted of a “qualifying” misdemeanor crime of domestic violence in state or tribal courts are prohibited from possessing any firearm or ammunition in or affecting commerce, shipping or transporting any firearm or ammunition in interstate or foreign commerce, or receiving any firearm

¹⁹ See <http://www.swclap.org/predominantaggressors.pdf> for more information.

²⁰ J. Campbell, D. Webster, J. Koziol-McLain, C. R. Block, D. Campbell, M. A. Curry, F. Gary, J. McFarlane, C. Sachs, P. Sharps, Y. Urlich, and S. A. Wilt, “Assessing Risk Factors for Intimate Partner Homicide,” *NIJ Journal* 250 (2003): 14–19.

or ammunition.²¹ A tribal law enforcement officer would generally not have authority to enforce federal law unless given federal authority, such as through Special Law Enforcement Commissions issued by the BIA. A tribe may consider implementation of similar firearms' laws in its own code. Reviewing federal firearms statutes may be informative and helpful in considering tribal laws and also in ensuring tribal protection orders are sufficient to trigger the federal laws if so desired.

To be a “qualifying” misdemeanor conviction under the federal firearms statute, the following elements must be met and these elements should appear as findings or conclusions of law in the judicial record of conviction:

- The use or attempted use of physical force or threatened use of a deadly weapon.
- The convicted person is a current or former spouse, parent, or guardian of the victim; a person with whom the victim shares a child in common; a person who is cohabiting or has cohabited with the victim as a spouse, parent, or guardian of the victim; or a person similarly situated to the spouse, parent, or guardian of the victim.
- The accused must have been represented by counsel or made a valid waiver and, if entitled to trial by jury, was so tried or made a valid waiver.

Persons subject to a “qualifying” protection order²² are also prohibited from possessing or purchasing firearms or ammunition under 18 U.S.C. § 922(g)(8). It is also unlawful to sell firearms and ammunition to such people. The requirements of such an order are discussed in more detail under the section on protection orders.

²¹ 18 U.S.C. § 922(g)(9).

²² 18 U.S.C § 922(g)(8) who is subject to a court order that—

(A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;

(B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and

(C)

(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or

Point of Discussion: How can we prevent victims from being arrested?

- Should we have a mandatory arrest law?
- Should we define *predominant aggressor*?
- Should we have a law prohibiting the possession or purchase of firearms or ammunition by a perpetrator? What authority should we give law enforcement to confiscate firearms?

Many codes also include special laws concerning tribal law enforcement or tribal government officials who are the perpetrators of domestic violence. These laws can help to establish some minimum requirements for law enforcement agencies in responding to their own employees and the tribal council in this regard.

Point of Discussion: Domestic violence committed by leaders

- Should we have a law that describes what should happen if a tribal leader or a relative of a tribal leader commits domestic violence?
- Should we have a law that describes what should happen if a tribal law enforcement officer (or other authority figure) commits domestic violence?

Keep in mind that your tribal law enforcement agency can also pass additional guidelines or policy that may go “beyond” what the law requires.

It is important for the tribal law enforcement department to be consulted on these laws. Because the tribal law enforcement officers will be required to follow the law, they should have a chance to review and comment.

TRIBAL CODE EXAMPLES

Law Enforcement

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

Mandatory Arrest

Confederated Tribes of Siletz Indians Domestic and Family Violence Ordinance

§ 12.505. Mandatory Arrest for Offenses Involving Domestic or Family Violence

A law enforcement officer must arrest and charge a person with the appropriate crime if the officer has probable cause to believe that the person has committed an offense involving domestic or family violence, even if a warrant has not been issued and the offense was committed outside the presence of the officer.

Fort Mojave Indian Reservation Law and Order Code

Article XIII, Sec. 1310. Mandatory Arrest—Criminal Offense of Domestic Violence

1. A law enforcement officer shall arrest a person anywhere, including at the person's residence, with or without a warrant if the officer has probable cause to believe that the person has committed a criminal offense of domestic violence. The victim need not sign a complaint for the arrest to occur. The arrest shall be made even if against the expressed wishes of the victim and even though the offense did not take place in the officer's presence. For the purposes of Section 1310(1), "probable cause" means the reasonable belief, based on the officer's observations and statements made by the parties involved and witnesses, if any, that the person committed the offense.

Primary Aggressor

Turtle Mountain Band of Chippewa Indians Domestic Violence Code

Sec. 1020(O)

"Primary aggressor" means the person(s) who has caused or has threatened to cause significant physical or emotional harm to another in his family or household, as compared to the other party(s) involved. This is regardless of which party was the first aggressor. In determining whether one person is a primary aggressor, consideration shall include but is not limited to:

Prior history of domestic violence;

The relative severity of the injuries inflicted on each person;

The likelihood of future injury to each person;

Whether one of the persons acted in self-defense; and

Relative ability to inflict harm between the parties involved.

Kickapoo Tribe in Kansas Domestic Violence Code

Sec. 205 (3) & (7)

(3) If a law enforcement officer received complaints of domestic violence from two [sic] or more opposing persons, the officer shall evaluate each complaint separately to determine who was the primary aggressor. If the officer determines that one person was the primary physical aggressor, the officer need not arrest the other person alleged

to have committed the domestic violence. In determining whether a person is the primary aggressor the officer shall consider:

- a) Prior complaints of domestic violence;*
- b) The relative severity of the injuries inflicted on each person;*
- c) The likelihood of future injury to each person; and*
- d) Whether on [sic] of the persons acted in self-defense and/or in defense of others;*
- e) The dynamics of domestic violence.*

(7) The law enforcement officer is not required to make an arrest based on who hit who first but shall consider the dynamics of domestic violence and the definition of primary aggressor in determining which party to arrest.

Response to Report of Domestic Violence

Saginaw Chippewa Domestic Abuse Protection Code Chapter 1.241 Reporting Requirements

1. A law enforcement officer must complete a detailed written report for each response to a family violence complaint. The report must include, but is not limited to:

- a) address, date, time of the occurrence or incident investigated;*
- b) the victim's name, address, home and work telephone numbers, race, sex, date of birth;*
- c) the suspect's name, address, home and work telephone numbers, race, sex, date of birth, and information describing suspect;*
- d) the name, address, home and work telephone numbers of any witnesses to the crime, including children of the victim or suspect or any children residing at the residence;*
- e) the relationship between the suspect and the victim;*
- f) a complete record of all statements made by the abuser, victim, witnesses, and all minor children present;*
- g) a detailed description of the victim's and the abuser's physical condition including height, weight, and photographs of all injuries;*
- h) history of prior abuse of any party;*
- i) the relationship of the person who called the police;*
- j) a notation that the 911 tape was requested for evidence;*
- k) whether alcohol or controlled substances were involved in the incident, and by whom;*
- l) a narrative describing the dispute and the circumstances that lead to it;*
- m) whether the suspect physically and/or sexually assaulted the victim, including a list on injuries;*
- n) a description of any weapon or object used in committing the crime;*
- o) a description of property damage and any evidence gathered at the scene;*
- p) information on the medical treatment, if any, that the victim received.*

2. The tribal police shall retain the completed police report in its files. The officer shall forward copies to the prosecutor within twenty-four (24) hours of the incident.

Makah Domestic Violence Code

§11.8.01

When an NBPD officer responds to a report of domestic violence, the officer shall do the following, as necessary and in the order appropriate to the circumstances:

- a) Request Back-Up: View a domestic violence call as a high risk situation, obtain as much information as possible from the dispatcher, and request back-up by at least one other officer.*
- b) Assure Safety: Act to assure the safety of officers, the victim, the victim's family and household members, witnesses, and bystanders. Separate the alleged perpetrator, the victim, and the witnesses for safety and investigative purposes.*
- c) Confiscate Weapons: Confiscate firearms or other dangerous weapons according to standard law enforcement procedures, and particularly firearms or other dangerous weapons involved in or threatened to be used in the alleged incident of domestic violence, regardless of ownership.*

- d) *Arrest Alleged Perpetrator: Arrest the alleged perpetrator according to standard law enforcement procedures and in accordance with MLOC 11.8.02 or MLOC 11.8.03, as appropriate.*
- e) *Request Emergency No-Contact Order: Request, prepare, and serve an emergency no-contact order pursuant to MLOC 11.4.11.*
- f) *Render Emergency First Aid and Obtain Medical Treatment: Render emergency first aid and obtain medical treatment for the victim and transport or arrange transportation for the victim to a medical facility. Obtain a signed medical release from the victim.*
- g) *Transport to Shelter: Transport or arrange transportation for the victim and the victim's family and household members to a place of safety or shelter, maintaining confidentiality.*
- h) *Observe and Place Minor Children, Disabled Persons, and Elders: Observe whether minor children, disabled persons, and elders in the household display physical signs of domestic violence, and report any such signs to Social Services. Notify Social Services if no parent or other reliable family or household member is available to care for minor children, disabled persons, or elders.*
- i) *Remove Essential Personal Effects: Assist the victim and the victim's family and household members in removing essential personal effects.*
- j) *Inform Victim of Rights, Remedies, Services: Provide the victim with oral and written information regarding legal rights, remedies, and local services for victims of domestic violence. Give the victim a Petition for an Order for Protection form and instructions.*
- k) *Collect Evidence: Secure the scene and collect and preserve physical evidence according to standard law enforcement procedures, remaining mindful of the possibility of a "victimless" prosecution. Photograph the scene, the victim, the injuries to the victim, alleged perpetrator, minor children in the household, and damage property. Promptly deliver to the Prosecutor a list of evidence collected and copies of photographs, retaining originals at the NBPD. If injuries are more apparent at a late date, photograph them again and promptly deliver copies to the Prosecutor.*
- l) *Obtain Victim and Witness Statements: At the scene or as soon as practicable thereafter, assist the victim and witnesses, if any, to prepare detailed written statements regarding the alleged incident of domestic violence, remaining mindful of the possibility of a "victimless" prosecution. Each statement should be signed by both the officer and the victim or witness and dated. Obtain a phone number, address, or other means for contacting each victim or witness, maintaining confidentiality. Promptly deliver to the Prosecutor copies of statements and information, retaining originals at the NBPD. When it is necessary to leave a statement form with a victim or witness, follow-up to be certain the form is completed and submitted.*
- m) *Prepare Incident Report: Prepare an incident report according to standard law enforcement procedures and deliver the report to the prosecutor within twenty-four hours after the incident. Include a description of the 911 call or other report to law enforcement; diagrams of the scene and of the victim's injuries, including those not visible; the names of all persons at the scene and their relationship to one another; the names of EMTs and other medical personnel treating the victim; a description of the physical and emotional condition of the victim and the alleged perpetrator; spontaneous statements by the victim, the alleged perpetrator, minor children, and others; a statement whether intoxicants or drugs were involved; and a statement of probable cause for each arrest. If no arrest occurred at the scene or if more than one arrest occurred, the report shall explain why. If an arrest occurs later, deliver a supplemental report to the Prosecutor within twenty-four hours after the arrest. When an arrest is based upon violation of an order, pursuant to MLOC 11.1.04 (e) (4), the incident report shall include a copy of the order and a statement of the specific conduct that violated a restraint provision.*

Authority of Law Enforcement Officer to Seize Weapons

Oglala Sioux Tribal Code Sec. 211

Incident to an arrest, or in the course of securing a crime scene involving domestic violence, a law enforcement officer:

Shall seize all weapons that are alleged to have been involved or threatened to be used in the commission of a crime or any weapon in the immediate vicinity of the alleged commission of the offense; and

Shall seize a weapon that is in plain view or which is located during a search authorized by a person entitled to consent to the search. The seizure of weapons is without regard to the ownership of the weapons; weapons owned by

a third party are subject to confiscation when officers conclude that the weapon was used in the commission of a crime or must be confiscated to protect law enforcement, victims of domestic violence, or others.

Procedure for Responding to Law Enforcement Officers and Public Officials Who Batter

Oglala Sioux Tribal Code Sec. 209

Upon receiving a report or notification that a law enforcement officer is a possible perpetrator of domestic violence:

- 1. The dispatcher shall immediately notify the Captain and a duty supervisor or designate. The supervisor will either respond to the call or will notify the officer's supervisor.*
- 2. Line officers may secure the scene and ensure the safety of all parties, if necessary, and await the response of a superior. However, under no circumstances will line officers be responsible for or be assigned to investigate calls regarding other officers of equal rank or superior officers.*
- 3. Someone of a higher rank than the alleged perpetrator must always be involved in responding.*

Upon receiving notification that a public official is a possible perpetrator:

- 1. The dispatcher shall notify the on-call supervisor and criminal investigator or designate, who shall respond immediately.*
- 2. The responding officer shall proceed with all reasonable means to secure the scene and ensure the safety of all parties, if necessary, and await the response of the supervisor or criminal investigator.*

Law enforcement officers and public officials who are suspected of committing the crime of domestic violence shall be subject to all provisions of the OST Domestic Violence code, including mandatory arrest with probable cause, prohibitions against temporary release, and all laws involving firearms disqualification herein.

The provisions of this section shall not relieve the responding officer from the duty to implement mandatory arrest, should probable cause and/or immediate victim safety indicate such action.

Immunity

Oglala Sioux Tribal Code Sec. 212 Immunity

- 1. Any law enforcement officer shall have immunity from any liability, civil or criminal, in making arrests or exercising any other authority granted under this section when domestic violence or any crimes involving domestic violence have been committed, if the law enforcement officer acts in good faith so as to provide protection for victims of domestic violence.*
- 2. Law enforcement officers shall have the same immunity with respect to participation in any court proceedings resulting from arrests made for domestic violence or any crimes involving domestic violence*

Spokane Tribal Code Ch. 29, Sec. 29-8.01 Liability of Police Officers

A police officer shall not be held liable in any civil action for an arrest based upon probable cause, enforcement in good faith of a court order, or any other action or omission in good faith under this chapter arising from alleged incident of domestic violence brought any party to the incident.

TRIBAL CODE COMMENTARY

A mandatory arrest law allows law enforcement officers to arrest an offender with or without a warrant if they have probable cause. The Fort Mojave Code goes one step further by declaring that officers can arrest without the consent of the victim. This provision avoids putting the victim in the position of making a decision about whether to press charges. The decision is made by law enforcement.

However, some may oppose the mandatory arrest provision. Consider what will happen under this section if a law enforcement officer accidentally arrests a victim. Discuss how you can prevent this or educate officers. This is an important consideration in adopting a mandatory arrest provision. Many tribes chose to address these issues through policy and protocol rather than statute.

The primary aggressor sections assist law enforcement officers in arresting the perpetrator by outlining specific considerations to help determine who the dangerous one at the crime scene is. Turtle Mountain and Kickapoo laws point out that the primary aggressor is not necessarily the person who “started” the situation. These codes can work to prevent officers from arresting victims who act in self-defense.

The Saginaw Chippewa Code requires officers to complete a written report that indicates specifics about the situation, such as sexual assault incidents. It also gives officers a timeline in which they need to turn in the report and asks them to note whether there was any alcohol or drugs involved in the incident. The Makah reporting code is specific in the steps that officers need to follow when responding to a crime. It forces them to take domestic violence cases seriously and call for backup when responding to a call that could prove dangerous for themselves as well as the victim. It also allows officers to confiscate weapons at the scene and collect evidence. It is victim centered in that it compels officers to provide care and shelter for victims, assist the victim in retrieving her belongings from the household, and help her fill out a protection order. Like the Saginaw Code, officers are required to turn in their report in a timely manner.

The Oglala Sioux Tribal Code, in the event that an officer or official is accused of domestic violence, requires supervisors or higher-rank officials to respond to the incident. The law enforcement officer or official is still subject to mandatory arrest laws. These laws can assure that the community holds their leaders accountable for violence against women. Oglala also provides immunity for its law enforcement officers from suit if they act in good faith to protect victims of domestic violence.

C: Role of Tribal Prosecutors

Role of Tribal Prosecutors Overview

The role of the prosecutor is to protect the public by holding perpetrators accountable. Many domestic violence codes include some guidance for the prosecutor. This section of the code will help assure that there are minimum guidelines in place for prosecutors. Keep in mind that prosecutors can usually establish internal protocols that can provide additional guidelines.

Some domestic violence codes include a “no-drop” policy for prosecutors (meaning that the prosecutor must pursue criminal charges in all domestic violence cases). Some people believe this kind of provision is necessary because victims often ask for the charges to be dropped against their batterers, recant their previous statements, or refuse to testify against the perpetrator. Requiring prosecutors to prosecute every domestic violence case may lessen the burden on victims who may otherwise be pressured to “drop the case.” Some people believe that the victim should have the final say in her case and whether she wants it prosecuted. Your community should make a decision on how to handle the role of the prosecutor in relation to the victim.

In considering a “no-drop” policy, it is important to consider that if a victim refuses to testify or is uncooperative if forced to testify by a subpoena, previous statements made by the victim may not be admissible. The U.S. Supreme Court decision in *Crawford v. Washington* 541 U.S. 36 (2004) has created barriers for prosecutors in domestic violence cases, especially cases in which the victim cannot or chooses not to testify. In *Crawford*, the U.S. Supreme Court held that the Sixth Amendment Confrontation Clause renders testimonial, out-of-court statements inadmissible unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness.²³

The Court in *Crawford* did not provide a comprehensive definition of the word *testimonial*, nor did it furnish an exhaustive list of what types of out-of-court statements are considered testimonial. *Crawford*, due to its broad impact and vague boundaries, left many questions unanswered. These questions take on increased importance in domestic violence prosecutions because prosecutors have come to

²³ John M. Leventhal and Liberty Aldrich, “The Admission of Evidence in Domestic Violence Cases after *Crawford v. Washington*: A National Survey,” 11 *Berkeley Journal of Criminal Law* 77, 79 (2006).

rely so heavily on the admission of out-of-court statements by complaining witnesses.²⁴

In *Davis v. Washington*,²⁵ the Supreme Court was asked to further define what circumstances render out-of-court statements “testimonial.”²⁶ The Court in *Davis* determined that courts must review out-of-court statements to determine their “primary purpose” in considering whether they are testimonial hearsay and therefore inadmissible.²⁷ The Court held that:

Statements are non-testimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.²⁸

However, if the victim's statement is non-testimonial and the victim fails to appear at trial, *Crawford* does not apply. Instead, the usual evidentiary rules applying to hearsay apply. Therefore, non-testimonial statements made to friends, neighbors, or others may still be admissible under the traditional *excited utterance* exception to the hearsay rule. Additionally, statements made to advocates or other non-law-enforcement personnel, who may work in conjunction with law enforcement, may also be considered outside of the scope of these decisions.²⁹ If a defendant caused the declarant’s unavailability, the *Crawford* Court recognized that the doctrine of forfeiture may allow such evidence in, even if the defendant had no prior opportunity for cross-examination. According to the Court, “[T]he rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds; it does not purport to be an alternative means of determining reliability.”³⁰

The question of the applicability of *Crawford* to tribal courts is an unsettled question. Some tribal jurists view *Crawford* only as binding on state courts. Others consider *Crawford* applicable to tribal court proceedings. ICRA’s confrontation

²⁴ Leventhal, *supra* note 66, at 79.

²⁵ *Davis v. Washington*, 126 S. Ct. 2266 (2006).

²⁶ *Id.* at 2270.

²⁷ *Id.* at 2269.

²⁸ *Id.* at 2273.

²⁹ Leventhal, *supra* note 66, at 97.

³⁰ *Crawford v. Washington*, 541 U.S. at 62.

clause parallels the same right to confront witnesses as is guaranteed by the Sixth Amendment of the U.S. Constitution.

Point of Discussion: Evidence-based prosecution

What should happen if a victim doesn't want to testify against her abuser?

- The prosecutor should proceed without the victim as the crime is against the tribal community (no-drop).
- The prosecutor should honor the wishes of the victim.
- The prosecutor should consider the role of victims on a case-by-case basis.

Ensuring victim safety is a guiding principal for tribal governments receiving funds from the OVW. OVW policy is that *OVW grant funds may not be used to support diversion programs or programs that use deferred prosecution or deferred sentencing*. Victim's safety can be compromised through the use of such programs, and it is questioned whether perpetrators are held accountable. OVW grantees are discouraged from proposing any of the following activities:

- Offering perpetrators the option of entering pretrial diversion programs;
- Mediation or counseling for couples as a systemic response to domestic violence;
- Batterer intervention programs that do not use the coercive power of the criminal justice system to hold batterers accountable for their behavior;
- Procedures that would force victims of domestic violence to testify against their abusers or impose sanctions on them for refusing to do so;
- Requiring victims to file for a protection order or file criminal charges against their abuser as a condition for receiving services; and
- Using practices or procedures that fail to protect the confidentiality of victims. Referring victims to Child Protection Services solely for the failure to protect their minor child from witnessing domestic violence.

It is very important for tribal prosecutors to be consulted in the drafting of this subsection. If there is not already representation from prosecution on the code-drafting committee, it is critical to involve them at this point in the process.

TRIBAL CODE EXAMPLES

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

Nez Perce Tribal Code

7-2-11 Written procedures for prosecution of domestic violence; purpose.

The Nez Perce Tribal prosecuting attorney shall develop or adopt and put into effect written procedures for attorneys who prosecute domestic violence concerning:

- (a) Effective prosecution of such crimes; and*
- (b) The protection and safety of victims of domestic violence.*

7-2-12 Duty of prosecutor to notify victim.

(a) The prosecutor shall make reasonable efforts to notify a victim of an alleged crime involving domestic violence when the prosecutor has decided to:

- (1) decline the prosecution of the crime;*
- (2) withdraw the criminal charges filed against the defendant; or*
- (3) enter into a plea agreement.*

(b) Release of a defendant from custody must not be delayed because of the requirements of subsection "a."

7-2-15 Rights of victims of domestic violence; duty of prosecutor to inform victim of rights.

(a) A victim of domestic violence is entitled to all rights granted to victims of crime including but not limited to the right to:

- (1) Be informed of all hearing dates and continuances;*
- (2) Provide the Court with a victim impact statement, victim opinion statement, and an assessment of the risk of further harm;*
- (3) Be present at sentencing and address the Court;*
- (4) Advise the Court of conditions of probation required to ensure the safety of the victim;*
- (5) Restitution for losses sustained as a direct consequence of any criminal conduct;*
- (6) Apply for victims' compensation and to be informed of procedures for applying; and*
- (7) Receive notice from the prosecutor in accordance with 7-2-12 of the Nez Perce Tribal Code.*

(b) The prosecuting attorney shall notify the victim of domestic violence of that victim's rights as set forth in this section.

7-2-17 Diversion prohibited; deferred sentencing permitted.

(a) A court shall not approve diversion for a perpetrator of domestic violence.

(b) The Court may defer sentencing of a perpetrator of domestic violence if:

(1) The perpetrator meets the eligibility criteria which may include any of the following:

- a. the perpetrator's history and pattern of violence,*
- b. the severity of injuries to the victim,*
- c. the criminal history of the perpetrator,*

- d. the nature of the crime (simple or aggravated),*
- e. prior participation in deferred sentencing; and*

- (2) Consent of the prosecutor is obtained after consultation with the victim, when the victim is available; and*
- (3) A hearing is held in which the perpetrator enters a plea or judicial admission to the crime; and*
- (4) The Court orders conditions of the deferred sentence that are necessary to protect the victim, prevent future violence, and rehabilitate the perpetrator.*

(c) The Court shall establish:

- (1) Criteria for determination of a perpetrator's successful completion of the conditions imposed by the Court; and*
- (2) Penalties for violation of the conditions imposed by the Court. The case against a perpetrator of domestic violence may be dismissed if the perpetrator successfully completes all conditions imposed by the Court.*

Oglala Sioux Tribal Code

Sec. 218, Duty of Prosecutor to Notify Victim

A prosecutor shall make reasonable efforts to notify a victim of an alleged crime involving domestic violence when the prosecutor has decided to decline prosecution of the crime, to dismiss the criminal charges filed against the defendant, or to enter into a plea agreement.

Release of a defendant from custody must not be delayed because of the requirements of subsection 1, except as provided for under Section 214(11)c above.

TRIBAL CODE COMMENTARY

The Nez Perce and Oglala codes describe the duty of prosecutors to notify the victim if the prosecutor declines their case. This is often important to victims of domestic violence because they often feel neglected by the legal system when their case does not get prosecuted. If prosecutors decide not to take legal action in their case, it makes a big difference if the victim understands why.

The Nez Perce Code is victim centered. It provides language to protect the safety of women by keeping them informed about their case, the perpetrator, hearing dates, sentencing appearances, and probation. In addition, the victim's rights are outlined regarding restitution and compensation for the crimes committed against her.

It is up to your tribal community as to what restitution and compensation might look like. There may be traditional methods for dealing with these issues. The Nez Perce Code permits deferred sentencing, although the tribal court must look at certain criteria and consult with the victim before allowing the deferred sentence.

By defining the rights of the victim and the prosecutor's responsibility to inform and assist the victim with these rights, the law will provide a safe and respectful environment for the victim. Often times in the Western legal system, victims expect the prosecutor to represent their interests. The prosecutor's first duty, however, is to represent the society's interests in state or federal cases. This can be discouraging for a victim. Tribes can advocate for their prosecutors to be more considerate of victims' needs. This in contrast to the way that victims are often treated as secondary in the Westernized court systems.

D. Role of Courts

Role of Courts Overview

Tribal courts are said to be the “cornerstone of sovereignty.” The courts sit in judgment in domestic violence cases and provide the government’s official response to the matter. It is important that tribal courts serve to protect victims’ rights and interests.

The tribal code can establish requirements of the tribal courts on a variety of issues. For example, the tribe may wish to establish a mandatory domestic violence docket to make sure cases are handled quickly and efficiently. An administrative calendar would provide a schedule for days or times when domestic violence cases would be heard. Other laws may deal with firearms possession and purchase, record keeping, pretrial release, and dismissals.

Point of Discussion: What should our law require the tribal court to do in domestic violence cases?

- Dedicate a certain docket (or day of the week) for domestic violence crimes.
- Keep separate records about domestic violence cases.
- Prohibit tribal judges from allowing pretrial release in dangerous cases.
- Provide detailed explanation about dismissed cases.
- Encourage or require the confiscation of firearms.

When considering the safety of the victim in a domestic violence protection order case a judge may be concerned about the respondent’s possession of firearms. Questioning a defendant about his possession or easy access to firearms is good practice to help evaluate the petitioner’s safety. Determining whether a weapon was used or threatened to be used in any acts of domestic violence is important, but not decisive in arriving at prohibitions against possession of firearms in the protection order.

The tribal code may provide the tribal court authority to have the respondent turn firearms over to another person or a law enforcement agency. Some tribes have specific statutes dealing with firearm removal while a protection order is in effect or while a criminal case is pending. A tribal statute may provide the court authority through a general catchall provision, which allows the court to impose any

conditions that could reasonably keep the complainant or the public safe, or it may specifically refer to firearms.

Persons subject to a “qualifying” protection order are prohibited from possessing firearms under federal law with some exceptions, and those convicted of a misdemeanor crime of domestic violence are prohibited from possession with no exceptions under federal law.

Although tribal courts do not enforce federal law, it is good practice for the court to notify the defendant/respondent of the requirements of federal law relative to firearms, in addition to any tribal or state requirements. Notification could be through a standard provision within an order. The following is possible language for a tribal court criminal protection order or civil protection order when federal law applies:

As a result of this order, it may be unlawful for you to possess or purchase a firearm, including a handgun or long gun, or ammunition pursuant to federal law under 18 U.S.C. § 922(g)(8) and/or state, tribal, territorial, or local law. If you have any questions whether these laws make it illegal for you to possess or purchase a firearm, you should consult an attorney.

Additionally, if a defendant is convicted of sexual assault or domestic violence in tribal court, a possible notification to the defendant of federal law is:

If you are convicted of a misdemeanor crime involving violence where you are or were a spouse, intimate partner, parent, or guardian of the victim, or are or were involved in another, similar relationship with the victim, it may be unlawful for you to possess or purchase a firearm, including a handgun or long gun, or ammunition, pursuant to federal law under 18 U.S.C. § 922(g)(9) and/or state, tribal, territorial, or local law. If you have any questions whether these laws make it illegal for you to possess or purchase a firearm, you should consult an attorney.

Alternatively, courts may provide notification by distributing the brochure of the Bureau of Alcohol, Tobacco, and Firearms entitled *Information Needed to Enforce the Firearm Prohibition: Misdemeanor Crimes of Domestic Violence*.

TRIBAL CODE EXAMPLES

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

Pretrial Procedures

Oglala Sioux Tribe Domestic Violence Code

Sec. 99.2, Ch. 1, Sec. 214

Section 214. Conditions of Pre-Trial Release

[Sub-sections 1-3 omitted]

4. In making a decision concerning pretrial release of a person who is arrested for, or charged with, a crime involving domestic violence or a violation of an order for protection, the court may ask for or entertain a pre-release investigative report from the Cangleska, Inc. domestic violence probation department. Regardless of whether or not any such investigation report and recommendations are asked for, the court shall review the facts of arrest and detention of the person and determine whether the person:

- a) is a threat to the alleged victim or other family or household member;*
- b) is a threat to public safety;*
- c) is reasonably likely to appear in court; and*
- d) past behavior while on previous pre-trial release(s).*
- e) [Sub-sections 5, 6 omitted]*

7. Before releasing a person arrested for or charged with a crime involving domestic violence, or a violation of an order for protection, the court shall make findings on the record, if possible, concerning the determination made in accordance with sub-sections 1-4 above, and the Oglala Sioux Tribe Probation and Parole Act, and may impose conditions of release or bail on the person to protect the alleged victim of domestic violence and to ensure the appearance of the person at a subsequent court proceeding. The conditions may include:

- a) An order enjoining the person from threatening to commit or committing acts of domestic violence against the alleged victim or other family or household member;*
- b) An order prohibiting the person from harassing, annoying, telephoning, contacting, or otherwise communicating with the alleged victim, either directly or indirectly through family, relations by marriage, friends, or co-workers.*

Record of Dismissal Required in Court File

Oglala Sioux Tribe Domestic Violence Code

Sec. 219. Record of Dismissal Required in Court File

When the court dismisses criminal charges or a prosecutor moves to dismiss charges against a defendant accused of a crime of domestic violence, the specific reasons for the dismissal must be recorded in the court file. The prosecutor shall indicate the specific reason why any witnesses are unavailable and the reasons the case cannot be prosecuted. Any dismissal of a complaint by the Court, for any reason other than insufficient evidence, may be appealed by the Tribe or the victim to the Oglala Sioux Supreme Court.

Makah Domestic Violence Code
§11.4.08 Disposition of Criminal Case

Reasons for Dismissal: When the Court dismisses or grants dismissal of a criminal charge under this Title, the specific reasons for the dismissal shall appear in the Court file.

Prohibited Dispositions: The Court shall neither dismiss nor grant dismissal of a criminal charge under this Title for the sole reason that the victim is uncooperative or unwilling to testify, unless no other means of prosecution exists. The Court shall neither dismiss nor grant dismissal of a criminal charge under this Title for the sole reason that a civil case has or will be filed or resolved. The Court shall neither order nor accept a plea of nolo contendere or a plea agreement providing for diversion, deferred prosecution, or deferred sentencing in a case charging a criminal offense under this Title.

Mandatory Domestic Violence Docket

Oglala Sioux Tribe Domestic Violence Code
Sec. 239. Mandatory Domestic Violence Docket; Limited Continuances

The OST Court shall expedite the hearing of domestic violence criminal cases on its docket, with domestic violence cases being scheduled no later than three (3) weeks following initial arraignment.

Tuesdays and Thursdays shall be designated by the court to hear domestic violence criminal cases, with only domestic violence cases scheduled for court on those days. The court administrator shall have the authority to designate Wednesdays, as needed, to schedule any backlogged domestic violence cases.

Clerks shall not schedule more than one such case per hour (several per court day), cases to start at 9:00 AM. Clerks shall expedite all paperwork to ensure the timely service of subpoenas and appearance of witnesses.

Judges shall limit continuances and grant continuances only after a proper Motion has been filed with sufficient grounds stated for the record. Only one such continuance shall be allowed per defendant, and only under one of the following grounds:

- 1. Lack of legal counsel.*
 - 2. Serious illness with a doctor's statement submitted when Motion is filed.*
 - 3. Death of serious illness of an immediate family member.*
 - 4. Pending Motion for Change of Venue, if filed two days prior to the scheduled court date.*
 - 5. Incarceration in another tribal, state, municipal, or federal correctional facility.*
- Employment issues, lack of transportation, or forgetfulness shall not be considered valid grounds for a continuance. No telephone, verbal, or third-person requests for continuances shall be accepted by the Court.*

TRIBAL CODE COMMENTARY

The tribal court has a strong role to protect the safety of women in your community. Use this idea as a framework for how the Court should operate when dealing with domestic violence cases.

The Oglala pretrial procedures section is clear on the provisions of a pretrial release. It also commits to researching the safety of the victim before releasing the perpetrator. The provision that allows the court to impose conditions of release or bail to protect the alleged victim may be interpreted to allow confiscation of firearms in certain circumstances. Oglala records the reasoning behind cases that are dismissed and allows for the victim or the tribe to appeal these decisions. The prosecutor is empowering the victim to assert her rights by keeping her informed and aware. Oglala also specifies the grounds on which continuances can be granted in domestic violence cases. This is extremely important to victims because it can be revictimizing to prepare oneself for court and have it delayed. The Oglala Tribal Court has a domestic violence docket on Tuesday and Thursdays, with Wednesdays as an overflow day.

The Makah Domestic Violence Code also requires that the reasons for dismissals are recorded and that domestic violence cases cannot be dismissed or deferred. The statute also prohibits the dismissal of a criminal case simply because the victim is unwilling to testify unless no other means of prosecution exists. The comments in the Role of Tribal Prosecutors section that discusses *Crawford* and *Davis* should be considered.

E. Evidence

Evidence Overview

Evidence laws can be significant in cases of domestic violence. Evidence laws or rules describe what and how evidence (testimony or exhibits) can be considered during a court proceeding. They are designed to assure fairness, aid in determining the truth, and eliminate unjustifiable expenses and delay.

This section of the workbook will require a review of the tribe's current laws/rules on evidence. If the tribe has adopted another jurisdiction's evidence code (some may use the Federal Rules of Evidence), be sure to review a copy of that code.

There are at least three very important areas of evidence to consider in cases of domestic violence.

- **Privileged communication:** Confidential communications to crisis counselors, spiritual leaders, and domestic violence advocates. It is essential to protect the victim's interests and the relationships between victim and advocate.
- **Exceptions to the hearsay rule:** Hearsay is the testimony of a witness who relates what others said or told him or her. In domestic violence cases, allowing specific types of hearsay evidence into tribal court proceedings can work to protect the victim, who is often called as a witness, while maintaining the reliability of the evidence.
- **Due process** includes the right of the defendant to face their accuser. However, confronting an abuser may not be in the best interest of the victim. Exceptions to hearsay rules can be added so that the victim does not need to stand before the defendant and be re-victimized, but consider the information in *Crawford* and *Davis* discussed in the Role of Tribal Prosecutors section.

Evidence laws are included here in the criminal section, but these laws may also apply in civil cases. Be sure to be clear if a particular evidence rule is only relevant to criminal cases.

TRIBAL CODE EXAMPLES

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

Spousal Privileges Inapplicable

Oglala Sioux Tribe Domestic Violence Code Sec. 223

Spousal privileges inapplicable in criminal proceedings involving domestic violence

The following evidentiary procedures do not apply in any criminal proceeding in which a spouse or other family or household member is the victim of an alleged crime involving domestic violence perpetrated by the other spouse:

*The privilege of confidential communication between spouses
The testimonial privilege of spouses*

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

5. The following evidentiary privileges do not apply in any criminal proceeding in which a spouse or other family or household member is the victim of an alleged crime involving domestic violence perpetrated by the other spouse:

- a. The privilege of confidential communication between spouses,*
- b. The testimonial privilege of spouses.*

Victim-Advocate Privilege

Oglala Sioux Tribe Domestic Violence Code Sec. 224

Victim-advocate privilege applicable in cases involving domestic violence.

1. Except as otherwise provided in subsection 2, and in compliance with the Victim-Advocate Privilege Act, a victim of domestic violence may refuse to disclose, and may prevent an advocate, elder, or medicine person from disclosing, confidential oral communications between the victim and the advocate and written records and reports concerning the victim unless the privilege is waived by:

- a. The victim; or*
- b. The death of the victim.*

2. The privilege does not relieve a person from any duty imposed in the mandatory reporting of child abuse or neglect. A person may not claim the privilege when providing evidence in proceedings concerning child abuse and neglect.

3. As used in this subsection, "advocate" means an employee of or volunteer for a program for victims of domestic violence who:

- a. Has a primary function of rendering advice, counseling, or assistance to victims of domestic violence; supervising the employees or volunteers of the program; or administering the program;*
- b. Has undergone a minimum of 40 hours of specialized domestic violence advocacy training; and*
- c. Works under the direction of a supervisor of the program, supervises employees or volunteers, or administers the programs.*

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

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

Victim's Statement Admissible

Spokane Tribal Code
Ch. 29, Sec. 29-4.11
Victim's Statement Admissible

Any written statement made by the alleged victim under oath and signed by the victim which describes the alleged acts of domestic violence shall be admissible in criminal proceedings if:

- 1. The Court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and*
- 2. The alleged victim either:*

- a. Testifies at the proceeding; or*
- b. Is unavailable as a witness; provided, that when the victim is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the fact(s) for which the defendant is charged.*

A statement may not be admitted under this section unless the proponent of the statement makes known to the adverse party his or her intention to offer the statement and the particulars of the statement sufficiently in advance of the proceeding to provide the adverse party with a fair opportunity to prepare to meet the statement.

Yakama Nation Domestic Violence Code
Ch. II, Sec. 2.8 Special Court Rules
Admissibility of Victim's Allegations

D. Any written statement made by the alleged victim under oath and signed by the victim describing the alleged acts of domestic violence shall not be considered inadmissible solely because of a hearsay objection or the inability of the defendant to confront the adverse witness face-to-face. RYS Sec. 6.03.05(3) is not applicable in the limited context of Domestic Violence acts of crime.

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

4. Any written statement made by the alleged victim under oath and signed by the victim describing the alleged acts of domestic violence shall not be considered inadmissible solely because of a hearsay objection. Such a statement shall be subject to ordinary judicial analysis for admissibility of evidence in the Tribal Court.

Expert Materials

Hopi Family Relations Ordinance

Subchapter. 1, Sec. 14.01 Evidence, Hearsay Exception

A court shall admit into evidence as an exception to the hearsay rule learned treatises or other reliable materials which describe and explain the “battered women’s syndrome” or otherwise examine the impact of abuse and violence upon victims.

TRIBAL CODE COMMENTARY

Evidence laws can be critical in protecting victims of domestic violence. They represent an important acknowledgment of victims' rights.

Both Oglala and Turtle Mountain exclude spousal privileges in domestic violence cases. Their codes also define a victim-advocate privilege as including an advocate, elder, or medicine person. None of these individuals can disclose confidential written or oral communication between themselves and the victim. Oglala goes even further to define an advocate as someone who has undergone 40 hours of specialized training.

The Yakama Nation, Spokane, and Turtle Mountain rules of evidence allow a victim's written sworn statement in domestic violence cases to be entered into evidence, explicitly stating that they are an exception to the hearsay objection. In some circumstances these rules of evidence may allow evidence that would be inadmissible under the federal standard in *Crawford*. The Hopi Family Relations Code allows prosecutors to admit reliable evidence on the battered women's syndrome into evidence.

Note: Many domestic violence victim advocates and other experts are not in favor of the term *battered women's syndrome* or the philosophy behind it. Consult with local experts regarding this issue.

Point of Discussion: Privileges in our community?

What kinds of discussions with survivors should be considered private and not open to court proceedings?

- Doctor, nurse, or other medical professional;
- Therapist, counselor, or elder;
- Advocate; and
- Medicine person or traditional healer.

F. Victims' Rights in Criminal Proceedings

Victims' Rights in Criminal Proceedings Overview

Protecting victims' rights through statutes is a critical step that tribal governments can take to address victim safety.

Victims' rights are a relatively new concept in Western courts, but most tribal traditions include strong victim-centered beliefs. Tribal governments may wish to codify the tribal philosophy toward victims, or may wish to include traditional words or phrases to more properly reflect tribal beliefs.

TRIBAL CODE EXAMPLES

Victims' Rights

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

Sault Ste. Marie Tribal Code

75.103 Initial Notice.

- (1) *Within 24 hours after the initial contact between the victim of a reported crime and the law enforcement agency having the responsibility for investigating that crime, that agency shall give the victim the following information:*
- (a) *The availability of emergency and medical services, if applicable.*
 - (b) *The availability of victim's compensation benefits and the address of the crime victim's advocate.*
 - (c) *The address and phone number of the prosecuting attorney whom the victim should contact to obtain information about victim's rights.*
 - (d) *The following statement:*
 - (i) *"If within six months, you are not notified of an arrest in your case, you may call [the victims advocate's telephone number] for the status of the case."*
- (2) *Law Enforcement agency shall notify the Crime Victim's Advocate.*

75.104 Return of Property.

- (1) *The law enforcement agency having responsibility for investigating a reported crime shall promptly return to the victim property belonging to that victim which is taken in the course of the investigation, except as provided in subsections 75.401(2) to (4).*
- (2) *The agency shall not return property which is contraband.*
- (3) *The agency shall not return property if the ownership of the property is disputed until the dispute is resolved.*
- (4) *The agency shall retain as evidence any weapon used in the commission of the crime and any other evidence if the prosecuting attorney certifies that there is a need to retain that evidence in lieu of a photograph or other means of memorializing its possession by the agency.*

75.105 Notice of Pretrial Release.

- (1) *Not later than 24 hours after the arraignment of the defendant for a crime, the law enforcement agency having responsibility for investigating that crime shall give to the victim notice of the availability of pretrial release for the defendant, the phone number of the sheriff, and notice that the victim may contact the sheriff to determine whether the defendant has been released from custody.*
- (2) *Based upon the victim's affidavit asserting acts or threats of physical violence or intimidation by the defendant or at the defendant's direction against the victim or the victim's immediate family, the prosecuting attorney may move that the bond or personal recognizance of a defendant be revoked.*

75.106 Notice of Trial Process.

- (1) *Not later than seven days after the arraignment of the defendant for a crime, but not less than 24 hours before a preliminary examination, the Crime Victim's Advocate shall give to each victim a written notice in plain English of each of the following:*
- (a) *A brief statement of the procedural steps in the processing of a criminal case.*
 - (b) *The rights and procedures under this Chapter.*
 - (c) *Details and eligibility requirements under Act No. 223 of the Public Acts of 1976, being sections 18.351 to 18.368 of the Michigan Compiled Laws.*
 - (d) *Suggested procedures if the victim is subjected to threats or intimidation.*
 - (e) *The person to contact for further information.*
- (2) *If requested by the victim, the Crime Victim's Advocate shall give to the victim notice of any scheduled Court proceedings and notice of any changes in that schedule.*

(3) The prosecuting attorney shall offer the victim the opportunity to consult with the prosecuting attorney to obtain the views of the victim about the disposition of a crime, including the victim's views about dismissal, plea or sentence negotiations, and pretrial diversion programs.

(4) A victim who receives a notice under subsection (2) and who chooses to receive any other notice or notices under this Chapter shall keep the following persons informed of the victim's current address and phone number:

(a) The prosecuting attorney, until final disposition or completion of the appellate process, whichever occurs later.

(b) The department of corrections or the sheriff as directed by the prosecuting attorney if the defendant is imprisoned.

(c) Crime Victims Advocate.

75.107 Separate Waiting Area.

The Court shall provide a waiting area for the victim separate from the defendant, defendant's relatives and defense witnesses if such an area is available and the use of the area is practical. If a separate waiting area is not available or practical, the Court shall provide other safeguards to minimize the victim's contact with defendant, defendant's relatives and defense witnesses during Court proceedings.

75.108 Confidentiality of Victim's Address.

(1) Based upon the victim's reasonable apprehension of acts or threats of physical violence or intimidation by the defendant or at the defendant's direction against the victim or the victim's immediate family, the prosecutor may move that the victim or any other witness not be compelled to testify at pretrial proceedings or at trial for purposes of identifying the victim as to the victim's address, place of employment or other personal identification without the victim's consent. A hearing on the motion shall be in camera.

(2) The address of the victim shall not be in the Court file or ordinary Court documents unless contained in a transcript of the trial or it is used to identify the place of the crime. The phone number of the victim shall not be in the Court file or ordinary Court documents except as contained in the transcript of the trial.

75.109 Request for Speedy Trial.

(1) A speedy trial may be scheduled for any case in which the victim is averred by the prosecuting attorney to be either of the following:

(a) A victim of child abuse, including sexual abuse or any other assaultive crime.

(b) A victim of criminal sexual conduct in the first, second, or third degree or of an assault with intent to commit sexual conduct involving penetration or to commit criminal sexual conduct in the second degree.

(2) The chief judge, upon motion of the prosecuting attorney for a speedy trial for a case described in subsection (1), shall set a hearing date within ten days of the date of the motion. Notice shall be made pursuant to the Tribal Court rules. If the motion is granted, the trial shall not be scheduled earlier than 20 days from the date of the hearing.

75.110 Confer for Jury Selection.

Upon request of the victim, the prosecuting attorney shall confer with the victim prior to the selection of the jury and prior to the trial of the defendant.

75.111 Right to be Present.

The victim has the right to be present throughout the entire trial of the defendant, including juvenile hearings, unless the victim is going to be called as a witness. If the victim is going to be called as a witness, the Court may, for good cause shown, order the victim to be sequestered until the victim first testifies.

75.112 Employment Protected.

An employer or the employer's agent, who threatens to discharge or discipline or who discharges, disciplines, or causes to be discharged from employment or to be disciplined a victim because that victim is subpoenaed or request by the prosecuting attorney to attend Court for the purpose of giving testimony, is guilty of a misdemeanor, and may be punished for contempt of court.

75.113 Notice to Victim for Sentencing.

(1) The Crime Victim's Advocate, upon and in accordance with the request of the victim, shall give to the victim notice of the following:

(a) The defendant's conviction.

(b) The crimes for which the defendant was convicted.

- (c) The victim's right to make a written or oral impact statement for use in the preparation of a **presentence investigation report** concerning the defendant.
- (d) The address and telephone number of the probation office which is to prepare the presentence investigation report.
- (e) That a presentence investigation report and any statement of the victim included in the report will be made available to the defendant unless exempted from disclosure by the Court.
- (f) The victim's right to make an impact statement at sentencing.
- (g) The time and place of the sentencing proceeding.
- (2) The notice given by the prosecuting attorney to the victim must be given by any means reasonably calculated to give prompt actual notice.
- (3) A notice given under subsection (2) shall inform the victim that his or her impact statement may include but shall not be limited to the following:
 - (a) An explanation of the nature and extent of any physical, psychological, or emotional harm or trauma suffered by the victim.
 - (b) An explanation of the extent of any economic loss or property damage suffered by the victim.
 - (c) An opinion of the need for and extent of restitution and whether the victim has applied for or received compensation for loss or damage.
 - (d) The victim's recommendation for an appropriate sentence.

75.114 Impact Statement for Sentencing.

The victim has the right to submit or make a written or oral impact statement to the probation officer for use by that officer in preparing a presentence investigation report concerning the defendant. A victim's written statement shall, upon the victim's request, be included in the presentence investigation report.

75.115 Right to Make Statement at Sentencing.

The victim shall have the right to appear and make an oral impact statement at the sentencing of the defendant.

75.116 Restitution to Victim.

- (1) For purposes of this section only, "victim" means an individual who suffers direct or threatened physical, financial or emotional harm as a result of the commission of a crime; and for purposes of 75.116, "victim" includes a sole proprietorship, or corporation.
- (2) The Court, when sentencing a defendant convicted of a crime, may order, in addition to or in lieu of any other penalty authorized by law or in addition to any other penalty required by law, that the defendant make restitution to any victim of the defendant's course of conduct which gives rise to the conviction, or to the victim's estate.
- (3) If the Court does not order restitution, or orders only partial restitution under this section, the Court shall state on the record the reasons for that action.
- (4) If a crime results in damage to or loss or destruction of property of a victim of the offense, the order of restitution may require that the defendant do either of the following:
 - (a) Return the property to the owner of the property or to a person designated by the owner.
 - (b) If return of the property under 75.116(4)(a) is impossible, impractical or inadequate, pay an amount equal to the greater of subparagraphs (i) or (ii), less the value, determined as of the date the property is returned, of that property or any part of the property that is returned:
 - (i) The value of the property on the date of the damage, loss or destruction.
 - (ii) The value of the property on the date of sentencing.
- (5) If a crime results in physical or psychological injury to a victim, the order of restitution may require that the defendant do one or more of the following: as applicable:
 - (a) Pay an amount equal to the cost of actual medical and related professional services and devices relating to physical and psychological care.
 - (b) Pay an amount equal to the cost of actual physical and occupational therapy and rehabilitation.
 - (c) Reimburse the victim or the victim's estate for after-tax income loss suffered by the victim as a result of the offense.
 - (d) Pay an amount equal to the cost of psychological and medical treatment for members of the victim's family which has been incurred as a result of the offense.
- (6) If a crime resulting in bodily injury also results in death of a victim, the order of restitution may require that the defendant pay an amount equal to the cost of actual funeral and related services.

(7) Instead of restitution under 116(4), (5), (6) if the victim or victim's estate consents, the order of restitution may require that the defendant make restitution in services in lieu of money, or make restitution to a person designated by the victim or victim's estate if that person provided services to the victim as a result of the crime.

(8) If the Court orders restitution under this section, the Court shall, if the victim is deceased, order that the restitution be made to the victim's estate.

(9) Any order of restitution shall be as fair as possible to the victim or victim's estate without unduly complicating or prolonging the sentencing process.

(10) The Court shall not order restitution with respect to a loss for which the victim or victim's estate has received or is to receive compensation, including insurance, except that the Court may, in the interest of justice, order restitution to the Crime Victim's Advocacy Program or to any individuals, organizations, partnerships, corporations or governmental entities that have compensated the victim or victim's estate for such loss to the extent of the compensation paid. An order of restitution shall require that all restitution to a victim or victim's estate under the order be made before any restitution to any other person under that order is made.

(11) Any amount paid to a victim or victim's estate under an order of restitution shall be set off against any amount later recovered as compensatory damages by the victim or the victim's estate in any federal, state or Tribal civil proceeding and shall reduce the amount payable to a victim or victim's estate by an award from the crime victims compensation board made after an order of restitution under this section.

(12) If not otherwise provided by the Court under this subsection, restitution shall be made immediately. However, the Court may require that the defendant make restitution under this section within a specified period or in specified installments. The end of the period or the last installment shall not be later than the following:

- (a) The end of the period of probation, if probation is ordered.
- (b) Two years after the end of imprisonment or discharge from parole, whichever occurs later, if the Court does not order probation.
- (c) Three years after the date of sentencing in any other case.

(13) If the defendant is placed on probation or paroled, any restitution ordered under this section shall be a condition of that probation or parole. The Court may revoke probation and the parole board may revoke parole if the defendant fails to comply with the order and if the defendant has not made a good faith effort to comply with the order. In determining whether to revoke probation or parole, the Court or parole board shall consider the defendant's employment status, earning ability, financial resources, and the willfulness of the defendant's failure to pay and any other special circumstances that may have a bearing on the defendant's ability to pay.

(14) A defendant who is required to pay restitution and who is not in willful default of the payment of the restitution, at any time, may petition the sentencing judge or his or her successor for a cancellation of any unpaid portion of restitution. If it appears to the satisfaction of the Court that payment of the amount due will impose a manifest hardship on the defendant or his or her immediate family, the Court may cancel all or part of the amount due in restitution or modify the method of payment.

(15) An order of restitution may be enforced by the prosecuting attorney or a victim or victim's estate named in the order to receive the restitution in the same manner as a judgment in a civil action.

(16) Notwithstanding any other provision of this section, a defendant shall not be imprisoned, jailed, or incarcerated for a violation of parole or probation, or otherwise, for failure to pay restitution as ordered under this section unless the Court determines that the defendant has the resources to pay the ordered restitution and has not made a good faith effort to do so.

75.117 Factors for Restitution.

(1) The Court, in determining whether to order restitution under 75.116 and the amount of that restitution, shall consider the amount of the loss sustained by any victim as a result of the offense, the financial resources and earning ability of the defendant, the financial need of the defendant and the defendant's dependents, and such other factors as the Court considers appropriate.

(2) The Court may order the probation officer to obtain information pertaining to the factors set forth in '75.117(1). The probation officer shall include the information collected in the presentence investigation report or in a separate report, as the Court directs.

(3) The Court shall disclose to both the defendant and the prosecuting attorney all portions of the presentence or other report pertaining to the matter described in '75.117(2).

(4) Any dispute as to the proper amount or type of restitution shall be resolved by the Court by a preponderance of the evidence. The burden of demonstrating the earning ability of the defendant and the amount of the loss sustained by a victim as a result of the offense shall be on the Crime Victim's Advocate. The burden of demonstrating the financial resources of the defendant and the financial need of the defendant and the defendant's dependents shall be

on the defendant. The burden of demonstrating such other matters as the Court deems appropriate shall be upon the party designated by the Court as justice requires.

75.118 Restrictions Upon Publication Profits.

(1) A person convicted of a crime shall not derive any profit from the sale of his or her recollections, thoughts and feelings with regard to the offense committed by that person until the victim receives any restitution or compensation ordered for him or her against the defendant and expenses of incarceration are recovered as provided in '75.118(3) and until the escrow account created under '75.118(2) is terminated under '75.118(4).

(2) Upon the conviction of a defendant for a crime involving a victim, and after notice to any interested party, an attorney for the Tribe in which the conviction occurred may petition the Court in which the conviction occurred to order that defendant forfeit all or any part of proceeds received or to be received by the defendant, or the defendant's representatives or assignees, from contracts relating to the depiction of the crime or the defendant's recollections, thoughts or feelings about the crime, in books, magazines, media entertainment or live entertainment. The proceeds shall be held in escrow for a period of not more than five years.

(3) During the existence of the escrow account, proceeds in the account shall be distributed in the following priority for the following purposes.

(a) To satisfy an order of restitution entered under '75.116 and '75.117.

(b) To satisfy any civil judgment in favor of the victim against that defendant.

(c) To satisfy any fines ordered.

(4) Fifty percent of the balance remaining in the escrow account at the end of the escrow period shall be payable to the defendant and the remaining 50% of the balance shall be payable to the Crime Victim's Advocacy Program to pay compensation claims.

75.119 Notice of Appeal.

(1) Upon the request of the victim, the Crime Victim's Advocate shall notify the victim of the following:

(a) That the defendant has filed an appeal of his or her conviction.

(b) A brief explanation in plain English of the appeal process, including the possible dispositions.

(c) Whether the defendant has been released on bail or other recognizance pending the disposition of the appeal.

(d) The time and place of any appellate court proceedings and any changes in the time or place of those proceedings.

(e) The result of the appeal.

(2) In the event the defendant's conviction is reversed and the case is returned to the trial court for further proceedings, the victim shall have the same rights previously requested during the proceedings which led to the appeal.

75.120 Notice by Corrections Facility.

(1) Upon the written request of a victim of a crime, the sheriff or the department of corrections shall mail to the victim the following, as applicable, about a prisoner who has been sentenced to imprisonment under the jurisdiction of the sheriff or the department for commission of that crime:

(a) Within 30 days after the request, notice of the sheriff's calculation of the earliest release date of the prisoner, or the department's calculation of the earliest parole eligibility date of the prisoner, with all potential good time or disciplinary credits considered if the imprisonment exceeds 90 days. The victim may request one-time notice of the calculation described in this subdivision.

(b) Notice of the transfer or pending transfer of the prisoner to a minimum security facility and the address of that facility.

(c) Notice of the release or pending release of the prisoner in a community residential program, under extended furlough, or any other transfer of a prisoner to community status.

(d) Notice of any reduction in the minimum sentence resulting under the prison overcrowding emergency powers act, Act No. 519 of the Public Acts of 1980, being sections 800.71 to 800.79 of the Michigan Compiled Laws.

(e) Notice of the escape of the person accused, convicted or imprisoned for committing a crime against the victim.

(f) Notice of the victim's right to address or submit a written statement for consideration by a parole board member or a member of any other panel having authority over the prisoner's release on parole.

(g) Notice of the decision of the parole board, or any other panel having authority over the prisoner's release on parole, after a parole review.

(h) Notice of the release of a prisoner 90 days before the date of the prisoner's discharge from prison where practical, unless the notice has been otherwise provided under this Chapter.

(i) Notice of a public hearing pursuant to section 44 of Act No. 232 of the Public Act of 1953, being section 791.244 of the Michigan Compiled Laws, regarding a reprieve, commutation or pardon of the prisoner's sentence by the governor.

(j) Notice that a reprieve, commutation or pardon has been granted.

(2) A victim's address and telephone number maintained by a sheriff or the department of corrections pursuant to a request or notice under '75.220(1) shall be exempt from disclosure under the freedom of information act, Act. No. 442 of the Public Acts of 1976, being sections 15.231 to 15.246 of the Michigan Compiled Laws.

75.121 Notice of Escape.

(1) As provided in subsection (2) or (3), a victim who requests notice of the escape and the prosecuting attorney who is prosecuting or has prosecuted the crime for which the person is detained or under sentence shall be given immediate notice of the escape of the person accused, convicted or imprisoned for committing a crime against the victim. The notice shall be given by any means reasonably calculated to give prompt actual notice.

(2) If the escape occurs before the sentence is executed or before the defendant is delivered to the department of corrections, the chief law enforcement officer of the agency in charge of the person's detention shall give notice of the escape to a victim who requested notice.

(3) If the defendant is confined pursuant to a sentence, the notice shall be given by the chief administrator of the place in which the prisoner is confined.

75.122 Right to Address Parole Board.

(1) A victim shall have the right to address or submit a written statement for consideration by a parole board member or a member or any other panel having authority over the prisoner's release on parole.

(2) Not less than 30 days before a review of the prisoner's release, a victim who has requested notice shall be given written notice by the department of corrections informing the victim of the pending review and of the victim's rights under this section. The victim, at his or her own expense, may be represented by counsel at the review.

(3) A victim shall receive notice of the decision of the board or panel and, if applicable, notice of the date of the prisoner's release on parole. Notice shall be mailed within a reasonable time after the board or panel reaches its decision but not later than 14 days after the board or panel has reached its decision.

75.123 Notice of Final Disposition.

Upon the request of a victim, the Crime Victim's Advocate shall, within 30 days of the final disposition of the case, notify the victim in writing of the final disposition of the case.

75.124 No Cause of Action.

Nothing in this Chapter shall be construed as creating a cause of action for money damages against the state, a county, a municipality, Tribe or any of their agencies, or instrumentalities, or employees.

75.125 Failure to Provide Notice.

The failure to provide a right, privilege or notice to a victim under this Chapter shall not be grounds for the defendant to seek to have the conviction or sentence set aside.

Oglala Sioux Tribe Code
Sec. 221 Rights of Victims of Domestic Violence

- 1. A victim of domestic violence is entitled to all rights granted to victims of crime, including but not limited to the right to:*
- a. Be informed of all hearing dates and continuances;*
 - b. Provide the court with a victim-impact statement, victim-opinion statement, and an assessment of the risk of further harm;*
 - c. Be present at sentencing and address the court;*
 - d. Advise the court of conditions of probation and parole required to ensure the safety of the victim and other family or household members;*
 - e. Restitution for losses sustained as a direct consequence of any criminal conduct;*
 - f. Apply for any available victims' compensation and to be informed of procedures for applying; and*
 - g. Receive notice from the prosecutor in accordance with Section 218.*

Makah Tribal Law and Order Code
Duties of Prosecutor §11 9.01 Communication with Victim

- In every case in which a person is arrested for or charged with a criminal offense under this Title, the Prosecutor shall endeavor to maintain contact with the victim throughout the criminal proceedings, with particular attention to the following:*
- a) No-Contact Order: Prior to in-custody and sentencing hearings, the Prosecutor shall confer with the victim regarding the need for a no-contact order and other restraints to assure the safety of the victim and the victim's family and household members. In the victim's absence, the Prosecutor shall be prepared to advise the Court as to the victim's position.*
 - b) Hearing Dates, Continuances, Sentencing: The Prosecutor shall assure that the victim is informed of all hearing dates and continuances and of the right to address the Court, in person or in writing, at a sentencing hearing regarding the various impacts of the criminal offense on the victim, the risk officer acts of domestic violence, and the conditions of sentence necessary to insure the safety of the victim and the victim's family and household members.*
 - c) Prosecutorial Decisions: The Prosecutor shall inform the victim of every major prosecutorial decision, including a decision not to file a charge under this Title when the victim has reported or the defendant has been arrested for a criminal offense under this Title, or the decision to enter into a plea agreement regarding a charge under this Title.*
 - d) Restitution: The Prosecutor shall obtain information from the victim regarding costs and losses sustained as a result of the defendant's act of domestic violence and shall seek restitution for the victim.*

TRIBAL CODE COMMENTARY

The Sault Ste. Marie Code is extremely extensive as compared to the other tribal codes and has very detailed procedures.

In the Initial Notice section, the code lays out the responsibilities for the law enforcement agency that receives a crime report. The law enforcement officer must notify the victim of available medical services, victim compensation, and contact information for the crime victim advocate. In addition, the officer must notify the crime victim advocate of the case. This section is victim centered because it makes the law enforcement agency accountable to the needs of the victim. The victim is provided with all the information she needs to make informed decisions. It also places a time frame on these actions, forcing the law enforcement agency to accomplish specific tasks within 24 hours of receiving the report.

The Separate Waiting Area section requires the court to provide a waiting area for the victim that separates the victim from the defendant and defendant's family. If this is not physically possible, the court needs to protect the victim and minimize contact with the defendant during proceedings. It is important, first, to assure the safety of the victim and, second, to make her feel comfortable, as the process of going through court proceedings can be traumatizing.

A prosecuting attorney can petition the chief judge for a speedy trial if the victim is a victim of child abuse or a victim of criminal sexual conduct or an assault with intent to commit sexual conduct. A speedy trial constitutes a hearing within 10 days of the motion and a trial after 20 days from the hearing. It is important for victims of sexual and domestic assaults to have resolution in legal proceedings as soon as possible, so that they can move through the healing process.

The code lays out a criminal violation for employers who punish a victim due to missing work because of court proceedings relating to the crime committed against them. Knowing that she will not lose her job encourages victims to disclose and move forward with court proceeding. In this way, she will be free and able to be present at tribal court to give testimony against the defendant if she chooses. Victims often need their jobs in order to become independent of the abuser.

The Notice by Corrections Facility section lays out an extensive list of situations in which the sheriff or the department of corrections must notify the victim regarding the prisoner. The victim can request a summary of the earliest release and parole eligibility date. The facility must notify the victim of a transfer of the prisoner to a

minimum security facility and of the prisoner's release into a community residential program. The victim must also be notified if the prisoner's sentence is reduced, if he escapes, the release of the prisoner or a decision regarding his status, and any pardons. The victim also has the right to address the parole board about the prisoner's release on parole. This assists in keeping the victim safe through knowledge and empowers her with knowledge about her perpetrator.

The Notice of Final Disposition section requires the crime victim advocate to notify the victim of the outcome of the court proceedings within 30 days. This provides some closure for the victim, even if the case is not in her favor or is not prosecuted. It is important for the victim to understand the process and know that the tribal court is doing everything they can to prosecute her case.

The Oglala and Makah tribal codes both contain sections on victims' rights in domestic violence cases. The major difference is that the Makah Code defines these rights under duties of the prosecutor. The prosecutor has the responsibility to provide for the victim's safety, to provide information to the victim relative to hearings and decisions, to secure restitution, and consult the victim on prosecutorial decisions. The Oglala Code, similarly, outlines several similar victim rights.

G. Sanctions

Sanctions Overview

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

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

Point of Discussion: Holding Perpetrators Accountable

- Is punishment, safety, or rehabilitation the primary goal of sanctions?
- How can sanctions ensure the safety of victims?
- How can sanctions serve to rehabilitate the perpetrator?
- What resources are available related to identified sanctions?

The federal government has several laws related to the commission of domestic violence. It is a federal crime (18 U.S.C. § 2261) for a person to travel interstate or to leave or enter Indian country with the intent to injure, harass, or intimidate an intimate partner when, during the course of or as a result of the travel, the abuser commits a violent crime that causes bodily injury. The abuser must intend to commit the domestic violence at the time of travel. The definition of *partner* is broad and basically includes a person with whom the abuser has cohabited in an intimate relationship (including a current or former spouse) or a person who has a child in common with the abuser. It is also a federal crime to cause an intimate partner to cross state lines, or leave or enter Indian country by force, coercion, duress, or fraud if the abuser intentionally inflicts or attempts to inflict bodily injury on the partner to facilitate or as a result of the travel.

It is a federal crime (18 U.S.C. § 2261) to cross a state line with the intent to injure or harass any person if, during the course of or as a result of the travel, the defendant places the person or a member of the person's immediate family in reasonable fear of death or serious bodily injury. The definition of *immediate family* is broad and includes a spouse, parent, child, sibling, and all other household members who are related to the primary victim by blood or marriage.

TRIBAL CODE EXAMPLES

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

General Provisions

Jicarilla Apache Tribe

Ch. 5, Section 3. Crime of Domestic Violence

A. Any person who shall knowingly commit an act of domestic violence as defined by Section 2 of this Chapter shall be deemed guilty of the offense of domestic violence and upon conviction thereof shall be sentenced to confinement not to exceed six months and/or to a fine not to exceed Five Hundred Dollars (\$500) or to both such confinement and fine.

B. In addition to or in lieu of the imposition of such confinement and/or fine, the court shall order the person convicted of the offense of domestic violence to participate in a domestic violence treatment program, as provided in Section 5 of this Chapter.

Prosecution for the offense of domestic violence shall not preclude prosecution for any other offense under the Jicarilla Apache Tribal Code arising from the same circumstances.

White Mountain Apache

Chapter 6, Section 6.3

A. Criminal Penalties

(1) First Offense:

(a) Any person who commits an act of domestic violence defined by this Chapter shall be deemed guilty of the offense of domestic violence. A person convicted of a first offense of domestic violence shall be imprisoned for a term of not less than ten (10) days or more than one (1) year and shall be fined an amount not less than One Hundred Dollars (\$100) or more than Five Thousand Dollars (\$5,000). Mandatory counseling shall be part of sentencing as provided in Section 6.4 of this Chapter, as well as restitution when appropriate.

(b) The Court may suspend imposition of fines and imprisonment for the first offense and place defendant on probation for not less than three (3) months nor more than one (1) year. When a sentence is suspended there must be complete cooperation with the orders of the Court requiring cooperation with the domestic violence program and counseling as ordered.

(2) Second Offense: A person convicted of a second offense of domestic violence within five (5) years shall be imprisoned for a term of not less than ninety (90) days or more than one (1) year and fined an amount not less than One Thousand Dollars (\$1,000) or more than Five Thousand Dollars (\$5,000). Mandatory counseling shall be part of sentencing as provided in Section 5.4 of this Chapter, as well as restitution when appropriate.

(3) Third or Subsequent Offenses: A person convicted of a third or subsequent offense of domestic violence within five (5) years of the last conviction shall be imprisoned for a term of not less than one hundred eighty (180) days or more than one (1) year and fined an amount of not less than Two Thousand Dollars (\$2,000) or more than Five Thousand Dollars (\$5,000). Mandatory counseling shall be part of sentencing as provided in Section 6.4 of this chapter as well as restitution when appropriate.

Firearms

Makah Tribal Code

Sec. 11.4.09(d)

Surrender of a Restraint Against Possession and Use of Dangerous Weapons: If the Court finds by clear and convincing evidence that the defendant used, displayed, or threatened to use a firearm or other dangerous weapon in the commission of the act of domestic violence or in the presence of a police officer responding to the report of domestic violence, the Court may require the surrender and impose the restraint described in MLOC 11.4.05 (h) as conditions of probation. Any firearm or other dangerous weapon surrendered to the Chief of Police, NBPd, as a condition of probation shall be destroyed.

Banishment

Makah Tribal Code

Sec. Sec. 11.4.09(h)

Banishment: When a Tribal member has been convicted of two or more criminal offenses under this Title, arising out of at least two separate incidents involving the same victim, and the victim is also a Tribal member, the Court may banish the defendant from the Reservation upon a finding by clear and convincing evidence that defendant's acts of domestic violence are likely to continue unless either the defendant or the victim leaves the Reservation. The banishment may be subject to conditions and may be for a period of (1) one-year.

Other Remedies

White Mountain Apache Domestic Violence Code

Chap. Six: Domestic Violence, Section 6.4

D. Other Conditions in Addition to Penalties

(1) In addition to the penalties above, the Court shall impose any condition it deems necessary to prevent further domestic violence, including but not limited to additional orders restricting the defendant's ability to have contact with the victim and other family or household members and the requirement that the defendant make timely reports to the Court for the duration of the sentence.

Saginaw Chippewa Domestic Abuse Protection Code

Section 1.2404

Purpose: To deter and punish family violence offenders and to provide safety for family violence victims in a culturally sensitive manner by utilizing modern and traditional Saginaw Chippewa remedies and punishments.

I. Sentencing Guidelines and First Offenders.

(a) When appropriate, the court may order the following types of counseling;

- i. Batterer's counseling;*
- ii. mental health counseling;*
- iii. substance abuse counseling;*
- iv. sexual offender counseling.*

(b) The court may impose monetary punishment(s) including, but not limited to:

- i. fines of up to One Thousand Dollars (\$1,000), which shall be separately accounted for and used to offset the costs of programming and enforcement under this code;*
- ii. court costs and legal fees;*

- iii. victim reimbursement including, but not limited to:
 - a. medical expenses;
 - b. personal property damage;
 - c. counseling expenses;
 - d. relocation expenses;
- iv. reimbursing service providers for court ordered counseling programs;
- v. reimbursing the local domestic violence program for emergency shelter services provided to the victim and other household members.
- (c) Jail time may be ordered.
- (d) Any traditional Saginaw Chippewa remedies that the Court deems appropriate may be ordered.

Collateral Effects

Omaha Tribe of Nebraska, Domestic Violence Code Sec. 3.08

1. Any person convicted of any Class I or Class II offense or subsequent Class III offense shall be ineligible for foster care placement or guardianship of a minor child for a period of five years from the date of the most recent conviction.
2. Any person convicted of any Class I or Class II offense or subsequent Class III offense shall be the subject of a rebuttable presumption against their suitability as a custodial parent in any child custody proceeding for a period of five years from the date of the most recent conviction.
3. Any person convicted of any Class I or subsequent Class II offense shall not own, use or possess any firearm for a period of twenty-four (24) months following the date of the most recent conviction. This section is enforceable by the contempt powers of the Court.
4. Any person convicted of any offense under this Title may be disqualified for certain positions or types of employment with the Omaha Tribe of Nebraska, its wholly owned subsidiaries, or companies or agencies doing business with the Omaha Tribe or on the Omaha Tribal Reservation.
5. All of these collateral effects shall be made part of the rights advisory at arraignment for any offense under this Title.

Repeat Offenders

Saginaw Chippewa Tribal Code 2. Sentencing Guidelines for Repeat Offenders

- (1) A court order prohibiting contact with the victim must be a condition to bond.
 - (a) The maximum jail sentence of one (1) year must be imposed.
 - (b) Monetary punishment including, but not limited to:
 - (i) Fines of up to Five Thousand Dollars (\$5,000), which shall be separately accounted for and used to offset the costs of programming and enforcement under this Code;
 - (ii) Court costs and legal fees;
 - (iii) Restitution to the victim, including, but not limited to:
 1. Medical expenses;
 2. Personal property damage;
 3. Victim counseling;
 4. Relocation expenses.
 - (iv) reimbursing service providers for court ordered counseling programs;
 - (v) reimbursing the local domestic violence program for emergency shelter services provided to the victim and other household members.

TRIBAL CODE COMMENTARY

There are two major limitations on the sanctions that can be imposed by a tribal government. ICRA limits the sanctions imposed by a tribal court to sentences not exceeding one year in jail and/or a fine of up to \$5,000, or both unless the tribal court provides the assurances required by the TLOA. If these requirements are met, sanctions could be up to three years in jail and a fine of up to \$15,000 per offense. If a tribal court orders incarceration for more than one year, it must

- Provide licensed legal counsel for the defendant (licensed by the tribe, state, or federal government);
- Ensure that tribal judges are law trained and licensed;
- Publish criminal laws, rules of evidence, and procedure; and
- Maintain an audio or video record of the criminal trial.

Incarceration for more than a year also requires that the defendant either was previously convicted of the crime or that the crime is one that would carry a penalty of more than a year if prosecuted in a state or federal court. The TLOA also allows for the defendant to be convicted of more than one offense at a time, allowing incarceration for up to nine years.

The Jicarilla Apache Statute allows up to six months in jail and/or a fine of up to \$500. The court can also sentence the offender to a treatment program in addition to the jail sentence and fine or instead of them. The decision on sentencing will be left to the tribal judge. It is assumed that the tribal judge will look at the past history of the offender and the seriousness of the current offense in arriving at a just sentence. Other codes, such as the White Mountain Apache, have required minimum sanctions as well as maximum ones. It requires that the judge impose at a minimum, a ten-day jail sentence and a fine of \$100. For a second offense, it requires a minimum jail sentence of 90 days and a \$1,000 fine. The judge can determine if more jail time or fine is needed up to the maximum allowed for a second offense of one year in jail and a \$5,000 fine, but must order the minimum required by law. An important decision for you to make is whether minimum jail sentences and fines will increase the safety for victims in your jurisdiction. If so, what should they be?

Many tribal codes contain enhanced penalties for repeat offenders, such as in the White Mountain Apache Code. The first domestic violence offense carries a minimum sentence of ten days and a maximum of one year. The fine can be anywhere from \$100 to \$5,000. In these cases, the court can suspend the

punishment for a probation period from three months to a year and require domestic violence counseling. The second offense within five years carries a prison term of 90 days to one year and a fine of \$1,000 to \$5,000. Mandatory counseling and restitution paid to the victim are required in these cases. Finally, the third offense carries a prison term of 180 days to one year and a fine of \$2,000 to \$5,000. What are some of the advantages of having a scaled response for repeat offenders like the White Mountain Apache Code? Which penalty system would work best with your tribe, one that increases the penalty for each conviction of domestic violence, or one that does not consider repeat offenses?

The Makah Tribal Code allows the judge to require surrender of a firearm if it was used in an act of domestic violence. If it is a condition of probation, the firearm can be destroyed. This is important to help protect the victim from further violence with the firearm. Furthermore, banishment is provided as a form of punishment for the individual convicted of two or more domestic violence offenses. The banishment period can last up to one year. There has to be a finding by the court that the violence is likely to continue.

Note: Federal law (18 U.S.C. § 922(g)(8)) prohibits an abuser subject to a qualifying order of protection from possessing firearms and ammunition. Abusers are not banned from possessing guns and ammunition permanently, only for the time that the order of protection is in existence. Additionally, there are “official use” exemptions, which allow law enforcement and military personnel who are subject to an order of protection to possess their service weapon while on duty.

Note: 18 U.S.C. § 922(g)(9) prohibits gun or ammunition possession by anyone who has been convicted of a qualifying misdemeanor crime of domestic violence. The gun ban is permanent, which means that if a person has been convicted of a qualifying misdemeanor, he or she can never legally possess a gun again unless the conviction has been expunged or set aside or the person has been pardoned or has had his or her civil rights restored. There is no “official use” exemption, so law enforcement officers and members of the military are subject to this law, even while on duty. The federal statute is also retroactive, so it applies to convictions that occurred before the law went into effect.

The White Mountain Apache Code allows the tribal court to impose any other penalties it deems necessary. The judge can, in addition to other penalties, impose a no-contact order that prevents the perpetrator from contacting the victim and her family or household members. The perpetrator can also be forced to regularly report to the court during his sentence.

The Saginaw Chippewa Code has a purpose section to their punishment section that explains it is culturally focused. It incorporates modern and traditional remedies for dealing with perpetrators of domestic violence. First offenders can be ordered into several different types of counseling programs, such as batterer's and sex offender's counseling. They can also be given a monetary punishment of up to \$1,000, which is used to offset the costs of programming and enforcement of their code. In addition, the offender may be required to reimburse the victim and service providers, such as a domestic violence shelter. Perpetrators can also receive jail time or any traditional Saginaw Chippewa remedy deemed necessary.

There are other noncriminal repercussions for people convicted of domestic violence violations in the Omaha Code. The convicted offender is ineligible to act as a foster parent for five years. They cannot possess or own a firearm for two years from the time of their conviction. The convicted offender may also be disqualified to apply for positions with the tribe. There are a wide range of potential punishments or sanctions. The OVW does not support diversion programs, deferred prosecution, or deferred sentencing as they are not designed to keep the victim safe or hold the offender accountable. Deciding how the offender should be sanctioned in your community in order to deter further violence and assure accountability is extremely important.

Point of Discussion: Treatment programs for offenders

Consider how you want the judge to deal with treatment programs for the offender, if you have them available in your community.

The Jicarilla Apache Code requires the judge to order participation in a domestic violence treatment program. The White Mountain Apache Code requires mandatory counseling and cooperation with a domestic violence program.

What are the possibilities in your community?

Should it be mandatory?

EXERCISES

These exercises are designed to guide you in drafting and revising your tribal criminal domestic violence laws.

STEP 1: Review the Law in the Concurrent Jurisdiction

Is your reservation affected by PL 280 or another law that gives criminal authority to the state government?

☐ Yes

☐ No

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

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

Points of Discussion: State law

What are the most important parts of the state laws?

How does the state government define domestic violence?

What is effective or positive about the state laws?

What is ineffective or negative about the laws?

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

STEP 2: Determine Existing Tribal Law

Does your tribal code currently define the behavior or conduct that constitutes domestic violence?

☐ Yes (If yes, write the citation here)

☐ No

Does your tribal code currently define the type of relationship that must be in place in order to trigger domestic violence laws?

☐ Yes (If yes, write the citation here)

☐ No

STEP 3: Determine the Forbidden Conduct

Discuss the type of behavior that should be forbidden through your domestic violence laws. There are two common approaches to defining forbidden conduct—the “laundry list” and the “separate definition.” Which approach will work best for your tribe? Sometimes both approaches are combined in a single code.

Laundry List

A laundry list approach means that the domestic violence code names each crime in your current statute that you want to be covered under the domestic violence code. This is the most common approach. You simply write out a list all of the crimes in your criminal code that you want to define as domestic or family violence. Some of the more common crimes include:

- Assault
- Battery
- Threats and intimidation
- Homicide
- Stalking
- Harassment
- Arson
- Burglary
- Trespass
- Cruelty to animals (when the animal belongs to the victim)
- Damage to property

When using this approach, it may be necessary to update the criminal code to include new definitions of crimes that may not exist in your current criminal code. Some tribal codes incorporate all crimes into the domestic violence code.

Separate Definition(s) of Domestic Violence

This approach requires the development of a new, separate definition of the crime of domestic violence. Elements of this new crime generally include:

- Causing or attempting to cause physical harm or bodily injury,
- Placing another in fear of physical harm or bodily injury, and
- Engaging in sexual activity or contact without consent.

Some tribes have also included “causing mental anguish” in their independent definition.

Step 4: Determine Relationship Requirement

Discuss what kind of relationships between the parties you want to cover in the domestic violence code. The classic definition of *domestic violence* uses an “intimate partner” model where there is (or has been) some kind of sexual relationship between the parties.

However, many tribes have chosen to adopt a “family violence” or “kinship” model. Also consider cases of dating violence where there may be no “family” or “intimate partner” relationship. This section should be carefully considered as it lays down the foundation for who can be protected by your tribe. Your group should discuss which relationships you would like to cover under the code. It is also important to think about partner violence (dating couple) versus family violence (two brothers). Some ideas of who might be covered by the law include:

- ☐ Married couples (or formerly married couples);
- ☐ Persons who are living together (or have lived together in the past);
- ☐ Persons who are engaged in a sexual or dating relationship (or have had such relationship in the past);
- ☐ Persons with a child in common or even expecting a child together;
- ☐ Household members (family);
- ☐ Related by blood, marriage, or adoption according to the customs and traditions of the tribe;
- ☐ Same sex partners (gay, lesbian, bisexual, transgender relationships);
- ☐ Elderly family members;
- ☐ Children; and
- ☐ Others_____.

Step 5: Tribal Law Enforcement

Does the tribal code already contain laws concerning the roles and duties of tribal law enforcement in domestic violence cases?

___ Yes (If yes, write the citation here)

___ No

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

You may want to consider and discuss the following requirements:

- ☐ Mandatory arrest for crimes of domestic violence;
- ☐ Predominant aggressor provisions;
- ☐ Mandatory information given to the victim as to their rights and the location of nearest shelter;
- ☐ Mandatory transportation of the victim (and children) to a shelter or other place of safety;
- ☐ Mandatory written report for all domestic violence calls, regardless of whether an arrest was made;
- ☐ Confiscation of firearms in certain circumstances;
- ☐ Police immunity from suit for the good-faith performance of their duties; and
- ☐ Authority of law enforcement officer to seize weapons (such as knives and guns).

Discuss and determine how the law enforcement agency should respond to a law enforcement officer or public official who is suspected of domestic violence. These laws can include:

- ☐ Dispatch should immediately inform captain or supervisor.
- ☐ Someone of higher rank than the alleged perpetrator must be involved in responding.
- ☐ No exceptions to the domestic violence codes and provisions where people in authority are involved.

Note: Training of law enforcement is covered in Part 6.

Step 6: Tribal Prosecutors

Does the tribal code already contain laws concerning the roles and duties of tribal prosecutors in domestic violence cases?

___ Yes (If yes, write the citation here)

___ No

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

You may want to consider and discuss the following requirements:

- ☐ Notify the victim of the status of the case,
- ☐ Provide information to victim on his or her rights under tribal law, and
- ☐ Provide explanation of decision to decline case.

Step 7: Tribal Courts

Does the tribal code already contain laws concerning the roles and duties of the tribal court in domestic violence cases?

___ Yes (If yes, write the citation here)

___ No

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

Discuss whether you think that the court should release people charged with a domestic violence crime before their trial. If yes, what should they consider before making a decision on the release?

- ☐ Victim's safety
- ☐ Perpetrator's likelihood of appearing before the court
- ☐ Perpetrator's past behavior

Should there be any conditions to the release?

Discuss whether the court should keep specific records of dismissed cases?

Look at your current tribal court calendar. Are there specific days set aside for domestic violence cases? If not, should there be?

Consider the number of cases that the tribal court usually processes and how much time each case needs.

Discuss whether your court will grant continuances in domestic violence cases and what will constitute a continuance and what will not?

Step 8: Evidence

Discuss and evaluate whether any of the following special rules should apply in cases of domestic violence.

- ☐ Victim-advocate privilege
- ☐ Victim–medicine person privilege
- ☐ Exceptions to hearsay: victim statement
- ☐ Expert/learned treatises (Consider allowing the testimony of expert witnesses. They can explain the dynamics of power and control in domestic violence.)

Does your tribal code currently have a privilege for husband-wife or spousal communications?

___ Yes (If yes, write the citation here)

___ No

Consider making this law inapplicable in domestic violence cases. Not doing so could protect the abuser.

Step 9: Victims' Rights

Does the tribal code already contain laws concerning victims' rights?

___ Yes (If yes, write the citation here)

___ No

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

Check the various "rights" that victims of crime/victims of domestic violence should have in your criminal justice system. Add rights that you do not see included, such as traditional rights that may be unique to your community.

- ☐ Be present during criminal proceedings
- ☐ Be heard in proceedings
- ☐ Protection from the accused and safety
- ☐ Notice of proceedings, conviction, sentence, release, and escape
- ☐ Privacy
- ☐ Restitution (either monetary or traditional forms)
- ☐ Speedy trial
- ☐ Compensation
- ☐ Confer with prosecution and offer input

Step 10: Sanctions

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

___ Yes (If yes, write the citation here)

___ No

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

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

- ☐ Mandatory incarceration (jail time) for a domestic violence conviction
- ☐ Mandatory counseling (e.g., batterer reeducation, drug/substance abuse treatment, and parenting classes) for a domestic violence convictions
- ☐ Banishment (requiring an offender to leave the reservation for a period of time)
- ☐ Seize weapons
- ☐ Other _____

Discuss **enhanced penalties** for the following acts:

- ☐ Repeat domestic violence offenders
- ☐ Use of weapons during an act of domestic violence
- ☐ Domestic violence in the presence of a child or elder
- ☐ Domestic violence against a pregnant woman
- ☐ Domestic violence against a child or elder

Step 11: Draft the Law

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

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

- ☐ Forbidden conduct
- ☐ Relationship
- ☐ Law enforcement duties
- ☐ Prosecutor duties
- ☐ Tribal court duties
- ☐ Evidence
- ☐ Victims' rights
- ☐ Sanctions

ADDITIONAL RESOURCES

ARTICLES:

Jeffrey Fagan, “The Criminalization of Domestic Violence: Promises and Limits,” National Institute of Justice (January 1996).

Andrew Klein, “Enforcing Domestic Violence Firearms Prohibitions: A Report on Promising Practices,” OVW and National Center on Full Faith and Credit (September 2006).

Melissa Tatum, “Establishing Penalties for Violations of Protection Orders: What Tribal Governments Need to Know,” 13 *Kansas Journal of Law and Public Policy* 125 (2003).

U.S. Department of Justice, *Information Needed to Enforce the Firearms Prohibition: Misdemeanor Crimes of Domestic Violence*, November 2007.

NOTES:

Part 5

PROTECTION ORDERS

OVERVIEW

Tribal sovereignty depends on the survival and wellness of all tribal people. Tribal members facing domestic violence on top of social problems like poverty, poor housing, and loss of tribal culture and language will likely need additional legal protections in order to escape a batterer.

Domestic violence does not just impact the criminal justice system, but it also impacts the civil justice system. Issuing and enforcing protection orders are often considered civil matters, although a violation could be a violation of criminal law. Victims of domestic violence need to have strong laws that allow them to receive full legal protection.

Remember that civil law is separate from criminal law. Tribal civil jurisdiction is different than tribal criminal jurisdiction. A victim can get a civil protection order even if there is no criminal prosecution for domestic violence.

This part includes three major subsections:

- A. Developing Civil Protection Orders
- B. Violating Protection Orders
- C. Full Faith and Credit

A. Developing Civil Protection Orders

Developing Civil Protection Orders Overview

Protection orders can be an important legal tool for victims of domestic violence. A protection order is a court-issued legal document that requires one person, the respondent (batterer), to stay away from the other person, the petitioner (victim). In addition, protection orders can provide relief for the victim, such as temporary custody, financial support, housing, child support, automobile use, batterer's intervention, and alcohol or substance abuse counseling for the batterer.

An ex parte order or temporary order is often issued immediately for a very limited period of time to provide emergency protection for the victim, without notification of the other party. A final order for protection or permanent order is issued after notification of the respondent and a hearing. A final order is generally for the period of time allowed by statute, such as one or two years.

The language used in the protection order is critical. For instance, the language used in the protection order may determine whether other jurisdictions are mandated by federal law (VAWA) to give full faith and credit to the protection order. It is critical that the protection order language make particular findings regarding the tribal court's jurisdiction over the subject matter, persons involved and the notice given to the defendant. Certain language may trigger the Federal Firearms prohibition against possessing ammunition or firearms during the period of a valid protection order. Further, a violation of the protection order may be the basis for a criminal prosecution of Indians and/or non-Indians (VAWA 2013). Finally, the language of the protection order may engage a presumption that custody of the child/children needs to be with the non-violent parent.

The following questions and examples are meant as a guideline for creating a civil protection order section for the domestic violence code.

The statutes regarding protection orders should cover the following issues:

- (1) Jurisdiction
- (2) Eligibility to Petition for a Protection Order
- (3) Procedure to Obtain a Protection Order
 - a. Petition for Protection Order
 - b. Emergency/Temporary Protection Order
- (4) Contents of a Protection Order
- (5) Hearing on the Protection Order

Civil Protection Orders—Jurisdiction

TRIBAL CODE EXAMPLES

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

Muscogee (Creek) Nation Code, Domestic and Family Violence
SubChapter 4. Civil Procedures and Remedies
3-401 Civil Jurisdiction

The District Court has full civil jurisdiction to issue protection orders if the petitioner currently or temporarily resides in the Muscogee (Creek) nation territorial jurisdiction, if the respondent currently or temporarily resides in the Muscogee (Creek) Nation territorial jurisdiction or if the domestic family violence occurred in the Muscogee (Creek) Nation territorial jurisdiction; provided that such civil jurisdiction may be exercised regardless of the Indian or non-Indian status of petitioners and respondents. There is no minimum requirement for residency to petition the District Court for an order of protection.

Hopi Family Relations Ordinance
Subchapter 2. Protection Orders
6.01 Jurisdiction

(a) Hopi Tribal Courts

- (1) The Hopi Tribal Court shall have jurisdiction over all proceedings under this ordinance.*
- (2) A protection order may be sought as an independent civil action, or joined with any other civil action over which the court has jurisdiction.*
- (3) Any person within the territorial jurisdiction of the Hopi Tribe may seek remedies for protection within such jurisdiction, regardless of where the abuse or violence occurred. The court may provide remedies to protect persons within the territorial jurisdiction of the Hopi Tribe to prevent future abusive and violent conduct.*
- (4) Acts of abuse and violence which violate an existing Hopi Tribal court order but which occur beyond the territorial jurisdiction of the Hopi Tribe remain subject to the jurisdiction of the court so long as the Hopi Tribe may exercise personal jurisdiction.*

Makah Tribal Law and Order Code
CHAPTER 5—Petition for an Order for Protection
§11.5.03 Venue

A petition may be filed under this Chapter in any of the following circumstances:

- a. The petitioner resides on the Reservation.*
- b. The respondent resides on the Reservation.*
- c. The alleged act of domestic violence occurred on the Reservation.*
- d. A communication that allegedly constitutes domestic violence was either made or received on the Reservation.*

TRIBAL CODE COMMENTARY

You may want to include extra jurisdictional language in your protection order section of your domestic violence code. The Muscogee (Creek) Code designates three requirements in order to petition for an order of protection: petitioner lives in Muscogee jurisdiction, the respondent lives in Muscogee jurisdiction, or the act of domestic violence occurred in the jurisdiction. In the Muscogee jurisdiction a person must meet one of the three requirements to petition for a protection order whether Indian or non-Indian.

In the Hopi Code, anyone can petition for an order of protection if they are within the territorial jurisdiction of the tribe, regardless of where the abuse occurred. However, in order for the Hopi order to be granted full faith and credit in other jurisdictions, the Hopi tribal court must have both subject matter and personal jurisdiction. Finally, the Makah Code is similar to the Muscogee Code except for the communication clause.

Civil Protection Orders—Eligibility to Petition

TRIBAL CODE EXAMPLES

Oglala Sioux Tribe Domestic Violence Code

Ch. 3, Sec. 301

Eligible petitioners for order:

- 1. A person who is or has been a victim of domestic violence may file a petition for an order for protection against any person who has threatened or has committed an act of domestic violence as defined in Section 201, and is a family or household member as defined in Section 103 of this code.*
- 2. A parent, guardian, or other representative may file a petition for an order for protection on behalf of a child or family or household member, or former household member on behalf of a child against a family or household or former household member, who commits an act of domestic violence.*
- 3. Issuance of an order for protection must arise from a situation of domestic violence as defined by Section 201 of this code.*
- 4. A person who is an employee of an agency or department engaged in conflict with another agency or department shall not be allowed to file for an order of protection against the individual employee or agency s/he is in conflict with. Neither shall an agency or department be allowed to file for an order for protection against another agency or department or against an individual employed by the agency or department because of personal or professional differences.*

Ch. 1, Sec. 103

- 2. "Family or household members" include:*
 - a. Adults or minors who are current or former spouses,*
 - b. Adults or minors who are dating or who have dated,*
 - c. Adults or minors who are engaged in or who have engaged in a sexual relationship,*
 - d. Adults or minors who are related or formerly related by marriage as recognized by Western or Lakota tradition,*
 - e. Persons who have a child in common,*
 - f. Minor children of a person in a relationship that is described in paragraphs a through e above.*

Salt River Pima-Maricopa Indian Community

Section I. Orders of Protection

Any person may seek relief under this Section by filing a petition, as a civil action, with the Court alleging that the person has been a victim of domestic violence committed by the respondent. The person may petition for relief on behalf of himself or herself and on behalf of minor family or household members. A domestic violence victim advocate may accompany the petitioner when filing for an order of protection. The petitioner may request an order of protection for the purpose of restraining a person from committing an act of domestic violence, without specifying irreparable harm as a casual factor.

1. Availability of Petition for Orders of Protection in General

A. Petition to obtain an order of protection under this Section may be filed by:

- 1. Any person claiming to be the victim of domestic violence;*
- 2. Any family member or household member of a person claimed to be the victim of domestic violence, on behalf of the alleged victim; or*
- 3. The Office of the Prosecutor.*

TRIBAL CODE COMMENTARY

The Oglala Sioux Code allows parents, guardians, or a representative to file on behalf of a victim of abuse if she is a child. Also when petitioning for an order for protection, the victim can include children and household members who might be vulnerable to the same abuse. They also make it clear that employees and an agency cannot file an order of protection against each other.

The Salt River Code also allows a victim to petition on behalf of a minor household member. They point out within their code that a victim advocate can accompany the petitioner to help her fill out the form because the advocate has more experience and knowledge of the process. They also specify that any family member or household member can petition on behalf of the victim. It is important to point out that, in this case, the adult victim does not need to be incapacitated. Therefore, even if the victim does not want the order, the family member can file. The office of the prosecutor is also eligible to file for an order for protection.

Civil Protection Orders—Procedure for Petition

TRIBAL CODE EXAMPLES

Personal Information Required in the Petition

*Ninilchik Village
Ordinance No. 99-01*

Section 6. Contents of the Petition to Use the Tribal Court

In domestic violence cases, the Petition shall contain the following information:

- 1. The name, address and age of the person to be protected;*
- 2. The names and addresses if known of the person's custodians, if any;*
- 3. The names and addresses of any other person or tribe with an interest in the domestic violence proceeding;*
- 4. Whether the Petitioner is the victim or whether some other person is the victim, and if so, the Petitioner's relationship to the person to be protected;*
- 5. The facts that make it necessary for the person to be protected; and*
- 6. The relief requested by the Petitioner.*

Confidentiality

*Navajo Nation Code, Title 9, Domestic Relations, Domestic Abuse Protection Act
§ 1658. Confidentiality*

A petitioner seeking protection shall not be required to reveal her or his address or place of residence except to the judge, in chambers, for the purpose of determining jurisdiction and venue.

Standards of Proof

*Hopi Family Relations Ordinance
§ 8.01 Standard of Proof, Defenses*

- (a) A court shall grant a protection order when it finds by a preponderance of the evidence that it is more likely than not that an act of abuse and violence has occurred or is about to occur. The order's purpose shall be to prevent the occurrence or recurrence of abuse and violence.*
- (b) A petitioner shall not be denied relief under this ordinance because:*
- (1) the petitioner used reasonable force in self defense against the respondent;*
 - (2) the petitioner has previously filed for a protection order and subsequently reconciled with the respondent;*
 - (3) the petitioner has not filed for a divorce; or*
 - (4) the petitioner or the respondent is a minor.*
- (c) The following shall not be considered a defense in a proceeding for the issuance or enforcement of a protection order under this ordinance:*
- (1) intoxication;*
 - (2) spousal immunity;*

(3) provocation.

(d) Abuse and Violence does not mean a person's act of self defense made in reasonable response to an abuser's act of abuse and violence.

(e) Village or Ceremonial Tradition: It shall be a defense under this ordinance that the alleged conduct is in accordance with Hopi customs, practices, traditions or ceremonies.

Hopi Family Relations Ordinance

Section 6.01 Jurisdiction

(b) Notice to Hopi Village(s)

(1) Notice from Hopi Tribal Court: If the petitioner and the respondent are members of a Hopi village, the Court shall provide written notice to the Petitioner's village within 24 hours of the filing of a petition for a permanent protection order, if any, that—

(2) Pursuant to Article III, Section 2, (b) of the Constitution of the Hopi Tribe, the Hopi village has the power to adjust family disputes and regulate family relations of members of the village, and

(3) If the village wishes to assert jurisdiction over the matter, it should inform the court, in writing, within (15) fifteen days of the notice from Hopi Tribal Court.

(4) If the Hopi village does not provide a written response to a notice from the Hopi Tribal Court within 15 days, the Hopi Tribe shall exercise jurisdiction over the petition for a permanent protective order.

(5) Section 6.01(b), (1-4) is not applicable when one party to a dispute is not a member of the Hopi Tribe.

Forms

The Confederated Tribes of Siletz Indians of Oregon

Tribal Government Operations

Domestic and Family Violence Code

§ 12.524. Standard form required for petitions and orders; required statements in petitions and orders; duty of clerk to provide petitions and clerical assistance.

(a) The Siletz Tribal Court must:

(1) develop and adopt standard forms for petitions and orders for protection, including but not limited to such orders issued pursuant to divorce, custody, emancipation and other domestic relations hearings; and

(2) provide the forms to the Clerk of the Court.

(b) In addition to any other required information, the petition for an order for protection must contain a statement listing each civil or criminal action involving both parties filed within the preceding five years.

(c) The following statements must be printed in bold-faced type or in capital letters on the order for protection:

(1) "Violation of this order may be punished by confinement in jail for as long as insert time period and by a fine of as much as insert amount."

(2) "If so ordered by the Court, the respondent is forbidden to enter or stay at the petitioner's residence and a reasonable area surrounding the residence; even if invited to do so by the petitioner or any other person. In no event is the order for protection voided."

(d) The Clerk of the Court must provide to a person requesting an order for protection:

(1) the forms adopted pursuant to subsection (a);

(2) all other forms required to petition for an order for protection; and

(3) clerical assistance in filling out the forms and filing the petition.

§ 12.525. Continuing duty to inform Court of other proceedings; effect of other proceedings; delay of relief prohibited; omission of petitioner's address.

- (a) At any hearing in a proceeding to obtain an order for protection, each party has a continuing duty to inform the Court of any civil or criminal action involving both parties filed within the previous five years that was not listed in the petition as required by § 12.524(b) for any reason.*
- (b) An order for protection is in addition to and not in lieu of any other available civil or criminal proceeding. A petitioner is not barred from seeking an order because of other pending proceedings. The Court must not delay granting relief because of the existence of a pending action between the parties.*
- (c) A petitioner may omit her or his address from all documents filed with the Court. If a petitioner omits her or his address, the petitioner must provide the Court a mailing address. If disclosure of petitioner's address is necessary to determine jurisdiction, the Court may order the disclosure to be made:*
 - (1) after receiving the petitioner's consent;*
 - (2) orally and in chambers, out of the presence of the respondent, with a sealed record to be made; or*
 - (3) after a hearing, if the Court takes into consideration the safety of petitioner and finds such disclosure is in the interest of justice.*

Oglala Sioux Domestic Violence Code

SECTION 302. Uniform form required for petitions and orders; required statements in petitions and orders; duty of clerk to provide petitions and clerical assistance; no fee for filing.

1. The Oglala Sioux Tribal Court system shall:

- (a) Develop and adopt uniform forms for petitions and orders, including but not limited to such orders issued pursuant to divorce, custody, protection and other domestic relations hearings;*
- (b) Provide that the title of any form or order developed under this section, whether an emergency, emergency ex parte, or permanent order for protection, shall include the words "Order for Protection";*
- (c) Provide that all petitions and forms developed and implemented under this section address and include all requirements for compliance with full faith and credit provisions of the Violence Against Women Act, 18 USC 2265; and*
- (d) Provide the forms to the clerks of court authorized to issue such orders, legal services agencies, victim services agencies, and advocacy agencies.*

2. In addition to any other required information, the petition for an order for protection must contain a statement listing all current or pending civil or criminal actions involving one or both parties.

3. The following statements must be printed in bold-faced type and/or in capital letters on the order for protection:

- (a) "Consequences for violation of this order for protection include"*
- (b) "If so ordered by the court, the respondent is forbidden to enter or stay at the petitioner's residence, even if invited to do so by the petitioner or any other person. In no event is the order for protection voided by any such invitation or contact initiated by the plaintiff."*
- (c) "Any person who is subject to an order for protection shall not possess, own, buy, sell, trade, or have immediate access to any firearm or ammunition, in violation of Section 206 of the OST Domestic Violence Code and Title 18, United States Code, Section 922 (g) (8). Violation of firearms restrictions shall result in prosecution under tribal and/or federal law."*

4. The clerk of court or Cangleska, Inc., personnel shall provide to a person requesting an order for protection:

- (a) The form adopted pursuant to subsection 1;*
- (b) All other forms required for an order for protection, including but not limited to, forms for service and forms required by Uniform Child Custody Jurisdiction Act; and*
- (c) Clerical assistance in filling out the forms and filing the petition.*

5. Except as otherwise provided in section 305, a petition for an order for protection must be in writing, verified, and subscribed to in the manner provided by tribal law.

6. All orders for protection must be issued on the form adopted in accordance with subsection 1.

7. There shall be no filing fees for any civil action arising from a situation of domestic violence.

Hopi Family Relations Ordinance

INSTRUCTIONS FOR FILING A PETITION FOR A PROTECTION ORDER

1. Explanation of Temporary Protection Order and Family Abuse Protection Order

The Court can issue a Temporary Protection Order ex parte (without notice to the abuser or a hearing) to protect you from immediate danger of harm by the person who is abusing you. If the Court determines that you need immediate protection, you can get a Temporary Protection Order in one day. It will last for up to fifteen days.

Within those fifteen days the Court will hold a hearing to decide whether it should issue a permanent Family Abuse Protection Order, which is a long-term protection order. The purpose of the hearing is to give you an opportunity to explain why you feel you are in danger and why you think you need the protection order. It will also give the abuser (the person harming you) the chance to show why a protection order should not be granted against him or her.

The hearing is informal, and you may speak for yourself. After the hearing, if the judge thinks you still need protection, you will get a long-term Family Abuse Protection Order. This order is good for up to one year.

2. Filling Out the Petition for a Protection Order

a. On the lines at the very top left-hand corner, write your name and address.

b. On the lines above the word "PETITIONER", fill in your name, census number and address. You are the Petitioner.

c. On the lines above the word "RESPONDENT", fill in the abuser's name, census number (if you know it) and address. The abuser is the Respondent.

d. Fill in your name where it says "I, _____."

e. Answer all questions and fill in all the blanks in the rest of the petition. Describe in as much detail as you can the most recent incident of abuse. Describe what the abuser did to you, your children and/or your property. Then describe threats the abuser has made and how this has made you feel (i.e., terrified, afraid for your life). In the "Requested Relief" section, check off what you want the Court to do for you.

3. Signature

Sign the petition where it says Petitioner, pro se. Pro se means that you are representing yourself in this action.

4. Verification

You must sign this part in front of a notary public. Do not sign it beforehand. If you do, you will not be able to get it notarized.

5. Service

You must also fill out the Application for Service of Process at the end of the petition. This is very important. The court will serve the Petition and order on the Respondent which means they will give the Respondent a copy of the Petition and Order. In order for the court to do this they need to know what the Respondent looks like and where the Respondent can be found. Without this information the court cannot serve the Respondent and the protection order will not be effective.

6. Filing the Petition

You must make three copies of the Petition. Take the original and the copies to the court and give them to the court clerk. The clerk will stamp them and give a stamped copy back to you. Keep the copy for your records.

7. The Hearing

The Court will schedule a hearing within fifteen days to decide whether or not you need a long-term protection order.

a. At the hearing both parties appear and the judge will determine whether to continue the protection order, modify it, or dismiss it.

b. You may bring witnesses and any other proof of abuse. You may represent yourself or seek the help of an attorney or advocate.

- c. The judge may issue a Family Abuse Protection Order effective for up to one year.
- d. If you are requesting that the abuser pay for damages he has caused, you must bring proof of such damages.
- e. If children are involved, be prepared to suggest appropriate visitation (i.e., when and where the Respondent can visit the children, and who should supervise the visitation). If you feel the children will be harmed or abducted by the Respondent if visitation is allowed, you should make this clear to the judge. The judge may then order supervised visitation or no visitation.
- f. If the judge enters a Family Abuse Protection Order after the hearing, you will get a copy. Keep a copy of the order with you at all times.

8. Violation of a Temporary or Permanent Family Abuse Protection Order

If the Respondent violates a protection order, call the police. Tell the police that you have a protection order and what the Respondent has done to violate the protection order. Then do the following:

- a. Fill out a "Motion for Order to Show Cause" form which may be obtained from the court.
- b. You must sign the form in front of a notary public.
- c. Bring the form to the family court and file it by giving it to the court clerk.
- d. You will be notified when the hearing on the motion will be held. At the hearing you will have the opportunity to show how the Respondent violated the order. Bring witnesses or other proof (i.e., hospital or police reports, proof of destroyed property, pictures of any cuts, scratches or bruises). The Respondent will have the opportunity to try to prove that he did not violate the order.

9. Canceling the Protection Order

A protection order will remain in effect until it expires or until the court "vacates" or cancels it. It can *ONLY* be canceled by court order. If Respondent is in contact with you while the order is still in effect, he or she may be arrested and sent to jail **WHETHER OR NOT YOU CONSENTED TO THE CONTACT**. To ask the court to cancel the protection order, do the following:

- a. Fill out a "Motion to Vacate" form which may be obtained from the court.
- b. You must sign the form in front of a notary public.
- c. Bring the form to the family court and file it by giving it to the court clerk.
- d. You will be notified when the hearing on the motion will be held. At the hearing you will have the opportunity to show why the order should be canceled. You will need to prove that the Respondent has made efforts to change his or her behavior (i.e., has attended domestic abuse or substance abuse counseling). The Respondent will also have the opportunity to try to prove that he or she should no longer be restrained by the order. The judge will then decide whether or not to cancel the order.

Service of Process

Navajo Nation Code Title 9, Domestic Relations Domestic Abuse Protection Act

§ 1661. Service of process

A. Upon entering a protection order under this Act, the Court shall immediately:

1. Provide for notice to the respondent.

- a. The court clerk shall hand-deliver any protection order, petition, motion, summons, notice of hearing, or other documents filed with the Court, to the proper person(s) for service upon the respondent.
- b. Any officer of the Navajo Police, court official, member of the Office of the Prosecutor or court-appointed process server may serve process within the Navajo Nation in a proceeding under this Act.
- c. Service outside of the Navajo Nation shall be completed according to Rule 4(e)(2) of the Navajo Rules of Civil Procedure.

d. If personal service cannot be made, the Court may serve the respondent by certified mail, return receipt requested. The return receipt, when received by the Court, shall constitute prima facie evidence that the respondent received notice of the proceedings.

2. Notify law enforcement. The court clerk shall provide a copy of the protection order to the police department(s) with jurisdiction over the residence of the petitioner, and over any other addresses listed in the order.

B. The Navajo Nation Police Department shall:

1. Upon receipt of documents pursuant to § 1661(A)(1), personally serve the documents upon the respondent immediately. Service of protection orders shall take priority over all routine police business.

2. Upon receipt of a protection order pursuant to § 1661(A)(2), file the order in a protection order registry. Each Navajo Nation Police Department shall maintain a registry of all protection orders. The orders shall be indexed by the names of both the petitioner and the respondent.

Ho-Chunk Nation

Rule 5. Notice of Service of Process.

A. Definitions.

1. Service of process—The manner in which parties are informed of the Complaint and of the opportunity to Answer. Personal service is preferred; however, service by registered U.S. mail (return receipt requested) at the person's home or usual place of business or employment are equally acceptable and effective. Other methods of service may be employed when, in the Court's discretion, they are most likely to result in actual notification of the parties.

2. Summons—The official notice to the party informing him/her that he/she is identified as a party to an action or is being sued, that an Answer is due in twenty (20) calendar days (See HCN R. Civ. P. 6) and that a Default Judgment may be entered against them if they do not file an Answer in the prescribed time. It shall also include the name and location of the Court, the case number, and the names of the parties. The Summons shall be issued by the Clerk of Court and shall be served with a copy of the filed Complaint attached.

(B) General. Any time a party files a document other than the Complaint with the Court in relation to a case, the filing party must serve copies on the other parties to the action and provide Certificate of Service to the Court. Any time the Court issues an Order or Judgment in the context of an active case, the Court must serve copies on all parties. Service of process can be accomplished as outlined in Section (C).

A. Methods of Service of Process.

1. Personal Service. The required papers are delivered to the party in person by the bailiff, or when authorized by the Court, a law enforcement officer from any jurisdiction, or any other person not a party to the action who is eighteen (18) years of age or older and of suitable discretion.

a. Personal Service is required for the initiation of actions in the following:

(i) Relief requested is over \$5,000.00, excluding the enforcement of foreign child support orders; or

(ii) Children's custody and/or placement are the subject matter of the proceedings.

(b) Where personal service is required by this rule and the Court or the filing party exercises due diligence in unsuccessfully pursuing personal service of process, the filing party may move for permission to pursue service of process by any means provided for in sections (c) through (f). The Court will grant the motion where good cause is shown. The Court may also enter such an order sua sponte for good cause shown.

(c) Service upon a Business, Corporation or Entity. Service may be made upon an agent of a business, corporation or governmental agency.

(d) Service upon an Individual. The required papers are delivered in person to the party's home or usual and current place of business or employment to someone of suitable age and discretion over fourteen (14) years of age.

(e) Service by Mail. Service of process may be accomplished by sending the required papers to a party by registered mail with return receipt requested, except in the instances of Rule 5(C)(1)(a)(i) and 5(C)(1)(a)(ii) as stated above.

(f) Service by Publication. Upon order of the Court for good cause shown, service of process may be accomplished by publishing the contents of the summons. Where service by publication is being made on a member or members of the Ho-Chunk Nation, the contents of the summons may be published in the Hocak Worak or a newspaper of general circulation in an area where the party is most likely to be made aware of the summons. In the case of non-members of the Ho-Chunk Nation, the contents of the summons may not be published in the Hocak Worak, but may be published in a newspaper of general circulation in an area where the party is most likely to be made aware of the summons. If publication is sought in the Hocak Worak, publication must be in two consecutive issues. If publication is sought in a paper of general circulation, publication must be at least, once per week for four consecutive weeks. Proof of publication must be provided to the Clerk of Court.

1. Service of process may be made on a party by any means permitted in sections (a) through (e). Service of process may be made on a party by publication as outlined in section (1)(f) provided a preponderance of the evidence shows the Court that the party to be served lives in the area where the summons is to be published.

2. After the first successful service of process, the Court and the parties will then perform all written communications through regular mail at that address. Therefore, each party to an action has an affirmative duty to notify the Court, and all other parties, of a change of address within ten (10) calendar days of such change.

(D) Using a Process Server or Bailiff. The Court's bailiff shall be authorized to serve process in any action filed with the Court. In addition, the Court may authorize other persons to serve process when there is an assurance the other person knows how to effect proper service and will make adequate factual inquiries to assure that service is proper.

(E) Return of Service. A return of service shall be endorsed with the name of the person serving and the date, time and place of service. It shall state the manner in which service was made and shall be filed with the clerk of Court.

(F) Effect of Incomplete or Improper Service. Incomplete or improper service results in a lack of jurisdiction over the person incompletely or improperly served. If a person refuses to accept, service shall be deemed properly performed if the person is informed of the purpose of the service and offered copies of the papers served. If a person intentionally avoids service, the Court may also consider service as properly performed. Upon order of the Court for good cause shown, if the Court or the filing party exercises due diligence in unsuccessfully pursuing service of process, whether personal or otherwise, a Default Judgment may be entered in accordance with Rule 54.

(G) Time Limit for Service of Process. A Complaint must be served, and proof of service filed with the Court within one hundred and twenty (120) calendar days of filing, or it will be considered dismissed without prejudice by the Court with notice provided to the filer. Upon order of the Court for good cause shown, a sixty (60) calendar day extension may be ordered in the event that the Court or the filer exercises due diligence in unsuccessfully providing service of process.

(H) Emergency Notice. The rule governs cases of emergency where the Court may need to conduct a hearing which provides less than forty-eight (48) hours notice to the parties. In cases of emergency, upon motion of a party or sua sponte, the Court can provide notice of a hearing less than forty-eight (48) hours prior to the hearing. In cases of emergency, the Court may provide notice by telephone with written confirmation or by telephone and fax at least forty-eight (48) hours in advance. Documentation of the call or fax shall be included in the record.

1. Notice by Telephone—When the parties are notified by telephone, documentation of the telephone call shall be filed in the record. Documentation of the call shall include who made the call, the name of the person to whom the

Notice was directed, the telephone number called, the date and time of the call, and the name given by the person receiving the call.

2. Notice by Fax—When the parties are notified by fax, a call must be made confirming receipt of the fax. Documentation of the call must be included in the record. Documentation of the call shall include the name of the party confirming receipt of the fax notice, the time of the confirmation call, and a copy of the time-stamped fax.

FORMS

IN THE HOPI TRIBAL COURT HOPI JURISDICTION KEAMS CANYON, AZ

_____) NO: _____
_____)
_____) PETITION FOR
PETITIONER,) FAMILY ABUSE
) PROTECTION ORDER
vs.) AND MOTION FOR
) TEMPORARY PROTECTION
_____) ORDER
_____)
_____)
RESPONDENT.)
_____)

PETITION FOR FAMILY ABUSE PROTECTION ORDER

I, _____, am an enrolled member of the Hopi Tribe residing within the territorial jurisdiction of the Hopi Tribe. I request that the Court grant a Family Abuse Protection Order based on the following:

1. The Respondent is ☐ my spouse, ☐ my ex-spouse, ☐ my boy/girlfriend, ☐ a family member, ☐ other (describe): _____.

2. Respondent has committed acts of domestic abuse against me.

a. Approximate date most recent abuse occurred: _____

b. Description of most recent abuse and any destruction of property:

c. Description of threats that caused me to fear that I was going to be hurt:

d. Respondent has been abusing me for _____.
(write in length of time).

e. In the past, Respondent has committed the following acts of physical and mental abuse against me (list approximate dates and describe):

f. I have suffered emotional and physical injuries as a result of Respondent's violence (describe injuries):

3. Respondent and I have been involved in the following court cases (Check all that apply, list date(s), any resulting court orders, and explain):

- ☐ Criminal Prosecution: _____
- ☐ Divorce: _____
- ☐ Other petition(s) for protection from abuse: _____
- ☐ Custody: _____
- ☐ Other: _____

4. Respondent and I are the parents of the following children (list names, census numbers, and dates of birth or attach a copy of family card): _____

The children are currently in ☐ my ☐ Respondent's physical custody.

5. I am the parent of the following children, who are not Respondent's children:

6. Respondent ☐ has ☐ has not abused the above children (describe any child abuse): _____

7. I have suffered emotional and physical injuries as a result of Respondent's abuse. Unless Respondent is restrained, such abuse will continue.

MOTION FOR TEMPORARY PROTECTION ORDER

☐ I also need a Temporary Protection Order to protect me until a hearing can be held on my petition. I fear that if Respondent finds out about this court case, Respondent will get angry and further injure me before the Court can issue a Family Abuse Protection Order.

☐ I do not need a Temporary Protection Order.

REQUESTED RELIEF

I REQUEST THAT THE COURT DO THE FOLLOWING (Check blanks):

☐ 1. Order Respondent not to abuse, harass, or threaten me, or commit any other domestic abuse.

☐ 2. Order Respondent to immediately leave my residence.

☐ 3. Order Respondent to stay at least 100 yards from the following places (DO NOT LIST ANY ADDRESS IF REVEALING IT WOULD FURTHER ENDANGER YOU):

☐ My residence: _____

☐ My place of employment: _____

☐ School attended by me or my children: _____

☐ Other place(s): _____

☐ 4. Order Respondent not to contact me in person, in writing, or by telephone.

☐ 5. Award me temporary custody of our children and order Respondent not to have contact with them until a court hearing.

☐ 6. After a hearing, allow Respondent to visit with the children only on the following day(s) of the week: _____ at the following place(s) _____ and times _____ under the supervision of the following person(s) _____

☐ 7. Order Respondent to pay \$ _____ per month/pay period (circle one) for the support of our minor children.

☐ 8. Order Respondent to compensate me for the following expenses, incurred as a result of the abuse:

Lost earnings: \$ _____

Property taken or damaged: \$ _____

Travel expenses: \$ _____

Other: \$ _____

☐ 9. Order Respondent to return to me the following items of my property (example: vehicle, clothing, identification documents): _____

☐ 10. Order Respondent not to sell, remove, hide, destroy or damage any property owned by me or by the two of us jointly.

☐ 11. Direct a police officer to accompany me to a residence occupied by the Respondent to:

☐ obtain physical custody of the children;

☐ collect my personal belongings;

☐ require Respondent to leave the residence.

☐ 12. Order Respondent to attend alcohol/domestic abuse (circle one or both) counseling.

☐ 13. Other relief, as follows: _____

Date: _____

TRIBAL CODE COMMENTARY

The Niniilchik Code does not include a preprinted form; however it provides the elements that a petition should contain. It asks the petitioner to include any interested parties, such as other tribes on the petition. The Navajo Code provides a way for the victim to keep her address confidential.

The Hopi Code takes into account Hopi traditions by acknowledging local jurisdiction of villages through the notice section. The Hopi Standards of Proof section indicates that the petitioner will not relinquish relief sought through a protection order because she fought back against the respondent. It is victim centered because it attempts to protect a petitioner from stereotypes, such as taking back her partner whom she previously filed against, or not getting a divorce from her partner. It is also very clear that alcohol, marriage, and provocation cannot be used as an excuse for the abuse. It allows village and ceremonial traditions to be considered. In the Service of Process section, Hopi procedure allows a respondent's household member or coworker to be served. It also provides direction on serving a respondent in the state of Arizona.

The Siletz section on petition forms calls for the tribal court to develop a form that is not contained in their code. Their form needs to always contain past criminal or civil violations. As well, the court needs to be continually informed and updated of these actions against the petitioner or the respondent. They also indicate that the petition form must contain a warning of consequences for the respondent if he violates the order. The order for protection is not voided if the petitioner invites the respondent into her residence. The petitioner has the right to seek other civil or criminal remedies while this order is going through the courts. The petitioner's address can be kept confidential.

The Oglala Code spells out the items necessary in the petition for an order of protection although they do not provide the form. The court is charged with this duty. They specifically require that the order must comply with full faith and credit laws, which will be discussed in Section C. It also prohibits any person subject to the order from possessing a firearm, whether or not it was used in the abuse. It has many similarities to the Siletz Code, especially the indication that the order will not be null if the petitioner invites the respondent into her protected area. A unique aspect of the Oglala Code is the recognition of its shelter and advocacy program. In assigning responsibilities, Cangleska is named with the clerk of the court as able to help a victim complete her petition. There is no fee for filing at Oglala, eliminating a barrier that could prevent many women from getting the protection they need.

The Hopi petition for protection order and motion for a temporary protection order are provided for reference. The family relationship is required in the first section. The evidence of most recent abuse is required next. It also allows a space for the petitioner to include the length of time the abuse has been going on and recount past abuses. It asks the petitioner to list current civil or criminal cases they are involved in. In section (4) there is space to list children and minors that need protection and of whom the petitioner may want to obtain custody. The final section allows the petitioner to motion for a temporary protection order at the same time and request relief. The Hopi court can also assess fees to the respondent.

The Navajo Nation has a specific Service of Process section in their Protection Order section that requires that the Navajo law enforcement officers give priority to service of documents filed in protection cases.

The Ho-Chunk Code's Service of Process section allows for service to be made in a publication of the Ho-Chunk newspaper or any other paper that is circulated where the non-Indian respondent may live off reservation. It also allows for service through the telephone or fax if it is an emergency notice, as in the case of a temporary order.

Civil Protection Orders

Procedure for Emergency/Temporary Protection Order

In many domestic violence cases, there is a need to immediately provide protection to a victim. An ex parte order is frequently issued in such a situation. Upon filing a petition for an ex parte order showing immediate danger, an order may be issued without notice or opportunity for the respondent to appear. This is an ex parte order. Because of the lack of due process (no notice or opportunity to be heard) provided the respondent, the ex parte order must be of short duration.

Your tribe may want to consider allowing for immediate, emergency ex parte orders to be granted. They are normally intended to provide immediate protection until a more permanent order can be secured, as well as give the victim time to collect evidence.

In deciding to implement such an emergency order, the tribe should seriously consider the situations when one would be appropriate. Generally, a good-faith belief that the petitioner is in immediate danger is the guiding principle as to whether an emergency order is needed.

TRIBAL CODE EXAMPLES

Civil Protection Orders Procedure for Emergency/Temporary Protection Order

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

Makah Domestic Violence Code *§11.5.07 Temporary Order for Protection*

- a. Standard for Issuance: Where a petition alleges, and the Court finds reasonable grounds to believe, that there is an immediate danger of domestic violence to the petitioner, based on an allegation that an act of domestic violence has occurred or is about to occur, the Court may enter a temporary order for protection on an ex parte basis, without notice to the respondent, pending a full hearing.*
- b. Contents of Order: A temporary order for protection may grant any of the relief listed under MLOC 11.5.11 as the Court deems necessary to assure the immediate safety and welfare of the petitioner and petitioner's family and household members.*
- c. Duration of Order: A temporary order for protection shall be effective for a period not to exceed ten judicial days, unless reissued for good cause. But if personal service on the respondent is not feasible, as described in MLOC 11.5.08 (c), then a temporary order shall be effective for a period not to exceed twenty judicial days, unless reissued for good cause.*
- d. Ex Parte Hearing: The Court may grant a temporary order for protection based solely upon the petition and affidavit or the Court may require the petitioner, the filing party, or both to appear at an ex parte hearing in person or by telephone on the day the petition is filed or on the next judicial day.*

Ninilchik Village Ordinance No. 99-01 *Section 7. Emergency Hearing—Temporary Protective Order*

The Court may hold an emergency hearing, and if the Court finds that the victim has been subjected to domestic violence, it may grant a Temporary Protective Order under this Section without written or oral notice to the Respondent so long as it appears that there is a substantial likelihood of immediate danger from the Respondent to the health, safety, or welfare of the victim or a member of his or her household from the Respondent and an attempt has been made by the Petitioner to notify the Respondent of the hearing. This Temporary Protective Order shall remain in effect until a regular hearing is held unless modified by the Court upon request of the Petitioner, Respondent or victim.

Section 8. Hearing

A hearing shall be held within 20 days of the granting of a Temporary Protective Order. Notice shall be provided of this hearing to the Respondent. If the Court finds at the decision hearing that the Order should be extended because there is a likelihood of substantial or immediate danger from the respondent to the victim, then the Court may extend the Temporary Protective Order for up to an additional 90 days.

Nez Perce Tribal Code Chapter 7 *7-3-4 Ex Parte Temporary Domestic Protection Order*

- (a) The Court may grant an ex parte temporary protection order pending a full hearing, granting such relief as the Court deems proper, where a petition under this section alleges that irreparable injury could result from domestic*

violence if an order is not issued immediately without prior notice to the respondent. The temporary order may include an order:

- (1) Restraining the respondent from contacting the petitioner, either directly or indirectly;
- (2) Restraining the respondent from committing or threatening to commit acts of domestic violence upon the petitioner;
- (3) Excluding the respondent from the dwelling which the parties shared or from the residence of the petitioner until further ordered by the Court;
- (4) Awarding temporary custody and/or establishing temporary visitation rights with regard to the minor children;
- (5) Restraining any party from interfering with the other's custody of the children or from removing the children from the jurisdiction of the Court;
- (6) Ordering other relief as the Court deems necessary for the protection of a domestic partner, including orders or directives to peace officers as allowed under this code;
- (7) Restraining the respondent from contacting, molesting, interfering with or menacing the minor children whose custody is awarded to the petitioner;
- (8) Restraining the respondent from entering any premises when it appears to the Court that such restraint is necessary to prevent the respondent from contacting, molesting, interfering with or menacing the minor children whose custody is awarded to the petitioner.

(b) An *ex parte* temporary domestic protection order shall remain in effect for 10 days from the date of issuance.

(c) A full hearing shall be held no more than 10 days from the date of issuance of a *ex parte* temporary domestic protection order. The respondent shall be personally served with a copy of the temporary order and notice of hearing, in accordance with the Rules of Civil Procedure of the Nez Perce Tribal Code.

(d) If the respondent is not personally served with a copy of the temporary order and notice of hearing, the existing temporary order may be extended for 10 days from the date originally set for hearing, and a new hearing date set. The respondent must be personally served with the new notice of hearing.

Hopi Family Relations Code

§ 9.01 Temporary Protection Orders, Ex Parte

(a) *Petition, Motion and Order.*

(1) Upon the filing of a *Petition for Abuse and Violence, Protection Order and Motion for Temporary Protection Order* the court shall immediately grant or deny the petitioner's *Motion for Temporary Protection Order* without a hearing or notice to the respondent. The court shall grant the motion if it determines that an emergency exists.

(A) A petitioner shall demonstrate an emergency by showing that:

(i) The respondent committed acts of abuse and violence within 24 hours of the filing of a petition for an emergency protection order, resulting in physical or emotional injury to the petitioner or another victim, or damage to property; or

(ii) The petitioner or another victim is likely to suffer harm if the respondent is given notice before the issuance of a protection order.

(B) Evidence proving an emergency situation may be based on the petition and motion, police reports, affidavits, medical records, other written submissions, or the victim's statement.

(C) The Temporary Protection Order may include any relief permitted by §15.01(b) of this ordinance and any other relief necessary to prevent further abuse and violence.

(D) The Temporary Protection Order shall direct the respondent to appear at a hearing to show cause why the court should not issue a Protection Order.

(E) Upon issuing the Temporary Protection Order, the court shall immediately provide for notice to the respondent and notify law enforcement of the order under §16.01 of this ordinance.

(2) If the court finds that an emergency does not exist, the court shall deny the petitioner's Motion for a Temporary Protection Order and schedule a hearing on the Petition for a Protection Order.

(A) The court shall schedule the hearing within fifteen (15) days of the petition's filing.

(B) The court shall provide for notice to the Respondent according to §16.01(a)(1) of this ordinance.

(3) The court shall issue a Motion for a Temporary Protection Order within four (4) court working hours of the time the petition is filed.

(b) Hearing, Protection Order.

(1) The court shall schedule a full hearing within fifteen (15) days after granting or denying a Motion for a Temporary Protection Order.

(A) The respondent may move the court to dissolve or modify any Temporary Protection Order within those fifteen (15) days.

(B) The respondent must give at least five (5) days notice of the motion to the petitioner. The court shall give priority to such motions.

(2) Upon petitioner's motion to continue, the court may continue the hearing for up to fifteen (15) days. Any Temporary Protection Order shall remain in effect during the continuance.

(3) If the respondent fails to appear after receiving notice, the hearing shall go forward.

(4) If, after a hearing, the court finds by a preponderance of the evidence that the alleged abuse occurred, or is about to occur, the court shall issue a Protection Order. The order may include the relief granted in any Temporary Protection Order and any additional relief that the court deems necessary.

(5) No Permanent Protection Order shall be issued without notice to the respondent and a hearing.

§ 10.01 Telephonic or facsimile applications and orders

An official of the Office of the Hopi Prosecutor, or an officer of Hopi Law Enforcement, or a legal representative may petition the Hopi Tribal court for an Emergency Protection Order by telephone, police radio or facsimile ("fax").

(a) The official, officer or legal representative shall fill out an Application for Emergency Protection Order, specifying his or her reasonable grounds to believe that a victim is in immediate and present danger of abuse and violence.

(b) The official, officer or legal representative shall then contact a judge of the Hopi Tribe courts by telephone or fax

(c) Any Hopi Tribal Court judge may receive and act upon such applications.

(d) A judge may issue an Emergency Protection Order by telephone or fax upon finding that:

(1) a reasonable person would believe that an immediate and present danger of abuse and violence exists; and

(2) an Emergency Protection Order is necessary to prevent the occurrence or recurrence of abuse and violence.

(e) The Emergency Protection Order may include any relief permitted by §15.01(b) of this ordinance and any other relief necessary to prevent further abuse and violence.

(f) The official, officer or legal representative shall record the order on an Emergency Protection Order form and, by his or her signature, certify that the writing is a verbatim transcription of the judge's order. The certification of any such official or officer shall be prima facie evidence of the validity of the order.

(g) The official or officer shall then give a copy of the order to the protected party, and serve a copy of the order on the respondent.

(h) The originals of the Application and Emergency Protection Order shall be filed with the court no later than 9 a.m. the next working court day.

(i) The Emergency Protection Order shall expire no later than the close of judicial business the next working court day after its issuance, unless the issuing judge indicates otherwise.

FORMS

IN THE HOPI TRIBAL COURT
HOPI JURISDICTION
KEAMS CANYON, AZ

_____)
_____)
_____)
_____)
vs. _____)
_____)
_____)
_____)
RESPONDENT. _____)
_____)

NO: _____

PROTECTION ORDER AND ORDER TO SHOW CAUSE

THIS COURT has reviewed the Petition for Family Abuse Protection Order and Motion for Temporary Protection Order in this case. The Court finds that there is good cause to believe that Petitioner and/or others are in imminent danger of harm from Respondent. To prevent further harm a Temporary Protection Order should issue without notice to Respondent.

THEREFORE, THIS COURT ORDERS AS FOLLOWS:

- ☐ 1. Respondent shall not abuse, harass, or threaten the Petitioner, or commit any other domestic abuse.
- ☐ 2. Respondent shall immediately leave Petitioner's residence.
- ☐ 3. Respondent shall stay at least 100 yards away from the following places:
- ☐ Residence: _____
 - ☐ Place of employment: _____
 - ☐ School attended by Petitioner or Petitioner's children: _____
 - ☐ Other place(s): _____
- ☐ 4. Respondent shall not contact the Petitioner, in person, in writing, or by telephone.
- ☐ 5. Until a hearing is held in this matter, Petitioner shall have temporary custody of the following minor children:
- _____

_____.
- ☐ 6. Respondent shall return to Petitioner the following items: _____
- _____
_____.
- ☐ 7. Respondent shall not sell, remove, hide, destroy or damage any property owned by Petitioner or by both parties jointly.
- ☐ 8. A Hopi Law Enforcement officer shall accompany Petitioner to a residence occupied by the Respondent to:
- ☐ obtain physical custody of the children listed in paragraph 5 above,
 - ☐ collect personal belongings listed in paragraph 6 above;
 - ☐ ensure that Respondent leaves the parties' residence located at: _____
- _____.
- ☐ 9. Other relief, as follows: _____
- _____.

_____ Judge, Hopi Tribal Court

WARNING

THIS IS AN OFFICIAL COURT ORDER. IF YOU VIOLATE THIS ORDER THE COURT MAY FIND YOU IN CONTEMPT OF COURT. YOU MAY ALSO BE ARRESTED AND PROSECUTED FOR ANY OTHER CRIME YOU MAY HAVE COMMITTED IN DISOBEYING THIS ORDER.

IT IS FURTHER ORDERED that Respondent, _____,
must appear before this Court on the _____ day of _____, 19____, at ____:____.m., to
show cause why this protection order should not continue in full force.

IT IS SO ORDERED this _____ day of _____, 19____, at the hour of ____:____.m.

_____, JUDGE, Hopi Tribal Court
I hereby certify that I personally served a true copy of the foregoing on the Respondent this _____
_____ day of _____, 19____. _____
NAME

NINILCHIK VILLAGE ORDINANCE NO. 99-01
NATIVE VILLAGE OF _____
TRIBAL COURT

_____))
Plaintiff))
v.))
_____))
_____))
Defendant))
_____))

Case No. _____

TEMPORARY PROTECTIVE ORDER

A hearing was held in this matter on the _____ day of _____, 19, _____.
The Petitioner, _____ received notice of the hearing and
Participated/did not participate. The Respondent, _____
(circle one) (name)

BEING FULLY INFORMED IN THE MATTER, THE TRIBAL COURT FINDS:

THE TRIBAL COURT ORDERS:

THIS ORDER EXPIRES AT 8:00 AM, _____, _____, 19 _____.

DONE BY ACTION OF THE TRIBAL COURT THIS _____ DAYS OF
_____, 19 _____.

STATEMENT OF SERVICE

I _____ mailed return receipt requested restricted delivery or _____ personally gave
(Check one) a copy of this petition to the other people involved on the _____ day of
_____, 19 _____.

Tribal Court Judge

NATIVE VILLAGE OF _____
TRIBAL COURT

TRIBAL CODE COMMENTARY

The Makah Code requires a showing of immediate danger of domestic violence to issue a temporary protection order without notice to the respondent. It will be effective until a hearing is held. The hearing must be held within ten days unless personal service on the respondent requires more time, than it can be up to twenty days. The tribal court is responsible for deciding the contents of the order and any relief granted. If necessary, the hearing can be held by telephone.

The Ninilchik Ordinance requires an emergency hearing in order to obtain the protection order. This can be accomplished without notice to the respondent, as long as an attempt has been made to notify that individual. The order is good until a regular hearing is held for a permanent order. The Ninilchik form for the temporary protective order has a place for the date of the emergency hearing, notice, and the relief granted to the petitioner. The Ninilchik form also allows the tribal judge to add language tailored to meet the victim's needs in the protection order.

The Nez Perce Code allows the issuance of an ex parte temporary order if the petitioner alleges that irreparable injury could result from domestic violence if an order is not issued immediately. The code lays out the relief options in the temporary order, such as directing a peace officer to intervene on the victim's behalf. The order is good for ten days whereupon there will be a full hearing. If there is a problem in serving the respondent, the order may be extended for another ten days.

The Hopi Code does not require notice or a hearing for the tribal court to issue a temporary order. However, the petitioner must show proof of recent violence or demonstrate that she is likely to suffer harm if the respondent is given notice before the issuance of a temporary protection order. The form does not specifically contain the VAWA full faith and credit language, however, a wide range of relief can be granted. The temporary order is followed by a hearing for the permanent protection order, where the respondent will be given notice to defend himself. If the tribal court denies the temporary order, a hearing for the permanent order is scheduled within fifteen days. An official from the prosecutor's office, law enforcement, or legal representation can obtain a temporary order by phone, radio, or fax. This is unusual and takes into account the geographic distances that might prevent women from obtaining temporary orders. The form for the temporary protection order is provided as an example. A petitioner can receive temporary

custody of children until the full hearing. It also warns the respondent of violations to the order and notifies the respondent to appear at the scheduled hearing.

Civil Protection Orders Contents of Protection Order

In addition to the petition, a protection order form needs to be created. This form should have spaces to describe the accused in detail and have information as to the victim, as well as spelling out what protection is in place and for how long and what other relief was granted by the court. Will the court be able to provide the same relief in an ex parte temporary order as it does in the final protection order?

The order form should permit the petitioner to hide her current address and contact information, if necessary to protect the individual. A mailing address of some sort must be provided however, to allow the court and the accused to communicate with the petitioner. In some jurisdictions, the court uses a local advocacy program as the address for the petitioner.

Each question is intended to guide the code-writing group in deciding if there is a traditional role that can be extended to encompass this role or if this is a role that needs to be delegated to a law enforcement officer. Not only will the tribe's history, custom, and tradition play a role in making such a determination, but also it may depend upon resources and on the likelihood that abused individuals will turn to a law enforcement officer or to a family member or other person in authority.

Be certain to consider your tribe's particular needs, traditions, and customs as you go through the questions and be certain to make a list of additional questions that may come to you as you go through the exercise and put those questions to the group as a whole as well.

It is also important that the tribal court's address and phone number be included on the order with a seal and signature line for the tribal court judge. This will improve the chances of the protection order being enforced by another state or reservation. Tribal courts must possess subject matter and personal jurisdiction and comply with the due process clause of ICRA before it may render a valid enforceable order under full faith and credit provisions of the VAWA. It is recommended that the tribe include specific language regarding the tribal court's subject matter and personal jurisdiction over the parties in the protection order such as citing to the

applicable tribal code and/or tribal constitutional provisions as well as findings relevant to the tribe's civil jurisdiction (Montana test). Some tribal courts have provided a sentence explaining that the respondent was provided with notice and an opportunity to be heard. Developing forms for this notification is helpful.

In order for federal firearms prohibitions to apply to the tribal protection order, the order must contain specific language that restrains a person from:

- Harassing, stalking or threatening an intimate partner of the person, or a child of the person or of the intimate partner, or
- Engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child.

Additionally, for the federal firearms prohibitions to apply the order must also include language that specifies *either*:

- A finding that the person subject to the order represents a credible threat to the physical safety of an intimate partner or child, *or*
- An explicit prohibition against the use, attempted use, or threatened use of physical force against an intimate partner or child that would reasonably be expected to cause bodily injury.

This federal statute would apply to the protection orders only against an intimate partner. *Intimate partner* is defined as a current or former spouse, co-parent, or one who cohabits or has cohabited with the subject of the protection order (18 U.S.C. § 921(a)(32)).

TRIBAL CODE EXAMPLES

Civil Protection Orders—Contents

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

Mutual Orders

Nez Perce Tribal Code

Sec. 7-3-9 Mutual Orders Prohibited

The Court shall not grant a mutual domestic protection order to opposing parties.

Oglala Sioux Tribe

Sec. 310. Mutual orders for protection prohibited.

A court shall not grant a mutual order for protection, ex parte or permanent, to opposing parties.

Protection Order

Muscogee (Creek) Nation

Title 6 Section 3-407(C)

Contents of protection order. Protection orders authorized by this section may include the following:

- 1. An ordering enjoining respondent from threatening to commit or committing acts of domestic or family violence against the petitioner or other family or household member;*
- 2. An order prohibiting the respondent from harassing, visiting, stalking, annoying, telephoning, contacting, or otherwise interfering with or communicating with the petitioner, directly or indirectly;*
- 3. An order removing and excluding the respondent from the residence of the petitioner;*
- 4. An order requiring the respondent to stay away from the residence, school, place of employment, or a specified place frequented regularly by the petitioner and any named family or household member;*
- 5. An order prohibiting the respondent from using or possessing a firearm or other weapon specified by the court;*
- 6. An order requiring the respondent to pay attorneys fees and court costs; and*
- 7. An order requiring the respondent to pay restitution, such as medical expenses, reimbursement for damaged property and expenses for shelter.*

Ninilchik Village Ordinance No. 99-01

Section 9. Final Protective Order

At either the emergency hearing or the decision hearing, the Court may decide to include any of the following provisions in the Final Protective Order:

- 1. Banishment of the Respondent;*
- 2. That the Respondent be restrained from committing domestic violence against the victim;*

3. That the Respondent move out of the home of the victim;
4. That the Respondent not communicate directly or indirectly with the victim (this may include no telephone call, letters, or in-person contact, depending upon the Court's Order);
5. An Award of temporary custody of the minor child(ren);
6. That a Respondent pay support to a victim or for a minor child in the care of the victim of the Respondent has a legal obligation to support the child;
7. That the Respondent pay medical or other expenses of the victim that resulted from domestic violence by the Respondent;
8. That the Respondent, victim or children engage in person or family counseling; or substance-abuse counseling or treatment;
9. That the Respondent stay away from a motor vehicle or boat owned or in the possession of the victim.or
10. That the Respondent stay away from a victim who is boarding a boat, aircraft, or any other motor vehicle.

A Protective Order granted at a hearing shall be in effect for 90 days from the date of the hearing. The Order may be extended upon request of the Petitioner or victim, and after another hearing is held indicating that it is necessary to extend the Order to protect the victim or a person residing with the victim.

Hopi Tribal Code
Subchapter 2, Sec. 15.01

§ 15.01 Available relief

(a) In any proceeding in which a petition for a protection order is filed, once the petitioner has met the burden of proof, the court shall grant any relief necessary to prevent further abuse. Available relief for a permanent protection order includes but is not limited to the following:

- (1) No further abuse. The court may order the respondent to refrain from further threatening, harassing, or harming the victim or committing any act of abuse and violence;
- (2) Possession of household. The court may grant temporary or permanent possession of the residence or household to a person regardless of whether the residence is owned jointly, or owned solely by the abuser. The court may order the respondent to vacate the residence;
- (3) Stay away. The court may order the respondent:
 - (A) to stay away from the victim and others who may be endangered;
 - (B) not to enter or linger outside of petitioner's or any family or clan member's residence, place of work, or school; or
 - (C) to leave and remain away from any reasonably-defined geographic area;
- (4) No contact. The court may order the respondent not to initiate contact with the petitioner in person, in writing, by phone or through others unless otherwise specified by the court;
- (5) Rent and mortgage payments. The court may order the respondent to pay rent or make mortgage payments on a residence occupied by the petitioner if the respondent is found to have a duty to support the victim or other members of the household;
- (6) Alternative housing. The court may order the respondent to pay for shelter or temporary housing for the victim if the victim cannot remain in her or his home due to the danger of recurrence of abuse and violence;
- (7) Child custody:
 - (A) The court may award either party immediate, temporary custody of any minor children of the parties until further order of the court, or the court may enter a permanent custody order;
 - (B) In determining custody, the court shall presume that an abusive parent is unfit to have custody of the minor children. The respondent may rebut the presumption by showing that he or she is not abusive of the children and that his or her abuse of others does not adversely affect the children;
- (8) Visitation. The court may grant the non-custodial parent visitation with any minor children of the parties:

- (A) If disclosing the victim's address for purposes of visitation may endanger the victim, the court may order alternative arrangements. Example: The petitioner drops the children off and the respondent picks them up at a pre-arranged neutral place such as a relative's home;
- (B) If there is evidence that the abuser may endanger the children, the court may order supervised visitation in a public location or may deny visitation entirely;
- (9) Payment of support. The court may order the non-custodial parent to pay child support if that parent is found to have a duty to pay such support;
- (10) Monetary compensation. The court may order the respondent to compensate the petitioner for the losses suffered as a direct result of the respondent's acts of abuse, including, but not limited to, medical expenses, loss of earnings or other income, cost of repair or replacement of real or personal property, moving or other travel expenses, and attorney's fees;
- (11) Possession of personal property. The court may order the respondent to give temporary possession of personal property to the petitioner or victim including automobiles, checkbooks, keys, documents and other personal property;
- (12) Non-disposition of property. The court may order either party or both parties not to transfer, encumber or otherwise dispose of specified property mutually owned or leased by the parties;
- (13) Counseling. The court may order either or both parties to attend any counseling which the court finds will address the problems underlying the parties' abuse and violence;
- (14) Substance abuse counseling. If the court finds that substance abuse was a factor in the abuse and violence, the court may order either or both parties to attend counseling or enter a rehabilitation program for substance abuse;
- (15) Payment of costs of counseling. The court may order the respondent to pay for the costs of any counseling ordered under §§15.01(a)(13),(14);
- (16) Law enforcement supervision of return to residence. The court may order the police to accompany the victim to a residence to collect her or his personal belongings, to take physical custody of the children, and/or to take physical possession of the residence;
- (17) Court costs and fees. The court may order the respondent to pay to the court the costs of the proceeding, including filing fees, fees for service of process, and photocopy costs;
- (18) Security or bond. To assure compliance with any court order, the court may require the respondent to post a bond, deposit money with the court, or pledge property as security. Upon determining that the respondent has violated the order, the court may require payment or transfer of the bond, money or property to the petitioner or to the Hopi Tribe;
- (19) Respite Care. The court may order temporary or respite care to another family member, a relative, or other person in the case of an elderly or vulnerable victim;
- (20) The Court may consider Hopi customary and traditional practices or remedies in order to provide relief to the victim;
- (21) Other relief. The court may grant such other relief as it deems necessary.

Oglala Sioux Tribe

CHAPTER 3—CIVIL ORDERS FOR PROTECTION, Section 305

2. A court may grant the following relief without notice and hearing in an order for protection or a modification issued ex parte, and the court may grant the following relief in a permanent order for protection or a modification of a permanent order for protection:

- (a) Enjoin the respondent from threatening to commit or committing acts of domestic violence against the petitioner and any designated family or household member;
- (b) Prohibit the respondent from harassing, annoying, telephoning, contacting, or other communicating with the petitioner directly or indirectly through friends, relatives, or co-workers;
- (c) Remove and exclude the respondent from the residence of the petitioner, regardless of ownership of the residence or lessee of record;
- (d) Order the respondent to stay away from the residence, school, or place of employment of the petitioner, or any specified place frequented by the petitioner and any designated family or household member;
- (e) Seize and prohibit the respondent from using or possessing a firearm or other weapon specified by the court;
- (f) Order possession of the parties' residence and use of or ownership of any vehicle and other essential personal effect, regardless of the ownership, and direct the appropriate law enforcement officer to accompany the petitioner

to the residence of the parties to ensure that the petitioner is safely restored to possession of the residence, vehicle, and other personal effects, or to supervise the petitioner's or respondent's removal of personal belongings;

(g) Prohibit the destruction, liquidation or disposal of any and all joint assets or property and any and all specific assets or property of the petitioner;

(h) Grant temporary custody of any minor children to the petitioner, including custody to any petitioner currently residing in a shelter or safe home; and

(i) Order such other relief as it deems necessary to provide for the safety and welfare of the petitioner and any designated family or household member.

3. The court may grant the following relief in an order for protection or a modification of an order after notice and hearing, whether or not the respondent appears:

(a) Grant the relief available in accordance with subsection 2;

(b) Specify arrangements for visitation of any minor child by the respondent and require supervision of that visitation by an independent third party or deny visitation if necessary to protect the safety of the petitioner and/or child;

(c) In specifying visitation arrangements, the court shall consider the respondent's overall lifestyle, especially as it pertains to alcohol and other chemical use;

(d) Order the respondent to pay any special legal fees.

(e) Order the respondent to:

(1) Pay rent or make payment on a mortgage on the petitioner's residence and pay for the support of the petitioner and minor child if the respondent is found to have a duty to support the petitioner or minor child,

(2) Reimburse the petitioner or other person for any expenses associated with the domestic violence incident, including but not limited to medical expenses, counseling, shelter, and repair or replacement of damaged property, and

(3) Pay any costs and fees incurred by the petitioner in bringing the action.

4. The court shall:

(a) Cause the order to be delivered to Public Safety or other appropriate person or agency for service;

(b) Make reasonable efforts to ensure that the order for protection is understood by the petitioner, and the respondent, if present;

(c) Transmit, by the end of the next business day after the order is issued, a copy of the order for protection to the local law enforcement agency or agencies designated by the petitioner; and

(d) Transmit a copy of the order to the appropriate entity for placement in the tribal registry.

FORMS

IN THE HOPI TRIBAL COURT
HOPI JURISDICTION
KEAMS CANYON, AZ

_____))
_____))
_____))

NO: _____

PETITIONER, _____))

FAMILY ABUSE
PROTECTION ORDER

vs. _____))

_____))
_____))
_____))

RESPONDENT. _____))

_____))

THIS COURT, having read the Petition For Family Abuse Protection order, and having determined that Respondent received proper and timely notice of the hearing, heard this matter on the _____ day of _____, 19____. This Court finds that Petitioner has proven the allegations of domestic abuse by a preponderance of the evidence.

THEREFORE, THIS COURT ORDERS AS FOLLOWS:

[] 1. Respondent shall not abuse, harass, or threaten the Petitioner, or commit any other domestic abuse;

[] 2. Respondent shall immediately leave Petitioner's residence;

[] 3. Respondent shall stay at least 100 yards away from the following places:

[] Residence: _____

[] Place of employment: _____

[] School attended by Petitioner or Petitioner's children: _____

[] Other place(s): _____

[] 4. Respondent shall not contact Petitioner, in person, in writing, or by telephone.

[] 5. Petitioner shall have custody of the following minor children:

_____ .

[] 6. Respondent shall be permitted to visit with the children only on the following day(s)

_____ at the following place(s)

_____ and time(s)

_____ under the supervision of the following

person(s): _____.

[] 7. Respondent shall pay to Petitioner the following amount for the support of their minor children:

\$ _____ per _____; these payments shall be made as follows: _____.

☐ 8. Respondent shall return to Petitioner the following items: _____

☐ 9. Respondent shall not sell, remove, hide, destroy or damage any property owned by Petitioner or by both parties jointly.

☐ 10. A Hopi Law Enforcement officer shall accompany Petitioner to a residence occupied by the Respondent to:

☐ obtain physical custody of the children listed in paragraph 5 above;

☐ collect personal belongings listed in paragraph 8 above;

☐ ensure that Respondent leaves the parties residence located at:

☐ 11. Respondent shall pay to Petitioner the following amounts, as compensation for expenses incurred as a result of the abuse:

☐ Lost earnings: \$ _____

☐ Property taken or damaged: \$ _____

☐ Travel expenses: \$ _____

☐ Other: \$ _____

☐ 12. Respondent shall participate in domestic abuse counseling at _____ for _____ weeks/months.

☐ 13. Petitioner shall participate in domestic abuse counseling at _____ for _____ weeks/months.

☐ 14. Respondent shall participate in alcohol counseling at _____ for _____ weeks/months.

☐ 15. Respondent shall pay to this Court the costs of this proceeding, \$ _____, in a money order made out to: _____.

☐ 16. Other relief, as follows: _____.

This order shall be effective for _____ years _____ months from the date of its entry.

IT IS SO ORDERED this _____ day of _____, 19____, at the hour of ____ o'clock ____m.

JUDGE, Hopi Tribal Court

1. Name of Protected Person (*Petitioner*):**2. Name of Restrained person (*Respondent*):**Sex: ☐ Male ☐ Female Height: _____ Weight: _____ DOB: _____

Hair Color: _____ Eye Color: _____ Age: _____ Race: _____

Tribe Member and Tribe: _____

Address: _____ City: _____

Date form is filed:

CASE NUMBER:

3. Additional Protected Persons

Full Name

4. Time of Hearing and Termination Date of This Order

The hearing was on (date): _____ with (name of judicial officer): _____

The orders end on (date): _____ at (time): _____

- If no end date is written, the restraining order is permanent until further order of the court.

5. ☐ The people in **1** and **3** must return to court on (date): _____ at (time): _____ ☐ a.m. ☐ p.m.
- to review (specify issues): _____

6. THE COURT ORDERS THE FOLLOWING (IF CHECKED)

☐ The Respondent restrained from having any contact or communication, direct or indirect, including by phone, mail, email, text message, or through third persons, ☐ with petitioner, ☐ petitioner's children (listed above), or ☐ petitioner's intimate partner (listed above);

☐ The Respondent is prohibited from being within _____ feet from ☐ petitioner, ☐ petitioner's children (listed above), or ☐ petitioner's intimate partner (listed above);

☐ You must leave the residence at _____ regardless of whose name is on any lease, mortgage, or other real estate agreement;

☐ You are prohibited from being within _____ feet of ☐ petitioner's residence ☐ petitioner's intimate partner's residence regardless of whose name is on any lease, mortgage, or other real estate agreement;

☐ The Respondent is prohibited from entering the petitioner's residence, school, business or place of employment, and the children's school or daycare;

☐ The Petitioner has been awarded ☐ custody of, or ☐ visitation with, the child or children (listed above); as follows:

☐ The Office of Child Support Enforcement has been informed of the request for child support and has appeared and advised the court as to appropriate amounts in accordance with provisions of the Family Law Code. As such, Respondent shall pay the Petitioner child support in the amount of \$_____, according to the following terms:

☐ The following additional orders are issued because they are necessary or appropriate to ensure ☐ petitioner's safety or ☐ the safety of petitioner's children_____

☐ The Respondent is excluded from the reservation as it is necessary to prevent future acts of domestic abuse as evidenced by the following findings:

7. Service

- a. ☐ The people in **1** and **2** were at the hearing or agreed in writing to this order. No other proof of service is needed.
- b. ☐ The person in **1** was at the hearing. The person in **2** was not. Police shall serve the person in **2** as detailed in the Instructions for Law Enforcement.

CERTIFICATE OF COMPLIANCE WITH THE VIOLENCE AGAINST WOMEN ACT: This protective order meets all full faith and credit requirements of the Violence Against Women Act, 18 U.S.C. 2265. This court has jurisdiction over the parties and the subject matter. The respondent was afforded notice and the respondent has been given a timely opportunity to be heard as provided by the law of this jurisdiction. **THIS ORDER IS VALID AND ENTITLED TO ENFORCEMENT IN THIS AND ALL OTHER JURISDICTIONS UNDER FEDERAL FULL FAITH AND CREDIT LAWS.**

WARNING: POSSESSION OF A FIREARM OR AMMUNITION BY RESPONDENT WHILE THIS ORDER IS IN EFFECT MAY BE PROHIBITED UNDER FEDERAL OR STATE LAW.

WARNING: ONLY THIS COURT HAS THE POWER TO ALTER THESE CONDITIONS REGARDLESS OF THE CONSENT OF THE PROTECTED PARTY.

Date

▶ _____
Judge (or Judicial Officer)

Instructions for Law Enforcement

Start Date and End Date of Orders. The orders start on the earlier of the following dates:

- The hearing date on page 1 or
- The date next to the judge's signature on page 3.

The orders end on the end date in item 4 on page 1. If no end date is listed, they are permanent until further order of the court.

Arrest Required If Order Is Violated. If an officer has probable cause to believe that the restrained person has notice of the order and has disobeyed the order, the officer must arrest the restrained person.

Notice/Proof of Service. If the person in **1** was at the hearing and the person in **2** was not, the Umatilla Tribal Police Department shall attempt personal service of the person in **2** within 7 days. If personal service is not successful, the Umatilla Tribal Police Department shall mail notice of this order to the person in **2**.

The Umatilla Tribal Police Department shall file the appropriate proof of service with the court.

If the Protected Person Contacts the Restrained Person. Even if the protected person invites or consents to contact with the restrained person, the orders remain in effect and must be enforced. The protected person cannot be arrested for inviting or consenting to contact with the restrained person. The orders can be changed only by another court order.

Conflicting Orders. A protective order issued in a criminal case on Form DV-310 takes precedence over any conflicting civil court order. Any nonconflicting terms of the civil restraining order remain in full force. An emergency protective order that is in effect between the same parties and is more restrictive than other restraining orders takes precedence over all other restraining orders.

Muscogee (Creek) Nation
Code Annotated

Title 6, § 3-404. Protection order; statement required; validity

In addition to the other provisions required by this chapter, or otherwise required by law, each ex parte or final protection order issued pursuant to this chapter shall have the following statement printed in bold-faced type or in capital letters.

“THE FILING OR NONFILING OF CRIMINAL CHARGES RELATING TO THIS MATTER AND THE PROSECUTION OF THE CASE SHALL NOT BE DETERMINED BY A PERSON WHO IS PROTECTED BY THIS ORDER, BUT SHALL BE AT THE DISCRETION OF THE MUSCOGEE (CREEK) NATION PROSECUTOR. NO PERSON, INCLUDING A PERSON WHO IS PROTECTED BY THIS ORDER, MAY GIVE PERMISSION TO ANYONE TO IGNORE OR VIOLATE ANY PROVISION OF THIS ORDER. DURING THE TIME IN WHICH THIS ORDER IS VALID, EVERY PROVISION OF THIS ORDER IS IN FULL FORCE AND EFFECT UNLESS A COURT CHANGES THE ORDER. THIS ORDER WILL BE IN EFFECT FOR THREE (3) YEARS UNLESS RENEWED, MODIFIED, VACATED OR RESCINDED BY THE COURT. A VIOLATOR OF THIS ORDER MAY BE PUNISHED BY CIVIL CONTEMPT OF COURT BY FINE OF UP TO \$5,000. A VIOLATION OF THIS ORDER IS A CRIME PUNISHABLE BY A FINE OF UP TO \$2,500 FOR A FIRST OFFENSE AND UP TO FIVE THOUSAND DOLLARS (\$5,000.00) FOR A SECOND OR SUBSEQUENT OFFENSE OR IMPRISONMENT OF UP TO ONE (1) YEAR, OR BY BOTH SUCH FINE AND IMPRISONMENT. A VIOLATION OF THIS ORDER WHICH CAUSES INJURY IS A CRIME PUNISHABLE BY IMPRISONMENT FOR TWENTY (20) DAYS TO ONE (1) YEAR OR A FINE OF UP TO FIVE THOUSAND DOLLARS (\$5,000.00) OR BY BOTH SUCH FINE AND IMPRISONMENT. POSSESSION OF A FIREARM OR AMMUNITION BY A RESPONDENT WHILE THIS ORDER IS IN EFFECT MAY SUBJECT THE RESPONDENT TO PROSECUTION FOR A VIOLATION OF FEDERAL LAW EVEN IF THIS ORDER DOES NOT SPECIFICALLY PROHIBIT THE RESPONDENT FROM POSSESSING A FIREARM OR AMMUNITION.”

“A KNOWING VIOLATION OF THIS PROTECTION ORDER IS A CRIME IN THE JURISDICTION OF THE MUSCOGEE (CREEK) NATION, IN THE STATE OF OKLAHOMA AND IN OTHER JURISDICTIONS. ANY PERSON WHO TRAVELS ACROSS STATE LINES OR ENTERS OR LEAVES THE MUSCOGEE (CREEK) NATION TERRITORIAL JURISDICTION OR OTHER INDIAN COUNTRY WITH THE INTENT TO VIOLATE A PROTECTION ORDER AND WHO SUBSEQUENTLY ENGAGES IN SUCH CONDUCT IS SUBJECT TO FEDERAL PROSECUTION FOR A FEDERAL OFFENSE UNDER 18 U.S.C. § 2262. ANY PERSON WHO ENTERS OR LEAVES THE MUSCOGEE (CREEK) NATION TERRITORIAL JURISDICTION OR OTHER INDIAN COUNTRY WITH THE INTENT TO KILL, INJURE, HARASS OR INTIMIDATE A SPOUSE OR INTIMATE PARTNER, AND WHO, IN THE COURSE OF OR AS A RESULT OF SUCH TRAVEL, COMMITS OR ATTEMPTS TO COMMIT A CRIME OF VIOLENCE AGAINST THAT SPOUSE OR INTIMATE PARTNER SHALL BE SUBJECT TO FEDERAL PROSECUTION FOR A FEDERAL OFFENSE UNDER 18 U.S.C. § 2261.”

“FEDERAL LAW REQUIRES THAT THIS ORDER BE GIVEN FULL FAITH AND CREDIT BY THE COURT OF ANY OTHER STATE OR INDIAN TRIBE UNDER 18 U.S.C. § 2265.”

TRIBAL CODE COMMENTARY

The Ninilchik Code contains standard and expansive remedies. Banishment is the first provision of relief. This section is also specific to Alaska Native communities as the court can require the respondent to stay away from a boat or an aircraft that the petitioner may be using to leave the village. The order for protection is effective for 90 days.

In the Ninilchik and Hopi codes there is language that permits the court to order counseling for not only the respondent, but for the petitioner as well. The Office on Violence Against Women (OVW) discourages ordering counseling for the victim as it is an activity that may compromise victim safety. The policy of most OVW grant programs is to prevent grantees from ordering victims to pursue a mandatory course of action.

Although the VAWA full faith and credit language is not set out clearly in the form, the Hopi Code provides standard remedies for relief in the protection order. The respondent may be banned from contacting the petitioner, even through writing. The respondent can also be required to pay for the rent or mortgage on the house or shelter expenses. The expansive remedies are extensive and can cover travel if the petitioner needs to move away. It also allows the court to grant the petitioner use of the car, keys, and household checks. However, the court can order counseling for both parties, even though it may not be appropriate for the victim. The respondent can be ordered to pay for the counseling. Other forms of relief are elderly care, any traditional Hopi remedies, and other remedies the court deems necessary. The Hopi Family Abuse Protection Order form is provided as an example.

An example of a tribal protection order form compliant with VAWA's full faith and credit language might have the following language:

1. The court has subject matter jurisdiction under tribal code section ____ and 25 USC 2265(e) based upon the following facts:

2. The court has jurisdiction over the parties according to section ____ of the tribal code and based upon the following facts:

3. The Defendant has been served in accordance with section _____ of the tribal code (or will be served according to _____ of the tribal code) and the court notes proof of service in the court file;
4. According to section _____ of the tribal code, the Defendant has/will be provided with an opportunity to be heard on this matter. A hearing is scheduled for _____. (or the Defendant was present at the regularly scheduled hearing on _____ (date), or, the Defendant was not present despite being duly served with notice according to section _____ of the tribal code as evidenced by the proof of service document in the court file.

The Umatilla Tribal Court Order form is an example from a tribe participating in the pilot project of tribes implementing the Special Domestic Violence Criminal Jurisdiction under VAWA 2013.

The Oglala Sioux Code provides for standard and expansive forms of relief in protection orders. The code prohibits the respondent from possessing or using a firearm. Some relief can be granted even if the respondent, after being notified, is not present at the hearing. They also specify the method for which the final order is delivered to the respondent and the petitioner, and then update it into the tribal registry.

The sections on mutual orders (when each party is issued an order against the other) indicate that both tribes decline to grant an order to both the petitioner and the respondent. Oftentimes, the respondent will try to get an order against the victim to make her look bad, or for retribution. Sometimes it is difficult to discern who the victim is because the perpetrator is a good talker and storyteller.

Civil Protection Orders—Hearing

TRIBAL CODE EXAMPLES

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

Hopi Family Relations Ordinance Section 9.01

(b) Hearing, Protection Order.

(1) The court shall schedule a full hearing within fifteen (15) days after granting or denying a Motion for a Temporary Protection Order.

(A) The respondent may move the court to dissolve or modify any Temporary Protection Order within those fifteen (15) days.

(B) The respondent must give at least five (5) days notice of the motion to the petitioner. The court shall give priority to such motions.

(2) Upon petitioner's motion to continue, the court may continue the hearing for up to fifteen (15) days. Any Temporary Protection Order shall remain in effect during the continuance.

(3) If the respondent fails to appear after receiving notice, the hearing shall go forward.

(4) If, after a hearing, the court finds by a preponderance of the evidence that the alleged abuse occurred, or is about to occur, the court shall issue a Protection Order. The order may include the relief granted in any Temporary Protection Order and any additional relief that the court deems necessary.

(5) No Permanent Protection Order shall be issued without notice to the respondent and a hearing.

Oglala Sioux Tribe

SECTION 307. Required Hearings; Service; Duty of Court When Order for Protection Denied

1. Except as otherwise provided in subsection 2, if a court issues an order for protection ex parte or a modification of an order for protection ex parte and the court provides relief pursuant to subsection 2 of section 305, the court shall set a date for a permanent order for protection hearing regarding the ex parte order for protection within 14 days. If personal service cannot be completed, the court shall notify the respondent by mail, at the last and best known address of the respondent and/or petitioner, of the date and time of the hearing for a permanent order for protection.

2. Upon approval of an ex parte order, the civil clerk of courts shall set a hearing date scheduled for within 14 days and immediately serve the petitioner regardless of the involvement or lack of involvement of an advocate.

3. If applicable, the respondent shall be served upon arraignment on any related charge(s). The civil clerk of courts shall be responsible for forwarding a copy of the ex parte order to the jail for service before the respondent's release on any related charge(s).

4. In the event that service is not successful, the judge shall ask the petitioner, under oath at the hearing for the permanent order for protection, if s/he believes the respondent is avoiding service by concealment or otherwise, and does not know the respondent's whereabouts or current residence. If the petitioner so states, the judge shall direct the civil clerk of courts to set another hearing date within 14 days and to initiate service by mail to the last and best known address of the respondent. 5. Any ex parte order shall remain in effect per provision of Section 305, subsection 5, above.

At a second hearing for a permanent order for protection and in the event the respondent again does not appear, irregardless of service, the judge shall issue a permanent order for protection, if warranted, and grant relief as the court deems appropriate.

6. At a second hearing for a permanent order for protection and having made reasonable efforts to contact the respondent, and in the event the petitioner requests or the court provides relief in accordance with paragraph (h), subsection 2, of Section 305, concerning custody of a minor child or the petitioner requests relief pursuant to

paragraph (b), (c), or (d) of subsection 3 of Section 305, such a hearing determining the above cited relief must be given precedence over all matters including older matters of the same character and involving the same petitioner and respondent.

7. In a hearing held pursuant to subsection 1 or 2 of this section:

(a) Relief in accordance with section 305 is available; and

(b) If the petitioner seeks further relief concerning an issue not outlined by the ex parte order for protection, the court may grant the relief or continue the hearing, or the petitioner may be granted a continuance to allow time to file a petition for modification of the order.

8. Whether or not the respondent has been arrested or charged with domestic violence, the judge shall order the respondent to participate in the Cangleska, Inc.'s domestic violence offender's program. Further, should the court determine that an assault has occurred or the threat of assault has occurred, the judge shall notify a tribal prosecutor for follow-up and possible investigation.

(a) The Cangleska, Inc., domestic violence offender's program shall be responsible for initiating a civil contempt action should the respondent fail to comply with court-ordered participation as outlined in this subsection.

(b) Completion, or partial completion, of the Cangleska, Inc. offender's program, as ordered under this section, shall not be substituted to meet any subsequent or existing sentencing condition imposed under any other section of this code.

9. The Department of Public Safety shall expedite service of permanent orders for protection. If the respondent is not able to be served in person after 30 days, the Department of Public Safety shall notify the civil clerk of courts and the permanent order for protection shall be mailed to the last and best known address of the respondent.

10. Any person against whom a permanent order for protection is granted under subsection 5 above may petition the court for reconsideration of the order for protection upon a showing, by clear and convincing evidence, that the respondent did not willingly and knowingly evade service and that there is a meritorious defense to the action. Upon such a showing, the court may grant another ex parte order to protect the petitioner and immediately schedule a hearing within 14 days. The respondent shall be served with a copy of the ex parte order at the same time the respondent's petition is granted.

11. If the court denies a petition for an order for protection or a petition to modify an order for protection that is requested without notice to the respondent, the court shall inform the petitioner, in person or by mail, of his or her continuing right to request a hearing upon notice to the respondent. The court must state in the court record why the request was denied.

Makah Tribal Law and Ordinance

§11.5.10 Hearing

a. In-Person or by Telephone: The hearing shall be conducted in person, unless the Court finds that a telephone hearing is necessary, in whole or in part, to accommodate a party's disability or to protect a victim.

b. Evidentiary Standard: In order to obtain relief, the petitioner or filing party must show that there is a present danger of domestic violence to petitioner, based on evidence that an act of domestic violence has occurred or is about to occur. If the Court finds by a preponderance of the evidence, after a full hearing, that there is a present danger of domestic violence, the Court shall enter an order for protection as described in MLOC 11.5.11.

c. Geographic Restraints: Restrain the respondent from frequenting any well-defined area, including but not limited to the residence, workplace, school, or daycare of the petitioner or petitioner's family member or household members.

d. Care, Custody, and Control of Minor Children; Restraint Against Interference: Provide for the care, custody, and control of the minor children of the parties, and restrain the respondent from interfering with the petitioner's care, custody, and control. In making provision for a minor child, the Court shall presume that the respondent is unfit to have care, custody, and control. The respondent may rebut the presumption by showing that he or she does not commit domestic violence against the child and that his or her acts of domestic violence do not adversely affect the child.

e. Residential Time or Visitation with Minor Children: Grant the non-custodial parent residential time or visitation with the minor children of the parties, under such conditions as the Court deems necessary to assure the safety and welfare of the minor children, the custodial parent, and other family and household members.

f. Support and Maintenance: Order the respondent to pay child support if the respondent is found to have a duty to pay such support. Order the respondent to pay maintenance or spousal support if the respondent is found to have a duty to pay such support.

g. Possession of Real Property: Award the petitioner exclusive possession of the residence that the parties share, regardless of whether the residence is owned jointly or by the respondent alone, provided that nothing in this Chapter may affect the title to or legal ownership of real property.

h. Rent or Mortgage: Order the respondent to make rent or mortgage payments on a residence occupied by the petitioner if the Court finds that the respondent has a duty to support the petitioner or another member of the household.

i. Possession of Essential Personal Effects: Order possession and use of essential personal effects, regardless of ownership.

j. Possession of Personal Property: Order the respondent to surrender possession of personal property to the petitioner, including but not limited to vehicles, keys, checkbooks, and documents, regardless of whether such property is owned jointly or by the respondent alone, provided that nothing in this Chapter may affect the title to or legal ownership of personal property.

k. Prohibition Against Transfer of Property: Order the parties not to transfer, encumber, or otherwise dispose of real or personal property jointly owned or leased by the parties, except as authorized by the Court.

l. Special Provision for Elder or Disabled: In the case of domestic violence against an elder or disabled person, appoint a caregiver, guardian, or designated payee.

m. Counseling and Treatment Programs: Order the respondent to attend and successfully complete one or more programs, including but not limited to a domestic violence perpetrator program, anger management, mental health counseling, substance abuse treatment, and parenting classes, and to execute all necessary forms and releases in connection with such programs.

n. Exclusion of Non-Member: Exclude a non-member respondent from the Reservation, without the necessity of a separate exclusion proceeding under MLOC Title 9.

o. Bond: Order the respondent to post a bond assuring compliance with the terms of the order for protection.

p. Compensation for Losses: Order the respondent to compensate the petitioner for losses suffered as a direct result of the respondent's acts of domestic violence, including but not limited to medical and counseling costs, loss of earnings or other income, cost of repair or replacement of real or personal property, cost of temporary shelter, and moving or travel expenses.

q. Court and Litigation Costs: Order the respondent to pay Court costs and service fees, as established by the Court, and to reimburse the petitioner for costs incurred in bringing the action, including reasonable attorney fees.

r. Relief: Grant such other relief as the Court deems necessary for the safety and welfare of the petitioner and petitioner's family and household members, including orders or directives to the NBPd, the Prosecutor, Social Services, or other Tribal departments.

In addition, if the Court finds, by clear and convincing evidence, that the respondent displayed, or threatened to use a firearm or other dangerous weapon in the commission of an act of domestic violence or in the presence of a police officer responding to a report of domestic violence, the Court may order the following:

s. Surrender of Dangerous Weapons: Order the respondent to surrender firearms and other dangerous weapons owned by the respondent or in the respondent's possession to the Chief of Police, NBPD, under such conditions as the Court deems appropriate.

t. Restraint Against Possession and Use of Dangerous Weapons: Restrain the respondent from the possession and use of firearms and other dangerous weapons.

TRIBAL CODE COMMENTARY

The Hopi Code states that the hearing will be held 15 days after a temporary protection order is issued. The tribal court can go forward with the hearing on the permanent protection order if the respondent does not show up, provided he has been notified of the event.

The Oglala Sioux Code states that the hearing will be held 14 days after the ex parte or temporary order has been granted. An attempt will be made to notify and locate the respondent. After two such attempts, the tribal court can proceed without the respondent. If the hearing involves the custody of minor children, it will be given priority. Relief will be decided at the hearing. The respondent can be ordered to participate in offender educational programs at the local shelter, Cangleska. If he fails to participate, Cangleska can follow up with a civil contempt action. The protection orders are to be served following the hearing. If the order for protection is denied, the court must indicate the reason why.

The Makah Ordinance is victim centered, allowing the hearing to take place over the phone if needed for the protection of the victim. There must be evidence to suggest that the petitioner is currently in danger to grant the order. There are standard and expansive forms of relief in the protection order. The code assumes that the respondent or abuser is not fit to care for the children; however, it says that the respondent can refute this by showing that his domestic violence does not affect the children. However, it has been proven that witnessing domestic violence negatively affects children on many different levels. The respondent can also be ordered to pay spousal support, provide documents, and care for elderly family members. Only the respondent can be ordered to receive counseling. The code also specifically outlines the sovereign right to exclude nonmembers from the tribal land. Finally, the respondent can be banned from using or owning a weapon, but only if the firearm was used in the abuse.

B. Violating Protection Orders

What happens when a perpetrator disobeys the protection order?

Violating Protection Orders Overview

Protection orders that have an enforcement mechanism are the most effective. If the perpetrator violates the conditions of the order, tribal codes should include the appropriate response. The order needs to provide for ease of enforcement, so that the petitioner has some way of easily proving that the order is in place. A copy should be given to all parties involved, as well as to her place of work, school, or any location covered in the order.

If the perpetrator violates the order of protection, civil sanctions and/or criminal sanctions need be in place and enforced. Sanctions act as an incentive for the perpetrator to comply with the order and insure accountability upon noncompliance. This can be accomplished through civil and criminal sanctions or punishments, even though a protection order is a civil action.

Tribes may want to consider violations of protection orders as a crime. However, a tribe must keep in mind that they do not have criminal jurisdiction over non-Indians unless the tribe meets the requirements of section 904 of VAWA 2013. Tribes may also be required to enforce protection orders from other jurisdictions under the VAWA full faith and credit provision. This increases the importance of ensuring that there are civil sanctions.

To handle violations criminally, a tribe may make a violation of a protection order a crime or it may want to treat violations as criminal contempt. A **criminal contempt** violation generally occurs directly before the court when the defendant improperly challenges or ignores the court's authority. This is done through interference with the ability of the court to function (e.g., yelling at the judge, threatening a witness, and refusing to sit down or remain quiet when ordered). A person found guilty of criminal contempt may be jailed and/or fined as punishment.

If a tribe decides that criminal penalties are important, it should also provide for civil sanctions. As mentioned before, civil sanctions are important to hold non-Indian offenders accountable, as well as Indians, when they violate orders of protection on the reservation. Civil contempt is a routine form of punishment for violating a court order, generally used to coerce compliance with a court order. Punishment for civil contempt can be fines or incarceration. The respondent can be

incarcerated to compel compliance with the order, not as punishment. The respondent can also be excluded, fined, and forced to forfeit items and lose licenses or privileges. Historically, tribes tended to use ostracism, restitution, and banishment to coerce compliance.

TRIBAL CODE EXAMPLES

Civil Protection Orders—Violation

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

Violation as a Crime

Confederated Tribes of Siletz Tribal Code

Sec. 12.504.

Violation of Certain Orders for Protection Is an Offense

Violation of one of the following orders issued in accordance with § 12.510, 12.520, 12.526 or 12.527 of this Ordinance is an offense of domestic or family violence:

- (a) an order enjoining the perpetrator from threatening to commit or committing acts of domestic or family violence against a family or household member;*
- (b) an order prohibiting the perpetrator from intimidating, harassing, menacing, annoying, telephoning, contacting, or otherwise interfering or communicating with a family or household member, directly or indirectly;*
- (c) an order removing and excluding the perpetrator from the residence of a family or household member and a reasonable area surrounding the residence;*
- (d) an order requiring the perpetrator to stay away from the residence, school, place of employment, or a specified place frequented regularly by a family or household member;*
- (e) an order prohibiting the perpetrator from using or possessing a firearm or other weapon specified by the Court;*
or
- (f) an order granting temporary custody of a minor child to the person protected by the order.*

Hopi Family Relations Code

§ 18.01 Violation of Protection Orders

(a) Criminal violations.

(1) If, after receiving notice of a protection order, the respondent disobeys the order, he or she commits the offense of contempt of court pursuant to the rules of Ordinance 21, Hopi Tribal Criminal Ordinance. The court may refer such violations to the Office of the Prosecutor for prosecution.

(2) A law enforcement officer with knowledge of the violation shall immediately arrest the respondent if there exists probable cause to believe that he or she has violated a protection order. The respondent shall be arrested whether or not such violation occurred in the presence of the officer. The violation shall then be referred to the Office of the Prosecutor for prosecution.

A. The respondent shall then be criminally prosecuted pursuant to Ordinance 21, Hopi Tribal Criminal ordinance and other applicable Hopi Tribal ordinances.

a. Contempt of court, forfeiture of bond, money or property.

(1) Any person who has reason to believe that the respondent has violated a protection order or has refused to carry out a judgment, order or condition imposed by the court may move the court for an order to Show Cause, pro se.

(2) The court shall hold a hearing within fifteen (15) days to determine whether the respondent violated the protection order or refused to carry out any judgment, order or condition.

(3) If the court finds, beyond a reasonable doubt, that the respondent violated the protection order, the court shall hold the respondent in criminal contempt of court. The court may punish the respondent pursuant to Ordinance 21,

Hopi Tribal Criminal Ordinance. Further, the court may require forfeiture of any bond posted, money deposited or property pledged as security to assure compliance with the order under §15.01(a)(18).

(4) If the court finds, by a preponderance of the evidence, that an individual has refused to carry out a judgment, order, or condition imposed by the court, the court may hold that person in civil contempt of court. To compel the person to carry out the judgment, order, or condition, the court may incarcerate that individual for up to one hundred eighty (180) days, or impose such other penalties as the court deems necessary to compel compliance.

(c) Hearings on alleged violations of protection orders shall be expedited.

Salt River Pima-Maricopa Indian Community
Section I. 7. Violation of Order of Protection

A. In addition to any other penalties available under law or equity, a person, who knowingly violates, or a person who aides and abets another person, to knowingly violate and order of protection is guilty of an offense and shall be sentenced to a maximum of one hundred-eighty (180) days imprisonment, or fined an amount not to exceed three thousand dollars (\$3,000.00), or both.

Fort Belknap Indian Community
Section 15 Violation of an Order for Protection

A. Whenever an order for protection is granted pursuant to this section, and the respondent or person restrained knows of the order, violation of the order from protection is a misdemeanor. Upon conviction the first time, the defendant must be sentenced to a minimum of three days imprisonment and must be ordered to participate in counseling or other appropriate programs selected by the court. If the court stays imposition or execution of the jail sentence and the defendant refuses or fails to comply with the court's treatment order, the court must impose and execute the stayed jail sentence. A person is guilty of Contempt under Title IV, part IV, section 2, subsection 2.2. Upon conviction, the defendant must be sentenced a minimum of ten days imprisonment and must be ordered to participate in counseling or other appropriate programs selected by the court. Notwithstanding other sentencing guidelines, the court must impose and execute the minimum sentence provided in this subsection for convictions.

B. A peace officer shall arrest without a warrant and take into custody a person whom the peace office has probable cause to believe has violated an order granted pursuant to this section restraining the person or excluding the person from the residence or the petitioner's place of employment, even if the violation of the order did not take place in the presence of the peace officer, if the existence of the order can be verified by the officer.

The person shall be held in custody for at least 36 hours, excluding the day of arrest, Sundays, and holidays, unless the person is released earlier by a judge or judicial officer. A peace officer acting in good faith and exercising due care in making an arrest pursuant to this subsection is immune from civil liability that might result from the officer's actions.

C. A violation of an order for protection shall also constitute contempt of court and be subject to the penalties therefore.

D. If the court finds that the respondent has violated an order for protection and that there is reason to believe that the respondent will commit a further violation of the provisions of the order restraining the respondent from committing acts of family member abuse or excluding the respondent from the petitioner's residence, the court may require the respondent to acknowledge an obligation to comply with the order on record. The court may require bond sufficient to deter the respondent from committing further violations of the order from protection, considering the financial resources of the respondent, and not to exceed \$10,000. If the respondent refuses to comply with an order to acknowledge the obligation or post a bond under this subsection, the court shall commit the respondent to the jail during the term of the order for protection or until the respondent complies with the order under this subsection. The warrant must state the cause of commitment, with the sum and time for which any bond is required. If an order is issued under this subsection, the court may order the costs of the contempt action, or any part of them, to be paid by the respondent. An order under this subsection appealable.

E. Upon the filing of an affidavit by the petitioner, any peace officer, or an interested party designated by the court alleging that the respondent has violated any order for protection granted pursuant to this section, the court may issue an order to the respondent, requiring the respondent to appear and show cause within 14 days why the respondent should not be found in contempt of court. The court also shall refer the violation of the order for protection to the appropriate prosecuting authority for possible prosecution under subsection (A).

F. If it is alleged that the respondent has violated an order for protection issued under section 6 and the court finds that the order has expired between the time of the alleged violation and the court's hearing on the violation, the court may grant a new order for protection under section 6 based solely on the respondents' alleged violation of the prior order. If the court finds that the respondent has violated the prior order, the relief granted in the new order for protection shall be extended for a fixed period, not to exceed one year, except when the court determines a longer fixed period is appropriate.

G. The admittance into petitioner's dwelling of an abusing party excluded from the dwelling under an order for protection is not a violation by the petitioner of the order from protection. A peace officer is not liable under for a failure to perform a duty required by subsection B.

H. When a person is convicted of violating an order for protection under this section and the court determines that the person used a firearm in any way during commission of the violation, the court may order that the person is prohibited from possessing any type of firearm for any period longer than three years or for the remainder of the person's life. A person who violates this subsection is guilty of an offense. At the time of the conviction, the court shall inform the defendant whether and for how long the defendant is prohibited from possessing a firearm and that it is an offense to violate this subsection. The failure of the court to provide this information to a defendant does not affect the applicability of the firearm possession prohibition or the offense penalty to that defendant.

Violation as Civil Contempt

Makah Tribal Law and Ordinance §11.5.14 Violation of Order for Protection

- a. Motion by Petitioner or Filing Party: If there is probable cause to believe that the respondent violated the terms of an order for protection, the petitioner or the filing party may file a written motion for an order to show cause, supported by an affidavit stating the specific facts and circumstances constituting the alleged violation. The Court shall cause the motion to be served on the respondent. At the same time, the Court may deny the motion outright but, if the motion appears to have merit, the Court shall proceed under MLOC Title 1, Chapter 15. The Court may also refer the matter to the Prosecutor for prosecution.*
- b. Action by Prosecutor: Upon receipt of a Court referral, police report, or statement from any person with personal knowledge that the terms of an order for protection have been violated, the Prosecutor may proceed under MLOC 11.3.01, under MLOC Title 1, Chapter 15, or under any other appropriate provision.*

Ninilchik Village Ordinance No. 99-01 Section 11. Violation of a Protective Order

If the Respondent violates any part of the Protective Order, he or she may be charged with contempt of court and subject to penalties as the Court decides, including but not limited to the following:

- 1. A fine not to exceed \$1,000 for each violation;*
- 2. Community service as determined appropriate by the Court;*
- 3. In cases of repeated contempt, after notice and opportunity for a hearing, the person may be deprived of some or all benefits of tribal membership for such time as determined appropriate by the Court, not exceeding five (5) years.*

Vacate or Modify

Ninilchik Village Ordinance No. 99-01 Section 10. Dissolving or Modifying a Protective Order

If the petitioner or victim later wishes to dismiss or change an existing Protective Order in any way, he or she may file a Petition to Use the Tribal Court form specifically requesting the change. The Tribal Court shall then hear and rule on the requested change in a timely manner upon notifying all parties.

Makah Tribal Law and Ordinance

§11.5.13 Termination or Modification of Order for Protection

- a. Motion to Terminate or Modify:*** *The petitioner, the filing party, or the respondent may file a written motion to terminate or modify the terms of an existing order for protection. The motion shall be supported by an affidavit stating why the movant believes the termination or modification is warranted due to changed or unanticipated circumstances.*
- b. Disposition of Motion:*** *The Court shall cause a motion to terminate or to modify to be served on the other party. At the same time, the Court may deny the motion outright but, if the motion appears to have merit, the Court shall order a written response or schedule a hearing, or both. Under exigent circumstances, the Court may temporarily grant a motion to modify on an ex parte basis, without notice to the other party, pending a written response, a hearing, or both.*

Hopi Family Relations Code
§ 19.01 Vacation of Protection Orders

- (a) A party who wishes to have a protection order vacated must move the court for an order.*
- (b) A protection order shall be vacated only by court order.*
- (c) In determining whether or not to vacate a protection order, the court shall consider the following factors:*
 - (1) whether either or both of the parties have attended counseling and for how long;*
 - (2) whether the respondent has attended substance abuse counseling and for how long;*
 - (3) whether the circumstances have changed so as to remove the danger to the petitioner from the respondent; and*
 - (4) any other factors the court deems relevant.*
- (d) The court clerk shall provide a copy of any subsequent order to all police departments to whom a copy of the original protection order was delivered under §16.01(a)(2).*
- (e) All Hopi law enforcement agencies shall enforce any protection order that has neither expired nor been vacated, regardless of the current status of the parties' relationship.*

Oglala Sioux Tribal Code
SECTION 308. Petitioner Cannot Violate Order for Protection

If a respondent is excluded from the residence of or ordered to stay away from the petitioner, an invitation by the petitioner to the respondent, and any acceptance of that invitation, does not waive or nullify an order for protection. Further, the petitioner cannot be considered by such invitation as having violated, or be subject to arrest for a violation of, his/her own ex parte or permanent order of protection.

TRIBAL CODE COMMENTARY

The first tribal codes are examples of protection order violations that are treated criminally. The Siletz Code spells out violations of the protection order that fall under the criminal code. The Hopi Code clearly defines the violations as criminal in nature, and those cases are referred to the office of the prosecutor. An officer can arrest the respondent even if the violation did not occur in his or her presence, because most violations are not going to occur directly in front of an officer. The Hopi Code also allows anyone to report a violation to the court. This report is followed by a prompt hearing on the violation. There are also civil sanctions, which can result in up to 180 days in jail, to coerce compliance with the protection order.

The Salt River Pima-Maricopa Code outlines a violation as criminal with a punishment of 180 days in jail or a \$3,000 fine, or both. Anyone who helps a respondent violate the order is also guilty of a crime. The Fort Belknap Code describes various degrees of criminal violations of an order of protection. The first violation is a mandatory three days in jail and counseling. If the judge decides to suspend the jail time until counseling can be completed, and the respondent does not follow through, he can be held in contempt and receive ten days in jail. Peace officers, like on the Hopi Reservation, can arrest violators even if the incident did not happen in their presence, as long as there is probable cause and proof of the order. If the officer acts in good faith, he or she is exempt from civil actions. Violations can also be seen as a contempt of court and treated civilly. If the respondent used a firearm in committing the crime, he can be prohibited from owning one again. Finally, the petitioner cannot violate the order by allowing the respondent into her home. Holding a petitioner liable for a violation demonstrates a misunderstanding of domestic violence and a lack of appreciation of the manipulation and control that can be exerted upon the victim by the perpetrator.

The other code examples describe violations as civil contempt. The Makah Tribal Code requires the petitioner to submit a written notice to the court of the violation. The court may proceed with civil sanctions and fine the violator \$200 or up to three months in jail, or it can refer the case to the prosecutor where it will be viewed as a criminal assault in the first, second, or third degree. The Ninilchik Code spells out civil punishments that can be administered for violations, including fines, community service, and a cessation of tribal benefits for a specified period of time.

Orders of protection can be vacated or modified at Ninilchik and Makah, by the victim petitioning to vacate or modify the order through the tribal court system. A hearing is held and an order issued. The Hopi Code lists matters that the tribal court should consider in making its decision on whether to vacate or modify a protection order. The Oglala Sioux Code clearly states that the petitioner cannot nullify a protection order by allowing the respondent into her home. Moreover, she cannot be arrested for violating the order. This is victim centered and shows an understanding of the cycle of domestic violence.

Note: There are also some federal crimes related to violating protection orders. Interstate Violation of an Order of Protection, 18 U.S.C. § 2262, prohibits interstate travel or leaving or entering Indian country with intent to violate a valid protection order that prohibits credible threats of violence, repeated harassment, or bodily injury. The abuser must intend to violate the order at the time of travel and a violation of the order must occur. It is also a federal crime to cause an intimate partner to cross state lines, or to leave or enter Indian country by force, coercion, duress, or fraud, if during or as a result of the conduct, the abuser intentionally inflicts bodily injury on the victim in violation of a valid protection order.

In addition, 18 U.S.C. Section 117 makes it a felony if a perpetrator is convicted of the crime of Domestic Assault by a Habitual Offender. This crime is defined as

(a) **In General.**--Any person who commits a domestic assault within the special maritime and territorial jurisdiction of the United States or Indian country and who has a final conviction on at least 2 separate prior occasions in Federal, State, or Indian tribal court proceedings for offenses that would be, if subject to Federal jurisdiction—(1) any assault, sexual abuse, or serious violent felony against a spouse or intimate partner; or (2) an offense under chapter 110A, shall be fined under this title, imprisoned for a term of not more than 5 years, or both, except that if substantial bodily injury results from violation under this section, the offender shall be imprisoned for a term of not more than 10 years.

C. Full Faith and Credit

Full Faith and Credit Overview

Full faith and credit refers to a legal doctrine that requires that an order validly issued in one jurisdiction, such as a tribal jurisdiction, be considered valid and enforceable in another jurisdiction, such as a state. Not all orders are granted full faith and credit in other jurisdictions. Generally, a tribal court does not honor all orders, but has a procedure by which some orders may be considered valid and enforceable on the reservation. Likewise, the states have honored some tribal court orders, through their procedures.

The issue of domestic violence has become so pervasive in the United States, that the U.S. government decided that it must step in to provide assistance to states and tribal governments in an effort to support consistency in enforcement of protection orders. Victims traveling to and from states or reservations need protection orders to be enforced. Requiring a victim to seek a protection order in each jurisdiction or requiring cumbersome registering of an order in a new jurisdiction place a victim in danger and is needlessly burdensome.

VAWA included in its provisions a section that specifically requires that any protection order issued by a state or Indian tribe be accorded full faith and credit, as if it were an order of the enforcing state or tribe. It is critical to understand the provisions of the act to ensure that tribal orders meet the requirements of the act so that full faith and credit will be given to orders issued by the tribal court and that there is an understanding of the obligations as well to enforce protection orders from other jurisdictions. It does require that the protection order afforded full faith and credit be issued by a court having subject matter and personal jurisdiction over the parties and that reasonable notice and opportunity to be heard be given to the person against whom the order is sought, or in the case of an ex parte order, the respondent will be given notice and an opportunity to be heard within a reasonable time, consistent with due process requirements.³⁰

There are some limitations on registration of protection orders by VAWA. A state or tribal government shall not notify the respondent of the registration of a foreign order in their jurisdiction, unless asked to do so by the victim. There can be no requirement in any jurisdiction that a protection order be registered in the jurisdiction before enforcement. Included as well, is a prohibition on making some information available on the Internet. Again, the safety of the victim is paramount.

One critical section of VAWA specifically deals with tribal enforcement of protection orders.

18 U.S.C. § 2265 (e) Tribal court jurisdiction.—For purposes of this section, a tribal court shall have full civil jurisdiction to enforce protection orders, including authority to enforce any orders through civil contempt proceedings, exclusion of violators from Indian lands, and other appropriate mechanisms, in matters arising within the authority of the tribe.

Developing laws that provide the maximum protection to Indian victims of domestic violence is vitally important. VAWA provides a mechanism to assure protection on and off Indian country; however, your tribe needs to assure that mechanism functions well for your tribe by ensuring that your statutes and procedures meet the requirements of VAWA. Many tribes have passed resolutions or passed statutes that specifically deal with the full faith and credit of protection orders issued by other tribes or states.

The tribal court can also increase the chances that police officers and courts from other jurisdictions will enforce a tribal protection order by following a few steps:

- Use clear, concise, and specific language in the protection order;
- Clearly state in the body of the order when the order takes effect and expires;
- Include some court contact information so the order can be verified;
- Include a finding on subject matter and personal jurisdiction;
- Specifically note the federal laws regarding interstate domestic violence;
- Specifically state the consequences of violating the order; and
- Provide each party with a certified copy of the order.

TRIBAL CODE EXAMPLES

Civil Protection Orders—Enforcement/Full Faith and Credit

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

Oglala Sioux Tribe

SECTION 315. Tribal Registry for Orders for Protection

- 1. To ensure the proper and timely enforcement of all Oglala Sioux Tribal orders for protection, and any foreign orders falling within its purview and jurisdiction, the Oglala Sioux Tribal Court shall provide for a registry of all orders for protection issued by or registered with the Oglala Sioux Tribal Court. The clerk of court shall provide the Public Safety dispatch centers with certified copies of orders for protection within the same day of issuance.*
- 2. The court shall coordinate with, and ensure any OST tribal orders for protection are submitted to any other registries, whether federal, state, tribal, or local, for the purpose of enhancing full faith and credit enforcement of all orders for protection, including provisions to enter the order for protection in the National Crime Information Center (NCIC) database.*
- 3. The clerk of court shall also immediately provide the dispatch centers and designated registry with certified copies and information concerning any modifications, revocations, withdrawals, and/or expired orders for protection.*
- 4. The court shall provide that information contained in the registry shall be available on a 24-hour basis to any court, law enforcement agency, or domestic violence program.*
- 5. Facsimile copies which meet the requirements of Title 18, United States Code, Section 2265 shall be recognized as valid and official copies for the purpose of entry into the registry.*

Hopi Family Relations Code

§ 12.01 Central Registry

The Office of the Hopi Tribal Prosecutor shall establish a central registry for the filing of civil and criminal convictions under this ordinance. The information in the central registry shall be confidential and only statistical information may be released for the administrative, planning or Hopi Tribal purposes.

(a) The Office of the Hopi Tribal Prosecutor shall approve and make standard forms available for filing a pro se petition and for reporting purposes.

(b) The following agencies shall report annually to the office of the Hopi Tribal Prosecutor and make available to victims, standard pro se forms to file and report abuse and violence under this ordinance:

- (1) Office of the Hopi Tribal Prosecutor;*
- (2) Hopi Law Enforcement;*
- (3) Hopi Social Services; and*
- (4) Indian Health Service Hospitals.*

(c) The above-named agencies shall:

(1) provide information to victims concerning:

- (A) the availability of pro se protection orders;*
- (B) procedures for obtaining a pro se protection order;*
- (C) the right of the petitioner to have her or his place of residence remain secret;*

(2) prohibit non-legal staff from rendering advice or services that call for the professional judgment of a lawyer or advocate;

(3) provide timely assistance to victims of abuse at no cost, in filing for protective relief;

(4) keep the addresses of victims confidential; and

(5) keep a record of each case in which they encounter and/or assist a victim in filing for a protection order. The record shall include the following information:

(A) name, gender and relationship of the parties;

(B) a description of the abuse and violence, any weapons involved and any resulting injuries;

(C) dates of the abuse and violence and dates of filing for protective relief; and

(D) the source(s) of all information obtained.

(d) The Office of the Hopi Tribal Prosecutor may make the standard *pro se* forms available to other community organizations which may interact with victims such as shelters, Hopi villages, schools, offices of the Hopi Tribe, federal/state and other local agencies.

Muscogee (Creek) Nation Code
Title 6 § 3-416. Judicial Enforcement of Foreign Protection Orders

A. Full faith and credit. Pursuant to 18 U.S.C. § 2265, any protection order issued that is valid according to the standards contained in subsection B of this section by the court of a state or another Indian tribe shall be accorded full faith and credit by the District Court and the District Court shall enforce a valid foreign protection order as if it were issued by the District Court.

B. Requirements for valid orders. A protection order issued by a State of another tribal court shall be valid if:

1. The issuing Court had jurisdiction over the parties and matter under the law of such State or Indian tribe; and
2. Reasonable notice and opportunity to be heard was given to the person against whom the order was sought sufficient to protect that person's right to due process. In the case of an *ex parte* order, notice and opportunity to be heard must have been provided within the time required by State or tribal law, and in any event within a reasonable time after the order was issued, sufficient to protect the respondent's due process rights.

C. Registration not required. Registration or filing of a foreign protection order shall not be a prerequisite for District Court enforcement of out-of-state or tribal orders of protection.

D. Initiation of proceeding for enforcement. A proceeding to enforce a foreign protection order may be started in the District Court by:

1. A motion filed by the petitioner holding the foreign protection order, alleging that respondent has violated the protection order and requesting that the District court enforce the order; and/or
2. An action filed by the Prosecutor alleging that respondent has violated the foreign protection order.

E. Validity of order; affirmative defense. If a foreign protection order bears the name of an issuing court, the persons to whom it applies, a judge's signature or an equivalent sign, terms and conditions against the respondent, and does not bear an expiration date that has passed or any other obvious indication that it is not authentic, it will be deemed valid, and the District Court shall enforce it, unless the party against whom the order is to be enforced proves, as an affirmative defense, that:

1. The issuing court did not have jurisdiction over the parties or the dispute under the law of the issuing court;
2. The respondent was not given due process, which means reasonable notice and an opportunity to be heard. If the foreign protection order was originally entered without the respondent having an opportunity to be heard, the respondent shall have been given notice and an opportunity to be heard within the time required by law of the issuing court, or in any event within a reasonable time after the order is issued, sufficient to protect the respondent's due process rights;

3. The protection order is a support or child custody order issued pursuant to State divorce and child custody laws that is not entitled to full faith and credit under other federal law.

F. Cross or counter petitions. Cross or counter petitions are not entitled to full faith and credit unless a petition, complaint or other written pleading was filed seeking a protection order and the issuing court made specific findings that each party was entitled to a protection order.

Turtle Mountain Band Domestic Violence Code

Section 5090. Foreign Domestic Violence Protection Orders—Full Faith and Credit Recognition and Enforcement

A. Subject to Section 5100.A. 1, a domestic violence Protection Order issued by a court of competent jurisdiction of another state, Indian tribe, the District of Columbia or a commonwealth, territory or possession of the United States must be accorded full faith and credit by the Court of Turtle Mountain Band of Chippewa Indians and enforced as if the Order was issued by a Turtle Mountain Tribal Court.

1. A foreign domestic violence Protection Order is enforceable on the Turtle Mountain Reservation if all of the following are satisfied:

- a. The Respondent received notice of the Protection Order in compliance with requirements of the issuing jurisdiction;*
- b. The Protection Order is in effect in the issuing jurisdiction;*
- c. The issuing court had jurisdiction over the parties and the subject matter;*
- d. The Respondent was afforded reasonable notice and opportunity to be heard sufficient to protect that person's right to due process. In the case of Ex Parte Protection Orders, notice and opportunity to be heard must have been provided within the time required by the law of the issuing jurisdiction and in any event within a reasonable time after the Protection Order was issued, sufficient to protect the Respondent's due process rights. Failure to provide reasonable notice and opportunity to be heard is an affirmative defense to any prosecution for violation for the foreign Protection Order or any process filed seeking enforcement of the Protection Order; and*
- e. If the Protection Order also provides protection for the Respondent, a petition, application or other written pleading must have been filed with the issuing court seeking such a Protection Order and the issuing court must have made specific findings that the Respondent was entitled to the Protection Order.*

*B. A person entitled to protection under a foreign domestic violence Protection Order may file the foreign Protection Order in the Tribal Clerk of Court's Office. The person filing the Protection Order shall also file an affidavit with the Clerk of Court certifying the validity and status of the foreign Protection Order and attesting to the person's belief that the Protection Order has not been amended, rescinded or superseded by any other Orders from a court of competent jurisdiction. If a foreign Protection Order is filed under this Section, the Clerk of Court shall transmit a copy of the Protection Order to the appropriate local law enforcement agency. Filing of a foreign Protection Order under this Section is not a **prerequisite** to the Order's enforcement by this Tribe. A fee for filing the foreign Protection Order shall not be assessed.*

C. A Law enforcement officer may rely upon any foreign domestic violence Protection Order that has been provided to the officer by any source. The officer may make arrests for violation of the Protection Order in the same manner as for violation issued by this Tribe. A law enforcement officer may rely on the statement of the person protected by the Protection Order that the Protection Order is in effect and that the Respondent was personally served with a copy of the Protection Order. A law enforcement officer acting in good faith and without malice in enforcing a foreign Protection Order under this section is immune from civil or criminal liability for any action arising in connection with the enforcement of the Protection Order.

D. Any person who intentionally provides a law enforcement officer with a copy of a foreign domestic violence Protection Order known by that person to be false or invalid or who denies having been served with a Protection Order when that person has been served with such an Order is guilty of a class 2 misdemeanor.

Section 5100. Tribal Registry for Protection Orders

A. The Court shall maintain a registry of all orders for protection issued by the Court. The Clerk of Court shall provide Law Enforcement with certified Protection Orders within 24 hours after issuance.

B. The Clerk of Court shall also provide the Police Department with any modifications of, revocations of, withdrawal of and/or expiration of Protection Orders.

C. The information contained in the registry is available at all times to the Court, law enforcement agencies and domestic violence shelters.

D. Facsimile copies shall be recognized.

TRIBAL CODE COMMENTARY

The Oglala Sioux Code sets up a tribal registry for tribal and foreign orders of protection. The clerk of the court is charged with keeping the public safety centers up to date with recent copies of the orders. Oglala enforces foreign orders of protection on the reservation, yet it also works with federal, state, local, and other tribes to help enforce Oglala orders of protection. Oglala attempts to keep up with this by adding their protection orders to the national crime database. The tribal registry can be accessed by the tribal court, law enforcement, and the domestic violence agencies. Oglala also accepts faxes to enter into the registry if they meet federal requirements.

The Hopi Family Relations Code provides for a central registry for filing civil and criminal convictions, including protection orders. It is a confidential database. In this section of the code, administrative functions of all the agencies that must coordinate to provide petitions and protection orders are outlined, as well as who can help petitioners fill out forms.

The Muscogee Nation uses language similar to the language in the VAWA to ensure that it is meeting the act's requirements. It provides full faith and credit to protection orders from other jurisdictions without requiring registration of the foreign order, provided they are valid orders and meet due process requirements. The code does note that if the order is a child custody or child support order issued under a state or tribe's divorce or custody laws, the order will not be granted full faith and credit.

The Turtle Mountain Code acknowledges full faith and credit by enforcing foreign orders of protection if they meet the following conditions:

- If the other jurisdiction provided notice to respondent,
- If the protection order is valid in the issuing jurisdiction,
- If the other jurisdiction had subject matter jurisdiction, and
- If the respondent was provided adequate notice for a hearing.

Foreign orders should be filed with the clerk's office in the tribal court, although this is not required for an officer to enforce the protection order. Officers should act as if foreign orders are tribal orders. If officers act in good faith, they are exempt from civil liability. Tribal court, law enforcement, and local domestic violence programs have access to the registry. It does not say whether the court works to enforce their orders in other jurisdictions.

EXERCISES

These exercises are designed to help you in drafting and revising your tribal protection order laws.

Step 1: Jurisdiction

Refer to your Civil Jurisdiction section developed in Part 3. The code provision you develop here must be consistent with the Civil Jurisdiction section. Does this cover all persons you want the court to have personal jurisdiction over when issuing protection orders?

☐ Yes

☐ No

If you answered no, you may want to revise the civil jurisdiction section of your code.

Do you want your protection order to cover Indians and non-Indians residing within your territorial jurisdiction? VAWA, 18 U.S.C. § 2265 (b) indicates that tribal courts have jurisdiction to issue protection orders against non-Indians provided that the court has personal and subject matter jurisdiction and complies with due process.

Point of discussion: Who can petition our tribe for a protection order?

Do you want tribal members to be able file a petition for an order against nontribal members who are abusing them?

Do you want non-Indians to be able to file a petition against a tribal member?

Do you want tribal members living off reservation to be able to petition for an order of protection if the incident occurred on reservation?

You may also want to add a jurisdiction component to your protection order's section. Use the examples above to illustrate how other tribes have written these sections.

Step 2: Relationships

Discuss who may apply for a civil protection order, or the eligibility requirements.

In preparing this section refer to the definition of *family relationships* and to the definition of *domestic violence* developed as part of the criminal code. Keep in mind that your definitions should be broad enough to cover a wide range of relationships to ensure protection in your community. Do you want to use the same definitions in the civil protection order section?

In this section you also want to think about who may petition for an order for protection besides the victim. Here are some people to consider:

- ☐ Parent
- ☐ Guardian
- ☐ Advocate
- ☐ Prosecutor
- ☐ Another third party if victim is incapacitated

If the adult victim is not incapacitated, will your tribe allow a family member to file on her behalf if she does not want a protection order against her abuser?

Point of Discussion: Victim autonomy and safety

Protection orders are specifically intended as civil remedies for victims in cases of domestic violence. Their intended purpose is to protect victims from domestic violence. Circumventing the victim's autonomy and choices can create additional dynamics that could lead a batterer to escalate his violence.

A protection order does not guarantee the violence will stop. A victim may choose not to file for a protection order as part of an overall survival strategy. If another party has authority to file for a protection order, the victim's autonomy and choices are circumvented, and the victim's safety could be jeopardized. Before victims can escape the violence they need to have resources and a safety plan in place.

If a tribal government has concerns about the well-being of women who are being abused, another option is to make the abuser stop the violence through criminal enforcement rather than impose a protection order. To assure that an offender stops abusing, the criminal justice system can do everything it can to arrest, prosecute, convict, and incarcerate offenders rather than mandate that victims separate from their abusers through the civil protection order process.

Step 3: Procedures for Obtaining a Protection Order

Now that you have made it clear about who can apply for a protection order, you need to be sure that there is a simple and effective way for them to apply.

Some tribes have a specific form that is required with a space for a statement of the most recent violence and history of violence. Note that placing forms in the tribal code will require a tribal code amendment if factors change. Each tribe will vary with respect to the procedure for amending tribal codes. Alternatively, forms that are created by the court or another administrative body can be amended more easily.

Many codes require that there be an immediate threat for a protection order to be put into place, but your protection order can include past abuses, paying close attention to the cycle of domestic violence.

Remember if you receive grants from the OVW, certain grants may restrict you from collecting fees from the victim.

Points of Discussion: Victim safety

Sometimes the petitioner may need to keep her address confidential for safety reasons.

What will the petitioner have to show in order to get the protection order?

- ☐ Does there need to be evidence that an act of domestic violence occurred recently? Within the past three months? One year?
- ☐ Does there need to be evidence that an act of domestic violence is likely to occur?
- ☐ Will you require *one* or *both* of these in order to file for an order of protection?

Do you want to develop a standardized preprinted petition form in your code for the petitioner to fill out when attempting to obtain a protection order from the court?

☐ Yes

☐ No

If no, do you want to require that the court be responsible for developing a standardized petition form?

Do you want to develop a standardized protection order and certification cover sheet that will be issued by the tribal court if they approve the protection order?

☐ Yes

☐ No

If no, do you want the court be responsible for developing a standardized order and certification cover sheet?

Carefully consider who should be responsible for:

- A. Providing information about the forms to the public,
- B. Assisting in completing the forms,
- C. Filing the forms, and
- D. Making the decision on whether to grant the protection order.

Here are some suggestions for people who could be responsible:

- ☐ Clerk of the court
- ☐ Legal advocate
- ☐ Shelter advocate
- ☐ Tribal court judge

Will there be a mandatory hearing set by the court in order to obtain the order of protection?

☐ Yes

☐ No

Point of Discussion: Notice to the respondent

- What kind of notice is enough?
- Can the petitioner give notice personally, or must notice be given by a third party?
- Can notice be given over the phone, or must it be done in person by a third party?

Notice is very important for full faith and credit, so that the tribal protection order will be honored in other jurisdictions.

To give notice of a court filing and hearing and to serve the temporary or permanent protection order on the respondent, the court needs to locate the respondent. You must decide how this will be accomplished using creative ways. It is important that the respondent is served as a part of his due process rights, so that the protection order will be upheld in other jurisdictions.

You should consult any current statutes on service of process. Service of process (serving the court documents) may be different for a protection order hearing than other civil process, as there is a need to resolve the issues quickly to protect the petitioner. Time lines are generally shorter and the methods of providing notice may be more expansive.

- ☐ Who can serve the respondent on the reservation?
- ☐ What happens if the respondent cannot be served? Will the order still be enforceable?
- ☐ What if the respondent is off reservation? How can he be served off reservation?
- ☐ What are more expansive ways of serving a respondent?
 - Posting in the community center
 - Serving a household or family member, or coworker
 - Service in the court or jail
 - Publication in newspaper or journal

Step 4: Emergency Protection Orders

What types of situations would require an emergency order of protection?

- ☐ Respondent has recently assaulted petitioner.
- ☐ Respondent has recently threatened to kill or harm the petitioner.
- ☐ Respondent is being released from jail after serving a sentence for assault of petitioner.
- ☐ Respondent has a long history of abusing the petitioner.
- ☐ Respondent, past abuser of petitioner, has recently returned to the reservation.
- ☐ Petitioner has recently returned to the reservation fleeing the respondent, abuser.
- ☐ Respondent has been stalking the petitioner.
- ☐ Other _____.

Ex parte (emergency) orders are temporary, and generally good for 30 days or less. By the end of the period, the petitioner is usually required to have the respondent served with the paperwork. In order to give notice, the respondent is also provided information and paperwork for when a hearing will occur in order to obtain a permanent protection order.

How long will the temporary order be valid? Are there any special factors affecting the time period?

How will the petitioner be able to obtain an emergency order?

- ☐ In person
- ☐ By telephone
- ☐ By facsimile (fax machine)

How will the respondent be notified?

Who in your jurisdiction should be authorized to issue *ex parte* orders? Must there be a hearing before a judge or can it be done by affidavit?

What other types of relief do you want to provide for the victim in the temporary order? Will they be the same types of relief as provided for in the more permanent protection order?

STEP 5: Contents of the Protection Order

The protection order form should clearly describe the party against whom it is being filed so that it can be enforced effectively. Discuss what types of relief will be provided to the petitioner in the order of protection.

Standard

Here are some things to consider regarding standard remedies and prohibitions:

- ☐ Should the order stop the respondent from any communication with the petitioner?
- ☐ Should it only limit the respondent from threats and verbal abuse?
- ☐ Can verbal abuse be defined narrowly enough or clearly enough?
- ☐ Will the order stop in-person, telephone, electronic, and written communication?
- ☐ What about stopping the respondent from having other people deliver messages for him or her?
- ☐ If you wish to have the protection order keep the parties apart, is there a specific distance that respondent must keep away? What would that be? (Often it is close to 100 yards. Is this reasonable?)
- ☐ Is the respondent to stay away from petitioner's home, work, school, car, and relatives' home(s)?

Make it clear what kinds of activity are prohibited, such as:

- ☐ Committing acts of domestic violence
- ☐ Calling
- ☐ Following
- ☐ Stalking
- ☐ Threatening
- ☐ Touching
- ☐ Harassing
- ☐ Visiting home, business, or school
- ☐ Annoying
- ☐ Telephoning
- ☐ Contacting
- ☐ Direct or indirect communication (e.g., friends, coworkers, or relatives)
- ☐ Possession of firearms
- ☐ Liquidation of joint assets (spending or selling property owned together)

Point of Discussion: What are expansive remedies?

Living Arrangements:

- If the parties live together, will the order force the respondent to move out?
- If so, does it matter who owns or is on the lease of the property?
- Is this a permanent exclusion?

Child Custody:

- Will granting custody to petitioner contradict any traditions?
- Is there an alternative?
- How will visitation take place to insure the safety of the petitioner?

Make clear what types of expansive remedies will be available such as:

- ☐ Traditional remedies (e.g., banishment)
- ☐ Guardianship of elderly relatives
- ☐ Child support
- ☐ Temporary custody
- ☐ Visitation and supervision of children
- ☐ Rent or mortgage payments
- ☐ Remove perpetrator from home
- ☐ Attorney fees
- ☐ Expenses (e.g., shelter, medical, property damage, and counseling)
- ☐ Use of vehicle
- ☐ Police officer assistance in removing items from the house and enforcement

STEP 6: Protection Order Hearing

After a petition for a protection order is filed, a hearing follows in which the respondent has an opportunity to attend and present his case. The petitioner also has an opportunity to present her evidence. It is important that the respondent receive notice to appear at the hearing. Tribal courts must decide who is responsible for notifying the respondent and what actions are permitted if he does not show up when notified.

Consider the time period the court has from the moment the petitioner files a petition for an order of protection to when the hearing takes place. What is a reasonable time frame?

Keep in mind the following:

- Victim safety
- Service on respondent
- Geographical distances
- Court calendar

Will you make exceptions or provide alternate locations for the hearings to take place, such as over the telephone?

Will the advocate be able to accompany the victim during the hearing?

Will you provide healer/victim or advocate/victim privilege so that the advocate does not have to disclose information regarding his or her private conversations with the victim to the court? Do your tribal codes contain specific language that protects the victim advocate's records?

What evidence does the petitioner need to provide in order to obtain a protection order?

What will be discussed in the hearing? What is the extent of the judge's authority? Will the judge decide on all the terms of relief? Can the judge send the respondent to offender reeducation programs if a protection order is issued?

Who will serve the respondent with the order for protection if he is not present at the hearing?

STEP 7: Enforcement of Protection Orders

What constitutes a violation of an order of protection?

Who can violate the order of protection? Can the victim?

What civil sanctions are in place for violators of protection orders? Do you want the same civil sanctions to apply for violators of the rest of the domestic violence code or should there be special sanctions for protection orders?

Consider the following civil contempt penalties:

- ☐ Fines
- ☐ Exclusion from Indian lands (e.g., tribal court order, resolution of tribal council, and decree from chief executive of tribe)
- ☐ Attorney's fees and court costs (e.g., reimbursement to victim or agency providing services, filing fees, witness fees, and service of process fees)
- ☐ Restitution to victim (e.g., expenses for medical, counseling, dental, property loss, lost wages, changing locks, and reimbursement for travel)
- ☐ Community service (e.g., trash collection, public speaking, and labor for ceremonies)
- ☐ Garnishment of wages
- ☐ Loss of tribal benefits over specified period of time
- ☐ Counseling (consider whether the victim should be ordered to counseling or just the perpetrator, because she is not to blame for violations)
- ☐ Batterer reeducation
- ☐ Loss of licensure or privileges (e.g., tribal business license, tribal employment, hunting or fishing license, tribal housing, and possession of firearm or weapon)
- ☐ Forfeiture (e.g., firearms, weapons, and car)

What criminal punishments are in place for violators of protection orders?

Does a violation of an order of protection permit criminal violations of domestic violence offenses?

☐ Yes

☐ No

If no, do violators receive a fine or prison time, or both? Remember ICRA limits fines to \$5,000 and imprisonment for a term of one year. What about multiple offenses? Can you stack criminal penalties or make the fines or jail time longer for repeat offenders? Are there traditional remedies for people who violate orders of protection?

Does the petitioner need to show cause for the violation or provide evidence to prove that the order was violated?

STEP 8: Full Faith and Credit

Find any statutes your tribe may have about full faith and credit and the registrations of orders from other jurisdiction, including any that may specifically deal with protection orders. How will your tribe accept protection orders from other jurisdictions and enforce them?

Does the petitioner have to register the orders somehow or can that person simply present a copy to the police or call out security personnel when there is a problem?

How will you work with local jurisdictions so that they will uphold and enforce tribal protection orders if members live or work off reservation?

Point of Discussion: Protection order registries

Many tribes have a central registry for orders of protection, and law enforcement and shelter advocates have access to it. If your tribe has a law relating to the registry of orders for protection, refer to it here. It helps them keep track of perpetrators in order to enforce protection orders. It can also help statistically to document domestic violence and sexual assault reported on the reservation. Finally, the tribe can include foreign orders of protection that they will enforce.

Do you want to include a central registry in your tribal code?

What resources would it take to institute one?

Who will have access to the central registry?

Will it be used to enforce foreign protection orders or only tribal ones?

STEP 9: Draft the Law

Use your answers in the previous steps to help draft your protection order laws.

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

- ☐ Jurisdiction
- ☐ Eligibility
- ☐ Procedures
- ☐ Contents
- ☐ Hearing
- ☐ Enforcement
- ☐ Full faith and credit

ADDITIONAL RESOURCES

ARTICLES:

Sarah Deer, “Expanding the Network of Safety: Tribal Protection Orders for Survivors of Sexual Assault,” *Tribal Law Journal* (2003–2004).
(http://tlj.unm.edu/tribal-law-journal/articles/volume_4/violence,%20women/index.php)

Sarah Deer and Melissa L. Tatum, “Tribal Efforts to Comply with VAWA’s Full Faith and Credit Requirements: A Response to Sandra Schmieder,” 39 *Tulsa Law Review* 403 (2003).

Jennifer Paige Hanft, “What’s Really the Problem with Mutual Protection Orders?” 22 *Wyoming Lawyer* 22 (October 1999)

Melissa L. Tatum, “A Jurisdictional Quandary: Challenges Facing Tribal Governments in Implementing the Full Faith and Credit Provisions of the Violence Against Women Acts,” 90 *Kentucky Law Journal* 123 (2001–2002).

Melissa L. Tatum, “Establishing Penalties for Violations of Protection Orders: What Tribal Governments Need to Know,” 13 *Kansas Journal of Law and Public Policy* 125 (2003).

Melissa L. Tatum, “Law Enforcement Authority in Indian Country,” 4 *Tribal Law Journal* (2004)(tlj.unm.edu/tribal-law-journal/articles/volume_4/tatum/index.php).

Elizabeth Topliffe, “Why Civil Protection Orders Are Effective Remedies for Domestic Violence but Mutual Protective Orders Are Not,” 67 *Indiana Law Journal* 1039 (1992).

WEBSITES:

www.TribalProtectionOrder.org

PowerPoint Presentation for Webinar: [Part I - Crafting, Serving, and Enforcing Protection Orders](#)

Part 6

FAMILY LAW AND CHILD CUSTODY

OVERVIEW

Divorce and child custody are special areas of civil law in which domestic violence victims need protection. Many victims of violence fear losing custody of their children or being required to share joint custody with a violent abuser. Even requiring the victim to exchange children for visitation or **joint custody** can create additional danger and trauma.

Tribal codes can be drafted to help protect victims of violence from abusers in custody proceedings. Among other things, a statute can create a **rebuttable presumption** against giving custody or visitation to a perpetrator of domestic violence. In the example statute below there is a rebuttable presumption that it is detrimental to the child and not in the best interest of the child to be placed in the custody of the perpetrator. This means that according to law it is believed that the perpetrator should not have custody, unless he can present sufficient evidence to demonstrate in his particular case that there are some special circumstances that make this untrue in his particular case. The perpetrator has the responsibility to convince the court (the **burden of proof**) through evidence that he should get custody. This means that the court cannot grant custody or visitation to someone who has background of domestic violence unless there are special circumstances. The assumption is that custody with a perpetrator of domestic violence is not in the best interest of the child.

As you work through this section of the resource guide, consider putting together a panel of survivors who have experienced divorce or child custody problems. These survivors are true experts in establishing the need for special laws in this area, and can provide insight and input in the code development process.

TRIBAL CODE EXAMPLES

Child Custody and Visitation

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

Turtle Mountain Band of Chippewa Indians

Domestic Violence, Sec. 3060 Child Custody and Visitation

A. In every proceeding where child custody is disputed, a determination by the court that domestic violence has occurred raises a rebuttable presumption that it is detrimental to the child and not in the best interest of the child to be placed in the sole custody, joint legal custody, or joint physical custody of the perpetrator of domestic violence. In determining whether the presumption applies, it is irrelevant whether the domestic violence occurred in the presence or outside the presence of the child.

B. When the custody of a child or visitation by a parent is at issue and the Court has made a finding of domestic violence:

1. The primary consideration of the court shall be the safety and well being of the child and of the parent who is the victim of domestic violence;

2. The court shall consider the perpetrator's history of causing or causing reasonable fear of physical harm, bodily injury or assault; and

3. The court shall also consider the perpetrator's overall lifestyle including alcohol and other chemical use.

4. If the parent is absent or relocates because of an act of domestic violence by the other parent, the absence or relocation is not a factor that shall weigh against absent or relocated parent.

C. When the custody of a child or visitation by a parent is at issue and the Court has made a finding of domestic violence, there is 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, whether that location is inside or outside the confines of the Indian reservation.

D. When the modification of an order for custody or visitation is at issue and the Court has made a finding of domestic violence since the order was established, a change of circumstances is established.

E. When the visitation by a parent is at issue and the Court has made a finding of domestic violence, the following conditions apply:

1. Only if the court finds that adequate provisions for the safety of the child and the parent who is a victim of domestic violence can be made, may the court award visitation by a parent who committed domestic violence.

2. In a visitation order, a court may:

a. Order the exchange of a child to occur in a protected setting;

b. Order visitation supervised by an independent third person or agency;

c. Order the perpetrator of domestic violence to attend and complete, to the satisfaction of the court, a program of intervention for perpetrators as a condition of visitation;

- d. Order the perpetrator of domestic violence to attend and complete, to the satisfaction of the court, a program for chemical dependency;*
 - e. Order the perpetrator of domestic violence to abstain from possession or consumption of alcohol or controlled substances during the visitation and the 24 hours preceding the visitation;*
 - f. Order the perpetrator of domestic violence to pay a fee to defray the costs of supervised visitation;*
 - g. Prohibit overnight visitation;*
 - h. Require a bond from the perpetrator of domestic violence for the return and safety of the child; and/or*
 - i. Impose any other condition that is deemed necessary to provide for the safety of the child, the victim of domestic violence or other family or household member.*
- 3. Whether or not visitation is allowed, the court may order the address of the child and the victim to be kept confidential.*
- 4. Supervised visitation shall be conducted by an independent third party as approved jointly by the court and the victim.*
- f. In resolving custody or visitation issues, the Court shall not order parties into medication, counseling, alternative justice, peace-making, circle sentencing, traditional Native ceremonies, or any other type of situation that would put the victim in the position of dealing directly with the perpetrator.*

TRIBAL CODE COMMENTARY

Because a woman is battered does not mean that she is unfit to care for her children. Although relatives' concern is understandable, relatives are not in the best position to assess her fitness. It is better that this function be limited to a social service agency or other professionals trained to assess the impact of domestic violence on the children, resiliency factors of both the mother and children, and protective measures that the mother may be employing to shield the children from danger.

Due to the negative impact that removal from parents can have on children, removal from the non-violent parent should only be considered as a last resort. Social services can also assist battered women to access other community services that will increase her resiliency, while protecting her and the children from further abuse.

Point of Discussion: How can our tribe best support battered mothers?

A child at risk is best protected in a system that fully understands the dynamics of domestic violence and where the adult victim can access services that:

- Protect her from further assault, including a strong advocacy, law enforcement, and criminal justice response.
- Assist her to become independent and financially secure (e.g., access to emergency and long-term housing, jobs, training, and health care).
- Provide parenting support and education.
- Enable her to regain control over her life, including support groups for battered women and treatment options for women who are chemically dependent.
- Minimize disruption in a child's life.

STEP 1: Determine Existing Law

Does your tribal code include laws that address child custody in the context of domestic violence cases?

☐ Yes

☐ No

If the laws exist, discuss whether the laws are adequate to ensure the tribe's purposes are met. If the laws are already working well, you may not need to work on this section.

Step 2: Review Example Code

Review the Turtle Mountain Domestic Violence Code printed above and discuss the following elements of the code:

- Rebuttable presumption against custody by a perpetrator of domestic violence
- Rebuttable presumption that it is the best interest of the child to reside with the nonviolent parent
- A finding of domestic violence establishes a “change in circumstances” when a modification of an order for custody or visitation is at issue
- Special requirements when ordering visitation in cases involving domestic violence
- Prohibition on mediation and/or counseling in cases involving domestic violence

Step 3: Draft the Law

Using your answers from Steps 1 and 2, draft or revise the child custody provision of your tribal domestic violence laws.

NOTES

Part 7

EDUCATION AND BATTERER INTERVENTION

How can we work to prevent domestic violence in the future?

OVERVIEW

As everyone knows, knowledge is power. The ability to access information is one of the first steps toward self-determination. Education can prevent future generations from repeating the cycle of violence. It can also teach institutions about their mistakes and make them more aware and sensitive to issues surrounding domestic violence in tribal communities.

Stopping domestic violence, and preventing it from happening again, is critical to each family's safety and each tribe's overall survival. Healthy and physically secure tribal members contribute to equality, the government, and the cultural ways of the tribe. According to tribal domestic violence advocates, equality is natural life-supporting power that is grounded in spirituality and essential to sovereignty.³¹ Domestic violence survivors will need to take steps to access services so they can break the cycle of violence. Yet tribal members cannot leave survivors alone to deal with these struggles on their own; at some point, tribal organizations will have to step in. You want your tribe to know exactly how to deal appropriately and empathetically with survivors, so educating tribal institutions about domestic violence is essential.

The following activity and discussion questions are to help design a community education program in your tribe's antiviolence code. It will be important to discuss mandatory education for agencies such as tribal law enforcement.

³¹"Natural Life-Supporting Power," from Domestic Violence Information Packet by Sacred Circle, National Resource Center to End Violence Against Native Women, a project of Cangleska, Inc. (based on DAIP's model).

TRIBAL CODE EXAMPLES

Prevention and Intervention

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

Oglala Sioux Tribe Domestic Violence Code *Ch. 5—Prevention and Intervention*

SECTION 506. Continuing education for law enforcement officers concerning domestic violence; content of course.

- 1. The Department of Public Safety, Training Center must provide forty (40) hours of initial education to all prospective and newly-hired law enforcement officers, detention officers, dispatchers, and supervisors, including those who have not had prior mandatory training concerning domestic violence, in accordance with Section 234 of this code.*
- 2. The Department of Public Safety, Training Center shall provide eight (8) hours of continuing education and minimum sixteen (16) hours mandatory refresher training on appropriate domestic assault response to law enforcement officers and supervisors each year.*
- 3. Any Bureau of Indian Affairs (BIA) criminal investigators and/or OST Department of Public Safety criminal investigators, whose responsibility is the investigation of misdemeanor and/or felony investigations of crimes occurring on the Pine Ridge Indian Reservation, shall adhere to the training requirements of subsections 1 and 2 above.*
- 4. The course of instruction and the objectives of training required pursuant to subsections 1 and 2 must be developed and presented in consultation with public and private providers of programs of service for victims of domestic violence and programs of intervention for perpetrators, persons who have demonstrated expertise in training and education concerning domestic violence as it relates to Lakota culture, and the implementation of a coordinated systems and community response to enhance the safety and respect for Lakota women and families on the Pine Ridge Indian Reservation.*
- 5. The course of instruction must include but is not limited to:*
 - (a) The investigation and management of cases involving domestic violence and writing of reports in such cases;*
 - (b) The nature, extent, and causes of domestic violence;*
 - (c) Practices designed to promote the safety of the victims of domestic violence and other family and household members, including safety plans;*
 - (d) The legal rights and remedies available to victims of domestic violence, including but not limited to victim rights, compensation for victims of crime, and enforcement of civil and criminal remedies;*
 - (e) The services available to victims of domestic violence and their children;*
 - (f) Sensitivity to cultural, racial, and sexual orientation issues and the effect of cultural, racial and gender bias on the response of law enforcement officers and the enforcement of laws relating to domestic violence; and*
 - (g) The provisions of the Oglala Sioux Tribal Code and any other laws and statutes applicable to the enforcement of this code.*

SECTION 507. Continuing education of judges and court personnel; prosecutors; content of course.

- 1. Cangleska, Inc., shall develop and present courses of continuing education concerning domestic violence for judicial officers, prosecutors, and other court personnel for the purpose of compliance with the provisions of Section 234 of this code.*

2. The courses must be prepared and presented in consultation with public and private agencies that provide programs for victims of domestic violence and programs of intervention for perpetrators, and advocates for victims.

3. Each judicial officer or court employee who comes into contact with either party or is involved in any aspect of domestic violence cases must have sixteen (16) hours of initial education in domestic violence and eight (8) hours annual refresher training.

4. The courses must include but are not limited to the following topics:

- (a) The nature, extent, and causes of domestic violence;*
- (b) Practices designed to promote safety for the victim and other family and household members, including safety plans;*
- (c) Resources available for victims and perpetrators of domestic violence;*
- (d) Sensitivity to gender bias and cultural, racial, and sexual orientation issues;*
- (e) The lethality of domestic violence;*
- (f) Sections 235 and 236 of this code;*
- (g) Proper use of relevant forms and orders applicable to this code; and*
- (h) The provisions of the Oglala Sioux Tribal Code and any other laws and statutes applicable to the enforcement of this code.*

SECTION 508. Continuing education for tribal employees who work with domestic violence cases and are required to report abuse and neglect of children.

1. The OST Health and Human Services Committee shall provide courses of continuing education on domestic violence issues for tribal employees who:

- (a) Work with cases of domestic violence; and*
- (b) Are required by law to report abuse or neglect of children.*

2. The courses must be prepared and presented in consultation with public and private agencies that provide programs for victims of domestic violence and programs of intervention for perpetrators, and advocates for victims.

3. The courses must include but are not limited to the following topics:

- (a) The nature, extent, and causes of domestic violence;*
- (b) Practices designed to promote safety of the victim and other family and household members, including safety plans;*
- (c) Resources available for victims and perpetrators of domestic violence;*
- (d) Sensitivity to gender bias and cultural, racial, and sexual orientation issues; and*
- (e) The lethality of domestic violence.*

4. As used in this section, tribal employees working with cases of domestic violence include:

- (a) Tribal probation officers;*
- (b) Workers in child protective services;*
- (c) Psychologists;*
- (d) Social workers;*
- (e) Advocates;*
- (f) Community health representatives;*
- (g) Emergency medical services personnel;*
- (h) Chemical Dependency personnel;*
- (i) Employee Assistance Program personnel;*
- (j) Civil Rights Office personnel.*

SECTION 509. Continuing education for attorneys.

1. In order to be licensed to practice in any Oglala Sioux Tribal Court, attorneys or legal advocates must complete sixteen (16) hours of initial legal education in domestic violence and participate in eight (8) hours continuing legal

education in domestic violence annually. The Attorney General shall provide for the courses of initial and continuing legal education in domestic violence for tribally licensed attorneys or attorneys applying for an OST attorney license.

2. The courses must be prepared and presented in consultation with persons who have demonstrated expertise and experience in providing legal assistance to victims and perpetrators of domestic violence, and advocates for victims.

3. The courses must include but are not limited to the following topics:

- (a) The nature, extent, and causes of domestic violence;*
- (b) Practices designed to promote the safety of the victim and other family and household members, including safety plans;*
- (c) Resources available for victims and perpetrators of domestic violence;*
- (d) Sensitivity to gender bias and cultural, racial, and sexual orientation issues;*
- (e) The lethality of domestic violence; and*
- (f) The OST domestic violence code and any other applicable laws, regulations, or statutes.*

SECTION 510. Required curricula for Pine Ridge Indian Reservation education system.

1. The OST Education Committee shall select or develop, within one year:

- (a) Curricula for pupils concerning domestic violence that are appropriate for various ages; and*
- (b) Curricula for school counselors, school health-care personnel, administrators, and teachers concerning domestic violence.*

2. The curricula must be selected or developed in consultation with public and private agencies that provide programs for victims of domestic violence and programs of intervention for perpetrators of domestic violence, advocates for victims, and persons who have demonstrated expertise and experience in education and domestic violence.

3. The curricula must include but are not limited to:

- (a) The nature, extent, and causes of domestic violence;*
- (b) Issues of domestic violence concerning children;*
- (c) The prevention of the use of violence by children;*
- (d) Sensitivity to gender bias and cultural, racial, and sexual orientation issues;*
- (e) Violence in dating and other social relationships of boys and girls;*
- (f) Practices designed to promote safety for the victim and other family and household members, including safety plans;*
- (g) Relevant provisions of the OST domestic violence code and any other applicable laws, regulations or statutes; and*
- (h) Information on available resources for victims of domestic violence or those residing in a domestic violence home environment.*

SECTION 511. Continuing education for school personnel who are required to report abuse and neglect of children.

1. The OST Education Committee shall provide courses of continuing education concerning domestic violence for employees who are required by law to report abuse or neglect of children.

2. The courses must be prepared and presented in consultation with public and private agencies that provide programs for victims of domestic violence, persons who have demonstrated expertise in education and domestic violence and advocates for victims.

3. The courses must include but are not limited to the following topics:

- (a) The nature, extent, and causes of domestic violence;*
- (b) Practices designed to promote safety of the victim and other family and household members, including safety plans;*

- (c) *Issues of domestic violence concerning children;*
- (d) *Sensitivity to gender bias and cultural, racial, and sexual orientation issues;*
- (e) *The lethality of domestic violence; and*
- (f) *Relevant provisions of the OST domestic violence code and any other applicable laws, regulations or statutes.*

SECTION 512. Initial training; OST Domestic Violence Code provisions.

Upon enactment of the OST Domestic Violence Code, and within thirty (30) days of the Code's effective date, Cangleska, Inc. shall provide to the OST Judiciary Committee training agendas for the immediate training of all Department of Public Safety, OST Court, OST Office of the Attorney General, and Cangleska, Inc. personnel on the provisions of the Domestic Violence Code. The training agendas shall provide for the completion of such training within 120 days from the effective date of this Code. Once approved by the OST Judiciary Committee, all named agencies shall coordinate with Cangleska, Inc. and designated training personnel to effectively get all their employees trained within the required 120 days. All other training and curricula required under this chapter shall be initiated within one (1) year of the effective date of the Code, unless otherwise provided for under this chapter.

Batterer's Reeducation Definitions

Nez Perce Tribal Code, Sec. 7-1-3(d) *Definitions*

Definition: "Program of Intervention for Perpetrators" means a specialized program that:

- (1) Accepts perpetrators of domestic violence into treatment or educational classes to satisfy court orders;*
- (2) Offers assessment and treatment to perpetrators of domestic violence; or*
- (3) Offers classes or instruction to perpetrators of domestic violence.*

Oglala Sioux Tribe Domestic Violence Code *Ch. 1, Sec. 103: Definitions (4)*

"Program of intervention for perpetrators" and/or "offender's program" means a specialized program that accepts court orders and voluntary participants that:

- 1. Offers intake, orientation, and placement in a domestic violence class;*
- 2. Offers a minimum of 24 re-education classes;*
- 3. Utilizes historical/ cultural information in re-educating perpetrators of domestic violence regarding responsible Lakota behavior in the family/community/nation;*
- 4. Makes available and integrates the specialized function, knowledge and expertise of elders and medicine people.*

TRIBAL CODE COMMENTARY

It is important to think about what prevention and education would entail in your community. An understanding of the operations and divisions of your tribal government is needed. You also need to envision how all these different agencies should work together to respond to survivors of domestic violence and people who are at risk of becoming either a perpetrator or victim in the future.

The first section of the Oglala Code outlines training for law enforcement. This section may or may not be applicable to your tribe depending on whether your tribe has its own police force. If you do not have your own police force, however, it is still possible to outline the education component in the code, as the Oglala Sioux did for the BIA or federal police forces working on their domestic violence cases. Although it may be difficult to enforce, your tribe can express its desire for state or federal police, working within your community, to be educated on domestic violence and responsive to your cases. Your community will have to be creative in working with state or federal law enforcement to educate them on your tribal code, culture, and domestic violence.

The next section deals with education of tribal court personnel. In this section, Cangleska, Inc., the tribe's domestic violence program, is responsible for administering the training. You will notice that different tribal departments are in charge of the education and training. Based on the resources, activities, and the organization of your tribal government, you will need to decide who should have these duties. It should also be noted that Oglala makes the training mandatory for tribal court personnel before they can deal with any domestic violence case. Also, the training agenda and topics covered are extremely comprehensive. The continuing education for tribal employees who work with children encompasses a wide range of community workers. Attorneys who work within the tribal court are also required to have several hours of domestic violence training through the Office of the Attorney General.

The following sections deal with domestic violence education within the school setting. The Education Committee is charged with developing appropriate curriculum for children and the people working with them. These actions can work to prevent and help in the recognition of domestic violence. The Education Committee is also responsible for continuing education classes for individuals who have a responsibility to report domestic violence so they can better recognize signs of abuse or trauma in children.

The final section provides an important timeline and training schedule needed to initiate the rest of the code. Cangleska, Inc. is charged with the initial education programs because its work centers on domestic violence.

Overall, the sections of this code are comprehensive because they cover a large number of tribal and nontribal employees, as well as a wide variety of training courses on domestic violence. If your tribe does not have tribal personnel in each of the areas covered by this code, it is still important to consider how you can work with nontribal employees to educate them on domestic violence in your community in order to work to prevent and recognize it.

Some tribal communities may decide that batterers' reeducation programs, alternative sentencing circles, peacemaking, or mediation programs are not appropriate for their community. Or your community may decide that it does not want to handle domestic violence perpetrators using those methods. This is an important discussion that needs to be held at a tribal level, with all tribal code participants and various groups participating in the decision process.

STEP 1: Determine Existing Law

Does your tribal code already contain laws concerning the education of tribal institutions on domestic violence or prevention programs?

☐ Yes

☐ No

If the laws exist, discuss whether the laws are relevant to the education of all institutions responsible for responding to domestic violence cases. Also evaluate whether the code covers any prevention programs. If the laws are working well, you may not need to work on this section.

STEP 2: Identify Community Needs

Brainstorm the various people in your community who need to receive education about domestic violence.

Possibilities:

- ☐ School children and teachers
- ☐ General community members
- ☐ Tribal court employees (e.g., prosecutor and judge)
- ☐ Attorneys
- ☐ Advocates
- ☐ Health care professionals (e.g., Health and Human Services, Indian Health Services, nurses, and midwives)
- ☐ Law enforcement
- ☐ Social services (e.g., child care workers and ICWA workers)

Point of Discussion: How do we get the word out?

Ask survivors! You can also get the viewpoints of varied community members, especially those working with domestic violence. There are no limits on who can receive education.

STEP 3: Identify Trainers and Resources

Who will be responsible for educating tribal institutions about domestic violence?

STEP 4: Batterer Intervention

Consider the batterers and potential batterers. How should the tribe educate potential batters to prevent violence? Or how should the community work to rehabilitate batterers so they can return to the community as productive members?

STEP 5: Draft the Law

Use your answers in the previous steps to help draft your prevention and intervention laws.

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

- ☐ Community education
- ☐ Training agencies
- ☐ Batterer intervention

GLOSSARY

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

Action: Term in usual legal sense means lawsuit.

Affidavit: A written statement of facts, made voluntarily and confirmed by the oath of the person making the affidavit before a person authorized to administer an oath, such as a notary public.

Arraignment: The procedure in which an accused is brought before a judge to hear criminal charges against him and to enter a plea.

Arson: Intentionally and wrongfully, burning a house or building. At times other property is also included in the definition.

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

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

Battery: An intentional, unconsented-to, physical contact by one person (or an object controlled by that person) with another person that results in some injury or offensive touching.

Burden of Proof: In evidence law it refers to the duty or obligation of a person, who is a party to the lawsuit, to prove a particular fact or issue through evidence.

Burglary: A person is guilty of burglary if he enters a building or dwelling for the purpose of committing a crime. Some laws classify the crime into first-, second-, and/or third-degree burglary with different definitions of each.

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

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

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

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

Codification: The process of collecting and arranging a government's statutes usually covering a particular area or subject of law, for example, U.S. Code, Turtle Mountain Tribal Code, and California Criminal Code.

Comity: When one government follows another's judicial decisions or laws, not because they are required to, but out of respect, courtesy, and goodwill.

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

Continuance: The postponement of a court proceeding to a later time.

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

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

Criminal Contempt: A crime that obstructs a judicial duty generally resulting in an act done in the presence of the court, for example, insulting a judge, disrupting a court proceeding, or refusal to answer questions.

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

Divest: Deprive or take away a right.

Deferred Prosecution: Prosecution is delayed, while offender is obligated to comply with certain conditions. If offender complies the charges are dismissed.

Deferred Sentencing: The offender is obligated to comply with certain conditions before he or she is sentenced in the case. The sentence is postponed.

Diversion Program: A program in which the offender is ordered to participate in a work or educational program as part of probation.

Docket: A formal record briefly entered of the proceedings in a court. A trial docket refers to the list of cases set to be tried before a court.

Domestic Violence: The definition of *domestic violence* varies from the federal to the state to the tribe. It includes behaviors used by one person in a relationship to control another. One of the key differences occurs in determining what a domestic relationship is, the possibilities are spouses and former spouses; persons living together or having resided together in the past; persons who have a child in common, including gay and lesbian parenting couples and cases in which the woman is pregnant but the child has not been born; persons related by blood or adoption, including parent-child, siblings, half-siblings and stepsiblings, and gay and lesbian relationships; and persons involved in a significant sexual or romantic relationship. Each law generally defines what type of behaviors would be considered. It could include name calling, stalking, sexual violence, physical violence, and numerous other activities. Some behaviors may be considered criminal and others not, depending upon the statute.

Due Process: The U.S. Constitution and ICRA require that no person be deprived of liberty or property without the due process of the law. There are two aspects: procedural due process, in which a person is guaranteed fair procedures, generally referring to a person's right to notice and an opportunity to present his or her side in a legal dispute; and substantive due process, which protects a person's property from unfair governmental interference or taking, requiring the laws to be fair and reasonable in content as well as application.

Elements: A basic part of a crime or civil action that must be proven. For example, some elements of a cause of action for battery are intentional, unwanted, physical contact. Each part, "intentional," "unwanted," etc. is one element.

Enhanced Penalties: Statute allows or requires that the punishment be increased due to the circumstances of the crime or repeating the crime.

Escrow Account: An account held for the benefit of another.

Ex Parte Petition: A written request that the court take some action immediately for the petitioner, without hearing the respondent's side, as in an ex parte petition for a restraining order. A court generally has certain criteria that must be met before responding to an ex parte petition with an ex parte order. Any order would be temporary out of concern for the respondent's due process rights.

Ex Parte Proceeding: Court proceeding in which only the petitioner participates, as in the case of an ex parte temporary restraining order.

Felony: A crime of a more serious nature than a misdemeanor. Under many state statutes it is punishable by more than a year in prison or even death.

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

Full Faith and Credit: A legal doctrine that means that an order issued in one jurisdiction, such as a tribal court, will be acknowledged as valid and enforceable in another jurisdiction, such as a state.

Good Faith: Generally a term that refers to honesty of intention; without intent to take advantage of another.

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

Hearsay: A term applied to testimony given by a witness who relates, not what he or she knows personally, but what others have told him or her, or what he or she has heard said by others.

Immunity: An exemption from a duty legally required of others, freedom from a duty or a penalty, for example, sovereign immunity (government's freedom from being sued) or immunity from prosecution (will not be charged with a crime, due to testimony against others).

In Camera Hearing: A private hearing in the judge's chambers or in which others are excluded.

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

Joint Custody: There is joint legal custody and joint physical custody. Joint legal custody involves parents jointly sharing responsibility and authority to make important decisions relative to their children. Joint physical custody means sharing the time with the child.

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

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

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

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

Mutual Protection Order: A protection order that restrains both parties.

Nolo Contendre: Latin phrase that means, “I will not contest it.” Has a similar effect in a criminal case as pleading guilty, but it is not an admission of guilt.

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

Perpetrator: A person who actually commits a crime.

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

Petitioner: One who presents a petition to a court.

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

Presentence Investigation: An investigation into the offender's background used by the judge in determining an appropriate sentence for the offender.

Pretrial Proceeding/Hearing/Conference: Court proceeding before trial to have the judge listen to issues or motions that affect the upcoming trial.

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

Probable Cause: Reasonable cause; having more evidence for than against.

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

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

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

Provision: A general term for a section in a statute, contract, or other legal instrument.

Rebuttable Presumption: In the law of evidence, a conclusion that will be drawn unless evidence is presented that counters it.

Relief: Remedy asked for in a petition.

Respondent: The person against whom an appeal is taken or against whom a petition is filed.

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

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

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

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

Sovereign Immunity: A judicial doctrine that prevents the government from being sued, without its consent.

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

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

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

Sua Sponte: Latin phrase meaning on his/her or its own motion. This refers to a judge making an order on his or her own without a request from the parties to the case.

Transcript: A written record of a court proceeding made by the court reporter.

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

Vacate: To nullify or cancel.

Victim Impact Statement: Statement generally read or given to a court at sentencing of an offender, which describes the harm and impact of the crime on the victim.