

# Chapter 11: Rights in Juvenile Proceedings

## [11.1] Overview

The early developers of juvenile justice systems in the United States (prior to 1967) intended legal interventions to be civil as opposed to criminal in nature.<sup>14</sup> The idea was to have informal proceedings, without legal procedures and evidentiary standards, which would allow the judge to get a “total picture” of the juvenile and to deal with the problems of the juvenile with prevention, treatment, and rehabilitation. The downside of this informality, as was demonstrated over and over again in the state court systems, was the absence of established guilt: an adjudication of delinquency was based upon the attitude of the child, the types of peers with whom he or she associated, or his or her family’s situation.

Fair hearings and high standards of proof of delinquency in juvenile proceedings have been generally required in state law since 1967 when the U.S. Supreme Court decided [In re Gault](#).<sup>15</sup> In *Gault*, the U.S. Supreme Court held that due process is required in juvenile court *adjudicatory proceedings*. *Gault* requires recognition and enforcement of constitutional rights, the application of certain rules of evidence, and the establishment, beyond a reasonable doubt, that allegations are supported by the admissible evidence. In the state systems, post-*Gault*, informality is still often permitted in the prehearing stages and generally accepted in the postadjudicatory hearings on disposition.

Tribal laws governing juvenile proceedings may appear to have criminal law characteristics. However, a good number of tribal laws governing juvenile proceedings appear to be civil in nature and may have a provision explicitly stating that they are civil proceedings. If a tribal court’s juvenile proceedings are civil in nature, this may be due to early state law influences with respect to informality and the desired purpose of rehabilitation. It is also likely due to the fact that federal limitations on the criminal jurisdiction of tribes make a civil jurisdiction scheme preferable to ensure that the tribal court fully exercises its powers and services in the interest of all juveniles and their family members within the jurisdiction of the tribe.

Even where a tribe’s juvenile code is civil in nature, it is still necessary to include provisions to protect the rights of juveniles, at a minimum, that comply with ICRA’s requirements for fair (due) process, and preferably, that comply with the “Juvenile 8” rights as directed by U.S. Supreme Court

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<sup>14</sup> Characterizations of state juvenile justice system process are taken from Steven M. Cox et al., *Juvenile Justice: A Guide to Theory, Policy and Practice*, Thousand Oaks, California: Sage Publications (2011).

<sup>15</sup> *In Re Gault*, 387 U.S. 1 (1967).

case law and federal statutes, and as generally applied across the state systems (see discussion below).<sup>16</sup> When a youth is found to be “delinquent,” it is like being found guilty of a crime, particularly where a juvenile may be subject to secure detention as a disposition whether it is treatment-based or not. While tribes are not bound to follow the U.S. Supreme Court case law on fair juvenile process in their lawmaking, a compelling argument can be made that they should do so to protect both the rights and welfare of tribal youth and their families.

## **Where do the “Juvenile 8” rights come from?**

The Juvenile 8 rights come from a combination of U.S. Supreme Court precedents (cases) and federal laws (statutes) protecting the rights of juveniles in the federal and state court systems and stem from U.S. Constitutional provisions.<sup>17</sup> While tribes may not be bound by federal or state law to set out and enforce these rights in tribal statutes, a compelling argument can be made that doing so effects the “due process” provision of the Indian Civil Rights Act for juveniles in tribal juvenile court. Tribes adopting provisions in their statutes consistent with the Juvenile 8 will ensure fair process for youth in their tribal juvenile justice systems.

The Juvenile 8 include the juvenile’s:

1. Right to counsel (In Re Gault, 387 U.S. 1 (1967));
2. Right to be notified of the charges (In Re Gault, 387 U.S. 1 (1967));
3. Right to have a speedy trial (Juvenile Delinquency Act, 18 U.S.C. § 5036; Interstate Agreement on Detainers, 18 U.S.C. Appendix 2, §2 Articles III-VI (time limits for persons incarcerated in other jurisdictions; & see also *Barker v. Wingo*, 407 U.S. 514 (1972));
4. Right to confront witnesses against the juvenile and subpoena and call witnesses on his or her behalf (In Re Gault, 387 U.S. 1 (1967));
5. Right to a fair trial (In Re Gault, 387 U.S. 1 (1967));
6. Right to not be a witness against oneself or otherwise incriminate self (In Re Gault, 387 U.S. 1 (1967));
7. Right that the juvenile’s case will not be transferred into the adult criminal court without due process (*Kent v. United States*, 383 U.S. 541 (1966); and

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<sup>16</sup> 25 U.S.C. § 1301 et seq.

<sup>17</sup> Tribal laws frequently incorporate the provisions of ICRA or in the alternative, incorporate provisions, often modified, directly from the U.S. Constitution, or even a state constitution.

8. Right not to be found to be a juvenile delinquent absent proof “beyond a reasonable doubt” (In Re Winship, 397 U.S. 358 (1970)).

There is no right to a jury trial in juvenile proceedings ([McKeiver v. Pennsylvania](#), 403 U.S. 528 (1971)), and in many jurisdictions, juvenile proceedings are closed to the public to protect the welfare of the juvenile.

Some of the rights of youth in tribal process are implicated throughout all stages of that process, from initial interactions with the police through court hearings and “sentencing.” Specified juvenile rights are particularly important when and if the youth is taken into custody and/or questioned (the concern here is what happens in interrogations); during a transfer hearing in tribal juvenile court (the concern being that a hearing with legal standards is undertaken before subjecting youth to adult criminal court process); and during a preliminary hearing and/or an adjudication (trial) in tribal juvenile court (the concern being that the juvenile court not merely accept unknowing admissions and/or false confessions and dispose of a trial before “sentencing” the youth). The table that follows reviews the comparative legal process requirements, standards, and evidentiary rules applied variously by ICRA, the 1989 BIA Tribal Juvenile Justice Code, and the University of Washington’s Center of Indigenous Research and Justice Model Tribal Juvenile Code, followed by a description of the varying provisions.

**Comparison of the statutory provisions of the Indian Civil Rights Act, the 1989 BIA Tribal Juvenile Justice Code, and the University of Washington’s Center of Indigenous Research and Justice Model Tribal Juvenile Code.**

Rights/privileges at various stages in juvenile process.	Indian Civil Rights Act (ICRA)	1989 BIA Tribal Juvenile Justice Model Code	Center of Indigenous Research and Justice Model Tribal Juvenile Code	
Custody (Interrogation)	<ul style="list-style-type: none"> <li>▪ No juvenile specific rights</li> <li>▪ No juvenile right against being compelled to be a witness against one’s self – applies to criminal cases only</li> <li>▪ Right to due process</li> </ul>	<ul style="list-style-type: none"> <li>▪ Privilege against self-incrimination</li> <li>▪ No questioning in custody except ...               <ul style="list-style-type: none"> <li>○ To identify</li> <li>○ Determine Parent, Guardian, or Custodian</li> <li>○ Medical assessment</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>▪ Right to Legal Counsel</li> <li>▪ Right to remain silent</li> <li>▪ Privilege against self-incrimination</li> <li>▪ Right to have Parent, Guardian, or Custodian</li> <li>▪ Statements made as result of interrogation inadmissible unless...               <ul style="list-style-type: none"> <li>○ Advised and waived</li> <li>○ Made after consulting with and in presence of legal counsel</li> <li>○ Recording made</li> <li>○ No threats.</li> </ul> </li> </ul>	▪

Potential Transfer to Adult Criminal Court (Factors)	<ul style="list-style-type: none"> <li>▪ No juvenile specific rights</li> <li>▪ No juvenile right against being compelled to be a witness against one's self – applies to criminal cases only</li> <li>▪ Right to due process</li> </ul>	<ul style="list-style-type: none"> <li>▪ Court must find by clear and convincing evidence that ... <ul style="list-style-type: none"> <li>○ No reasonable prospects for rehabilitating</li> <li>○ Offenses evidence a pattern of conduct that constitutes a substantial danger public</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>▪ No transfers to adult criminal court authorized by statute</li> </ul>	▪
Preliminary Hearing &/or Adjudication (Trial) (Admissions)	<ul style="list-style-type: none"> <li>▪ No juvenile specific rights</li> <li>▪ No juvenile right against being compelled to be a witness against one's self –applies to criminal cases only</li> <li>▪ Right to due process</li> </ul>	<ul style="list-style-type: none"> <li>▪ Court may accept an admission (like a guilty plea) if ... <ul style="list-style-type: none"> <li>○ Understands rights &amp; consequences</li> <li>○ Voluntary</li> <li>○ Intelligently</li> <li>○ Knowingly admits</li> <li>○ No facts = defense</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>▪ Right to Counsel</li> <li>▪ Right to due process including: <ul style="list-style-type: none"> <li>○ Notice</li> <li>○ Opportunity to be heard</li> <li>○ Discovery</li> <li>○ Testify</li> <li>○ Subpoena witnesses</li> <li>○ Introduce evidence</li> <li>○ Cross-examine witnesses</li> <li>○ Findings based solely upon evidence</li> </ul> </li> </ul>	▪
Adjudication (Trial)& Evidence (Out of Court Admission or Confession)	<ul style="list-style-type: none"> <li>▪ No juvenile specific rights</li> <li>▪ No juvenile right against being compelled to be a witness against one's self – applies to criminal cases only</li> <li>▪ Right to due process</li> </ul>	<ul style="list-style-type: none"> <li>▪ Valid out-of-court admission or confession insufficient w/out corroborating evidence</li> <li>▪ Statements made in custody to JC not used</li> </ul>	All of above for preliminary hearings. Plus same as 1989 BIA Tribal Juvenile Justice Code to left.	

The table compares the statutory provisions of ICRA, the [1989 BIA Tribal Juvenile Justice Code](#), and the University of Washington's Center of Indigenous Research and Justice [Model Tribal Juvenile Code](#). Relevant excerpts of the model codes are set out in the following text. We have compared and contrasted provisions as they apply to four critical stages of a tribal juvenile justice process and in answer to the question—why might so many tribal juvenile cases be transferred out, or if they remain in tribal juvenile court, why might they proceed to disposition (“sentencing”) without undergoing adjudication (“trial”)? The answer, we suspect, would be that tribal youth either admit to committing an offense early on or that they “plead guilty” during preliminary hearings. If this is the case, then it will be important to include tribal statutory protections against false and

coerced confessions, unknowing admissions, and use of what would be inadmissible evidence in juvenile proceedings in jurisdictions following U.S. Supreme Court precedent on fair process in juvenile proceedings. The four critical areas of tribal process include: (1) questioning, custody, and interrogation; (2) transfer hearings to adult criminal court (or to federal or state court); (3) preliminary hearings and/or adjudications in tribal juvenile court; and (4) in tribal juvenile adjudications specifically, the applicable rules of evidence.

**The Indian Civil Rights Act**—ICRA sets out only two rights applicable to tribal juvenile court process: due process and equal protection. None of ICRA’s criminal provisions apply to juveniles. The act requires that tribes treat everyone fairly and equally. Some may argue that the ICRA due process provision alone should be sufficient to ensure that all of the “Juvenile 8” rights are legally recognized and enforced. The difficulty is that this hasn’t been the experience in the state juvenile systems, where decades of abuses have resulted in a series of U.S. Supreme Court cases delineating specific rights and process to be applied in state and federal juvenile cases. In the tribal context, many tribal courts operate with lay judges and advocates who may not be familiar with the U.S. Supreme Court’s juvenile case law, or for that matter, with comparative tribal and state juvenile court process. It will be important to discuss hardwiring in specific juvenile statutory rights protections into the tribal laws applicable to tribal youth. This will ensure that tribal juvenile judges, court personnel, and advocates recognize, apply, and enforce them.

**(1989) BIA Tribal Juvenile Justice Code**—The BIA Tribal Juvenile Justice Code includes a number of specific juvenile statutory protections applicable to:

- **Questioning/Custody/Interrogation**—The BIA Tribal Juvenile Justice Code recognizes a youth’s right not to be compelled to answer questions that might incriminate him or her in tribal juvenile proceedings (the “privilege against self-incrimination,” a.k.a. “Fifth Amendment right” under the U.S. Constitution). It also prohibits questioning of youth who are taken into custody except to identify him or her, to determine who his or her parent(s), guardian, or custodian is, or for purposes of medical assessment.
- **Transfer Hearings**—The BIA Tribal Juvenile Justice Code requires that a tribal juvenile court find by “clear and convincing evidence” that there are no reasonable prospects for rehabilitating a youth and that the alleged offenses demonstrate that the youth has a pattern of conduct that poses a substantial danger to the public, before it can transfer him or her to an adult criminal court to be processed.
- **Preliminary Hearings/Adjudications (Re: Admissions)**—BIA Tribal Juvenile Justice Code requires that, before accepting a youth’s “guilty plea,” the tribal juvenile court judge questions the youth about whether he or she understands his or her rights and the consequences of admitting to having committed the alleged offense, whether he or she voluntarily, intelligently, and knowingly admits to all the facts necessary to prove the alleged

offense, and where the judge has determined that the youth has not, in his or her statements, set forth facts that, if true, would be a defense to the alleged offense.

- **Adjudications (Re: Rules of Evidence)**—BIA Tribal Juvenile Justice Code also makes a youth's out-of-court admission, for example to a police officer, inadmissible in a trial (adjudication) unless other evidence is offered; in addition, that would point to the youth's having committed the alleged offense. Also, any statements made by the youth to the juvenile counselor are inadmissible later at trial. Finally, any out-of-court statements or illegally seized or obtained evidence, that would be inadmissible in an adult criminal trial, are likewise inadmissible.

**Model Tribal Juvenile Code of the University of Washington's Center of Indigenous Research and Justice**—The University of Washington's Center of Indigenous Research and Justice Model Tribal Juvenile Code includes a number of specific juvenile statutory protections applicable to:

- **Questioning/Custody/Interrogation**—The University of Washington's Center of Indigenous Research and Justice Model Tribal Juvenile Code provides a specific list of rights and a requirement to advise the youth of these rights for youth during custody and interrogation, including the right to legal counsel, the right to remain silent, the privilege against self-incrimination, and the right to have a parent, guardian, or custodian present. Further, the code makes any of the youth's custodial statements inadmissible unless the youth was advised of his or her rights and waived them, made the statement(s) after consulting with and in the presence of legal counsel, a recording was made of the statement(s), and the youth was not threatened in making the statement(s).
- **Transfer Hearings**—The University of Washington's Center of Indigenous Research and Justice Model Tribal Juvenile Code does not recommend or authorize transfers from tribal juvenile court to adult tribal criminal court.
- **Preliminary Hearings/Adjudications (Re: Admissions)**—The University of Washington's Center of Indigenous Research and Justice Model Tribal Juvenile Code sets out a comprehensive list of due process rights for youth in all proceedings under the code, and after adjudication (or in contempt proceedings). Such rights include the youth's parent's, guardian, or custodian, including rights to notice of all proceedings, the opportunity to be heard before an unbiased fact-finder, the right to do discovery, the right to testify, the right to subpoena witnesses, the right to introduce evidence on one's own behalf, the right to cross-examine witnesses, and the right to have court findings be based solely upon the evidence properly admitted in hearings before the juvenile court. In delinquency proceedings, the youth has a right to counsel at all stages of the juvenile proceedings. His or her parent(s), guardian, or custodian has a right to counsel at the youth's disposition proceedings and in any contempt proceedings. The code modifies the right to counsel in

“child-in-need-of-services” proceedings (or proceedings involving status offenses or truancy) to include the youth’s right to be represented at any services planning conference and at all stages of any subsequent proceedings, and at all stages where a child-in-need-of-services petition has been filed. The model code also sets out comprehensive rights for youth including the privilege against self-incrimination; the right not to be fingerprinted, photographed, or to have any tissue samples taken absent a court order; the right not to be detained in a secure detention facility (except in compliance with the delinquency provisions) or in a jail, adult lock up or other detention facility; and special confidentiality provisions with respect to hearings and informal conferences (e.g., closed to the public), inspection of records, identifying information, and disclosures.

- **Adjudications (Re: Rules of Evidence)**—The University of Washington’s Center of Indigenous Research and Justice Model Tribal Juvenile Code includes comprehensive rules of evidence specific to tribal juvenile delinquency proceedings, including (1) rules of admissibility modeled on the 1989 Tribal Juvenile Justice Code mentioned previously; (2) that oral, written, or other statements made as a result of an interrogation are inadmissible unless the youth was advised of his or her rights and waived them, made the statement(s) after consulting with and in the presence of legal counsel, a recording was made of the statement(s), and the youth was not threatened in making the statement(s); and (3) before permitting a youth’s statement to be introduced as evidence against the youth, the court must find that the statement was voluntarily and knowingly made, taking into account a list of factors (e.g., age, maturity, education, intelligence, mental development, physical and mental condition, consultation with parents/counsel, length of time interrogated, environment of interrogation, number of officers present, use of deception, use of isolation, food or sleep deprivation, or other coercive measures).

## [11.2] Model Code Examples

### (1989) BIA Tribal Juvenile Justice Code 1-3 TRANSFER TO TRIBAL COURT

#### **1-3 A. Transfer Petition**

An officer of the court may file a petition requesting the juvenile court to transfer the child to the jurisdiction of the adult tribal court if the child is sixteen (16) years of age or older and is alleged to have committed an act which would have been considered a serious crime if committed by an adult.

#### **1-3 B. Transfer Hearing**

The juvenile court shall conduct a hearing to determine whether jurisdiction of the child should be transferred to tribal court. The transfer hearing shall be held within ten (10) days of

receipt of the petition by the court. Written notice of the time, place and purpose of the hearing is to be given to the child and the child's parent, guardian, or custodian at least three (3) days before the hearing. At the commencement of the hearing, the court shall notify the child and the child's parent, guardian or custodian of their rights under chapter 1-7 of this code.

### **1-3 C. Deciding Factors in Transfer Hearing**

The following factors shall be considered when determining whether to transfer jurisdiction of the child to tribal court:

1. the nature and seriousness of the offense with which the child is charged;
2. the nature and condition of the child, as evidenced by his age, mental and physical condition; and
3. the past record of offenses.

### **1-3 D. Standard of Proof in Transfer Hearing**

The juvenile court may transfer jurisdiction of the child to tribal court only if the court finds clear and convincing evidence that both of the following circumstances exist:

1. there are no reasonable prospects for rehabilitating the child through resources available to the juvenile court; and
2. the offense(s) allegedly committed by the child evidence a pattern of conduct with constitutes a substantial danger to the public.

## **1-7 Rights of Parties in Juvenile Proceedings.**

### **1-7 A. Privilege against Self-Incrimination.**

A child alleged to be a "juvenile offender" or a child whose family is "in need of services" shall from the time of being taken into custody be accorded and advised of the privilege against self-incrimination and from the time the child is taken into custody shall not be questioned except to determine identity, to determine the name(s) of the child's parent or legal custodian, or to conduct medical assessment or treatment for alcohol or substance abuse under section 1-13C of this code when the child's health and well-being are in serious jeopardy.

(1-7 B. Omitted)

### **1-7 C. Fingerprinting and Photographs.**



A child in custody shall not be fingerprinted nor photographed for criminal identification purposes except by order of the juvenile court. If an order of the juvenile court is given, the fingerprints or photographs shall be used only as specified by the court.

#### **1-7 D. Right to Retain Counsel.**

In “juvenile offender” and “family in need of supervision” cases, the child and his parent, guardian, or custodian shall be advised by the court and/or its representative that the child may be represented by counsel at all stages of the proceedings. If counsel is not retained for the child, or if it does not appear that counsel will be retained, the court in its discretion may appoint counsel for the child.

#### **1-7 E. Explanation of Rights.**

At his first appearance before the juvenile court, and at each subsequent appearance before the court, the child alleged to be a “juvenile offender” or a child whose family is “in need of services” and the child’s parent, guardian, or custodian shall be informed by the court of the following:

1. the allegations against him;
2. the right to an advocate or attorney at his own expense;
3. the right to testify or remain silent and that any statement made by him may be used against him;
4. the right to cross-examine witnesses;
5. the right to subpoena witnesses on his own behalf and to introduce evidence on his own behalf; and
6. the possible consequences if the allegations in the petition are found to be true.

#### **1-8 JUVENILE OFFENDER--TAKEN INTO CUSTODY**

(1-8 A. Omitted)

#### **1-8 B. Provision of Rights [when a Juvenile Offender is taken into custody]**

At the time the child is taken into custody as an alleged “juvenile offender,” the arresting officer shall give the following warning:

1. the child has a right to remain silent;
2. anything the child says can be used against the child in court;

3. the child has a right to the presence of his parent, guardian, or custodian and/or retained counsel during questioning, and;
4. the child has a right to an advocate or attorney at his own expense.

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**University of Washington**  
**Center of Indigenous Research and Justice**  
[Model Tribal Juvenile Code](#)  
**CHAPTER 1 GENERAL PROVISIONS**

**1.10 RIGHTS OF PARTIES**

**1.10.010 Due Process Rights**

In all proceedings conducted under [the provisions of this title], the parties shall have the right to due process, including:

- (a) the right to adequate notice of all proceedings, and the opportunity to be heard before an unbiased finder of fact;
- (b) the right to discovery [as provided for herein];
- (c) the right to testify, the right to subpoena witnesses, and the right to introduce evidence on the party's own behalf;
- (d) the right to cross-examine witnesses, except in such cases as this [title] expressly permits the use of hearsay testimony; and
- (e) the right to findings which are based solely upon evidence properly admitted in hearings before the Juvenile Court.

**1.10.030 Right to Counsel**

- (a) Neither a child nor the child's parent, guardian or custodian may waive the child's right to be represented by counsel.
- (b) Where counsel has not already been appointed or retained to represent the child, the Juvenile Court shall appoint the juvenile advocate, or other qualified and competent counsel, to represent the child at the child's first appearance before the Juvenile Court.

- (c) Prior to the child's first appearance before the Juvenile Court, the juvenile advocate shall be authorized to represent the child, without formal appointment by the Juvenile Court, in any proceedings conducted under the provisions of this title.
- (d) Upon presentation by counsel for the child of an order of appointment or a court order specifically allowing such access, any tribal agency, department, authority, institution, school, or health care provider shall permit counsel for the child to inspect and copy, without the consent of the child or the child's parent, guardian, or legal custodian, any records relating to the child involved in the case.

#### **1.10.050 Privilege Against Self-Incrimination**

Every child coming within the jurisdiction of the Juvenile Court shall be accorded and advised of the privilege against self-incrimination, and the child's exercise of the privilege shall not be used against the child in any proceedings conducted pursuant to [the provisions of this title].

#### **1.10.070 Fingerprinting and Photographs**

- (a) A child shall not be fingerprinted, photographed or have any tissue sample taken except by written order of the Juvenile Court.
- (b) Fingerprints, photographs or tissue samples from a child taken pursuant to a written order of the Juvenile Court shall be used only as specified in the written order.
- (c) This provision, however, shall not disallow photographs taken or fingerprints collected during an investigation.

#### **1.10.090 Secure Detention**

In no case shall a child be detained:

- (a) in a secure juvenile detention facility, except in accordance with [the relevant provisions of the delinquency code, where the child is alleged or found to have committed a delinquent act]; or
- (b) in a jail, adult lock-up or other adult detention facility.

#### **1.10.120 Confidentiality**

- (a) All Juvenile Court hearings and informal conferences held pursuant to this article shall be closed to the public.

- (b) Only the Juvenile Court judges, juvenile case coordinators, juvenile presenting officers, counsel, law enforcement officers, witnesses, the parties, service providers and such family and friends of the child to whose presence the parties have no reasonable objection, may be present.
- (c) All records concerning a child are open to inspection only by his or her parent, custodian or guardian, their counsel or other legal representative, or other parties to related proceedings before the court.
- (d) With the consent of the court, records may be inspected by the child.
- (e) The name, picture, place of residence, or any other identifying information concerning any child, parent, custodian or guardian, or person appearing as a witness in any proceeding held pursuant to this article, shall not be published in any newspaper, newsletter, electronic publication, internet site, nor be given for any other publicity.
- (f) Unless otherwise provided in this article, and except as is necessary to conduct an investigation or properly adjudicate the matter, no person shall disclose any identifying information concerning a matter conducted pursuant to this title. The Juvenile Court judge shall so warn those in attendance at each proceeding held pursuant to this title.
- (g) Any person who violates any provision of this section maybe subject to a civil contempt order by the Juvenile Court.

## **CHAPTER 2 DELINQUENCY**

### **2.02 RIGHTS OF PARTIES**

#### **2.02.110 Parties in Delinquency Proceedings**

The parties to all proceedings conducted pursuant to the provisions of this chapter shall be:

- (a) the child;
- (b) the Tribe; and
- (c) following adjudication, the child's parent, guardian or custodian.

#### **2.02.130 Right to Counsel**

- (a) The child shall be represented by counsel at all stages of any proceedings conducted pursuant to the provisions of this chapter.

- (b) The child's parent, guardian or custodian shall have the right to be represented by counsel at disposition, and in any proceedings for contempt brought against the child's parent, guardian or custodian pursuant to the provisions of this chapter.

#### **2.02.150 Hearings - Advisement of Rights**

At the commencement of all hearings conducted pursuant to the provisions of this chapter, the Juvenile Court shall advise the child, in language the child will easily understand:

- (a) of the nature and purpose of the proceedings;
- (b) of the right to counsel;
- (c) of the right to remain silent, and that any statement made by the child may be considered by the Juvenile Court as evidence that the child committed a delinquent act;
- (d) of the right to appeal any final order of the Juvenile Court.

### **2.04 INTERROGATION**

#### **2.04.110 Interrogation and Custodial Interrogation - Definitions**

For the purposes of this chapter:

- (a) an interrogation occurs whenever a law enforcement officer or other official asks a child a question, or subjects a child to any words or actions, that the law enforcement officer or other official knows or should know is reasonably likely to elicit an incriminating response; and
- (b) a custodial interrogation is any interrogation during which a reasonable person of the child's age and in the child's position would consider himself or herself to be unable to terminate the encounter.

#### **2.04.130 Advisement of Rights**

- (a) Prior to interrogating a child, the law enforcement officer or other official shall advise the child, in language the child will easily understand:
  - (1) that the child has the right to remain silent, and anything the child says may be used against the child in court;
  - (2) that the child has the right to have his or her parent, guardian or custodian present during any questioning;

- (3) that the child has the right:
  - (A) to be represented by counsel;
  - (B) to consult with counsel prior to any questioning; and
  - (C) to have counsel present during any questioning.
- (b) Prior to initiating or resuming the interrogation of any child, the law enforcement officer or other official shall again advise the child as required by subsection (a):
  - (1) if there has been any lapse in time since the prior advisement, including but not limited to circumstances in which the interrogation is resumed or reinitiated after ceasing or being interrupted for any reason; or
  - (2) if the law enforcement officer or other official is not the person who most recently advised the child as required by subsection (a), and:
    - (A) the law enforcement officer or other official was not present during the prior advisement; or
    - (B) the child was unaware that the law enforcement officer or other official was present during the prior advisement.

#### **2.04.150 Inadmissible Statements and Derivative Evidence**

- (a) An oral, written, or other statement of a child made as a result of any interrogation shall be inadmissible as evidence against the child in any delinquency or criminal proceedings, unless:
  - (1) the child was advised in accordance with §2.04.130; and
  - (2) the child clearly and affirmatively waived his or her rights before being questioned.
- (b) An oral, written, or other statement of a child made as a result of a custodial interrogation shall be inadmissible as evidence against the child in any delinquency or criminal proceedings, unless:
  - (1) the statement is made after consultation with and in the presence of counsel;
  - (2) an electronic recording is made of the custodial interrogation; and
  - (3) the recording is accurate and not intentionally altered.

- (c) An oral, written, or other statement of a child made as a result of any interrogation prior to or during which the child was subjected to threats or physical punishment shall be inadmissible as evidence against the child in any delinquency or criminal proceedings.
- (d) If the Juvenile Court finds that a statement is inadmissible under this section, then any statements or other evidence derived from the inadmissible statement, including subsequent statements made by the child, shall be likewise inadmissible as evidence against the child in any delinquency or criminal proceedings.

## **CHAPTER 3 CHILD IN NEED OF SERVICES.**

### **3.02 RIGHTS OF PARTIES**

#### **3.02.110 Right to Counsel**

- (a) The child shall be represented by counsel:
  - (1) at any services planning conference conducted pursuant to the provisions of §§ 3.07.1 10, et seq., and at all stages of any subsequent proceedings conducted pursuant to the provisions of this chapter; and
  - (2) at all stages of any proceedings conducted pursuant to the filing of a child in need of services petition in accordance with § 3.08.130.
- (b) The child's parent, guardian or custodian shall have the right to be represented by counsel [at disposition, and] in any proceedings for contempt brought against the child's parent, guardian or custodian pursuant to the provisions of this chapter.

## **[11.3] Tribal Code Examples**

### **Sault Ste. Marie Tribal Code**

#### **[Chapter 36: Juvenile Code](#)**

### **SUBCHAPTER IV: ORGANIZATION AND FUNCTION OF THE JUVENILE DIVISION**

#### **36.402 Rights of Parties in Juvenile Proceedings.**

- (1) A child alleged to be a juvenile offender shall from the time of being taken into custody be accorded and advised of the privilege against self-incrimination and should not be questioned without the presence or permission of the parent, guardian, or custodian except to determine identity, to determine the name(s) of the child's parents or legal custodian, or to conduct medical assessment or treatment for alcohol or substance abuse when the child's health and well-being are in serious jeopardy.

- (2) Omitted
- (3) In juvenile offender cases, the child and his parent, guardian, or custodian shall be advised by the Court and/or its representative that the child may be represented by counsel at all stages of the proceedings. If counsel is not retained for the child, or if it does not appear that counsel will be retained, the Court in its discretion may appoint counsel for the child.
- (4) At his first appearance before the Juvenile Division, the child alleged to be a juvenile offender and the child's parent, guardian or custodian shall be informed by the Court of the following:
  - (a) The allegations against him.
  - (b) The right to an advocate or attorney at his own expense.
  - (c) The right to testify or remain silent and that any statement made by him may be used against him.
  - (d) The right to cross-examine witness.
  - (e) The right to subpoena witnesses on his own behalf and to introduce evidence on his own behalf.
  - (f) The possible consequences if the allegations in the petition are found to be true.

#### **36.403 Taking a Child into Custody.**

- (1) Omitted
- (2) At the time the child is taken into custody as an alleged juvenile offender, the arresting officer shall give the following warning:
  - (a) The child has the right to remain silent.
  - (b) Anything the child says can be used against the child in court.
  - (c) The child has a right to the presence of his parent, guardian, or custodian and/or counsel during questioning.
  - (d) The child has a right to an advocate or attorney at his own expense.



## **CHAPTER 7 - KALISPEL YOUTH CODE**

### **PART 1 GENERAL PROVISIONS**

#### **Section 7-16 Rights of Parties**

##### **Section 7-16.01 Rights**

All parties are entitled to the following rights in all proceedings under this Code:

1. A statement by the Court to the youth and his or her parent(s), guardian, or custodian that the youth has the right to have a legal representative's advice and representation, at his or her expense. A party may request a continuance of a proceeding in order to seek legal representation;
2. The opportunity to subpoena witnesses;
3. The opportunity to introduce, examine, and cross-examine witnesses;
4. The opportunity to discover, offer, and inspect evidence; and
5. The opportunity to present arguments and statements.

##### **Section 7-16.02 Jury Trial**

There is no right to a jury trial for any proceeding under this Code.

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## **OGLALA SIOUX TRIBE LAW AND ORDER CODE**

### **Chapter 5: Juvenile Code**

#### **SUBCHAPTER II RIGHTS AND OBLIGATIONS**

##### **Section 2.01 Rights in Juvenile Offender Proceedings.**

At every stage of a juvenile offender proceeding under Chapter 5 of the Juvenile Code, the minor involved and his parents, guardian, or custodian shall be afforded the following rights, in addition to any others which may be available or provided by any other provisions of the Oglala Sioux Tribal Code:

- a) The right to have retained counsel at all hearings;
- b) The right to be present when any and all Tribal witnesses testify;
- c) The right to introduce evidence for and on their own behalf and to have witnesses subpoenaed to be present to testify for and on their behalf;
- d) The right not to be a witness against or otherwise incriminate themselves;

- e) The right to question or otherwise examine any witnesses who testify for and on behalf of the Tribe;
- f) The right to request a new hearing within ten (10) days after the adjudicatory hearing and the dispositional decision, on the grounds that new evidence has been discovered, which was not available at the original adjudicatory hearing;
- g) The right to appeal to the Oglala Sioux Tribal Court of Appeals, provided appellate procedure under the Tribal Code is followed accordingly.

## [11.4] Tribal Code Commentary

The 1989 BIA Tribal Juvenile Justice Code has served as a “model code” for many tribes to date. Section 1-7 “Rights of the Parties in Juvenile Proceedings” effectively provides for notification of five of the seven rights critical to juvenile proceedings (right to counsel, notice of charges, right to a fair hearing, right to confront and cross-examine witnesses, and protection against self-incrimination). The remaining two (no transfer to adult court absent a hearing and specified reasons and the requirement of proof beyond reasonable doubt) are set out in later sections of the code. It is noteworthy that Section 1-7A “Privilege against Self-Incrimination” provides significant protection for youth where it requires notification of the privilege from the time a child is taken into custody and prohibits the questioning of a child beyond identification and/or treatment or emergency purposes.

A good number of tribes have followed the 1989 BIA Tribal Juvenile Justice Code provisions with modifications. A good example of this is the juvenile code of the Sault Ste. Marie Tribe. The Sault Ste. Marie rights provisions are identical to the model with the omission of the right not to be fingerprinted or photographed for criminal identification purposes. This may be due to the fact that many tribes lack the resources to do so for even their adult criminal defendants.

The Kalispel Youth Code, Section 7-16.02 “Jury Trial” provides an example of a tribe that explicitly denies the right to a jury trial in juvenile proceedings. This is consistent with most state juvenile proceedings. It is also consistent with the research on adolescents that argues against the use of public proceedings due to potential harms to youth and stigmatization of youth. In many tribal communities the use of a jury in a kin-based society, would, in effect, publicize the proceeding.

The Oglala Sioux Tribe, in its Section 2.01(f) guarantees a right to request a new hearing where new evidence has been discovered after an adjudicatory hearing or dispositional decision. This right appears unique across the tribal juvenile statutes reviewed.

## [11.5] Exercises

The following exercises are meant to guide you in writing the “rights” section of the tribal juvenile code.

- Find and examine your juvenile code provisions setting out juvenile rights—does your list contain the “Juvenile 8”?
  - right to counsel (lay advocate or lawyer at own expense)
  - right to be notified of the charges
  - right to have a speedy trial
  - right to confront/cross-examine witnesses against the youth and to subpoena and call witnesses on his or her behalf
  - right to a fair trial (right to due process)
  - right to not be a witness against oneself or otherwise incriminate oneself
  - right not to have a case transferred into adult criminal court without a hearing and clear and convincing evidence that . . .
    - No reasonable prospects for rehabilitating through resources available; and
    - Offense(s) allegedly committed evidences a pattern of conduct that constitutes a substantial danger to the public
  - right not to be found to be a juvenile delinquent absent proof “beyond a reasonable doubt”
- If not, find and examine your constitution and/or judicial or court establishment code—do you have a general list that applies to everyone (adults and youth)? Is it based on the ICRA list (it usually begins, “No Indian tribe in exercising powers of self-government shall”)? Or is it based on the federal or a state constitution list?
- Discuss whether you want your youth to have the specially tailored “Juvenile 8” rights in juvenile court.
- Discuss whether you want your youth to have tribally paid for legal counsel in juvenile court (an attorney or lay advocate).

## Read and Discuss\*

**Should a tribe pay for and provide attorneys or lay advocates for youth involved in tribal juvenile court?**

The question of whether the tribe should provide an attorney or other well-trained lay advocate for juvenile offenders is an important decision and could have a dramatic impact on the fairness of your juvenile process. Read the following excerpt from testimony by Nadia Seeratan, Senior Staff Attorney and Policy Advocate, National Juvenile Defender Center at the Hearing on Native Children Exposed to Violence, February 11, 2014 in Scottsdale, AZ, and discuss.

The juvenile defender is a unique role in that they are the only person in the justice system whose role it is to express the expressed interest of the child. By representing the expressed interest of a child, the defense attorney becomes the child's voice in a proceeding that is overwhelmingly confusing and frightening for young people. Although decisions of the United States Supreme Court—afford a constitutional right to counsel for youth are not binding on tribal nations—JDC believes these decisions, which recognize developmental science and brain science research, brings important information to bear and should provide persuasive and compelling arguments for the need for legal representation for all juveniles including American Indian and Alaska Native youth in tribal courts. So I'll start with Gault, the United States Supreme Court Case 47 years ago that provided juveniles with the right to counsel. In Gault, the court found that the child requires the guiding hand of counsel at every step in the proceedings, because the juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into facts and to insist upon the regularity of proceedings. The court recognized the unique and critical role of the defender, stating the probation officer cannot act as counsel for the child, his role is an arresting officer and witnessing as the child, nor can the judge represent the child.