Legal Education Series

Children's Justice Act (CJA) Program For Native Americans Tribal Code Revision Resource Packet

NATIONAL INDIAN JUSTICE CENTER

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The National Indian Justice Center, Inc. (the Center) is an Indian owned and operated non-profit corporation with principal offices in Petaluma, California, (707) 762-8113. The Center was created through the combined efforts of those concerned with the improvement of tribal court systems and the administration of justice in Indian country. Its goals are to design and deliver legal education, research, and technical assistance which promote this improvement.

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CHILDREN'S JUSTICE ACT (CJA) PROGRAM FOR NATIVE AMERICANS TRIBAL CODE REVISION RESOURCE PACKET

This tribal code revision resource packet is designed to provide assistance for Native American CJA program grantees. The following are possible guidelines for use in revising tribal codes to improve the investigation and prosecution of child abuse and neglect cases in Indian country. The general guidelines are supplemented with a series of more detailed appendices.

I. General Tribal Code Revision Guidelines

A. Drafting Tribal Laws - A Manual for Tribal Governments (Appendix A)

Appendix A contains an extensive guide to the tribal code revision process in general. This manual provides very useful resource information which should be reviewed before undertaking the tribal code revision process.

B. General Guidelines

The end of Appendix A contains an article on the tribal code revision process entitled "Tribal Child Protection Codes" which sets forth a series of problems which tribes have experienced concerning tribal code revision and some general guidelines for the code revision process. A few additional guidelines are that (1) any tribal code revisions should reduce legalese as much as possible so that the community can understand the code and (2) multiple copies of the code should be made available to the community.

C. **National Indian Law Library Tribal Code Project**

The final section of Appendix A contains information on the National Indian Law Library Tribal Code Project. This project has developed and analyzed an extensive collection of tribal codes and serves as a vital resource for tribes who are considering developing or revising tribal codes.

D. **Tribal Child/Family Protection Code (Appendix B)**

This code (developed by NIJC) provides tribes with a guide when drafting or revising child protection codes. It includes both a model code and extensive commentary explaining the code and how to adapt the code to meet the needs of an individual tribe. The code covers civil child abuse and neglect, child custody, foster care licensing, guardianship, termination of parental rights and adoption.

E. **Tribal Juvenile Justice Code (Appendix C)**

This code (developed by NIJC) provides tribes with a guide when drafting or revising juvenile justice codes. It includes both a model code and extensive commentary explaining the code and how to adapt the code to meet the needs of an individual tribe. The code addresses juvenile delinquency proceedings and a narrow range of status offenses.

II. Children's Bill of Rights

The tribe should consider adopting a comprehensive children's bill of rights. An example of a tribal children's bill of rights from the Salt River Pima-Maricopa Indian Community is included in Appendix D. In addition, the tribe should consider adding a section to the code which provides a statement of traditional tribal child rearing practices and states that child sexual abuse was not a traditional practice and is not an acceptable community practice.

III. Criminal Provisions

A. Jurisdiction Issues

Child abuse and neglect cases often involve non-members and non-Indians. Although tribal courts do not have criminal jurisdiction over non-Indians (*Oliphant v. Suquamish Indian Tribe*), tribal courts still maintain civil jurisdiction over non-Indians (see section IV below). The *Duro* case had placed the issue of tribal court criminal jurisdiction over non-members in doubt, but Congress has recently acted to permanently restore tribal court criminal jurisdiction over non-member Indians (see Appendix E). It is important that the tribal code assert the greatest possible criminal jurisdiction. This includes the assertion of criminal jurisdiction over non-member Indians.

B. Exclusion Code

Exclusion ordinances are necessary for the tribe to be able to exclude persons who commit child abuse acts, especially non-Indians who are not subject to the tribal court's criminal jurisdiction. Pages 71-72 of Appendix A contains guidance for developing exclusion codes.

C. Concurrent Jurisdiction Over Major Crimes

The federal courts have criminal jurisdiction over 16 major crimes set forth in the Major Crimes Act (18 U.S.C. 1153) when committed by an Indian within Indian country. There are many instances in which the federal authorities fail to prosecute for various offenses, including child sexual abuse. Consequently, tribal courts have been forced to consider criminal prosecution in tribal court. Until recently, however, most tribal codes did not include these 16 major crimes. Tribes should including the 16 major crimes within the tribal code so that if someone is prosecuted in tribal court they will actually be prosecuted for the major crime and not just for the lesser included offense. In 1984, the BIA finally recognized the need for tribal codes to

include the 16 major crimes in tribal codes and decided to approve tribal codes which include the 16 major crimes (see Appendix F).

D. Specific Child Abuse and Neglect Statutory Provisions

Tribal criminal code provisions should specifically define child abuse, especially child sexual abuse, and provide clear guidance for the court in criminal child abuse cases. Appendix G contains American Bar Association (ABA) guidelines concerning criminal child abuse provisions, including specific child sexual abuse definitions.

E. Provisions for Victim Impact Statements

The tribal code could contain specific provisions allowing for victim impact statements and appearances (see Appendix H for information on victim impact statements).

F. Incorporate Increased ICRA Sentencing Authority

The Indian Civil Rights Act (ICRA) was amended in 1986 to increase tribal court sentencing authority from 6 months and $500. fine to one year imprisonment and a $5000. fine (see Appendix I). For the tribal court to use the increased sentencing authority, however, the tribal code must be amended to incorporate the increased sentencing authority.

G. Provide Criminal Penalties for Failure to Report Child Abuse

The tribal code should include criminal penalties for failure to report suspected instances of child abuse and neglect. Appendix J contains a copy of the Indian Child Protection and Family Violence Prevention Act which includes very specific criminal reporting law provisions - Section 404 (a)(1).

H. Revise Statute of Limitations Provisions for Child Abuse

The tribe should consider extending the statute of limitations for child abuse cases (see Appendix G).

IV. Civil Code Provisions

A. Specific Child Abuse and Neglect Civil Statutory Provisions

The tribal code should include comprehensive and specific civil child abuse and neglect provisions. Appendix B contains a tribal child\family protection code which includes comprehensive civil child abuse and neglect provisions. The ABA recommendations in Appendix G contain additional possible guidance.

B. Broad Civil Jurisdiction Provision

The tribal code should include the broadest possible statement of tribal court civil jurisdiction in child abuse and neglect cases, including civil jurisdiction over non-Indians (see Chapter 2-2 of Appendix B for a possible example).

C. Formalize Child Protection Team Role

The tribal code should include provisions formalizing the role of the child protection team (see Chapter 2-7 of Appendix B for a possible example).

D. Include Comprehensive Reporting Law

The tribal code should include a comprehensive reporting law (see Chapter 2-8 of Appendix B for a possible example).

E. Clear Responsibility\Authority for Investigation and Removal

The tribal code should include clear responsibility and authority for investigation and removal (see Chapter 2-9 of Appendix B and the Indian Child Protection and Family Violence Act in Appendix J for possible guidance).

V. Evidentiary Code Provisions

The tribe should consider revising the tribal evidentiary code to include specific provisions protecting child victim witnesses such as the use of closed circuit testimony, videotaped depositions, and exceptions to the hearsay rule. Appendix K contains extensive child victim witness protection resource materials. Appendix L contains specific child victim witness protection code provisions.

APPENDICES

APPENDIX A

DRAFTING TRIBAL LAWS
A MANUAL FOR TRIBAL GOVERNMENTS

DRAFTING TRIBAL LAWS

A Manual for Tribal Governments

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(Cover logo designed by Pete Dunthorne)

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ABOUT THE PUBLISHER

The Northwest Intertribal Court System (NICS) was founded in 1979 by Indian tribes in western Washington. It is a non-profit corporation governed by representatives from its 13 member tribes. The NICS mission, as defined by its Governing Board is:

> To assist the member tribes, at their direction, in a manner which recognizes the traditions of those tribes in the development of tribal sovereignty, individual character, and courts which will provide fair, equitable, and uniform justice for all who fall within their jurisdiction.

NICS assists member tribes in the development of their individual justice systems and provides personnel as needed to operate tribal courts.

The member tribes of NICS are: Chehalis, Lummi, Hoh, Muckleshoot, Nisqually, Nooksack, Sauk-Suiattle, Shoalwater Bay, Skokomish, Squaxin Island, Swinomish, Tulalip, and Upper Skagit.

NICS staff include: Elbridge Coochise, Chief Judge and Administrator; Richard Kilmer, Prosecutor; Tallis Woodward, Codewriter; Babs Edwards, Administrative Secretary; Margaret (Peg) Nadler, Codewriter Secretary; and Evelyn Dunlop, Tribal Community Boards Project Secretary. Under contract are Alan J. "Rusty" Kuntze and Emily Mansfield to coordinate the Tribal Community Boards Project, and Ted Maloney for codewriting and related legal services.

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The author also acknowledges the helpful suggestions received from Judge Lawrence Numkena who reviewed a lengthy draft of the manual, and the comments received from Tallis Woodward on an early outline of the manual.

Special recognition must go to Margaret (Peg) Nadler, who edited, proofread, and typed the manual during the final stages of its production. Peg's cheerful cooperation, patience, dedication, and ability under the most difficult time constraints contributed immeasurably to the final product.

PREFACE

In recent years, American Indian tribes have begun to enact more and more laws to promote economic development, to protect their natural resources, and to provide for the safety and welfare of their members. As tribal legislative activity increases, tribal legislatures increasingly need access to the resources that will help them make the important decisions that will affect their future. The resources needed are the same ones that other legislatures rely on - research, experts, public testimony.

Increased legislative activity also brings with it the need for improvement in the drafting and management of laws being enacted. State and federal legislatures have met this need in part by establishing offices of legislative counsel, staffed by attorneys who specialize in drafting legislation. While only the very largest tribal governments may need or be able to afford such in-house legislative counsel, all tribes can benefit from the availability of specialized legislative drafting services.

From 1981 to the present, the Northwest Intertribal Court System (NICS) has provided specialized services in tribal legislative drafting ("codewriting") to its member tribes (cuts in federal funding curtailed these services during most of 1983 and 1984). While there have been good legislative drafting manuals available to NICS codewriters, they are usually oriented toward the state and federal government (See BIBLIOGRAPHY). Reed Dickerson's Legislative Drafting, published in 1954 and probably still the best in the field, fails to even mention tribal governments. No drafting manual specifically for tribal governments has been published.

In order to overcome this neglect, and to provide NICS staff and member tribes with a drafting manual that would address the unique issues affecting tribal governments in their legislative functions, NICS obtained funding from the Administration for Native Americans (ANA), Department of Health and Human Services (HHS), to develop this manual as one part of an overall Code Development Project.

The manual makes no pretense at trying to cover all possible issues arising in Indian law that may affect tribal legislation.

Nor does it attempt to cover legislative drafting problems in the same detail as other manuals. What it does attempt is a synthesis of these broad areas to provide tribal codewriters with a starting point for further research. It also attempts to describe, in a general way, the legislative process of most Indian tribes and the codewriters role in that process.

Because of NICS' committment in working towards developing among tribal members the necessary skills to effectively manage their own tribal legal systems, whether by improving procedures in tribal courts or by helping tribal councils enact new laws, this manual was not written primarily for the law school-trained lawyer in mind. The primary audience is those tribal members who tribal governments would like to see develop as tribal codewriters.

There is no reason to assume that Indian people who have effectively taken control of their own court systems as judges, administrators, prosecutors, lay advocates, and court clerks will not be able to be equally effective as tribal codewriters. Law-school trained lawyers are not the only ones who can learn legal research and writing skills. An ever-increasing reliance by law firms on trained paralegals demonstrates this. While this manual cannot by itself take an uninformed lay person and transform him or her into a skilled codewriter, it can be of value to those who have the necessary background and determination to bring about that transformation. The manual can can also assist tribal council members who have no desire to write laws, but who must review and act upon laws drafted for them by others. It is hoped the manual will help them to be more critical of the work being done for them and to enable them make more informed and careful decisions.

Lawyers with limited experience in writing legislation, or with little or no exposure to tribal governments and the field of Indian law, may also find helpful the manual's discussion of legislative drafting rules and tribal legislative procedures and process.

While it is hoped that this manual can make a significant contribution to the development of tribal legislatures and the improvement of tribal laws, much more is needed. Unless tribes are able to gener-

ate revenues by increased economic activity on their reservations, either directly thorugh their own businesses or indirectly by taxation, they will remain largely dependent on the federal government or outside sources to finance their legislative activity. A 1978 study by the National American Indian Court Judges Association concluded that $348,000 annually over a five-year period would be needed, followed by $110,000 annually in subsequent years in order to permit all interested tribes the opportunity to adequately revise and maintain their laws.* Until the federal government - Congress, the Bureau of Indian Affairs, and other agencies - recognises its obligation to provide the needed financial support for tribal legislatures, most Indian tribes will have to continue piecing together the necessary funding from whatever sources they can.

E.G.M.
January 1986

NOTE: This manual will be used in training sessions for NICS member tribes during 1986. From that experience, we hope to determine whether revisions in the manual will be needed. We welcome suggestions from readers on how the manual can be improved.

* Indian Courts and the Future, National American Indian Court Judges Association, pp. 156-161, USGPO, 1978.

INTRODUCTION

Purpose and Use of This Manual

This manual is written as a practical guide to drafting laws for enactment by Indian tribal governments. While the primary intent is that of a step-by-step guide for the non-lawyer already familiar with tribal governments, it may also be useful for lawyers who have limited experience in Indian Law, in working with tribes, or drafting legislation.

There are three distinct parts to the manual.

Part I, The Legislative Process, contains an overview of legislation in the American legal system (chapter 1), a look at the tribal legislative process (chapter 2) and the powers of tribal legislatures (chapter 3), and concludes with an examination of the tribal code-writer's role (chapter 4).

Part II, Fundamentals of Legislative Drafting, begins with a summary of basic legal research, analysis, and writing techniques, (chapter 5) goes on to review general rules that courts use to interpret statutes (chapter 6), and ends with a discussion of rules that make for better legislative drafting (chapter 7).

Part III, Drafting Tribal Laws, applies the information from the previous chapters to the tribal contest. The special drafting problems that arise generally in drafting tribal laws, because of tribes' unique jurisdictional and political status, are covered first (chapter 8). Issues that arise in drafting specific tribal laws, such as law and order codes, exclusion ordinances, and children's codes, are discussed next (chapter 9). The final chapter examines the benefits of keeping a tribal legislative history and organizing tribal laws into a tribal code (chapter 10).

The Appendix includes a bibliography of references used to produce the manual, a glossary of legal terms (which appear in bold face in the manual) that may be unfamiliar to the lay person, a table of cases and statutes cited in the manual, a list of addresses for sources of additional information, and a list of some sample or model tribal ordinances and codes and how to obtain copies of them.

The manual is designed so that the genuine novice can proceed

step-by-step, chapter-by-chapter, when working on drafting laws for a tribe. By itself, the manual is only a general guide to tribal law drafting. The other sources referred to in the manual should be consulted to help insure the laws to be adopted will stand the test of any legal challenges, whether in tribal, state, or federal courts. If the drafting is done by someone who is unfamiliar with Indian law, review of draft legislation by someone knowledgeable about Indian Law is advised prior to final enactment.

The manual can also be used by tribal officials who, while not engaged in the actual drafting of tribal legislation, will be considered the true "lawmakers" when the laws are finally adopted. With the aid of the manual, tribal legislatures can better evaluate draft laws presented to them for adoption, enabling them make more informed decisions about whether to enact a given law. By knowing the right questions to ask, tribal lawmakers can decide if the legislation before them is appropriate or, if not, reject the legislation and ask it to be rewritten.

Chapter 3, Tribal Legislative Process, may not reflect the lawmaking process of every tribe, but it should be fairly representative of most tribes. The Appendix should be consulted to determine if a special supplement has been prepared for a specific tribe. Special supplements (Tribal Government Profiles) provide individualized information on a given tribe that may be helpful to a codewriter working for that tribe. Upon request, a Tribal Government Profile can be prepared which addresses matters of significance for a specific tribe or group of tribes. Profiles will be prepared for each of the member tribes of the Northwest Intertribal Court System (NICS) participating in the NICS code development project funded by the Administration for Native Americans (ANA) of the Department of Health and Human Services (HHS).

While this manual is intended principally for those assigned by the tribal government to draft laws, it could also be used by those outside the tribal government who seek to propose legislation to the tribes governing body, or to actually enact legislation where a tribal initiative process is available.

Finally, it should be acknowledged that the manual can rightfully

be accused of blatant sex bias, since the pronouns "he," "his," and "him" are used almost exclusively. This was chosen for convenience only, and in technical violation of the rule stated at section 7.3F. Lest there be any doubt, both women and men are equally qualified to be tribal codewriters.

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PART I

THE LEGISLATIVE PROCESS

CHAPTER 1

LEGISLATION IN THE AMERICAN LEGAL SYSTEM

This chapter presents an overview and comparison of federal, state, and tribal governments, and their respective legislative systems.

1.1 What is Law?

Law is the set of rules by which a society is governed. At the extremes, these may be written and highly formalized, or they may be less formal traditions passed on orally. The nature and form the law takes in any one society depends on the complexity of the society's structure and form of government.

In many highly organized societies, laws are enacted by a governmental body called the legislature. Another type of law, the constitution, is usually created by the people founding the government. Courts are sometimes said to create a separate body of law called decisional law in which judges interpret the meaning and application of legislative and constitutional laws in resolving disputes.

For example, when the United States Supreme Court in 1978 decided that Indian tribes could not prosecute non-Indians in tribal court for crimes against the tribe, it made decisional or case law based on an interpretation of the United States Constitution (constitutional law) and the history of Congress' dealing with Indians (legislative or statutory law) as well as past decisions of the Supreme Court on similar matters (case law). There are also rules and regulations adopted by administrative agencies (regulatory law) that are given the force and effect of law within the scope of their statutory authority.

The people eligible to vote in a government (the electorate) may also be able to adopt or direct the adoption of statutory laws through procedures called initiative and referendum.

1.2 An Overview of the American Legal System

A. Federal Government

The United States of America has what is called a "constitutional" form of government. That means that its founding document, the Constitution, is the supreme rule of law for the government. All other rules and laws must conform to the requirements set out in the Constitution or they are invalid. The United States form of government is set out in the Constitution. The government is composed of three distinct branches - a popularly elected Legislature (Congress), the Executive (President and federal agencies), and the Judicial (Supreme Court and lower federal courts). These branches govern in a system of "checks and balances." For example, when Congress passes a law it does not become "law" until signed by the President. If the President refuses to sign it, or vetoes it, it may yet become law if Congress can override the law by a two-thirds majority vote. After a law is enacted it may later be invalidated if persons aggrieved by the law challenge it in the courts and the courts decide that it is unconstitutional. Each branch acts as a check on the abuse of power by another, thus achieving stability of the government through a balance of power.

Besides laws passed by Congress there is another large body of federal law known as case law. This is the law that derives from court decisions that interpret statutory law and previous court decisions and apply them to new sets of facts in cases brought before the court. The reason this enormous body of law exists is because of a doctrine called stare decisis or precedent. Simply put, this doctrine, which is the foundation of English and American legal systems, says that a court will follow its own prior decisions or the decisions of higher courts in deciding new cases that raise similar factual or legal issues. In order for courts to keep track of decisions in hundreds of thousands of cases, they are published in an organized manner so they can be easily found. Much of modern legal research is devoted to the finding of the law in these court decisions.

Another source of federal law consists of the rules and decisions of federal administrative agencies (federal regulatory law).

B. State Governments

Each of the fifty state governments is organized in a similar fashion to that of the federal government. Each state has its own constitution, its own legislature, and its own courts. Most states have official or unofficial codes that contain laws passed by the legislature. The decisions of the state appellate courts, and some trial courts, are also published.

One major difference between state and federal governments is that the powers possessed by state governments are considered general powers, those inherent powers that all governments must have to survive. The state constitutions contain any limits on those powers imposed by the voters. The federal constitution also imposes, and authorizes Congress to impose, certain limits on a state's powers. Unless the state constitution or federal law says that the state government cannot exercise a certain power, it is presumed that the state can exercise that power. This inherent power of governments is called the police power. The federal government on the other hand is considered one in which it exercises only those powers granted to it by the people through the federal constitution. The original thirteen states, in forming the federal government, were considered to be creating a limited confederation for their mutual defense and economic cooperation. The federal government's powers are considered delegated powers, in contrast to the state's general powers, and the federal government can only exercise those powers delegated to it.

C. Tribal Governments

Nearly all Indian tribes have their own governments, composed of tribal chairmen and tribal councils. Most tribes have constitutions and legal codes, many of which have been approved by the Secretary of Interior under the 1934 Indian Reorganization Act. Those that have not been approved by the Secretary are nonetheless effective under principles of inherent sovereignty.

Almost all tribes have tribal courts. These courts operate very much like their counterparts in the non-Indian judicial system. Tribal court judgments are often recognized and enforced by state courts.

Tribal law is the body of law that governs the tribal government and the people subject to its jurisdiction. In a more general sense tribal law is of two types: 1) the law of Indian tribes as it may vary from one tribe to another and 2) the law of a single Indian tribe. It should be understood, however, that there is no uniform body of tribal law that is applicable to all tribes just as there is no uniform state law applicable to all states, except as each state may have adopted a specific uniform law. Also significant is that tribal law is generated by the tribe, rather than imposed on it or made for it by an outside body.

Prior to European contact, and for a significant period thereafter, Indian tribes managed to survive and flourish without written laws. In order to participate fully as governments in the modern world, however, Indian tribes, like all other developing nations, have had to adopt modern systems of self-government while at the same time steadfastly retaining their cultural traditions. The written law is one of these modern systems.

Aside from the ability to participate in the world of governments, written laws provide other advantages. The written law informs members of the society (those who can read or be read to in the language of the written law) what kind of conduct is and is not permitted. While this was and still is traditionally done orally through families in many Indian societies, the written law has become the means of formal governmental communication of general rules of conduct. Members of the community who are fully informed of the rules governing their behavior are likely to conform to those rules or, if the rules are not appropriate, to seek changes in them. In addition, because due process requirements imposed by the Indian Civil Rights Act (ICRA) have in some instances been incorporated into tribal constitutions themselves, written laws become even more important.

1.3 Sources of Tribal Law

Tribal law may be found in treaties, constitutions, resolutions, ordinances, regulations, court decisions, and custom or tradition.

A. Treaties

Treaties with the United States that are ratified by the United States Senate become federal law and are published in the Statutes at Large, the only official publication for Congressional statutes prior to codification in the United States Code.
(Other sources for treaties include Kappler's multi-volume work, listed in the BIBLIOGRAPHY). The Bureau of Indian Affairs, federal archives and tribal files may also have copies or originals of treaty documents.

B. Constitutions

Many tribes have constitutions adopted by the general tribal membership. These constitutions usually set out the powers of the tribe's governing body, including the power to enact laws, whether expressed or implied.

C. Ordinances

Ordinance is the label most tribes assign to laws enacted by their governing body. The power to enact a law on any particular subject must derive from the governing body's inherent powers or delegated powers. These may be found in the written constitution, or in the lack of any restrictions contained in the constitution.

D. Resolutions

Resolutions are also enactments of a tribe's governing body that may or may not be considered laws. Some resolutions may enact an ordinance into law, may amend existing law or may set out the text of certain laws within the body of the resolution itself. Other resolutions that are not laws provide for things such as appointments of tribal officers, authorization for grant requests from funding sources, and other matters more of an administrative rather than legislative nature. However, the resolution is a device used by federal and state legislatures as well.

E. Regulations

Regulations are rules of law that are adopted by tribal agencies within the scope of regulatory powers and jurisdiction delegated from the tribe's governing body. The purpose of regulations is both to implement laws enacted by the governing body (resolutions and ordinances) and to take care of routine matters that come up that

are not suitable to being addressed by the governing body. Regulations may be permanent or temporary.

SUMMARY

The American legal system includes three essentially independent governments - federal, state, and tribal. Tribal governments share many similarities with the federal and state governments. Tribes enact their own laws, many of which are similar in form to state and federal laws, and must accomplish similar purposes. Tribal legislatures are an integral and important part of the American legislative scene.

CHAPTER 2
TRIBAL LEGISLATIVE POWERS

This chapter examines the power of tribal governments to enact their own laws.

2.1 Sources of Tribal Powers

The power to regulate through the enactment of civil and criminal laws, the power to tax, and the power to take private property for public purposes are considered to be powers inherent in organized original governments. These powers are considered inherent because they are necessary to fulfill the purposes of organized governments to maintain a peaceful, ordered, and functioning society. Governmental regulating powers are so extensive that it is impossible to list all the possible subjects that may come within their scope.

Except as limited by applicable law, these same powers belong to Indian tribes because of their status as original sovereign governments predating the arrival of Europeans in North America. In addition, tribes may also exercise powers of property owners to use and regulate their own property, and such other powers as may be delegated by Congress. However, sovereignty remains the primary source of tribal governmental powers.

While Congress' power over Indian tribes is considered plenary, it is not absolute. Delaware Tribal Business Committee v. Weeks, 430 U.S. 73, 84 (1977), citing United States v. Tillamook, 329 U.S. 40, 54 (1946). Other constitutional limitations on federal authority also apply to federal dealings with Indian tribes, such as affording due process of law and paying just compensation for the taking of Indian property. These constitutional protections, however, have not prevented the complete termination of some tribes or the taking of territory from other tribes.

Governmental powers can be divided into three separate functions: legislative (making laws), executive (implementing laws), and judicial (interpreting laws). While the federal and state governments exercise these separate functions through distinct and separate branches of governments, tribal governments typically do not. Tribal councils usually exercise both legislative and executive

functions, while the judical function is exercised by a tribal court established by a tribal council.

The absence of a three-branch system or of any other characteristic of state or federal governments in no way diminishes a tribe's inherent governmental powers. Although the powers of tribal governments derive from their own historic sovereignty as independent nations, their ability to exercise those powers is subject to the willingness of the United States to allow them to do so. The United States Supreme Court has interpreted the United States Constitution broadly as granting plenary and exclusive power to the federal government over Indian tribes. Morton v. Mancari, 417 U.S. 535, 551-552 (1974); Antoine v. Washington, 420 U.S. 194, 199-204 (1975); Williams v. Lee, 358 U.S. 220,221 (1959); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1836).

As a practical matter, absent recognition and support (or at least acquiesence) from the federal government, tribes could not effectively exercise their powers. Tribes are simply dwarfed by the sheer size and superior strength of the United States. Some tribes have taken grievances into world human rights forums to question federal authority over them under international law. Ultimately, however, the success of such efforts depends on the desire and ability of other nations to influence U. S. policy toward tribes. As a result, tribes must continue to rely upon their own ability to influence the political process through whatever means are available in order to insure that Congress takes actions that promote, rather than diminish, tribal powers.

Although tribal powers do not require court approval before they can be exercised, many powers have been specifically recognized by the Supreme Court, including the power to determine their form of tribal government, Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55, 62-63 (1978); determine tribal membership, Cherokee Intermarriage Cases, 203 U.S. 76 (1906); Roff v. Burney, 168 U.S. 218, 222-203 (1897); regulate domestic relations among tribal members, Fisher v. District Court, 424 U.S. 382 (1976); United States v. Quiver, 241 U.S. 602 (1916); make laws for the inheritance of property, Jones v. Meehan, 175 U.S.1, 29 (1899); United States ex rel. Mackey v. Coxe, 18

How. 100, 15 L. Ed. 299 (1856); enforce criminal laws against tribal members, United States v. Wheeler, 435 U.S. 313, 328 (1978); enforce tribal laws in tribal forums, Williams v. Lee, 358 U.S. 217 (1959); regulate commerce and raise revenue through a licensing or permit scheme, Morris v. Hitchcock, 194 U.S. 384 (1904); levy taxes for regulatory and revenue raising purposes, Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982); regulate conduct of non-members on non-tribal land who enter into consensual relationships with the tribe or its members, or whose conduct threatens or directly affects a significant tribal interest, United States v. Montana, 450 U.S. 544, 565-566 (1981). See also Powers of Indian Tribes, 55 I.D.14 (1934).

When a tribe has the right to exercise its governmental power in a particular area, it also has the right to enact legislation in that area.

Because of the limitations imposed on Indian tribes by Congress, or by the courts in analyzing the unique dependent status of tribes, not all of these powers can be exercised to the same extent as federal and state governments, or in some cases even local governments. On the other hand, the unique status of tribes as separate sovereigns also means that some limitations which apply to federal and state governments may not apply to Indian tribes.

Before concluding that a tribe has the power to enact and enforce particular legislation it should be determined whether:

(1) Congress has expressly limited the Tribe's authority in a particular area; or

(2) The courts have held, or are likely to hold, that because of their status as "domestic dependent nations" Indian tribes inherently lack authority in a particular area, and Congress has not delegated the necessary authority to them.

To make this determination requires an understanding of federal statutes, regulations, and case law that apply to Indian tribes, as well as federal and state law that apply to the subject matter of the proposed legislation. The following is a summary of some of the major limitations that affect tribal legislative powers. It is not

an all-inclusive list. Research and analysis of the relevant law must be done. This is especially important in Indian law because so many areas of tribal authority are untested and, if challenged, will likely be decided by the courts. Therefore, a prediction of how the courts might rule will often be a critical part of the analysis.

2.2 Limitations on Tribal Powers

The exercise of tribal powers of self-government, including enactment of tribal laws, may be limited: 1) by federal treaties or statutes, 2) by implication because of tribes' status as domestic, dependent nations, and 3) by tribal law. Limitations in tribal law are unique to each tribe, and must be found by examining a particular tribe's constitution and laws.

The following are some of the limitations on tribal powers. Indian tribes cannot: criminally prosecute non-Indians, Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978); impose fines or jail sentences in excess of $500.00 and six months for each criminal offense; exercise their powers in a way that violates due process or equal protection of the laws, Indian Civil Rights Act, 25 U.S.C. §§1301-1303; engage in certain trade or commerce with non-Indians free of state regulation (e.g. sales of cigarettes and liquor), Washington v. Confederated Colville Tribes, 447 U.S. 134 (1980), Rice v. Rehner, 103 S.Ct. 3291 (1983); exercise exclusive criminal or civil court jurisdiction in states that have been delegated Public Law 280 ("P. L. 280") jurisdiction from Congress, Public Law 83-280, August 15, 1953, 18.U.S.C. §1162, 28 U.S.C. §1360 (amended in 1968, at 25 U.S.C. §§1321-26); exercise civil regulatory jurisdiction over nonmembers on nonmember-owned land with the reservation, unless the nonmember is in a consensual relationship with the tribe or unless tribal interests are affected. United States v. Montana, supra. 544 (1981).

These and other examples are discussed in more detail in Chapters 8 and 9. Additional information about federal limitations on tribal powers can be found in the Indian law publications listed in the BIBLIOGRAPHY, and by doing legal research as described in Chapter 5.

2.3 Scope of Tribal Lawmaking Authority

State laws generally do not apply in Indian country unless Congress clearly so provides or unless Indian interests are relatively minor. Federal legislation, notably P.L. 280 caused many reservations to become subject to state criminal jurisdiction and to the civil jurisdiction of state courts (but not to state regulatory or taxing authority). (see section 8.1)

2.4 Criminal Laws

The application of criminal law in Indian country is complex. In summary, state criminal jurisdiction applies to non-Indians who commit crimes against non-Indians in Indian country. Federal criminal jurisdiction applies to non-Indians who commit crimes against Indians. Federal criminal jurisdiction applies to Indians who commit major crimes against either Indians or non-Indians. Tribal jurisdiction applies to Indians who commit minor crimes (and probably major crimes as well) against Indians or non-Indians, with punishment limited to six months and $500 per offense. On P.L. 280 reservations the federal Major Crimes Act no longer applies to crimes committed by Indians; it is replaced by state criminal laws. Also, federal jurisdiction is replaced by state jurisdiction as to non-Indians committing crimes against Indians. Tribal criminal jurisdiction arguably continues to apply to Indians, concurrent with state criminal jurisdiction, on P.L. 280 reservations.

Tribal governments and tribal courts are bound by the Indian Civil Rights Act of 1968, and must recognize and apply federal "Bill of Rights" concepts to Indians and non-Indians with whom they deal; however, the only appeal to federal court is by habeas corpus. (But see discussion of National Farmers Union Insurance Co. v. Crow Tribe, sections 8.1 and 8.5.)

2.5 Civil Laws

The civil jurisdiction pattern in Indian Country is not quite so complex. Absent P.L. 280, state civil jurisdiction does not apply in Indian country as a rule. Tribal courts have general civil jurisdiction over both Indians and non-Indians, although recent federal decisions reflect a trend to restrict tribal regulatory jurisdiction

over non-Indians to matters involving important Indian interests. (see section 8.2)

Indian tribes have power to levy taxes on both Indians and non-Indians residing, working, or doing business on reservations, whether on tribal, allotted, or fee patent land.

State taxes do not apply to income received by reservation Indians from reservation sources. States cannot generally tax or regulate on-reservation activities by reservation Indians. State taxes will not apply to the activities of non-Indians on reservations (e.g., school construction, operating of trading post, logging) where federal legislation is so comprehensive it preempts the field. (see section 8.11)

State property taxes do not apply to trust or restricted lands in Indian country. They do however apply to fee patent lands. While state regulatory and tax laws do not generally apply in Indian country, state taxes can be imposed on sales of personal property by Indians to non-Indians where the incidence of the tax falls on the non-Indian.

SUMMARY

Like any other government, tribal governments have the power to enact their own laws. This is an inherent power, although it can be, and has been, limited by Congress and the federal courts. Familiarity with the cases and statutory law that affect the tribal legislative power in general, and as applied to specific subject areas, is essential for the codewriter. Only then can the tribe be aware of the likely consequences from enacting a new law.

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CHAPTER 3

THE TRIBAL LEGISLATIVE PROCESS

This chapter describes the legislative process common to most Indian tribes. An Indian tribe's legislative powers are typically exercised by a governing body called the tribal council. Some tribes, however, may exercise that power through only one person, such as a governor or a chief. Although most tribal governing bodies are called tribal councils, they instead may be called a general council, business committee, board of directors, or senate. The term "tribal council" will be used in this manual in its generic sense as that governing body of the tribe which exercises the tribe's legislative powers.

A tribal council may be composed of from as few as three to as many as eleven or more voting members. The larger a council is the more likely it also is to have committees with responsibility for selected areas such as law and order, health, finance, natural resources, and planning. Sometimes these committees will be composed exclusively of council members, while other tribes will appoint non-council members to sit on committees. The committees, like the council, may have both legislative and executive responsibilities. For example, a law and order committee may have responsibility for the tribal police department on routine administrative matters, and responsibility for reviewing and making recommendations to the council about proposed amendments to the law and order code.

Smaller tribal councils often handle all legislative and administrative matters directly rather than through committees. However, they may form special temporary committees to help draft a proposed ordinance for council review.

Council and committee members may be paid a salary, or a fee, or expenses when attending meetings, or nothing at all, depending on a tribe's policy. Some will have extensive experience as lawmakers and parliamentarians, while others will have none at all. Councils may meet weekly, monthly or only as needs arise - there is usually no specific legislative session as in federal or state governments. In terms of process, tribes resemble local city or county governments more than federal or state legislatures.

Unlike their state and federal counterparts, tribal councils usually have no formal procedure for introduction of proposed legislation. Ordinarily a problem will be placed on the council's agenda in advance and be presented to the council, either by a council member, a tribal member or other community resident, or a staff person or attorney. The council may be requested to enact a law to address the problem. A council decision to consider legislative action on the problem may be made by informal consensus or by formal motion or resolution. The degree of adherence to parliamentary procedure will vary from tribe to tribe.

If the problem requires emergency action, and a draft ordinance or resolution has been prepared, the council might enact a law immediately. Otherwise, the problem will be referred to a committee, staff, or attorney to study and report back at a later date, possibly with a draft law for council consideration.

Whether the bulk of the work is done by the council or a committee, the process is much the same (whenever the tribal council is mentioned in this manual in discussing the tribal legislative process, it should be understood that much the same process applies to the committee level). Assume, for example, that reservation residents complain to the council about excessive noise from all night parties at a neighbor's house. The tribal police have told the residents they can do nothing because the problem is not covered by the law and order code. The council agrees to look into the problem, and assigns the task to the law and order committee to review and report back with a proposed amendment to the code.

The committee meets with the tribe's codewriter (attorney or other person) and police chief to discuss the problem. The codewriter prepares a draft ordinance and distributes copies to committee members to review. After reviewing it committee members meet again and suggest some changes, then agree to recommend it to the council after the codewriter makes the changes.

Copies of the revised draft ordinance are made for the council. The council meets and reviews it, agrees to more changes, then votes to approve it as changed. Copies of the new law are then made available to the police, the prosecutor, the tribal court and the

public. If required, the ordinance is sent to the B.I.A. agency superintendent for secretarial approval.

A copy of the amending ordinance is filed together with the law and order code it amends. Later, the code may be re-typed in whole or in part to incorporate any amendments.

SUMMARY

Although Indian tribes may use different forms or names in enacting their laws, the tribal legislative process is often very similar. It is probably more like the local non-Indian municipal government than it is like a state legislature in their procedures and degree of formality. Local procedures unique to a particular tribe can usually be determined by contacting the tribal administrator.

CHAPTER 4

THE TRIBAL CODE WRITERS JOB - A STEP-BY-STEP APPROACH

This chapter describes, in step-by-step fashion, the role of the legislative drafter ("codewriter") in the tribal legislative process (discussed in chapter 3). The emphasis is on what the codewriter's role should be, rather than what it typically may be. Although the tribal council is the focus for discussing the codewriter's role, the discussion applies equally to working with a committee appointed by the council.

4.1 Information About the Problem

By the time the codewriter is called in there already may have been discussion about the nature of the problem for which a law seems to be needed. The first step the codewriter must take is to obtain as much information as possible about the problem and why it is felt that a new law, or a change in existing law, is the best way to address that problem. Possible sources of information include tribal staff who must deal with the problem (for example, law enforcement officers, judge, housing administrator), persons who will be affected by a new law (for example, tribal members, reservation residents, businesses), and persons who have had experience with prior legislative efforts to address the same or similar problem in the same or other jurisdictions. The services of a skilled consultant may be needed if the problem is of a highly technical or sensitive nature.

4.2 Is a Legislative Solution Appropriate?

Before proceeding to enact a particular law, the codewriter should encourage the tribal council to ask itself "what is the nature of the problem that needs a legislative solution?" A thorough understanding of the problem is essential for developing the proper legislative solution, or for determining if legislation is indeed the solution to the problem. A definite decision that legislation is appropriate is not absolutely necessary before proceeding with further drafting steps. A decision that legislation is not the way to go can be made at any step up to final enactment. For example, assume a tribal council is considering adopting a tribal employment rights

ordinance (TERO) because an outside construction firm will be building tribal housing on the reservation. There are no other employers on the reservation nor will there be any for the foreseeable future after the construction contractor is gone.

Rather than adopt a TERO ordinance, an alternative in this situation might be to incorporate TERO-type preference provisions directly into the construction contract. By this approach the immediate problem of assuring tribal preference in hiring for the housing construction is solved. Also, the TERO provisions in the construction contract can be tailored to the specific needs and requirements of the tribe and the contractor; for example, specific numbers of tribal employees, qualifications, etc.

While this approach does not take care of the long-term need for a TERO ordinance, it does allow the tribe time to consider more carefully what such an ordinance should include so that it will comprehend as many future situations as possible. In the short term, prospective tribal workers can take advantage of the immediate employment opportunities and not be adversely affected by the delays of long-term planning. Experience gained from administering the TERO provisions of the construction contract may also assist tribal officials in deciding what the TERO ordinance should include to make it more workable.

A. Asking Questions

The best approach to take in trying to understand the problem, then, is to ask questions of the people who have identified the problem - covering the basic who, what, when, where, how, and why:

(1) Who does the problem affect? Only tribal government employees? All tribal members? All reservation residents? Certain age groups? Non-Indians?

(2) Who will implement the legislation? Are there sufficient personnel and funds to implement a legislative solution?

(3) Has the tribe had experience with other solutions (legislative or otherwise) to the proposed problem? Did they work? Why or why not?

(4) Are there people with expertise in this subject matter (for example, an Indian Child Welfare worker, a law

enforcement officer, etc.) who can "brainstorm" the problem?

(5) How have other jurisdictions - tribal, state, local or federal - handled the same or similar problems? Are copies of sample statutes available?

(6) Is there any consensus among people who will be affected by a legislative solution to the problem, or is the community sharply divided?

(7) To what extent can a self-executing law be drafted?

(See also BIBLIOGRAPHY: Read, Materials on Legislation, pp. 233-234 for a sample questionnaire in preparing draft legislation.

B. Using Tribal Committees

Many tribes appoint committees to oversee various tribal programs or areas of governmental interest (see chapter 3). These committees can be a valuable source of information in determining what laws are needed on a particular subject. Committees made up of tribal members (and sometimes nonmembers) for such areas as law and order, housing, social services, health, personnel, land use and many other areas are both a source of expertise on their given subject area and a valuable source of input from community members on what solutions are needed. If a committee has a budget or certain powers to investigate within its jurisdiction, it can aid in the investigation and solution of the problem. The codewriter should discuss the appropriateness of using a tribal committee.

C. Holding Public Hearings

The public hearing is another source of information the codewriter may recommend in determining whether a problem requires legislative solution and, if so, what such legislation might be. This is a common practice among federal, state and local legislative bodies, perhaps in part because of legal requirements. While public hearings are less common in tribal governments, they can serve a number of useful purposes and may in some instances avoid possible deprivations of due process under the Indian Civil Rights Act or the tribal constitution.

This is especially true when a problem or proposed solution affects more than just tribal members. It provides a forum for non-members who otherwise have no voting rights, in which they may seek to persuade the tribal hearing body to take a particular course of action. However, it should be noted that there is presently no constitutuional requirement that any legislative body - federal, state, tribal or local - give the public notice of laws that are being considered for enactment.

A taped record of a public hearing, and possibly a written report based on the hearing (see for example, congressional hearing records, Illustration 4-1), may prove useful in analyzing possible solutions and their likely effects.

4.3 Evaluating Alternative Solutions; Recommending Proposed Solutions

After helping the council to consider alternative solutions, the codewriter should ask the council to decide on one that seems to have the most merit and support. At this point it is not necessary to decide what is legally supportable, but what is practically supportable. In other words, will this solution, assuming it can be framed in a way that will survive legal challenges, work within the community and governmental framework of the tribe?

4.4 Researching the Law

After making a decision to draft a law, the codewriter must research relevant law affecting the subject matter of the problem. At a minimum the research should include all current tribal laws and any federal laws that may affect the subject matter. In addition, the codewriter will want to research other tribal, state, federal or model codes that deal with the same subject matter since they may provide good starting points for a first draft. Most importantly, any restrictions in tribal or federal law which would limit the effectiveness of the legislative solution must be identified. Restrictions in tribal law may be easier to accommodate or change, but applicable restrictions in federal law will usually have to be followed. If it appears that federal law or its application may have to be challenged in order to achieve a satisfactory tribal legislative solution, an attorney with experience in federal Indian law should first be consulted. (see, generally, sections 5.1 and 5.4)

4.5 Reporting the Research Results

The next step for the codewriter is to write a report of his research results. Following a legal memorandum format (see section 5.3) the issues raised by the problem and the law relating to that problem should be fully discussed. A conclusion, based on applying the law to the facts of the problem, should recommend possible solutions, legislative or otherwise. The report should be reviewed by others, including tribal attorneys, judges, and committee and council members as appropriate. Copies of relevant laws or cases, or sample provisions from other jurisdictions, may be attached to the report.

4.6 Drafting a Proposed Law

A. Getting Started

If the research report concludes, and the council agrees, that a legislative solution seems appropriate, the drafting process can begin. Drafting should begin with a plan and an outline of how the draft law will look (see Section 7.2). Special attention should be given to the drafting of clear and accurate language (see generally chapter 7). Equally important are the compliance mechanisms - will they be self-enforcing or will penalties be imposed? Is the tribe equipped to enforce compliance or are additional resources needed? Initial drafts should be circulated for discussion and comment. Final editing and typing should be done only after comments are received. It may be helpful to include a written commentary if the draft is lengthy or requires explanation.

B. Making Revisions

Before a draft is taken back to the council, it should be reviewed, edited and revised as many times as necessary to get it into readable form and to accomplish the intended purpose. If there are problems with the organization of it, the outline should be revised. If the arrangement of sections is not right, they should be rearranged. Important checks should be made for consistency throughout the document. Is the language understandable? Is it too wordy? It should be revised accordingly, left alone for a while, then re-read again. If others whose ability and opinion are respected are willing to be available, their comments should be

sought as well. The comments should be considered and included, if acceptable.

If proposed legislation will affect particular persons if enacted, it should be reviewed by them, if the council consents. Public hearings may be useful in such situations.

C. Preparing for Council Review

After the draft appears ready to be sent back to the council, enough time for it to be read should be allowed before scheduling a meeting to discuss it. If certain people should review the draft before the council meets, the codewriter should make sure they have a copy well enough in advance so that any objections can be corrected. If after reviewing the draft the council has problems with it, the codewriter should try to understand their objections and what it will take to remedy them. The codewriter should resist as persuasively as possible any efforts by the council to let someone else make the necessary changes, especially if he has more familiarity with the subject matter, the law, and other practical concerns. Ultimately, though, the codewriter must yield to the council's wishes.

To avoid potential problems, from the beginning it should be clearly understood whether the council or a committee is the final authority. If the council is to assign the work, the codewriter ultimately is responsible to the council. The council should state what the committee can and cannot expect from the codewriter. If the committee begins to direct in ways that are not in the best interest of the council for this particular legislation, there needs to be a means of recourse back to the council. Otherwise too much time will be wasted and the council will not be pleased.

To summarize, in preparing a draft tribal law, for presentation to the council, the codewriter should:

(1) Find out what the tribe wants to accomplish and what concrete problems this involves.

(2) Explore the problems with the tribal council, pointing out what the alternatives are, and by asking appropriate questions, help them think the problem through.

(3) Explore the existing legal situation to find out what constitutional provisions and what ordinances, if any, already deal with the subject. Which ordinances need to be repealed? Which need to be amended? What administrative practices will be affected? What might be the collateral results?

(4) Develop a concrete and cohesive plan of organization and arrangement.

(5) Prepare a draft of the proposed law, paying attention to the principles outlined in this manual, and checking doubtful substantive and technical matters with the available experts or by such independent research as appears to be necessary to get a reliable result; and, as new problems come to light, get the answers from the tribe or the available experts, or by individual research.

(6) Revise the draft as many times as may be necessary to produce a professionally satisfactory result.

(7) Make appropriate across-the-board checks for consistency, coherence, and clarity.

(8) If the problem is very complicated or the result must be satisfactory to many people, submit the tentatively complete draft to a panel of experts, circulate copies to a representative group for suggestions and comments, or hold hearings.

(9) Polish the language to make the draft as readable as possible.

(See also BIBLIOGRAPHY: Dickerson, Legislative Drafting, p. 45)

4.7 Getting the Draft Law Approved

A. Committee Approval

The procedure for obtaining final approval will vary from tribe to tribe. The codewriter should ensure that the requirements of tribal

law are met. If a tribal committee is involved, the first task after completing the draft is to get approval from the committee. This may require a number of revisions. Once the committee is satisfied with the draft, a memorandum should be prepared summarizing the committee's comments on the more important sections. This will serve the purposes of both communicating to the council why the committee recommended the version it did, and also by recording some of the significant legislative history (see section 10.1). It also rewards the committee members by pointing out the great amount of work they contributed.

This memorandum may be one from the codewriter to the council, or from the codewriter to the committee chair for transmittal to the council, or one to the council prepared by the codewriter and from the committee chair. It will depend on the preferences of each tribe.

B. Council Approval

Much of the same process that went on at the committee level will also occur at the council level. However, if the committee and codewriter have done their jobs, including trying to develop the kind of law the council will be inclined to enact, most of the work will not have to be repeated. If an additional memorandum is needed from the codewriter at this point, it will probably be a short one. If one has already been done, another is not necessary. The council's preferred procedure should be followed.

The documents that go to each council member should include the final draft approved by the committee, if applicable, the final memorandum summarizing the committee's work, any previously drafted research reports (memoranda) and any other documents that will help the council evaluate the proposed law. The council should be given copies of any earlier versions of the draft law as well as copies of the tribal code (if the tribes laws are codified; if not, copies of any laws related to the one under consideration), including the tribal constitution, and any sample or model laws upon which the draft was based. While they may not be needed, they are available for reference.

There may be aspects of the council's review of the proposed law

for which assistance is not needed. The codewriter must be sensitive to this and be prepared to graciously "butt out" if requested to, or offer to do so if it seems appropriate.

As with any other legislative body the council should be addressed and treated with the proper respect. While often less formal than their federal or state counterparts, the importance and seriousness of the council or committee work is no less, and should be treated accordingly. A restrained but relaxed sense of humor will also help as long as it is handled in an appropriate manner (see Dodge v. Nakai, 298 F, Supp.26 (D.Ariz. 1969) for an example of how not to do it). Remarks should be as brief and as clear as possible.

The codewriter should be sensitive to often heavy council agendas and be prepared to point out the major issues as well as explain any differences over the final draft. Any additional changes and the reasons for them should be explained. Questions from any member are to be openly welcomed and answered directly. If it is a question to which the codewriter does not know the answer, it should be stated. If it is a question to which he should know the answer, the codewriter should find it and report back. Any concern raised should be regarded as important, especially to the person expressing the concern.

4.8 Post-Enactment Procedures

After enactment, a number of procedures are necessary to insure that proper records are kept and that notice of the new law is given.

After the original law is passed, certified and sealed (if applicable) by the council, it should be filed with all other tribal laws in chronological order and in a secure place.

Prior to that copies should be distributed to appropriate tribal officials (see Illustration 4-2). Copies for public examination also should be made available. It is recommended that notice the law has been enacted, with a summary of its effect and its effective date, should be published in the tribal newsletter or local newspaper, and posted at other locations likely to give notice to the public (see Illustrations 4-3 and 4-4). The notice should also indicate where

a copy of the law can be read during regular business hours. An affidavit of publication should be retained in the appropriate files so that any questions that may arise at a later date about adequate notice of the new law can be resolved in the law's favor (see Illustration 4-4). You may want to send a copy of the law to the local Bureau of Indian Affairs Agency Office so that it can be made available there for public reading. Distribution to local law libraries may also be done as well as to the National Indian Law Library (see APPENDIX).

The codewriter should also determine whether approval by the Assistant Secretary or Commissioner for Indian Affairs, Department of the Interior, is required by the tribe's constitution or federal law before the law becomes effective (see section 8.10).

4.9 Updating Tribal Law Changes

Adequate records of tribal laws are necessary, but may not be enough if they do not show clearly what laws remain current at any given time. This problem increases as the number of new laws and amendments to old laws increases. The current status of tribal law on any particular subject can be more easily located by putting together a set of current tribal laws organized by subject matter in a suitable filing system or 3-ring binder (see section 10.2 on codification). Prior enacted laws and future laws will still be retained in the order of being passed.

Keeping a legislative history of enacted laws (for example, early drafts, memoranda of law, research reports, correspondence, etc.) may also be helpful for determining the tribal council's intent at a later date (see section 10.1).

SUMMARY

The codewriter's role in the tribal legislative process is very important. He must be able not only to draft effectively, but also to assist the tribal council at every step of the way. He must help the council determine in the first instance whether legislation is needed. If it is needed, the codewriter must determine how to make it work effectively on a practical level and meet all legal requirements. Finally, he must help insure that adequate notice of newly enacted

laws is given, and that the laws are maintained in a way that those affected can refer to them easily.

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* See BIBLIOGRAPHY for complete citations.

PART II

FUNDAMENTALS OF LEGISLATIVE DRAFTING

CHAPTER 5

BASIC DRAFTING SKILLS AND REQUIREMENTS

This chapter addresses some of the basic skills a codewriter should have. These skill areas include legal research and analysis, preparation of research reports, subject matter knowledge, and basic writing ability.

5.1 Legal Research - An Introduction

Legal research is an extremely important tool for the codewriter. Entire texts are devoted to the subject. This section provides only a basic introduction to how research is done in the American legal system. For more information on how to do legal research, the reader is directed to the references listed under that topic in the BIBLIOGRAPHY. Law schools sometimes devote two full semesters to a legal research course and many two-year colleges that have paralegal programs now offer legal research classes as part of their curriculum.

Because the bulk of law in the American legal system is found in statutes, cases, and regulations, the system of legal research is aimed at getting access to those laws.

A. Researching Statutes

When Congress or the state legislature passes legislation that becomes law, the new law is published. The laws passed by Congress are published in an official multi-volume set called Statutes at Large in the chronological order in which they became law.

Each law of Congress is assigned a number. The laws that affect the general public are called public laws. For example, the Indian Self-Determination Act is Public Law 93-638, which means it was the 638th public law passed by the 93rd Congress. It is published at volume 88, page 2203 of the Statutes at Large and cited as 88 Stat. 2203 (see Illustration 5-1).

Each state, having its own constitution and form of government, may vary from others in how it enacts and publishes its laws. Some states' statutory laws are published in an official multi-volume set similar to Congress' Statutes at Large. The numbering system and

organization of the laws will also vary from state to state. (See Illustration 5-2) Some states' statutes are published by private publishing companies.

Within the last thirty to forty years, most states also have codified their statutes. (Illustration 5-3) Codification is a rearrangement of existing statute law by subject matter, without making substantive changes, thus enabling easier access to current laws. (See Chapter 10) Some of these are official (directed by statute) and others are unofficial (privately published). Laws of Congress, after the publication in the Statutes at Large, also are rearranged by subject matter in the United States Code, the official codification of federal statutory law. (See Illustration 5-4)

There are also two unofficial codifications of federal statutes. The United States Code annotated (USCA) and the United States Code Service (USCS) are privately published codifications which include citations to court cases that have interpreted the code sections (annotations), legislative history and related information. (See Illustration 5-5)

Because of the subject arrangement, the law on a particular topic can be located by looking in the Code's index, which then indicates the title, chapter, section, or similar number where that code section can be found. (See Illustration 5-6)

B. Researching Cases

The decisions of courts are published in a manner similar to that of statutes except that there is no codification of the case law. Instead, digests are used to locate judicial opinions on a particular subject. While court decisions are published chronologically in multi-volume sets based on jurisdiction (called Reporters), the digests summarize the points of law from those decisions and index them by subject. These summaries also contain citations to the volume and page in the reporter for that jurisdiction where the cases can be found which discuss that point of law.

Federal Court decisions are published in unofficial reporters by West Publishing Company. The decisions of the United States Courts of Appeals are found in the Federal Reporter. Decisions of the United States District Courts are found in a reporter called the

Federal Supplement, and also in the earlier volumes of the Federal Reporter. The decisions of the United States Supreme Court can be found in an official reporter, United States Reports, and two unofficial reporters, the Supreme Court Reports (West Publishing Company and Bankcroft - Whitney), and the Supreme Court Reporter, Lawyers Edition (Lawyers Cooperative Publishing Company). (See Illustrations 5-7 through 5-11)

State Court decisions may be published in official or unofficial reporters, or both. For example, some states have an official reporter which reports only that state's decisions. The same decisions also will appear in the unofficial regional reporters published by West. (See Illustrations 5-12 and 5-13) Each regional reporter reports the decisions of the appellate courts of the states in a particular geographic region. For example, the Pacific Reporter reports the appellate decisions from Alaska, Hawaii, Washington, Oregon, California, Idaho, Montana, Arizona, Colorado, New Mexico, Kansas, Utah, Wyoming and Oklahoma.

Both statutory and case law are kept current by the publication of pocket parts or supplements to the reporters, code books, indexes and digests. (Illustration 5-13A)

There also are reporters that deal exclusively with cases in a particular area of law. For example, the Indian Law Reporter publishes monthly reports of federal, state and tribal court decisions that affect Indian law. (Illustration 5-14)

C. Researching Regulations

Regulatory laws include the rules, regulations, decisions and orders of governmental administrative agencies that have the force and effect of law. These agencies are generally creatures of the legislature, owing their very existence to the passage of a law. Therefore, the legal force and effect of any given regulation will depend on whether or not it is within the scope of power delegated by the statute to the agency and on whether the statute itself is valid.

Regulations are generally not in effect until they are published. Federal regulations and other federal agency matters are published weekly in the Federal Register. Those that are of a general and per-

manent nature are codified in the Code of Federal Regulations (CFR). The CFR is organized much like The United States Code with regulations arranged in titles, parts, and sections according to subject matter. (Illustrations 5-15 and 5-16)

LAW-FINDING TOOLS

D. Digests

Digests are case finding tools. They are law books arranged alphabetically by subject matter in a manner that allows the researcher to locate cases on specific points of law. Within a particular subject cases from one or more jurisdictions are cited together with a brief of a point of law discussed in that case. With the citation, the researcher can then locate and read the case to make sure it does relate to the point of law being researched. (Illustration 5-17)

E. Encyclopedias

Encyclopedias are case finding tools, too, but they serve another important function as well. An encyclopedia, a multi-volume set arranged aphalbetically by subject matter, contains broad introductory treatment in particular areas of the law. This is an especially helpful place to start research when unfamiliar with a particular area of the law.

Encyclopedias also contain footnotes which cite cases or other authority which support the point of law being discussed in the text. One can either look up the cases cited or, based on better understanding of the law, go directly to a digest and look for cases that deal with a particular issue.

The two most commonly used encyclopedias are Corpus Juris Secundum (CJS) and American Jurisprudence (Am.Jur.). (Illustration 5-18)

F. Treatises, Law Reviews, Hornbooks and Loose Leaf Services

These publications are similar to encyclopedias; however, they usually are dedicated to a particular area of law such as contracts, torts, criminal law or federal tax, and therefore can provide much more detailed treatment. Treatises, such as the Restatement of Torts, tend to codify the case law into a comprehensive restatement

of what the law is, or in some instances, what it should be. Hornbooks are text books published by West Publishing Company, each one dealing with subjects such as torts, evidence, criminal law, federal courts and many others. Loose leaf services are exhaustive treatments of particular legal areas of practice that, like digests, contain not only case summary and citations but also practical information that is useful to the lawyer practicing in that area. Loose leaf services, published in ring-type binders, are updated frequently and provide one of the most current sources of changes in the law. One of the most commonly used loose leaf services is United States Law Week (USLW), which is updated weekly and contains current information on the activites of the United States Supreme Court as well as a general law volume that keeps track of recent legal developments around the country. Summaries or complete texts of some cases will often be published in the United States Law Week before appearing anywhere else, including the official reporters. (Illustration 5-19)

HOW TO FIND OUT IF CASE LAW IS STILL GOOD

G. Shephards Citations

Shephards Citations is a specialized publication devoted solely to keeping track of court decisions that have cited to and discussed an earlier court decision. For example, if a case is found that sounds like it is good authority for the point of law a reviewer is interested in, how would one know if it is still good law? Has it been reversed by a higher court? Was it later overruled? Have any other courts discussed the same issue and cited, favorably or unfavorably, to the case? If the citation for a case is found in Shepards, a list of subsequent cases that have cited to that case will be found also. Letter notations next to each subsequent citation will indicate the treatment that later courts give to the case; for example, reversal (r), overruled (o), followed (f), examined (e), and similar notations. (Illustration 5-20)

H. Other Sources

Many other publications will help in doing legal research. Those mentioned above are the most commonly used sources. Local bar organi-

zations and others publish practice manuals and form manuals which can be helpful shortcuts for the practitioner, although there are no substitutes for careful legal research. Computerized legal research is a rapidly growing field, with Westlaw and Lexis computer systems able to provide direct access to many thousands of court decisions. Legislative history may be important to research to find out the background of particular law; the U. S. Code Congressional and Administrative News (USCCAN) publication reprints congressional committee reports and related information on particular federal legislation. (Illustration 5-21) Direct access to sources of legislative history is also available at selected libraries.

For more information, consult the legal research publications listed in the BIBLIOGRAPHY or contact the librarian at your local law library.

5.2 Legal Analysis

A. How to Read a Statute

A statute must be read with great care in order to determine what it means. Each word and punctuation mark may be important and cannot be overlooked. What specific words or phrases mean in statues is often unclear. Sometimes these ambiguities are intended because a statute must cover a lot of different situations that cannot be spelled out in advance. Other times these ambiguities are simply the result of the general uncertainty of the meaning of words.

The best approach in analyzing a statute is to first determine its common sense meaning. The more technical the subject matter is, however, the more difficult this will be. The second step is to consult related parts of the statute, especially any "definitions" sections, to see if the common sense meaning holds up in context. The third step is to read any legislative history, such as minutes of legislative sessions, committee reports, or transcripts of legislative hearings. The fourth step is to research cases in which the courts have attempted to interpret the same, or a similar, statute's meaning.

Analysis of a regulation should usually follow the same procedure.

B. How to Read a Case

An effective reseacher does not read with the same degree of care and attention every case he comes across. He must go through a "weeding out" process to find those cases that are on point, that is, directly related to the question he is researching. This process is made easier by the use of headnotes at the beginning of most published court opinions. The headnotes summarize the major points of law contained in the opinion. While the headnotes cannot be relied upon as the law, they are a useful device to help the researcher determine whether it is necessary to read the entire opinion. However, the relevance of a case should not be rejected based on the headnote alone since it is only an editorial summary and may not correctly analyze the particular point of law discussed in the actual opinion. The headnote also refers the researcher to the location in the opinion where the headnote subject is discussed. Always double-check the headnote's accuracy by looking to the opinion itself. (See Illustrations 5-7 through 5-13)

Once a relevant case is found, based on headnote researching, the case should be read carefully and notes taken. This note-taking is often referred to as briefing a case. The brief should contain 1) the full citation of the case so it can be found or cited to later, 2) a brief history of the proceedings leading up to the decision (for example, "the case was an appeal from a summary judgment by the federal district court, Western District of Washington"), 3) a summary of the essential facts, 4) a statement of the issue or issues, and 5) the court's decision, or holding, and the reasons for it.

The brief of the case could also include the court's discussion of related issues not before it, called dictum, which does not have the force of legal precedent that the holding does. The arguments of the parties and how the court responded to them could also be noted.

The idea is to keep a short but helpful record of the research for future reference so that it can be referred to again rather than having to locate and read the case all over again.

5.3 Research Memorandum

A. Communicating the Results of your Research

If the research has been done thoroughly, a fair amount of information may have been compiled. The researcher may have copies of laws adopted by other jurisdictions on the same subject matter being considered for legislation, in addition to citations and brief summaries of recent federal court cases that affect the tribe's ability to legislate in the subject area. There could be excerpts from the tribe's constitution that address the council's powers to legislate, as well as notes on what all this law means and how it affects the tribe's ability to enact some kind of law.

While all of this may be meaningful to the codewriter who did the research, there remains an obligation to communicate the results of the research to the council. That body is the client that must make, and is responsible for, the decision to legislate or not to legislate and how exactly to go about doing it. It will be <u>their</u> law and not the codewriter's.* Some tribes will insist on being fully informed of the legal basis for legislation, and all efforts to get down to the "real work" will be rightfully impeded. Other tribes, however, may decide that since they have an expert legislative drafter, an opinion that the proposed legislation will work is good enough for them. The temptation to accept this unbridled faith should be resisted even at the risk of the client's impatience. The codewriter should explain the importance of being fully informed of the consequences of the proposed law. It will be an unhappy situation if the Council is later surprised by adverse consequences of which it had not been advised. Every course of action, especially by tribes in trying to exercise their powers, involves some degree of risk.** Those who must live with the consequences of that risk occuring should be fully advised of its seriousness in advance.

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* "The codewriter mustn't forget that he is a legislative mid-wife; he is not having the baby himself." (Dickerson at 14)

** Tribes have come to learn that some of their powers exist more in theory than in fact, because as soon as they begin to exercise them, efforts are made to take them away." (Pevar at 70)

Sometimes the codewriter's advice may be simple enough to be given orally to the committee or council. Even then, if it is that simple it will take only a little extra time to put it in writing and give a copy to each member. If they read it, the oral message is reinforced. If they don't, a record has been made that they have been advised of the possible consequences. This will be especially important if efforts to give an oral report are squeezed out by the press of other agenda items.

B. Basic Format for a Research Report

The format for a written research report will depend a great deal on the number of issues that need to be addressed, their complexity, and matters of personal drafting style. It will depend upon who the audience is (committee, council, attorney, etc.) and what they need to know. These are important considerations and any research report should be tailored to fit them.

The format to be discussed here, the memorandum, is only one possible approach. If it seems to fit well in a particular situation it can be used without modification. If it does not fit well, it should be modified. If there are numerous issues, the report may need to include several separate memoranda which can be tied together by a brief cover memo or letter. The kind of research preparation done before any substantial drafting of the proposed law may be very different than when a completed draft is being presented. In the latter case, a report may have substantial discussion of specific provisions in the draft law, unless these kinds of comments have been included in the draft itself. (See Chapter 4)

When citing to cases, statutes, or other references in the research report, use generally the citation form suggested by A Uniform System of Citation. (Harvard Citator or "blue book") (see BIBLIOGRAPHY)

The following explains the basic format for a memorandum-type research report. (An example of an actual report is shown in Illustration 5-22)

To: Tribal Committee (or Council)

FROM: (Name)

RE: Research on Questions related to Proposed Tribal Law on (subject matter)

DATE: (Date of memorandum)

I. INTRODUCTION

(Explain in a few sentences the purpose of the memorandum, a description of the problem for which legislation was requested by the committee or Council on _____, 19 __, and that what follows is results of research into that area)

II. ISSUE(S) (or "QUESTIONS")

1. Does the tribe have an inherent power to (regulate a specific area, etc.)?
2. If so, are there any limitations in federal, tribal, or other law on the tribe's inherent power in that area?
3. Has this tribe, or any other jurisdiction, adopted laws to regulate this area? If so, how successful have they been?

III. BRIEF ANSWERS

1. Yes, the tribe does have inherent power to regulate (whatever...).
2. Yes, there are limitations in federal law, but they are limited in a way that will not affect this specific area the tribe wants to regulate, etc.
3. The tribe has a few laws that do not adequately address the problem area (copies attached), etc.

Several other tribes and the state have adopted legislation that has worked well, but may need to be modified for use here, etc. (See attached copies)

IV. STATEMENT OF FACTS (Optional)

V. DISCUSSION

(This section should contain a fairly thorough, but understandable discussion of the law as it affects the issues listed above. If the memorandum is intended primarily for the tribe's internal, policy-making use, it should be a balanced discussion that fully evaluates the positive and negative aspects of applicable law. If it is designed for, or may be used for, convincing persons or authorities outside the tribe that the tribe does have authority to regulate in a given area, the memorandum should be persuasive. If this latter type of document is needed, a separate "internal" memorandum should be prepared for the tribe that lays out the "down side", or weak points, of the argument. The discussion section should apply the law to the facts as framed by the issues and fully analyze the results.)

VI. CONCLUSION

(This section should briefly set forth the specific conclusions shown by the discussion section and then answer the issues set out in Section II. The "brief answers" should be done last, since they are summaries of the conclusion.)

5.4 Subject Matter Knowledge

There are a number of areas of the law that the tribal codewriter should have at least a working familiarity with. The following discussion examines some of these subject areas.

Federal law has a tremendous impact on tribal law. In addition to looking to the federal statutes or leading cases that have affected tribal law, federal rules and regulations, and even state law, must be examined to determine the actual effect on tribal law making. Where the federal government has given some of its authority over Indians to the states, or where the federal courts have declared that authority to rest with the states rather than with the federal government, state law must be consulted.

For example, while the federal executive and legislative branches have been content for a number of years to allow tribes to sell liquor under Secretarial-approved liquor ordinances, that authority was struck down by the Supreme Court in Rice v. Rehner, 103 S.Ct. 3291 (1983). The court held that liquor sales in Indian country must comply with state law. Therefore, before proceeding with a liquor business or the licensing of liquor sales on its reservation, the codewriter should examine state law to make sure tribal efforts will not be frustrated. Likewise, in states that were given jurisdiction over Indian country by Congress under Public Law 83-280 ("P.L. 280") tribes look not only to that federal legislation, but also to state law to determine the scope and application of that jurisdiction by the state. That will vary from state to state according to federal law and from reservation to reservation within a state according to federal or state law, or both. (see section 8.7)

Because the existence of Indian tribes dates before the arrival of Europeans and formation of the American government, a number of tribes (for example, Pueblos of New Mexico) may have rights that are affected by land grants under treaties with other countries (Great Britian, Spain, etc.). Knowledge of these treaties may be important to the exercise of certain tribal governmental powers. Likewise, the powers granted or reserved in treaties with the United States may vary greatly from tribe to tribe, affecting

the specific powers a particular tribe can exercise.

It will take time to develop a working familiarity with Indian law and related subjects, but it is an effort the tribal codewriter cannot afford to ignore.

5.5 General Writing Skills

In addition to the other skills discussed in this chapter, the codewriter should also have the basic ability to write well. Good legal writing, whether in drafting legislation or any other legal document, has four basic elements. It must be 1) accurate, 2) brief, 3) ordered, and 4) clear. To be accurate requires stating correctly the law or facts. To be brief requires saying what needs to be said in only as many words as are required to get the point across. To be ordered means that the legal document follows a logical pattern from beginning to end. To be clear means that unnecessary "legalese" and duplication is avoided so that the meaning of the words used can be easily understood.

(See the BIBLIOGRAPHY for references to legal writing publications.)

SUMMARY

By learning the essential skills of legal research, analysis, research report preparation, and good writing, and by learning Indian law and related subjects, the codewriter will be on the way to developing as a legislative drafter.

REFERENCES*

Legal Writing/Ethics (Legal Education Series), National Indian Justice Center.

(Also, legal research and writing publications listed in BIBLIOGRAPHY)

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* See BIBLIOGRAPHY for complete citations.

CHAPTER 6

GENERAL RULES OF STATUTORY INTERPRETATION

This chapter examines the rules that courts may apply when interpreting legislation. The codewriter must be aware of these rules so that the legislation he drafts will be interpreted correctly.

It is important to keep in mind while selecting the wording and arrangment of a draft tribal law that it will be subject to differing interpretations by different readers. The tribal member or non-member who must comply with a law will interpret it one way; the tribal officials who have to use it may interpret it another; and the courts that must hear and decide on disputes may give still a third interpretation. The selection of wording should, as much as possible, lead to interpretations by these various readers that are as close as possible to each other in order to avoid confusion, and as close as possible to the council's intent so that the legislative purpose is fulfilled. Because language itself is not always clear as a means of communication, the codewriter should be familiar with basic principles courts use to interpret statutes (also called statutory construction).

The codewriter should not rely upon these rules of statutory construction as an excuse for unclear drafting. He should hold himself to a higher standard so that resort to the rules of construction will be unnecessary. Because exception to the rules of construction is often taken where the legislative intent is otherwise clear, and because the rules are ever subject to widely varying interpretations by the courts, reliance on them will leave the outcome of any legislative effort gravely in doubt.

The following are the generally accepted rules for interpreting statutory law.

RULES OF STATUTORY CONSTRUCTION

6.1 Specific Controls the General

A. General words are understood to be restricted in their meaning by more specific words which came before.

For example, in the phrase "boats, nets and other property may be seized...," "property" is a general term that would be understood as being limited to property that is similar to the more specific terms "boats" and "nets" for purposes of the code or statute.

B. If the meaning of a general word cannot be reconciled with the meaning of a specific word in the same code, the specific word will control.

For example, "The court shall not exercise jurisdiction over domestic relations disputes" in one statute cannot be reconciled with "The court shall exercise jurisdiction over disputes between spouses over custody of their children" in another statute. The second provision will control, since it is more specific, and allows the court to exercise jurisdiction over child custody disputes between spouses even though they may be considered domestic relations disputes.

C. The expession of one thing is the exclusion of another.

For example, if "Non-member Indians may fish in reservation waters without a license," by strict application of this rule members cannot fish without a license.

6.2 Last Word in a List

When a series of words of general meaning is followed by words of limitation, the limitation will apply only to the last word in the list, unless otherwise stated. For example, "licensee may hunt moose, deer, geese, and ducks that are not within the reservation's housing area." Strictly interpreted, only "ducks" would be off limits in the reservation housing area.

6.3 Interpreting Meaning from Context

- The meaning of doubtful words may be determined by their reference to associated words.
- Words and phrases are not to be understood in any manner but as is written exactly.
- Statutes that are related are understood in a consistent fashion, so as to harmonize one with the other, and achieve a uniform result.
- The Statute should be read as a whole. The words of a statute or code are not meant to be isolated - their

meaning must be found in reference to the statute as a whole. Words will be understood to make the statute internally consistent.

6.4 "And/Or."

The use of the words "and/or" may be interpreted as either way, and or or, as appropriate. Example: "Service of process shall be by personal service and/or by certified mail." If "and/or" were interpreted to mean "and," every service of process would require both personal and certified mail service. Since this duplication was likely not intended, "and/or" would be interpreted to mean "or," either method of service being sufficient, but allowing both.

6.5 Later Enactment Controls Earlier Enactment

If a later enacted statute cannot be read in agreement with an earlier enactment, the later enactment, as a more recent expression of legislative intent, will control. For example, in the "domestic relations" example discussed earlier, assume that the prohibition against tribal court jurisdiction over domestic relations disputes was the most enactment. Even though the specific controls the general, here the later general enactment is considered the most recent statement of legislative intent and therefore controls over the earlier specific statement.

DETERMINING LEGISLATIVE INTENT

Where the meaning of a statute is unclear when applied to specific circumstances, the courts will look beyond the words of the statute to determine what the legislature intended. This "legislative intent" may be any one of three kinds:

(1) Intent regarding the meaning of specific statutory provisions, words, or phrases;

(2) Intent regarding the general purpose of the statute; and

(3) Intent to address a general social problem.

Oftentimes it may be enough to know about the last two general kinds of intent. These are usually the easiest to determine from the available sources of information about legislative intent. The first kind of intent is more difficult to determine because legislators seldom spend a great deal of time figuring out for them-

selves what specific words mean and how they apply to different possible situations. This is especially true with regard to tribal legislative bodies where, even if a tribal council has taken the time to determine what meaning applies to specific words or phrases, their intent may not be recorded.

Information about legislative intent is generally from three sources:

(1) evidence in the definition or purpose sections of the statute, ordinances or other information in related tribal laws;

(2) tape recordings or minutes of meetings, notes of the drafter or others, letters or notes prepared to accompany particular drafts, and changes from early drafts to final drafts; and

(3) existing case law, studies or reports, or other non-legislative information which the lawmakers may have considered or reacted to.

The first source listed above is the most reliable source out of the three. The second source may be extremely helpful if sufficient information is available. The third source is the most indirect reflection of the legislature's intent.

SUMMARY

Courts apply the rules of statutory construction when the meaning of the statute is unclear. The codewriter can avoid this problem by writing laws clearly, as discussed in the next chapter. He must still be aware of how courts will likely interpret any unclear laws, and what sources of information they look to for external aids in interpretation.

REFERENCES*

Cross, Minnesota Revisor's Manual.
Dickerson, Legislative Drafting.
Read, Materials on Legislation.

* See BIBLIOGRAPHY for complete citations.

CHAPTER 7
LEGISLATIVE DRAFTING RULES

This chapter discusses some commonly accepted rules for good legislative draftmanship. These rules are not hard and fast, and a law will not likely be declared invalid on grounds that a rule wasn't followed. (However, not following a rule of good draftmanship could lead to a vaguely-worded law that is invalidated by the court because it is unconstitutionally vague.) The primary purpose of the rules is to encourage clarity and uniformity of expression in statutes so that they can more readily be understood. If, in the drafter's best judgment, following the rules in a given instance would clearly defeat purpose, the rules should be ignored in that instance.

7.1 Basic Approach

If a research report was prepared and submitted in response to a tribe's request for legislation, a recommendation should have been included on how to proceed with drafting the new law. If the recommendation is acceptable to the council, the codewriter has a solid basis from which to plan his approach to drafting. (This discussion also applies to working with a committee instead of the council.) The proposed approach should be communicated in writing so that the codewriter and council are proceeding from the same starting point and with the same set of assumptions about what is to be done.

If a due date was not assigned for completion and return of a proposed draft to the council, one should be set and the council notified it will be back to them by that date. The deadline will help the codewriter focus the work and get it done amidst the press of other demands that ultimately intervene. If the deadline cannot be met, the council should be told far enough in advance so that members can rearrange their schedules.

With the deadline in place, the drafter can start to design a plan of operation. This plan should include the additional research tasks that were not completed in the earlier research stage, as well as other tasks, such as consultation with experts in the field at hand, or government officials (for example, the Solicitor's office -

see section 8.10 - who may ultimately have some impact on the enactment of the law.

Most importantly, however, the plan should include an outline of the draft law itself. This can be fairly general at first, but detail should be added as soon as possible. As in architecture, the outline provides a "blueprint" of what the ultimate product will look like. Dividing the different parts of the drafting project into separate categories within the outline allows the codewriter to focus on specific parts without having to worry about where it fits in the entire draft.

The outline will also be indispensable if more than one person is to be involved in the drafting. By assigning different parts of an outline, each codewriter will better understand the scope of his own assignment.

7.2 Arranging the Statute

Arranging a statute means making some very basic decisions about how to write it. What will the first part of the statute say? What will the second part say? And so on. The main objective is to make the provisions of the statute clear, usable and easy to find by those who will have to use them the most. The provisions should be arranged so that the parts of it can be amended later without requiring re-writing of the entire statute.

Listed below are some basic rules to follow in arranging a statute; however, the codewriter should not be afraid to depart from them if another arrangement will make the statute clearer, more usable, or its parts easier to find.

A. Each separate subject should be located in a single place.

If it is necessary to treat the same subject in more than one place, a cross reference should be indicated so that the reader is not deceived into thinking that all the law on the subject is covered in one place.

B. Do not state the same rule of law in more than one place, unless it is being applied to different curcumstances.

C. General provisions normally come before special provisions.

D. More important provisions normally come before less important provisions.

E. Permanent provisions normally come before temporary provisions.

F. Technical "housekeeping" provisions normally come at the end.

G. When writing about a series of events that may take place over time, especially if they are related, it is best to put them in chronological order.

H. A term or subject that recurrs often should be treated at the beginning.

The following outline is a typical order for a draft statute. When drafting a short and simple amendment, of course, this outline may not be needed. It should be used as a flexible guide rather than rigidly adhered to. (An example from the contents of an actual code section is shown in Illustration 7-1.)

Outline for drafting a statute:

TITLE

ENACTING CLAUSE (if used)

(1) Short title, if any.
(2) Statement of purpose or policy, if needed.
(3) Definitions.
(4) Most significant general rules and special provisions.
(5) Subordinate provisions, and exceptions large and important enough to be stated as separate sections.
(6) Penalties.
(7) Temporary provisions, if any.
(8) Specific repeals and related amendments.
(9) Saving clauses, if needed
(10) Severability clause, if needed.
(11) Expiration date, if any.
(12) Effective date, if different from date of enactment.

7.3 Legislatiave Writing Style

A. Abbreviations. Avoid abbreviations unless the abbreviation is part of a corporate name or legal citation.
Example: Beer Steins Co., Inc.

B. Capitalization.

Capitalize the following:

(1) Proper nouns and their derivatives (Indian, American);

(2) Common nouns when they form part of a proper name Example "tribe" in Upper Skagit Indian Tribe" or the Tribe;

(3) "Act", "Ordinance", or "Code" when referring to a particular statute. Example: Indian Self-Determination Act (the Act); Housing Ordinace (the Ordinance); Law and Order Code (the Code);

(4) "Government" when referring to the United States government.

Do not capitalize the following:

(1) "title", "chapter", "section", "article", "paragraph", except when referring to a particular reference (e.g., "Title VI");

(2) Common nouns when not part of a proper name nor used in reference to an entity whose name is a proper noun ("city", "county", "state", "tribe");

(3) Official titles unless in conjunction with a person's name ("governor", "senator", "chairman", "Chairman Jones");

(4) Words indicating geographical location ("northern Arizona").

C. Consistency. The codewriter should attempt to make the draft consistent with existing laws in grammar, punctuation and style. If existing code language is outdated grammar, punctuation and style, existing law may need to be amended. The choice of words within a draft should be consistent. Different words should not be used to convey the same meaning. The same words should not be used to convey different meanings.

D. Directness. Where the same idea can be accurately expressed either positively or negatively, it should be expressed positively. The negative expression is used only where compliance

compliance with the law is required before the transaction becomes valid. Example: "No person may drive a motor vehicle on the reservation unless he has first obtained a valid driver's license." (negative expression) "Every person shall obtain a valid driver's license before driving a motor vehicle on the reservation." (positive expression)

E. Mood. Avoid use of the phrase "shall be" when stating what the law is. For example, say "A license is required to engage in business on the reservation" rather than "A license shall be required..." Use of "shall" should be limited to directing an official or other person to carry out a duty. For example, "The administrator shall order anyone conducting business on the reservation without a license to cease business operations."

F. Number and Gender. Ordinarily, the singular should be used instead of the plural. As a rule, the drafter should prepare drafts which are sex neutral. In the selection of sex neutral terms, however, the codewriter should avoid artificial or coined terms, or the repeated use of "his or her" when to do so would be clumsy. This applies to amendments as well as new laws, if it can be done without creating problems in the statute. For example, the drafter should be careful to determine that by drafting in the singular and sex neutral in a few new sections of a law the impression is not created that the remaining sections concern only the plural or males. (See "Consistency" section 7.3C)

G. Numbers.

(1) Amounts. Numbers one through ten are written out ("five"), unless in groups ("8, 10, or 27"), and at the beginning of a sentence. Numbers over ten are written in figures ("12, 19, 146"). Compound numbers, if expressed in words, are hyphenated ("thirty-four, fifty-ninth").

(2) Order. Numbers in a series one through ten are written out ("first, second, fifth", NOT 1st, 2nd, 5th").
Numbers in a series over ten are expressed with numbers and letters ("11th, 22nd, 23rd, 81st").

(3) Dates. Dates are always expressed in figures or numbers only. Example: "January 1, 1986" not January First, Ninteen Hundred

and Eighty-Six."

(4) Fractions. When the denominator is ten or less, the fraction is written in words ("nine-tenths"). When the denominator is over ten, the fraction is expressed with figures (e.g., 3/11, 4/17, etc.). All mixed numbers are expressed in figures with hyphens (1-1/2, 37-3/8, 811-1/32).

H. Official Titles. Use the official and correct title of the public officer, department or agency referred to. Once used, however, a shorter reference, e.g., "hereinafter 'the Department'," can be made in a subsequent text.

I. Person. The third person is used (he, she, they, it), not the first person (I, we) or second person (you).
Example: "Every applicant shall provide proper identification upon request of the Tribe," not "You shall provide proper identification upon our request."

J. Punctuation.

(1) Clauses. Use commas to set off clauses that describe a subject already identified (e.g., "the hearing officer, who shall be appointed as provided in section 12, may..."), but not clauses that identify the subject (e.g.," the hearing officer who is appointed under section 12 may...") This most frequently occurs when the draftsman omits one of the two commas which should be used to set off a parenthetical expression from the rest of the sentence. For example, say "The citation, which shall be signed by the alleged violator, shall be filed with the prosecutor" not "The citation which shall be signed by the alleged violator, shall be filed with the prosecutor."

(2) Series of words. In a series of words, put a comma after the next to the last item (e.g., "nets, boats, and other gear").

(3) Periods. In legislative quotations, put punctuation inside quotation marks if it is part of the quoted material; outside if it is not. For example, "this ordinance may be cited as the 'Exclusion Ordinance'." This is a departure from usual punctuation rules.

K. Spelling. When referring to a dictionary, the first listed spelling is not necessarily the preferred spelling - the most commonly

used should be selected.

L. Tense. Use present tense, "any person who drinks...", rather than future tense, "any person who shall drink...". Use perfect tense, "when the advocate who first addressed the jury has completed...", rather than future perfect, "when the advocate who shall have first addressed the jury shall have completed...".

M. Voice. Use the active voice, not the passive voice.
Example: "The manager shall issue a permit to each eligible applicant." not "Each eligible applicant shall be issued a permit by the manager."

N. Miscellaneous. Avoid symbols such as *, #, %, ¢, &, and @.

O. Age.

1. To indicate a person below a certain age, say:
"...who is under 21 years of age." or
"...who is less than 21 years of age."

2. To indicate a person above a certain age, say:
"...who is 21 years of age or older"
(not "over 21 years of age")

3. To indicate a person within certain age limits, say:
"...who is 21 years of age or older but less than 66 years of age" (not "between the ages of 21 and 65")

P. Dates.
Express dates as follows:
June 28 (not "June 28th" or "28th of June")
June 1985 (not "28 June, 1985")
Express periods of time by making clear exactly when the period begins and ends:
"After March 12..." (not "from March 12")
"Before June 1, 1985"...(not "until June 1, 1985")

Q. Qualifications and Provisos. Ordinarily, a rule stated in a statute that needs to be qualified should be by case or condition rather than by exception. (such as a proviso).
Example:
(Case) "An individual who is 21 years of age or older may purchase alcoholic beverages at a tribal liquor store."
(Condition) "If an individual is 21 years of age or older, he

may purchase alcoholic beverages at a tribal liquor store.
(Proviso) "An individual may purchase alcoholic beverages at a tribal liquor store provided, however, that the individual is 21 years of age or older."

R. Tabulation. Tabulation is a useful device for bringing order and simplicity to a complex sentence. For example: example:

"An individual who is 21 years of age or older, and who is a tribal member who voted in the last general tribal election, and who has no convictions in tribal court within the last five years, is eligible to be a candidate for a Tribal Council position."

That sentence can be made clearer by tabulating as follows:

"An individual who is 21 years of age or older and who:

1. is a tribal member;
2. voted in the last general tribal election; and
3. has no convictions in tribal court within the last five years;

is eligible to be a candidate for a Tribal Council position."

S. Sections. Individual sections should be kept as short as possible and as narrow as possible. The more complex a section gets, dividing it into several sections should be considered. For extremely long and complex legislation, a draft law would be organized as follows:

Title I
Chapter 1
Article (or Part) A
Section 1
[subsection] (a)
[paragraph] (1)
[subparagraph] (A)
[clause] (i)

T. Making Amendments.

(1) Single parentheses in an amendment reflects normal usage:
"The person applying for a license (applicant) ..."

(2) The use of brackets or double parentheses reflects special

treatment, such as a previous amendment which has never been incorporated into a reprinted version of the amended statute. If the previous amendment was an addition, the language within the brackets or double parentheses is underlined or struck-through, as appropriate. This will allow the reader who has only a printed version of the unamended statute to more easily understand the effect of a proposed change. Sometimes the use of double parenthese around words with strike-through indicate simply that the words are being deleted from the law being amended. Example: "Tools used for employment will be exempt from execution up to a value of ((~~$100.00~~)) $500.00." (See also section 7.5 C).

7.4 Legislative Grammar

The list in the left-hand column below includes words that are overused and usually unnecessary. The words listed in the right-hand column are preferred alternatives because they say the same thing but are shorter, clearer, and more direct.

Words to Avoid	Words to Use Instead
such	the, a, an
said, same	that, it, him, her, they, etc.
any, each, every, all, some	a, an, the
shall (if conferring a right or a privelege)	may
where (for demonstrating examples)	when, if
"this act"	"this section" or more specific references
is directed to	shall
has the duty to	shall
is hereby authorized to	may
is empowered to	may
shall have the power to	may
means and includes	"means" or "includes"
in the event that	if

Words to Avoid	Words to Use Instead
in case	if
necessitate	require
null and void	void
per annum	a year
per day	a day
not later than	before
prior to	before
forthwith	immediately
full force and effect	"force" or "effect"
sole and exclusive	"sole" or "exclusive"
together with	and

7.5 Common Drafting Problems

A. Definitions. Legal definitions should be used only where necessary. The main use of a definition is to get clarity and consistency without burdensome repetition. A term should not be defined in a way that significantly conflicts with how it would be understood by the legislative audience to whom the law is primarily addressed. This does not rule out the use of "fictions" where convenient. For example, instead of saying "'automobile' includes trucks, power boats, and airplanes," say "in this section (or title) trucks, power boats, and airplanes shall be treated as if they were automobiles."

An exhaustive definition should use the word "means" (the term 'fracture' means 'break'). A partial definition should use the word "includes." The indefinite or unclear phrase "means and includes" should never be used. The terms can be used separately, however: "The term 'gear' means personal property that is capable of being used to capture fish, and includes boats, nets, hooks, barbs, and traps."

When a comparable equivalent is not available, the words "refers to" can also be used.

Definitions should generally be placed at the beginning of the act, ordinance, title, or chapter where the term is used.

B. Incorporation by Reference. Incorporation by reference has the advantages of saving space and time, and often guaranteeing parallel results. This is especially true with regard to technical uniform codes such as the Uniform Building Code, Uniform Electrical Code and Uniform Plumbing Code.

However, there are risks involved. One risk is that the incorporated material may not fit the legislative need. The material should be checked thoroughly before being incorporated.

Another problem is whether the incorporation is meant to extend to future amendments to the incorporated material. Usually, in the absence of a statement to the contrary, only the text as written at the time of incorporation is deemed adopted. If the intent is to incorporate future amendments, and judicial or administrative interpretations, this should be clearly stated. Doing this, however, could result in an unconstitutional delegation of authority to legislate to a non-tribal entity. The safest procedure is to expressly adopt the text only as written and incorporate any future amendments only after they are reviewed and found appropriate.

C. Amendments and Repeals.

Amendments. Although some legislation may be interpreted to amend existing law by implication (as being inconsistent with existing law), good drafting practice dictates that changes be made by express amendment. There are three kinds of express amendments.

(1) "Blind" Amendments. This method is used as follows: "Section 6 is amended by striking out the word 'citation' and by substituting the word 'complaint'. In more complex revisions the results are not that clear, leaving the reader "blind."

(2) Writing out the revised results. Under this method, the amendment would be written to show how the law would look after enactment of the amendment. The reader is not blinded as to the amended result, but must consult the existing law to compare the changes, which can be a difficult and tedious task.

(3) Special formatting. In this method, the section that is being amended is reprinted in full. Added wording is inserted

at the proper location and underlined. Deleted words are typed over with strike-through type. The reader can thus see in one document the old and new sections and what changes are proposed. (See Illustration 7-2) This also saves time and effort (and paper) for the codewriter.

Sometimes tribal ordinances must be amended a second time or more before there has been time to incorporate earlier amendments into the ordinance's text. As a result, the codewriter is faced with the problem of showing existing law in the special format method that is nowhere typed out in the way he seeks to demonstrate it. One solution is to put brackets or double parentheses around language that has been added or deleted in previous amendments, using underlining or strike-through typing to show the treatment. For example, "when a ~~citation~~ complaint is filed with the [~~judge~~ clerk]..." If this approach is followed, care should be taken in selecting how to strike through so that the draft still has some readability. For example, if the word "Concealing" is being replaced with the uncapitalized "conceals", it could be done as follows:

"Any person who ~~C~~conceal~~ings~~ a weapon..." or better

"Any person who ~~Concealing~~ conceals a weapon..."

The latter form is much easier to read and still adequately indicates the change that was made.

(4) Repeals. Do not use a general repealing clause such as:

"All laws and parts of laws in conflict herewith are repealed."

Repeal existing law specifically by citing to it by name, title, chapter, and section number. Do not use a repealed clause to strike out less than a section or group of sections - use these amendment formats.

A repealed law should not be revived by repealing the law that repealed it. In other words, if Law B repeals Law A, Law A may not be presumed to become law again simply be repealing Law B. Instead the repealed law should be renacted.

D. Purpose or Policy Section. The general rule is that such sections should be avoided since they tend to lead to sloppy drafting. The purpose of the legislation will ordinarily be clear if it is properly drafted. However, purpose or policy sections may be useful in emergency legislation, codification legislation (to overcome the presumption that substantive changes are being made) or where guidance to the administrative agency is desirable.

E. Regulation. Generally, it is not necessary to expressly grant an administrative agency or official the power to issue regulations to implement the legislation. This will be implied from the authority delegated. Use of the ambiguous word "regulation" should be avoided unless a specific format and procedure for rule-making by the agency is desired, or unless the power to regulate the public is granted.

F. Severability Clause. While courts often interpret that the invalidity of any one provision of a law does not invalidate the entire law, use of a severability clause may help resolve any possible doubt. The following language is recommended:

> "If a part of this ordinance is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this ordinance is invalid in one or more of its applications, that part remains in effect in all valid applications that are severable from the invalid applications."

Of course, the court still must determine which provisions are severable and which are not. If there is concern over any especially doubtful provision, it may be helpful to specifically identify that provision in the severability clause.

G. Savings Clause. A savings clause is used to avoid disrupting transactions that are in progress at the time of the law's effective date. If some or all of these transactions are meant to be affected, the savings clause can be drafted to express that. Otherwise, the following language is used.

> "This ordinance does not affect rights and duties that matured, penalties that were incurred, and proceedings that were begun before its effective date."

SUMMARY

The many legislative drafting rules presented in this chapter may leave the reader a bit bewildered. They should be referred to by the codewriter primarily as an aid to writing clear laws. The codewriter should rely on his own instincts initially in trying to draft clearly. These rules can then be consulted to identify and correct any hidden errors.

REFERENCES*

Bill Drafting Guide (Washington).

Cross, Minnesota Revisor's Manual.

Dickerson, Legislative Drafting.

Mehlman and Grossman, Handbook of Legislative Drafting.

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* See BIBLIOGRAPHY for complete citations.

PART III

DRAFTING TRIBAL LAWS

CHAPTER 8

SPECIAL DRAFTING PROBLEMS

This chapter identifies certain drafting problems that are unique to drafting laws for tribal governments and discusses possible solutions.

8.1 Waiver of Sovereign Immunity

As sovereign governments Indian tribes are immune from suit without their consent. Tribal sovereign immunity is essential to the promotion of tribal self-government and the protection of tribal culture and values. See Note, In Defense of Tribal Sovereign Immunity, 95 Harv.L.Rev. 1058 (1982).

In enacting a piece of legislation a question may arise as to whether the tribe is waiving its immunity from suit as to matters covered by the legislation, and can therefore be sued by persons adversely affected by the law. The general rule is that a tribe's sovereign immunity is waived only if it is done so expressly. (See cases* cited in Appendix.)

Since implied waivers of sovereign immunity are disfavored, it usually will be unnecessary for legislation to state that "nothing in this ordinance shall be construed as a waiver of the tribe's sovereign immunity..." However, as a matter of policy and in order to inform the public, it may be useful to pass a law of general application that

> "No provision in any law of this tribe shall be construed as a waiver of the tribe's sovereign immunity from suit unless the following language is used:..."

By this method the tribe may gain some control over poorly drafted provisions that unintentionally seem to allow for a suit against the tribe. If language is used that is very close to the required waiver language, however, or if a waiver is otherwise clearly apparent, a court might disregard the general waiver language requirement. A general law that "all waivers of sovereign immunity shall be strictly construed" may also be helpful where waivers are not carefully drafted.

choice as a forum for resolving disputes that arise under a tribal legislative scheme. By providing such a forum, the tribe may prevent or delay an aggrieved party seeking the federal court resolution of a dispute over the tribe's jurisdictional authority. The Supreme Court has held that whether a tribal court has exceeded its jurisdiction presents a federal question that can be reviewed by a federal court, but only after remedies in tribal court are first exhausted. National Farmers Union Insurance Co. v. Crow Tribe, 53 U.S.L.W. 4649 (June 3, 1985).

Generally, waivers should be restricted to the precise subject matter necessary, and then only allow suit in a tribal forum (e.g., tribal courts). In fact, limited waivers for equitable (non-monetary) suits against the tribe in tribal court in selected areas should be encouraged because they provide a forum for protection of rights under the Indian Civil Rights Act. The Supreme Court has suggested that lack of such a forum could affect Congress' willingness to allow tribes exclusively to determine the scope and content of those rights.

8.2 Jurisdiction over Non-Members

Tribal jurisdiction over nonmembers has been severely restricted by the Supreme Court. Tribes cannot exercise criminal jurisdiction over non-Indians. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978). The question of tribal criminal jurisdiction over nonmember Indians is now before the courts. Duro v. Reina, 12 Ind. L. Rep. 3003 (D. Ariz., Jan.8, 1985).

Tribal civil regulatory jurisdiction over nonmembers on their own fee land is also limited. There must be a consensual relationship between the nonmember and the tribe and its members, or the activity being regulated must affect vital tribal interests. United States v. Montana, 450 U.S. 544 (1981). Tribal authority to tax nonmembers, however, even for activities on their own fee land, is well established. Merrion v. Jicarill Apache Tribe 455 U.S. 130 (1982); Snow v. Quinault Indian Nation 709 F. 2d 1319 (9th Cir. 1983), cert. denied 104 S.Ct. 2655 (1984); Kerr-McGee v. Navajo Tribe, 12 Ind. L. Rep. 1027 (U.S. Sup.Ct., Apr. 16, 1985).

8.3 Sentencing Alternatives

The Indian Civil Rights Act (ICRA) restricts tribal court sentencing power to sentences of no more than six months confinement and a $500.00 fine for each offense. 25 U.S.C. 1302(7). Other than that, the only restriction is that sentences must not deny the offender due process of law or equal protection of the law. 25 U.S.C. 1302 (8). While the tribal court can make these determinations in the first instance, federal court review is available under the writ of habeus corpus. 25 U.S.C. 1303.

Often a tribe will prefer that its tribal judge order alternative sentences other than jail or fines. For many Indian families the loss of a family bread-winner, or payment of several hundred dollars in fines, can be a severe hardship. Therefore, sentencing alternatives are sometimes provided for in a tribal ordinance. These may include community service for the benefit of the tribe, treatment or rehabilitation for alcohol or drug-related offenses, probation with specified conditions, and restitution.

Restitution is in many respects a traditional tribal remedy, requiring the convicted offender to pay back or "make whole" the victim or his family. Arguably, the imposition of a monetary restitution requirement should not be restricted by the $500.00 ICRA limitation, since it is more in the nature of damages than a penalty. However, at least one BIA Area Office has disapproved a tribal law and did so under a code that allowed a combination of fines and restitution in excess of $500.00.

In accord with other ICRA restrictions, it may be advisable to hold a separate hearing on the restitution issue (for example, a sentencing hearing) so that the defendant can contest his liability. Ohterwise, his ICRA right to not testify against himself may be violated.

There may be other sentencing alternatives that are in keeping with tribal custom. These should be incorporated into a sentencing law or the tribal judge should be given broad discretion in designing appropriate alternatives. Involvement of the defendent in arriving at an appropriate alternative should be encouraged when possible.

8.4 Appeals

The ICRA does not require that a tribe establish a court of appeals to review decisions of the tribal trial court. Nor is this a requirement of procedural due process. All that is required is adequate notice and a meaningful opportunity to be heard; however, there are good reasons why a tribe should have some kind of appeals process.

First, since an appeals court normally consists of three judges, it provides three "second - chances" to evaluate whether any errors were made that could later be challenged in federal court. Second, it provides an opportunity to develop a better record and reasons why tribal authority or action should be upheld if the matter does go to court. Third, since tribal remedies must first be exhausted before proceeding to federal court, the prospect of lengthy proceedings at the tribal level may provide an incentive to litigants to negotiate a settlement instead.

Review on appeal should preferably be "on the record" rather than by trial de novo, which requires an entire re-litigation of the same case. Review on the record below can be de novo (reviewed as if the appellate judges were the trial judge deciding the case in the first instance). Some tribes establish the tribal council as the appeals panel, but this creates obvious problems where the tribe is a party. If the tribe has at least four judges, three of them can sit as the appeals panel for the fourth judge's case; otherwise the tribal judges from neighboring reservations can be specially appointed to serve as appellate judges on a case-by-case basis. This latter system has worked well for the tribes of the Northwest Intertribal Court System. (See Justice in Indian Country, BIBLIOGRAPHY)

To save the tribe from burdensome cost of frivolous appeals, appeals can be by permission of the appellate judges only rather than by right. Also, selection of the appellate panel can operate so that one judge automatically has the authority to make interim decisions that do not require the full panel to meet. This also can save time and money. Other efficiency measures may include telepone

conferences among judges and parties, and decisions on written submissions instead of oral arguments in simple cases.

8.5 Judicial Review

Some B.I.A. officials, long concerned about the lack of express "judicial review" authority for tribal courts to review tribal legislative or executive actions, believe that a constitutional separation of power is the answer. This is a bit ironic when one considers that the United States' Constitution never expressly provided for judicial review of governmental actions. The Supreme Court simply decided that the Constitution meant for federal courts to have that authority, and the legislative and executive branches (Congress and the President) have never seriously opposed it. Many tribes do the same thing today even though their court is established by legislation rather than in the constitution. While some tribal councils resist judicial review, others routinely allow tribal court reviews of their authority or actions because it insures the availability of an accessible independent tribal forum for resolution of disputes that might otherwise end up in federal court or that might aggravate political tensions within the tribal community if left unresolved. If tribal members are not provided a meaningful forum for resolution of their disputes against the tribal government, they will either exercise their power at the ballot box and select new tribal leaders or Congress may be asked to intervene and provide for federal court review (assuming that the Supreme Court has not already done that in National Farmers).

8.6 Intergovernmental Agreements

Cooperative agreements with state, local or other tribal governments may be of great help in areas where tribal jurisdiction or legislative powers are limited. Examples would include agreements for state social service investigation and placement in Indian Child Welfare cases pursuant to tribal court orders; cross-deputization for law enforcement services, especially with regard to non-Indian offenders; co-management of fisheries, water and other shared resources; recognition of court judgments; and joint economic development efforts. The agreements themselves may be adopted as special

legislation, or new or amending legislation may be needed to meet requirements set forth in the cooperative agreements.

Sources for information about sample cooperative agreements are listed in the APPENDIX.

8.7 State Jurisdiction on Reservations; Public Law 280

State jurisdiction over Indian reservations is a frequent subject of controversy and litigation.

As discussed in chapter 2, state jurisdiction on an Indian reservation is permitted only if Congress allows it, Worcester v. Georgia, supra (and other cases). In some instances the courts have found state jurisdiction to exist absent express Congressional intent. For example, states may regulate on reservation if such regulation is not preempted by federal regulation, and if it does not infringe on tribal self-government. Warren trading Post Co. v. Arizona Tax Commission, 380 U.S. 685 (1965); Central Machinery v. Arizona Tax Commission, 448 U.S. 160 (1980); Williams v. Lee, supra (chapter 2).

The more a tribe regulates on its own reservation (keeping in mind limitations as to nonmembers and nonmember lands, see chapter 2 and section 8.2), the better chance it will have of keeping state regulation out. This is sometimes referred to as "filling the field."

On the criminal side, states have criminal jurisdiction to prosecute non-Indians who violate state criminal laws while on a reservation. United States v. McBratney, 104 U.S. 621 (1882). If the victim is non-Indian the state's jurisdiction is exclusive. If the victim is Indian, federal jurisdiction may be exclusive although the federal policy has been to defer to state prosecution. Hall, Criminal Jurisdiction in Indian Country, p.39-40, 46 (BIBLIOGRAPHY).

Public law 83-280 ("P.L. 280") is the most graphic example of Congressionally authorized state jurisdiction over Indian country. (See Appendix F, Selected Federal and State Statutes.) Under P.L. 280 six states were given mandatory civil and criminal jurisdiction over all Indian country within their borders. Other states were given the option to assume full or partial jurisdiction. States that have assumed full or partial civil and criminal jurisdiction over Indian country within their borders, under P.L. 280, do not necessarily have

exclusive jurisdiction. (See APPENDIX, supra where the State of Washington assumed full civil and criminal jurisdiction over some Indian country, but only partial subject matter over others.) It is exclusive as to the federal government, but tribes may have concurrent jurisdiction, although the law is unclear. See Solicitors Opinion, November 14, 1978, 6 Ind. L. Rep. H-1 (1979).

State civil jurisdiction is limited to court jurisdiction over civil disputes arising in Indian country. P. L. 280 does not give the state civil regulatory jurisdiction over Indian country. Bryan v. Itasca County, 426 U.S. 373 (1976); Santa Rosa Band v. Kings County, 531 F.2d 655 (9th Cir. 1975) cert. denied 429 U.S. 1038 (1977). However, it does not prohibit it, either. Instead, the pre-emption/infringement analysis discussed earlier must be applied.

Another issue that arises under P.L. 280 is the status of lands established as Indian country after 1968, when Congress amended P.L. 280 to require tribal consent to state jurisdiction. 25 U.S.C. §1326. Arguably, without tribal consent, P.L. 280 jurisdiction does not extend to these new Indian country lands. A Solicitor's opinion appears to have adopted this position in at least one case. Some tribes have exercised the option to seek retrocession of P.L. 280 jurisdiction. See F. Cohen, Handbook of Federal Indian Law, p. 370-371, n. 195 (BIBLIOGRAPHY)

Tribes should not allow the sometimes complicated question of state jurisdiction to deter them from enacting laws that are needed, except in those areas where congress or the courts have clearly eliminated tribal jurisdiction. Tribal laws can be drafted in a way that anticipates the possibility of concurrent state jurisdiction, so that tribal officials implementing the law will have some guidance for resolving a state-tribal jurisdictional conflict if it arises.

8.8 Tribal Custom

What happens when tribal legislation is in conflict with tribal custom? Which one controls? There is no easy answer to this. Unless there are tribal court decisions to the contrary that have been generally accepted as authoritive by the tribal government, tribal legislation will probably be considered to prevail. If the

tribal council wants tribal custom to prevail in any conflict, it should pass a law stating as much. However, in doing so, numerous problems may be created. What is tribal custom? Who determines which tribal custom applies, or how it applies, in a given situtation? Will elders be called as experts? How will they be qualified? Will they be subject to cross-examination? What if tribal custom violates the ICRA's Bill of Rights?

All of these issues need to be addressed by the tribal council before deciding how to incorporate tribal custom and assure its rightful place as an important social institution of the Tribe.

Aside from substantive law that conflicts with tribal custom, the formalized Anglo-style court procedures may themselves conflict with tribal custom. As much as possible, alternative forums should be developed to allow tribal custom to operate in ways that still make sense within, and will receive the support of, the tribal community. This kind of process has already begun at some tribes. The Navajo Tribe now has a Peacemaker Court which mediates disputes among tribal members and others. Several NICS tribes have implemented dispute resolution panels patterned after the Community Boards Program in San Francisco. (See BIBLIOGRAPHY)

8.9 Due Process and Equal Protection

Due process of law must be provided all persons affected by the exercise of tribal powers of self-government. ICRA, 25 U.S.C. 1302 (8). The "due process" phrase is borrowed from the U.S. Constitution and generally means "fundamental fairness" or "basic fairness." Tribes are free to develop their own interpretation of ICRA rights like "due process" according to tribal value and customs (See Santa Clara Pueble v. Martinez, cited in APPENDIX).

In drafting legislation, there are two aspects of due process that require attention. First, the legislation must not violate a person's right to substantive due process. This means that the activity being regulated, or the effect on the individual's liberty or property interest must bear some rational relation to a legitimate governmental objective. Procedural due process requires that a person be afforded notice and a meaningful opportunity to be heard

prior to being adversely affected by tribal legislation. The "meaningful" hearing need not be highly formalized, but it should provide "some kind of hearing" by an unbiased decision-maker who allows the person an opportunity to present arguments or facts to support reversal of the governmental action. This hearing requirement can be provided by authorizing tribal court jurisdiction or by authorizing a tribal agency or staff member (or the council) to conduct the hearing.

"Equal protection" must also be considered when drafting tribal laws. See ICRA, 25 U.S.C. 1302(8). Equal protection simply means that persons similarly situated cannot be treated differently absent a rational governmental interest. If the differential treatment is based on race or some other "suspect" classification, the tribal government may have to show a compelling tribal interest. Indian preference by tribes generally escape suspect class treatment since it is based on a political rather than a racial classification. (See Morton v. Mancari, cited in Appendix)

8.10 Secretarial Approval

Some tribal constitutions require approval of a tribal ordinance or resolution by the Secretary of Interior before it can become effective. There are a great many variations on this requirement in tribal constitutions. Some provide that the tribal law is not effective until approved, while others allow the law to be effective until disapproved by the Secretary. Some impose deadlines within which the Secretary must act (either approve or disapprove), for example, 60 or 90 days. Others haves no deadlines, and secretarial approval could take as long as three years if the subject matter is particularly sensitive.

The Secretary's authority to approve or disapprove is usually delegated to the Assistant Secretary for Indian Affairs or the Commissioner of Indian Affairs, who in turn may delegate the authority to a B.I.A. Area Director for the tribes in his area. The Secretary or his designee may seek the advice of the Solicitor on a particular ordinance.

To avoid excessive delays, the codewriter should consider

advising the tribe to consult with the B.I.A. or Solicitor at an early stage of the tribe's legislative process. In this way, any potential problems can be dealt with in advance, and early B.I.A. involvement may expedite approval.

Although there may be advantages in certain situations to obtaining Secretarial approval, e.g., New Mexico v. Mescalero Apache Tribe, 11 Ind. L. Rep. 1028 (U.S. Sup.Ct., June 13, 1983), it is not legally required if the tribal constitution does not require it. See, e.g., Kerr-McGee v. Navajo Tribe, 12 Ind. L. Rep. 1027 (U.S. Sup. Ct., Apr.16, 1985). Tribes should consider amending their constitutions to delete such requirements where not mandated by federal law.

SUMMARY

Because of the unique legal status of tribal governments, the tribal codewriter must be aware of how this status will affect tribal legislation, and ways in which tribal laws can be drafted to avoid adverse consequences (like an unintended waiver of sovereign immunity) or take advantage of special opportunities (like tribal-state agreements on child welfare matters).

REFERENCES*

Taylor, Tribal Sovereign Immunity, Tribal Economic Development (NARF)

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* See BIBLIOGRAPHY for complete citation.

CHAPTER 9
SPECIFIC TRIBAL LAWS

This chapter focuses on particular tribal laws and possible approaches and pitfalls for the tribal codewriter in drafting them.

9.1 Constitution

Most Indian tribes are organized as governments pursuant to a written constitution adopted by tribal members. Many tribes adopted constitutions under the authority of Section 16 of the Indian Reorganization Act of 1934 (IRA), 25 U.S.C. 476.

Constitutions are generally of two kinds. The first kind enumerates or describes the powers the government may exercise, reserving all other powers to the people to exercise by referendum or to delegate to the government by constitutional amendment. The federal constitution is of this type. The second kind delegates general sovereign powers to the government, but specifying any limitations on the exercise of those powers. Most state constitutions are of this type. Most tribes, upon advice of the B.I.A., adopted the enumerated powers (federal) type of constitution.

The result of this has been that many powers which tribes need today to fully exercise their powers of self-government are reserved to the general membership and cannot be effectively exercised. This has occasionally resulted in somewhat strained interpretations of tribal constitutions by tribal courts in order to allow tribes to function as governments. See e.g., Squaxin Island Tribe v. Thomas, 10 Ind. L. Rep. 6005 (Sq.I. Ct. App., May 18, 1982)

Instead of putting up with a situation that hampers efforts to get the most basic kind of legislation adopted and enforced, tribes should be advised to consider focusing attention on amending their constitutions to either add additional enumerated powers, or to revamp the constitution entirely from one of enumerated powers to the general powers kinds. Even under a general powers constitution, adequate limitations reserving membership approval for certain kinds of laws of transactions can be incorporated, as well as protection of individual civil rights.

Efforts to revise a tribal constitution would probably meet with

support from B.I.A., especially if the revisions include separation of powers (legislative, judicial, executive) between different branches of tribal government. (See section 8.5)

9.2 Court System

Tribal court systems may vary a great deal from one reservation to another. Some tribal laws provide for election of judges by tribal members, while in others judges are appointed by the tribal council. If the tribal constitution does not establish the tribal court, the tribal council has broad power to establish the kind of court system it wants. The court can be delegated broad jurisdiction and powers of judicial review, or it can be given very restrictive jurisdictional powers. The goal should be to achieve a balance of power that will allow the government to function effectively and that will allow tribal members access to an independent forum for the resolution of disputes. Care should be taken to insure that the court is not given such broad powers that it effectively ends up governing the tribe through judicial review. On the other hand, the court must have sufficient powers to provide protection for individual rights so that it is viewed as a meaningful institution of government. Judicial review need not be a threat to tribal councils if limitations on the scope of review are made clear and other doctrines (for example, exhaustion of administrative remedies, political question, and comity) are rationally employed. Before giving constitutional review authority to a tribal court, however, the Council should take a long hard look at its constitution to see whether a narrow reading of its governing powers might render tribal government dysfunctional (See section 8.5).

Rules of procedure (general, criminal, civil, appellate) for the tribal court can be enacted by the Council. Caution should be exercised before adopting in their entirety rules from state or federal courts. Many of these may not be appropriate for the tribal court based on its budget and staffing situations, and especially if most people appearing in court are not represented by lawyers. State and federal court rules were written for judges and lawyers, not for "real" people. (Note: The Navajo Peacemaker Court has two sets of

rules, one for lawyers and judges, and another for lay persons. See BIBLIOGRAPHY)

9.3 Criminal Code

The simplest course to follow in drafting a tribal criminal code (often called a Law and Order Code) is to borrow provisions from the codes of other tribes, or from state codes if appropriate. The criminal provisions at 25 C.F.R., Part 11, for B.I.A. Courts of Indian Offenses may also serve as a useful guide. (Note, however, that some sections are quite archaic, and that each provision applies to Indians only - see discussion below.)

One of the first issues that must be addressed is the scope of personal jurisdiction. The C.F.R. code and some tribal codes, say "...any Indian who..." Because of the Supreme Court's decision in Oliphant, the immunity of non-Indians from tribal criminal prosecution is a fact of life. However, by stating the limit outright the tribe is imposing that limit on itself. Should the courts or Congress develop exceptions to Oliphant in the future, a tribe that had limited its criminal jurisdiction to Indians only would not be able to take advantage of the change without amending its code.

The "any Indian who..." or "any tribal member who..." limitations on personal criminal jurisdiction may cause other problems. An exclusion ordinance may refer to violations of the criminal code as a basis for excluding a nonmember. If the nonmember is non-Indian in "any Indian who..." jurisdiction (or an Indian in an "any tribal member who..." jurisdiction), it may be argued that he cannot be excluded for violation of the criminal code because the class of persons to which he belongs is exluded from coverage.

Finally, by listing "Indian' or "tribal member" as the actor in the crime, proof that the person accused is Indian or is a tribal member may be a required element of the offense that must be proved by the prosecution. The best course would be to use the phrase "any person who..." and in an introductory section on jurisdiction indicate that persons not subject to tribal criminal jurisdiction as a matter of federal law will not be criminally prosecuted for violations of the criminal code, but other judicial or administrative

remedies may be exercised.

9.4 Exclusion Ordinance

Exclusion ordinances are necessary if tribes are to retain any significant control over nonmembers, especially non-Indians, who violate tribal laws of personal conduct (for example, criminal laws). The kinds of conditions or conduct that will trigger the exclusion process should be clearly stated. Notice and opportunity for a hearing also must be provided. Authority to exclude may be exercised by the tribal council or it may be delegated to the tribal court, or a tribal agency or official. All of this should be set forth in the ordinance. Owners of fee land cannot be excluded from the land they own, but they can be restricted in their access to other areas within the tribe'e territorial jurisdiction. Exclusion orders can completely exclude or they can set time, place and manner restrictions on access to the reservation. Likewise, a monetary fine or similar sanction could be imposed as a condition to an exclusion order not being enforced. In theory, and notwithstanding the Oliphant decision, a non-Indian violating a tribal criminal law could be allowed to remain on the reservation on the conditions that he pay a $500.00 fine and stay in the tribal jail for six months. Even though a non-Indian cannot be criminally prosecuted and imprisoned by the tribe, the resulting remedy would be almost the same. The choice would be up to the non-Indian violator. He could choose to abandon his jail visit at any time, but face immediate exclusion.

A more troubling question is whether or not tribal members can be excluded. Most (if not all) ordinances deal only with the exclusion of nonmembers. However, there may be instances where a tribe would want to exclude a member. To use a "worst case" example, a tribal member who commits a grisly multiple homicide on the reservation may only be subjected to six months in jail for each murder under tribal law (assuming tribal concurrent jurisdiction for major crimes). The U. S. Attorney might prosecute, or decline to prosecute, or the defendant might be acquitted, or the case might be dismissed on a procedural error. Does the tribe want this member back in its community again after serving either no time or at most several months in jail? What about the families of the victims? How

much confidence will the community have in the tribe's ability to provide for the "health, safety, moral and general welfare?"

In such a situation, and others perhaps not as notorious, exclusion of members may be desirable for the safety of the tribal community. For many tribes expulsion of members was one of the traditional sanctions used against non-conforming behavior. Reference to how other governments deal with those who commit heinous acts against the government may or may not be helpful since the penalty restrictions imposed on tribes by the Indian Civil Rights Act (ICRA) do not exist elsewhere.

If it appears that exclusion of a member would violate tribal constitutional and ICRA safeguards of substantive due process, a tribe might consider provisions for disenrollment in its enrollment ordinance. After meeting due process notice and hearing requirements for a proposed disenrollment, the member could be disenrolled and then excluded under the exclusion ordinance as a nonmember.

Tribes may balk at such measures as being unduly harsh, but sometimes harsh measures are required to deal with dangerous situations where express or implied limitations on tribal powers leave the tribe otherwise incapable of protecting its members and other reservation residents. Legal advice should be sought before trying this, and especially, questions of substantive due process should be carefully examined.

9.5 Children's Code

Many tribes have enacted Children's codes since the passage in 1978 of the Indian Child Welfare Act (ICWA). A Children's code allows a tribe to exercise jurisdiction (inherent, or granted or restored by the ICWA) over cases transferred from state court proceedings involving the placement of dependent Indian children. A model children's code is available from the American Indian Law Center at the University of New Mexico in Albuquerque. Other sample codes are available from the Northwest Intertribal Court System (NICS).

Essential to effective implementation of a children's code is the availability of social services to provide for evaluation, in-

vestigation, counseling and placement of dependent Indian children. If the tribe cannot provide these services itself, or get funding for them from the B.I.A., it may need to negotiate a cooperative agreement with a social services agency of the state, another tribe, or a private organization.

Other issues related to children's code are discussed in publications listed in the BIBLIOGRAPHY.

9.6 Gaming Ordinance (Bingo)

In the last few years, many tribes have enacted ordinances to establish and control reservation bingo operations. The promise of great economic fortune from bingo has been realized by some tribes, but not by all. Where tribes have been successful, state and local politicians have attempted to eliminate tribal bingo (and other gambling activity) through lawsuits and Congressional lobbying.

The cases deciding the issue have generally upheld tribal bingo in states where charitable bingo was permitted and regulated by the state, or at least where there was no state public policy prohibiting bingo. See Seminole Tribe v. Butterworth, 658 F 2d 655 (5th Cir. 1981), cert. denied 455 U.S. 1020 (1982); State of Washington v. Hatch, ____ F.Supp.___ (W.D.Wa., Aug. 14, 1984). appeal dismissed (9th Cir., Feb. 21, 1985). But see State of Oklahoma v. Seneca-Cayuga Tribe of Oklahoma, 12 Ind. L. Rep. 5085 (Okla. Sup. Ct., July 2, 1985) (State can regulate tribal bingo). If lower court cases are reviewed by the Supreme Court, tribal bingo may suffer the same fate of tribal cigarette and liquor sales. Legislation pending in Congress - some bad, some not as bad - could well decide the future of tribal bingo enterprises. See Hearing on S.902, etc, June 26, 1985, Senate Select Committee on Indian Affairs, Washington, D.C. (BIBLIOGRAPHY).

Before enacting a gaming ordinance a tribe would be well-advised to consult an attorney or congressional representative about the current status of the law in this area. (See BIBLIOGRAPHY: Native American Rights Fund)

9.7 Housing Ordinance

Tribes that establish housing projects under HUD programs are required to adopt a ("boilerplate") ordinance set forth in Title 24

C.F.R., Part 805. Beyond that, there are many areas relating to regulations of housing that tribes can address.

Usually the first concern is an eviction ordinance since the HUD-generated ordinance requires the tribal government to exercise its authority to provide remedies for lease or home-ownership contract violations. A number of tribes have adopted eviction ordinances, some of which are available from NICS. States also have eviction laws ("unlawful detainer" statutes) which may serve as a model. Care should be taken to determine the precise relationship between the residents of the housing project and the housing authority (lessor-lessee? mortgagor-mortgagee?), and the resulting effect on each party's rights and liabilities as to occupancy, property, fixtures, repairs, etc. Also, what if the primary tenant wants to evict others living in the household with him or her?

A housing ordinance might also address such matters as building, electrical and plumbing standards (See section 9.14, Uniform Codes). Other issues are discussed in the housing law publications listed in the BIBLIOGRAPHY.

9.8 Hunting and Fishing

Hunting and fishing rights are substantial rights tribes never relinquished, or that were specially reserved in treaties with the United States. Court decisions have said that the right includes the authority to participate in management of the resource. As a result, many Pacific Northwest and Great Lakes area tribes have enacted fishing ordinances as a major component in their regulatory management scheme. Where fishing rights exist off-reservation these ordinances allow the tribes to exercise their jurisdiction over their fishing licensees in those off-reservation areas. Sample fishing ordinances are available from NICS. Tribes claiming treaty-reserved hunting rights have begun to adopt hunting ordinances to regulate off-reservation hunting areas.

Tribes that have substantial reservation land bases regulate hunting on-reservation, as well. Samples of these may be found in the Johnson Microfiche collection, or obtained directly from the tribes. (See BIBLIOGRAPHY.)

9.9 Tax Codes

Most governments supported themselves by raising revenue through taxation. Recently, tribes have begun to use their taxing powers to provide revenue needed to support tribal programs. Royalty taxes and severance taxes on gas, oil and mineral leases and production are probably the most well known. For those tribes that do not have such resources, sales of fish and fireworks are taxed, businesses and occupations (B & O) are taxed, along with other activity. If tribes are to achieve true self-government they must begin exercising their taxing powers to the fullest extent possible. Taxation ordinances provide the mechanism for implementing and collecting taxes. (See also Hoff, Tribal Taxation for Economic Development, BIBLIOGRAPHY)

9.10 Business Codes

Tribal business codes serve to regulate business practices and to encourage business development. If tribes are to effectively encourage and administer economic development on their reservations, a solid foundation of business laws is needed (See section 9-15, Uniform Codes). Some sample codes are available in the Johnson microfiche materials. (See BIBLIOGRAPHY) In addition, model tribal business codes are available. (See Press, Legal Structures for Business Development on Reservations, BIBLIOGRAPHY)

9.11 Domestic Relations

Tribal domestic relations ordinances generally regulate marriage and divorce of tribal members. In the absence of tribal laws or customs state law may apply or, in P.L. 280 states, state courts may have jurisdiction but may have to apply tribal law or custom. In enacting tribal domestic relations laws sensitivity to tribal custom is especially important. Such laws should provide for resolution of child custody and division of property and debts.

More recently, domestic relations legislation in the states has focused on domestic violence. The purpose of this special legislation is usually to provide a prompt and effective mechanism for law enforcement and judicial intervention in situations involving threatened or actual physical abuse of one spouse by another, or of one household member against another. In the past, without such

legislation, women that were being abused by their husbands often had to leave home and file for divorce before they could obtain any help from the courts or from police. Under typical domestic violence legislation, the abused spouse or household member can obtain immediate response from law enforcement, including arrest of the abusers. Without filing for a divorce or moving out, the abused person can obtain an immediate court order that restrains the abuser from coming to the premises where the abused person lives, subject to arrest for violation of the order.

Citation to Washington State's domestic violence law is listed in the APPENDIX.

9.12 Probate

Probate, the process for settling the estate of someone who has died, becomes much more complex where Indian property is involved. The usual purpose of probate laws are 1) to provide an efficient process for distributing property of a deceased person's estate to designated heirs and to creditors and 2) to determine who should be entitled to inherit in the absence of any will of the deceased person. State probate codes establish elaborate schemes for meeting these purposes.

Because Indian property may include trust assets, distribution of these assets must be done by the B.I.A., based on federal law. All other assets of the estate may be probated in tribal court. Where there is no will, the probate law indicates which of the deceased's heirs will inherit what assets. State codes usually attempt to follow what people generally would have intended had they written a will. Thus, the statutory distribution is based on perceived notions of dominant American cultural views of inheritance. These cultural values may not be shared, in whole or in part, by a given tribe. Investigation into the predominant inheritance practices and values of tribal members should precede legislation in this area.

Fractionated heirship, in which many Indians inherit small fractions of beneficial ownership interests in trust lands, is another difficult problem. Land may be tied up and unusable for years

because of problems in getting consent from so many heirs. The Indian Land Consolidation Act of 1982 was intended to help remedy some of these problems by allowing tribes to condemn trust land that was so fractionated that the leasehold value to any one heir was minimal. Because of strong feelings among heirs about their rights of ownership of even small factions, tribes can expect to encounter opposition to any such legislative efforts.

Sources of further information on matters relating to tribal probate codes are in the BIBLIOGRAPHY.

9.13 Traffic

Traffic codes are one of the best-suited areas for "decriminalization." This is especially important where a large number of motor vehicle drivers on the reservation are non-Indians. Without a cooperative arrangement with local city, county or state law enforcement agencies, the tribe must devise a legislative scheme that will allow it to keep unsafe drivers, Indians or non-Indian, off of reservation roads.

Many states, and some tribes, have adopted civil traffic procedures which are enforced through payment of fines and suspension of licenses to drive. If a driver violates a tribal traffic law he is issued a citation or notice which gives him the opportunity to either pay the specified fine or request a hearing before a judge to either contest the violation or explain mitigating circumstances. If a driver fails to pay the fine, or appear in court, his privilege to drive on the reservation is suspended. He is subject to immediate removal pursuant to the tribe's exclusion power. The department of licensing in the state where the driver is licensed may be notified of suspension and violations, and that state may take action to suspend the driver's license, depending upon that State's laws. Resident Indian motorists could be criminally prosecuted and jailed for the same reasons the non-Indian may be excluded from the reservation. (See discussion of exclusion considerations, section 9.4).

An example of a tribal civil traffic law is cited in the APPENDIX.

9.14 Zoning

Zoning is the mechanism by which state, local and tribal governments control land use development within their territorial jurisdiction. It allows certain geographic areas to be developed for residential housing and other areas to be developed for commercial and industrial purposes.

Tribal zoning ordinances that primarily affect tribal members will likely encounter no serious problems if they are related to a rational governmental objective. Zoning laws that directly affect non-Indians, however, will be scrutinized under the principles set forth in the Montana case, and related cases, discussed earlier. Where there are significant numbers of non-Indian residents and businesses on fee land within the reservation, zoning may be difficult. The problem is made even more complex where a local non-Indian government also zones the same areas. If zoning is undertaken, efforts should be made to involve the affected persons as much as possible, and early on, in an attempt to obtain support from them and avoid litigation. If there will be benefits to those affected this should be stressed.

A tribal zoning ordinance is cited in the APPENDIX. Before relying on any one scheme, other tribes who have zoning laws should be contacted to find out what problems they have encountered, or if they are enforcing their laws at all.

9.15 Uniform Codes

More and more states are adopting uniform laws in an effort to improve regulating of activities that routinely cross state lines. Examples of such laws include the Uniform Commercial Code (regulating business and financial transactions) and the Uniform Child Support Enforcement Act (regulating the collection of child support payments from absentee spouses). Other uniform codes are adopted because of their highly technical nature; for example, the Uniform Building Code, Uniform Electrical Code, and the Uniform Plumbing Code. Tribes may find it useful to adopt some of these laws for many of the same reasons. (See BIBLIOGRAPHY)

Especially where tribes are developing cooperative agreements

with state and local agencies, tribal adoption of laws identical or similar to the participating jurisdictions may be helpful. Of course, this should only be done if the other jurisdiction's laws are suitable to tribal needs. If they are not, the negotiations for a cooperative agreement may need to include discussion of both governments adopting uniform laws.

9.16 Employment Preference (TERO)

Essential to successful tribal economic development on Indian reservations is the employment of tribal members. Tribal employment rights ordinances (TERO - also an acronym for tribal employment rights office) are a means of securing employment and business opportunities for tribal members. Employers and others doing business on reservations are required under a TERO to meet certain requirements in hiring preferences for tribal members or other Indians who are otherwise unsuitably skilled or trainable for the available jobs. If construction contracts and sub-contracts are to be let out, for example, Indian firms are given preference over other bidders.

Sources for more information about tribal employment rights and sample ordinances are listed in the BIBLIOGRAPHY.

9.17 Other Laws

Legislation is appropriate for any kind of problem or need for which the tribal council determines that a legislative solution can help. As a result, there are countless areas in which tribes can, and should, regulate by legislation to preserve their interest and promote their powers of self-government. The legislation suggested in the preceding sections is only a sampling of the most common laws that tribes adopt or consider for adoption. In areas where there is controversy or substantial risk of exposure to liability or litigation, legal advice should be obtained before venturing forth with new legislation.

The following are some additional subjects that tribes may want to consider for legislation:

1. Legislation Ordinance (setting out procedures for submission of draft laws to the Council; rules of

style, grammer, etc. as discussed in this manual; format for draft laws and amendments; procedure for keeping legislative histories, and codifying and updating tribal laws).

2. Environmental Laws
3. Election Ordinance
4. Licensing Ordinance
5. Utility Code
6. Fire Safety Code
7. Administrative Procedures
8. Personnel Policies

SUMMARY

This chapter presented only a brief look at each of the tribal law areas discussed. More research is advised before proceeding confidently in any particular areas. However, the approach to each area can be applied in drafting other tribal laws.

CHAPTER 10
LEGISLATIVE HISTORY AND CODIFICATION

This chapter examines briefly two areas often neglected by tribal governments where the codewriter may provide a great deal of assistance. Proper organization of enacted tribal laws, and their legislative history, will help tribes function more effectively as governments.

10.1 Legislative History

A recorded history of tribal legislation may help in the future to determine the legislative purpose of a law whose language turns out to be less than clear in a particular case. In addition it may help to establish a tribal track record of responsible law-making in a variety of areas even if legislation is later repealed in those same areas. The legislative history will serve later legislators or drafters in trying to understand why a particular course of action was undertaken.

In Congress, legislative history normally contains the enacted law, all draft bills, committee reports, committee hearings, debates, and other entries in the congressional record. (see Illustration 5-21) Likewise, a tribal legislative history should contain at a minimum the enacted law, the draft law as recommended by a committee (if different from the one finally enacted), all research or committee reports, hearing records, council and committee meeting minutes, and any othe relevant memoranda, letters, or sample provisions or other documents. These can be kept in a single location, such as a binder, in chronological order or separated out for each law that they affect. The important thing is to have the documents in an identifiable location and part of an accessible filing system.

10.2 Codification

Codification is the organization by subject matter of compiled current laws. The advantage of codification is that it permits easy access to current laws that is not available in a chronological only system. The resulting "code" is usually organized by titles (broad subject matter categories), chapters, (more specific categories, often involving a major government department), and sections. All

repealed laws are deleted, but reference is made to them by way of "source notes" or similar references. Some codes are "annotated" which means that the court decisions and other rulings regarding that law are listed, usually right after that section, but sometimes in a separate volume. Some codes additionally contain cross-references to related laws or reference material, and practice aids that may be important to the practitioner. Legislative history may be listed. (see Illustration 5-5)

The accompanying illustration shows a typical code arrangement. (Illustration 10-1) New laws can amend the code directly and be incorporated into reprinted versions, or printed earlier in pocket parts or supplements to the main volume so that it is kept as up to date as possible.

The following is a recommended procedure for codifying a tribe's laws and maintaining an updating system for the code:

(1) Compile all tribal laws, including resolutions, etc.
(2) Separate out repealed laws.
(3) Assign laws to appropriate titles, chapters.
(4) Edit language, make cross-references and renumber sections for uniformity.
(5) Identify enacted law and legislative history sources for each code section.
(6) Present codified arrangement to Council for approval.
(7) Publish and distribute approved code.
(8) Establish a regular system for the audit and update of distributed codes by way of supplements, pocket parts or loose-leaf substitution.
(9) Periodically reprint code with new material incorporated.
(10) Maintain an index and cross-reference tables for purposes of comparing enacted laws with codes.

Advances in micro-computer technology in recent years has brought computer word-processing and data base management within the reach of many tribal governments. This technology is ideally suited for developing and maintaining tribal codes. Many state legislatures have been using larger computers for years to keep track of, and even publish, their own codes. Although no applications software exists specifically

for managing a tribal code, data base software now on the market could be adapted for that purpose.

For those tribes that would prefer not to maintain their tribal code themselves, there are publishing companies that provide that service. (See APPENDIX)

SUMMARY

Tribes will be able to more effectively exercise their governmental powers if they can more effectively manage their legislation. Tribal codewriters can assist tribes in keeping track of the legislative histories of tribal laws, and in organizing them into tribal codes.

III.

TRIBAL CHILD PROTECTION CODES

Some tribes have extensive child protection codes which take into account the unique needs of that specific tribe. Many tribes, however, have inadequate child protection codes. Some tribes do not have any type of child protection code.

The following are some of the general problems which many tribes have experienced concerning child protection codes:

* Child protection codes are often inadequate, out of date, and/or very difficult to understand.
* Child protection codes often include wholesale adoption of state law which does not adequately reflect the needs of the individual community.
* Child protection codes are often developed by non-Indian lawyers with little or no familiarity with the needs of the tribe.
* Many child protection codes do not provide adequate guidance for the tribal court.
* Child protection codes are often combined with juvenile delinquency codes when the primary emphasis is upon the delinquency procedures and/or it is difficult to tell which provision refers to which type of case.
* Tribal constitutions and/or tribal codes sometimes include restrictions upon the potential jurisdiction of a court system (e.g., restrict jurisdiction to tribal members only).
* Tribal constitutions often require BIA approval for any code revisions.
* Code revision is an expensive and time consuming process.
* It can be difficult to educate the tribal council concerning the need for code revisions.
* Code revisions are sometimes enacted without adequate input from the court personnel who will implement the code revisions.
* It is often difficult to codify tribal law.

The following article from National American Indian Court Judges Association ICWA training materials provides some possible guidelines for the development and implementation of Children's Codes:

DEVELOPMENT AND IMPLEMENTATION OF CHILDREN'S CODES

Since the adoption of the Indian Child Welfare Act, the need for a formal system of tribal law to deal with children and their legal problems has become apparent. A children's code, which is a comprehensive code dealing with the needs of children, will define the tribe's relationship to its children as well as provide the court and tribal and BIA Social Services Divisions with objectives and guidelines, especially in standards of treatment. It will also do the same for its members in a clear and comprehensible manner.

Most tribes have a juvenile code which allows the tribal court to deal with children when they have committed a defined wrongful act. A child welfare code usually covers abuse and neglect, termination of parental rights, and adoption issues; a number of tribes have welfare codes. A children's code combines the coverage of a juvenile and child welfare code. It is recommended that tribes adopt the more comprehensive children's code.[1]

Since the tribal council ultimately has the legislative power and duty to adopt laws, it is this group which will determine whether or not to adopt a children's code. Because of its many duties, the Council should not undertake to write a code but should delegate the drafting duty to another group. The Council may wish to set certain guidelines even before drafting is begun. Such guidelines could include requiring simple procedures, forbidding placement in a detention facility for children under a certain age, forbidding adoption of tribal children by non-Indian people, and allowing ICWA transfers from state courts.

Delegation may be to a standing committee of government, such as the law and order committee (or a specific tribal equivalent), or it may be to a specially formed committee. Whichever group is used, all professions which would have contact with a family court or a children's court should be represented on the committee. A wide representation of interests and skills will encourage a comprehensive code which will be realistic in its approach to dealing with children and their problems.

Once a committee has been delegated to draft a code, the members should first identify all resources available to it and to the tribe which will assist in code development, adoption, and implementation. Every tribal department, federal agency, tribal committee, individual and extratribal resource (including state and private organizations and individuals) should be evaluated according to these criteria. The tribal law firm should be involved in the process, but this may add considerable cost to the venture. The tribal council should be consulted about the role the law firm is to take.

Other codes are excellent resources, both for what should be done and for what should not be done. The Council should be certain that all provisions that are drafted meet specific tribal needs and can be realistically implemented considering tribal resources. Model codes are typically broad and inclusive and may contain provisions that tribal members do not want, cannot afford, or do not understand. The Model Children's Code, 2nd edition, published by the American Indian Law Center, Inc., also offers the latest law and recommended procedures for tribes.

At the first meeting of the committee, representatives of identified resources should be invited to attend and should be involved in the entire process. A person should be designated

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1. Note that many commentators would contend that it is best to provide separate child protection (or dependency) codes and delinquency codes.

by the committee to act as coordinator of the drafting process. In addition, people should be selected to research tribal needs and laws and to do the actual drafting. A specific time table is very important; even if it is not always met, it will assist the committee in completing its work. Again, this is up to the committee, but detailed and specific series of goals and objectives are important to the committee's work.

Committees rarely are efficient; a few individuals almost always do the majority of the work. The usual function of a committee is to produce ideas and policy and to analyze material brought to them. The most effective system may be to have the committee set the goals and objectives and time table for one or two people who will perform the actual research and drafting.

A crucial preliminary activity is the needs assessment of the community which will cover every issue relating to children. Only after this is completed can a responsive code be written. The drafting process should take a number of months of research, writing, analysis, commentary, and rewriting. Although one or two people may be doing the actual drafting, the committee should be closely involved in the process, especially in terms of critical commentary. Once the committee is satisfied that the code is complete, it should be reviewed by several lawyers who have not been involved in the drafting process. Either the tribal attorney or Legal Services lawyers, if available, can perform this function.

Social service providers should also review the procedures set by the code to determine if the expectations of the social services system built into the code are realistic. The resulting code should be a good blend of legal requirements and social services reality.

If changes are recommended in the review process, the committee should meet to consider the recommendations and whether to adopt them. If the committee decides to adopt all or part of the recommendations, the writers should be directed to incorporate them and the review process should be repeated again.

A note of caution about the legal review. It may be less costly and more effective to hire a lawyer with expertise in children's law rather than to use a retained lawyer with no knowledge of children's law. The Tribal Council should direct the review by setting cost limits and demanding that a children's law expert be consulted. Recommendations for changes should be adopted if they are backed by solid reasoning and can be implemented on the reservation.

Once the drafting and review process are complete, copies of the final code should be made available to the tribal council well before it is formally presented to the entire council. It is an excellent idea for a member of the committee to meet with each council member to review the draft. This will make certain that the council has read the code before the meeting, save meeting time, and allow committee members to prepare testimony on any points which may be brought up questioning the code.

The community also should be thoroughly aware of the code and its provisions. If possible, the proposed code should be published in the tribal newspaper and posted on bulletin

boards throughout the reservation. Special community meetings should also be held. Committee members also should present the code at regular community meetings. Questions should be answered clearly; if answers are not readily available, committee members should promise to find them and report back and must follow through on this promise.

One of the problems or complaints that inevitably arises, either during or immediately after the adoption of major law, is that some group, organization, interest, or person was excluded from the adoption process, either negligently or intentionally. Unfortunately, this claim will arise even after the thorough process recommended here. If a broad-based group of people are involved in the drafting process and the review procedure includes as many people as possible, committee members should not feel guilty if this kind of claim is made.

For a major new or revised code to be accepted by the majority of tribal members, as many people and interests as possible must be included in the development process. Information must be made available. The implications of the important sections, as well as the entire code, should be completely explained. Such items as increased program costs, additional people, more training, new equipment and infra-structure, as well as the impact of non-traditional provisions, must be detailed. A well-prepared, well-explained process and one that is not rushed will allow for a gradual public acceptance in most instances.

Once all of the work is completed, the ultimate decision will be made by the Tribal Council. If the committee has done its work, there is strong probability that the council will adopt the code, but nothing is guaranteed. If drastic changes are involved, people may resist simply because of the fear of the new.

If the code is adopted, the Council should also set up funding for implementing the code. Budgets, detailed budget narratives, funding sources may have to be provided in the process leading up to the code adoption. If it has not been done, then the tribal planner, budget officer, committee, etc., should set up a funding plan.

Once funding has been secured, the children's court should be implemented. Staff should be hired and trained, systems and forms including statistical formats should be designed. The court's location, equipment, furniture must be settled. Once these activities have been completed, the children's court should be ready for business.

NATIONAL INDIAN LAW LIBRARY TRIBAL CODE PROJECT:

PRODUCT OF SUCCESSFUL JOINT EFFORT

by Joanna L. Wilkerson

Despite centuries of devastation, Indian tribes have persisted as politically, socially, and culturally distinct entities, capable of and intent upon deciding their own destination through tribal government. This continuing endeavor culminated in a fundamental change during the era of social upheaval and reformation of the 1960s. Thus was begun a more comprehensive, concerted effort in the legal protection of Indian rights by lawyers who have an understanding of the subtleties of the problems at work at the interests at stake. The permanency of Indian tribes was acknowledged during the Johnson administration and reaffirmed by President Nixon's special message to Congress recommending a policy of support to Indian self-government.

Tribal governments are now becoming vehicles to serve the interests of their constituents. Constitutions conceived by Indian tribes themselves are replacing BIA boiler plate documents. Tribal courts are taking the place of the BIA controlled courts of Indian offenses and Code of Federal Regulations (CFR) courts. Although many tribal laws are still replicae of the BIA models of earlier years, tribal governments are now comprehensively rewriting law and order codes. Some governments are rewriting their existing tribal documents, and others are replacing them entirely with documents of their own fashioning. Tribes are taking legislative control of reservation management, environmental and wildlife protection, criminal prosecution, family welfare, juvenile delinquency, housing, zoning, economic development, taxation, business associations, non-Indian presence and business relations, and every other conceivable legal concern by promulgating comprehensive, sophisticated codes of law to serve the needs and protect tribal culture.

The rapid developments spawned both in federal Indian law and in tribal government

revealed, among other things, a vacuum of resources. There had never been any effort to create and upkeep a comprehensive collection of past and present cases, legislation, treaties, and other documents pertinent to the practice of Indian law, as well as existing tribal constitutions, codes, revisions, amendments, and other tribal government documents. In response to this insufficiency, the Native American Rights Fund (NARF) established a special project in 1972 called the National Indian Law Library (NILL) to serve as a clearinghouse for such a need.

The isolated nature of tribal governments required some systematic procedure of gathering and updating tribal codes and constitutions. The extensive time and cost involved in such an undertaking was prohibitive. Early efforts were made to gather existing documents, such as Colorado State College professor George E. Fay's compilation of tribal constitutions, charters and by-laws begun in 1967; and the work of University of Washington School of Law professor Ralph Johnson in compiling a microfiche collection of Indian tribal codes in 1980. Although both of these collections have been updated during this decade, as of 1988 there was no lending collection of complete tribal codes, constitutions, and other tribal documents for use in drafting or updating code provisions.

In September of 1987 NARF began submitting proposals for the funding of a tribal code project to be housed at NILL. In early spring 1988, the AT&T Foundation awarded an initial grant of $7,500 for the twofold purpose of collection development of the most comprehensive "Tribal Code" accumulation and the implementation of a regular updating process to ensure that the tribal codes are current. In the summer of 1988 the project's coordinator was hired to begin the arduous task of contacting tribal governments, requesting their participation in this essential project. By the end of summer, the "Tribal Code" collection project was underway.

The grant which made the tribal code collection project possible, though generous, was still only the initiative for an immense and ongoing process. The rest would depend on the complete and perpetual cooperation of the tribal governments themselves. it would be a little like the old tale of "rock stew" and the old man who put in the first potato, inspiring the other

members of his starving community to contribute what little each one had until eventually there was a great feast for all.

When the project first began, NILL's code collection contained about eighty entries of code material, some of which lacked their subsequent amendments. Only twenty of these were complete codes of laws; the rest were various ordinances, resolutions and other fragments. There was only one document from Alaska. There was no established method of contacting tribal governments and requesting code materials, following up on promised documents or gathering updates. The most efficient means of contact, at this point, was a compiled tribal leader's list, however many of the addresses and phone numbers were to be outdated. Excused from this listing were unrecognized and petition-status tribal entities. Later an entirely separate list of unrecognized tribes and those petitioning for recognition was discovered in the BIA;s Department of Acknowledgment and Research. Others not included in either of these lists were simply hunted down through telephone calls and research.

The compilation of these three sources produced a current mailing list of approximately 700 tribal governments for the project. An introductory letter described the project, stressed the importance of such a collection and requested that the tribes assist by sending to NILL their legal documents in their entirety, either as a complementary copy or including an invoice, and to forward any future updates. Though there had been great uncertainty as to what type of response to expect, dozens of pieces began immediately to arrive in the mail, and the rock stew began to take on a little flavor.

The response to letters requesting copies of code materials continued, varying from notices of delay in availability to statements of traditional law and absence of written documents, to boxes full of documents. It was tremendous. Given the scarcity of resources and manpower available on most reservations, the response was both unexpected and excellent. With the overwhelming cooperation demonstrated by the tribes, it began to appear more possible to accomplish the seemingly impossible comprehensive compilation of tribal law on a very tight

budget. New documents continue to arrive and tribal files are expanding.

Since the initial contact in the introductory letter, nILL has received replies from approximately 450 out of 700 mailed inquiries. The collection now contains over a thousand pieces of tribal law, comprising roughly 15,000 hard copy pages and includes over a hundred comments from Alaskan villages and corporations. Of the 107 constitutions in the collection, approximately a dozen are from Alaska villages. In addition, 17 have been authored by tribal entities seeking recognition. There are two dozen corporate charters, eight of which are from Alaska. There are now 60 complete codes of law, where self-labeled as such, including ten from the Pacific Northwest, 11 from California and the west, 10 from the northern plains, 16 from the southwest and Oklahoma, three from the southeastern region, one from New England, nine from the Great Lakes, and one from an Alaskan village. Of the other Alaskan documents, most are articles of association, ordinances establishing tribal courts, enrollment ordinances, and foster home regulations.

This does not include those governments who do not refer to their documents as a single collection, but whose complete collection of statutes the library nevertheless retains. Frequently the tribal government has only passed statutes pertinent to its particular situation, occasionally resulting in some unique laws and ordinances. Unlike before, the library now has model documents on almost every conceivable subject, from declarations of self determination to burial to sewage disposal, limited adoption of the Uniform Commercial Code, off-Reservation regulations, conservation and pow-wow ordinances, and an array of usual and unusual subjects so numerous that a new area of the catalogue has been created to accommodate tribal code topics.

This is fortunate, since requests for the most sophisticated and effective examples of codes addressing certain issues are made to NILL from three times a week to as frequently as three times a day. Authors of new codes, ordinances, and/or revisions, usually tribal lawyers, judges, and councilmen, are the most frequent and grateful users of the collection of tribal legal documents. Some of the more frequent subjects of tribal law revision work reveal the growth

and assertion of self government. Business codes are an especially popular request, with the growing degree of self-control over tribal business and development. The most sophisticated tribal business code at the library is over 100 pages. Hunting and fishing codes are requested as frequently, in response to the pressures arising from limited resources and to the cultural interests at stake for Indians. Fortunately, this is a subject on which there are numerous codes. Constitutions rewritten by tribal governments to serve their own people are an item in demand by others who are doing likewise. But the requests are more than challenging to the collection in some fields. The growing frequency of requests for conservation and environmental protection codes taxes a field of Indian law so new that there are few documents to fill the requests; there has been little such regulation promulgated in the past by tribal legislatures. Likewise, there are few examples of limited tribal adoption of the OAK, even though uniformity in trade laws is critical to facilitate growing trade relationships between Indian and non-Indian entities. Also, sophisticated corporation and business association codes are of increasing demand, as tribal governments reassert self control and reroute economic development along paths more compatible to their needs.

Despite deficiencies in the collection, the very fact that such subjects are requested with increasing frequency suggests that soon the dearths will be filled, as long as the tribes continue to contribute the finished products of their efforts so that others will be able to benefit from them in the future. The process becomes self-generating as rewritten and improved codes, based on models found at nILL, themselves become refined models for the future assertion of the right of Indians to govern themselves.

Yet, the urgent need for a single repository, where tribal governments habitually send all documents and their revisions, necessitates the highest possible level of cooperation in order to provide for the most benefit to all. NILL, like the rest of NARF, is strongly committed to the significance of a total team effort in the development of Indian law to meet the challenges of tribal self government. As with any team effort, individual components of that team must execute their respective roles if the effort is to be successful. While collection development, legal

research and reference may not be as visible to the public as appearances in the national media, NARF believes these functions must serve as a focus for the preservation of tribal existence. Indeed, the Tribal Code project depends heavily on tribal cooperation and self-initiative in sending NILL existing and/or new documents. Although great willingness has already been demonstrated, in response to recent requests it is estimated that at least half the existing tribal legal documents have yet to be acquired by NILL.

Probably no library came into existence with more of a mandate to serve as an information provider than did NILL. This tribal code project is only an example of how NARF has, since its founding been involved in efforts to develop Indian law. It is the goal of NILL to serve as a medium through which tribal decision makers can exchange information and thus improve the work of all tribal governments. The information problem which faces governments is the lack of mechanics for supplying to them the information they need. No individual tribal government has the capacity to keep track of what other tribal governments are doing and therefore tribal governments are not learning from the mistakes and successes of each other. Efforts such as the Tribal Code project indicate that NILL promises to be an important information resource for tribal governments in the years to come.

(Reprinting from Winter 1989 NARF Legal Review. Please contact NARF at 1506 Broadway, Boulder, Colorado,. 80302, (303) 447-8760 for more information on the Tribal Code project.)

[To run in shaded box near Resource Directory and training publications]

THE NATIONAL INDIAN LAW LIBRARY

The National Indian Law Library (NILL), a program of the Native American Rights Fund (NARF), has developed an extensive collection of legal materials relating to Federal Indian law and the Native American. The collection consists of standard law library materials such as law review materials, court opinions and legal treatises that are available in most well-stocked law libraries. The core of the NILL collection is comprised of trial holdings and appellate materials of important cases relating to the development of Indian law. The materials are in the public domain (i.e., non-copyrighted) and are available from NILL on a per-page-cost basis plus postage.

Considered to be a major contribution to the field of Indian law, NILL has created a National Indian Law Library Catalogue: An Index to Indian Legal Materials and Resources. The catalogue lists all NILL holdings and includes a subject index, an author/title table, a plaintiff-defendant table and a numerical listing. This 1,000 page reference tool is supplemented periodically and is designed for those who want to know what is available in a particular area of Indian law. It sells for $75.

NILL also offers an extensive collection of resource materials and publications focusing upon specific areas of Indian law. Of particular interest to tribal courts, NILL's tribal code project has developed and evaluated an extensive collection of tribal codes. This collection can serve as a resource for tribes who are considering developing or revising tribal codes.

For further information on NILL's resources and services, contact the National Indian Law Library, 1522 Broadway, Boulder, CO, 80302; (303) 447-8760.

RESOURCE DIRECTORY

The Tribal Court Record periodically features this directory, which lists recent available videotapes, training materials, books and other resources of interest to tribal court personnel, along with information about ordering the material.

Videotapes

Working Conference on Court Systems in Indian Country

This 75-minute videotape presents the highlights from a two-day working conference on court systems in Indian country, held on January 21-22, 1988 in Washington, D.C. The working conference was entitled, "Indian Self-Determination and the Vital Role of Tribal Courts — Evaluating Issues, Needs and Performance." Many issues of paramount importance to tribal court systems are discussed and various proposals to improve the effectiveness of tribal court systems are discussed. Copies of this videotape are available from the National Indian Justice Center for $35 per videotape.

Indian Civil Rights Act Hearings

This 50-minute videotape presents highlights from a January 22, 1988 hearing in Washington, D.C. (following the Working Conference, above) conducted by the U.S. Senate Select Committee on Indian Affairs on Indian tribal court systems and how they have been affected by the Indian Civil Rights Act (ICRA). Specifically, the purpose of the hearing was to examine tribal court systems 20 years after the enactment of the ICRA and to explore the need for ICRA revision and/or creation of new legislative action to facilitate the enhancement of tribal court systems. Many issues of paramount importance to tribal court systems are examined. Copies of the videotape are available from the National Indian Justice Center for $35 per videotape.

Civil Jurisdiction Over Non-Indians

This 60 minute videotape is designed to provide tribal court judges with practical knowledge and tools for determining whether or not to assert jurisdiction over non-Indians in civil cases brought before the court. It should assist tribal court judges in their efforts to comply with recent U.S. Supreme Court decisions, especially *National Farmers Union Insurance Co. v. Crow Tribe of Indians*, 471 U.S. 845 (1985). Copies of this videotape are available from the National Indian Justice Center for $35 per videotape.

Books and Manuals

Protecting Youth From Alcohol and Substance Abuse: What Can We Do?

A 96-page handbook for tribal members living in a reservation community, who want to contribute toward lessening alcohol and drug abuse among Native American youth. Copies of the handbook may be obtained from its publisher, the Native American Development Corporation at 1000 Connecticut Avenue NW, Suite 401, Washington DC 20036; (202) 296-0685.

The New Child Protection Team Handbook

This handbook (edited by Donald Bross, Richard Krugman, Marilyn Lenherr, Donna Andrea Rosenberg, and Barton Schmitt) offers guidelines for establishing an effective child protection program with techniques used across the country by hospitals, schools and social service agencies. The handbook covers diagnosis of child abuse, how to conduct interviews, how to gather evidence, and how to prepare children to testify in court. $52.00. Contact: Garland Publishing, Inc., 136 Madison Ave., New York, NY 10016; (212) 686-7492.

AIDS Information

Technical Assistance

Technical assistance with AIDS education, prevention and treatment proposals, grant applications and other projects is available from the National Native American AIDS Prevention Center. This Center, located in Oakland, California, with a branch in Minneapolis, can be reached through (415) 658-2051; or (612) 721-3568.

Indian-Specific AIDS Hotline

The National Native American AIDS Prevention Center also operates a toll-free Indian AIDS hotline which is staffed by Native American volunteers. The hotline is available from 9 a.m. to 5 p.m. Pacific time. Its number is (800) 283-AIDS.

Tribal Codes

NARF Tribal Code Project

The National Indian Law Library (NILL), a program of the Native American Rights Fund (NARF), has developed and analyzed an extensive collection of tribal codes. This collection serves as a vital resource for tribes who are considering developing or revising tribal codes. For further information, contact the National Indian Law Library, 1522 Broadway; Boulder, Colorado, 80302; (303) 447-8760.

Tribal Child/Family Protection Code

Developed by the Center, this code provides tribes with a guide when drafting or revising child protection codes. It covers civil child abuse and neglect, child custody, foster care licensing, guardianship, termination of parental rights, and adoption proceedings. For further information or copies of the code in text or on 5 1/4" floppy disks, please contact the Center.

Tribal Juvenile Justice Code

Also developed by the Center, this code provides a guide for drafting or revising juvenile justice codes. It addresses juvenile delinquency proceedings (referred to in the code as "juvenile offenses" or "juvenile offender" proceedings) and a narrow range of status offenses (referred to in the code as "family in need of services" proceedings). For further information, or copies of the code in text or on 5 1/4" floppy disks, please contact the Center.

Computer Guide

The Center has developed a guide to the selection, purchase and use of computer equipment. It includes suggestions for purchasing hardware, how to shop for computer systems, and recommendations for software including a data base package that has been specifically tailored to tribal courts. In addition, tribal court personnel who have questions about the selection, installation and use of computer hardware and/or software, particularly for IBM systems and major word processors, are invited to call Marsh at the Center, 707-762-8113.

APPENDIX B

TRIBAL CHILD\FAMILY PROTECTION CODE

Legal Education Series

TRIBAL CHILD/FAMILY PROTECTION CODE

NATIONAL INDIAN JUSTICE CENTER

NATIONAL INDIAN JUSTICE CENTER

The McNear Building (707) 762-8113
#7 Fourth Street, Suite 28, Petaluma, California 94952

Joseph A. Myers, Executive Director

The National Indian Justice Center, Inc. (the Center) is an Indian owned and operated non-profit corporation with principal offices in Petaluma, California, (707) 762-8113. The Center was created through the combined efforts of those concerned with the improvement of tribal court systems and the administration of justice in Indian country. Its goals are to design and deliver legal education, research, and technical assistance which promote this improvement.

STAFF

Joseph A. Myers, Executive Director (*Pomo*)
Jerry Gardner, Staff Attorney
Maureen Minthorn, Training Coordinator (*Cayuse-Yakima*)
Marsh Rose, Computer Technician
Darcy Richardson, Bookkeeper
Raquelle Myers, Staff Assistant (*Pomo*)

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The Center provides a broad range of training and technical services to Indian Tribes and their court systems, including legal education programs, court planning assistance, court evaluation services, assistance in selecting court personnel, code drafting and revision services, publications and resource services. For brochures and additional information concerning these programs, please call or write to the Center.

A major activity of the Center is the design and delivery of regional training sessions for tribal court personnel under contracts with the Bureau of Indian Affairs. Since May 1983, the Center has designed and delivered more than 70 training sessions for more than 4,500 tribal court personnel and others. These training sessions have included the following topics: Alcohol and Substance Abuse, Child Abuse and Neglect, Tribal Court Probation, Indian Civil Rights Act, Indian Youth and Family Law, Juvenile Justice Systems, Basic Criminal Law, Criminal Procedure, Advanced Criminal Law, Civil Procedure, Contracts and Personal Injury, Tribal Court Management, Evidence and Objections, Legal Writing/Ethics, Opinion Writing/Ethics, Legal Research and Analysis, and Indian Housing Law.

PUBLICATION SERVICES

The Center offers for sale many of the written training materials that are employed in our educational programs. In the near future, the Center will publish self-study materials to aid Indian justice personnel who are unable to attend the Center's training programs.

The following is a list of the Center's training publications which may be obtained by mailing the enclosed publication order form or by calling or writing to the Center.

Indian Civil Rights Act

Indian Probate Law

Indian Youth and Family Law

Contracts and Personal Injury

Criminal Procedure

Advanced Criminal Law

Evidence and Objections

Tribal Court Management/Tribal Court Operations and Procedures Manual

Indian Housing Law

Legal Writing/Ethics

Opinion Writing/Ethics

Juvenile Justice Systems

Child Abuse and Neglect

Alcohol and Substance Abuse

Tribal Court Probation

Civil Procedure in Indian Country

Legal Research and Analysis

TRIBAL CHILD/FAMILY PROTECTION CODE

This tribal child/family protection code was developed by Jerry Gardner and Joseph Myers of the National Indian Justice Center, Inc., and others. It was developed for the Bureau of Indian Affairs. It is intended to cover civil child abuse and neglect, child custody, foster care licensing, guardianship, termination of parental rights, and adoption proceedings. Its purpose is to protect and promote the safety and welfare of Indian children and families.

The National Indian Justice Center has previously developed a tribal juvenile justice code for the BIA in order to comply with the requirements of the Indian Alcohol and Substance Abuse Prevention and Treatment Act of 1986. The tribal juvenile justice code covers juvenile delinquency proceedings (referred to in the code as "juvenile offenses" or "juvenile offender" proceedings) and a narrow range of status offenses (referred to in the code as "family in need of services" proceedings).

This tribal child/family protection code was developed in September 1988. It has undergone a review and comment process since that time. This final version of the tribal child/family protection code reflects modifications to the code as of March 1989 as a result of the review and comment process.

This tribal child/family protection should be read in conjunction with the commentary which follows the code. Any tribe considering the adoption of this code should carefully review the code and the accompanying commentary to determine the extent to which the code meets the needs of their individual community and then make any necessary changes to the code before enacting it. (Note that the tribal child/family protection code is available on floppy disks or we can make the modifications for you on the Center's word processor. Check with us concerning the cost of these services.)

Please contact us if you have any questions concerning the tribal child/family protection code or the tribal juvenile justice code.

TRIBAL CHILD/FAMILY PROTECTION CODE

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CHILD/FAMILY PROTECTION CODE

2-1 SHORT TITLE, PURPOSE AND DEFINITIONS

2-1 A. Short Title

Title 2 (Chapters 2-1 through 2-30) shall be entitled "The Child/Family Protection Code" (code).

2-1 B. Purpose

The child/family protection code shall be liberally interpreted and construed to fulfill the following expressed purposes:

1. To provide for the welfare, care and protection of the children and families on the _____ Reservation;

2. To preserve unity of the family, preferably by separating the child from his parents only when necessary;

3. To take such actions as may be necessary and feasible to prevent the abuse, neglect or abandonment of children;

4. To provide a continuum of services for children and their families from prevention to residential treatment, with emphasis whenever possible on prevention, early intervention and community-based alternatives;

5. To secure the rights of and ensure fairness to the children, parents, guardians, custodians or other parties who come before the children's court under the provisions of this code;

6. To ensure that off-reservation courts will be willing to return tribal children to the reservation by establishing this code;

7. To recognize and acknowledge the tribal customs and traditions of the _____ Tribe with regard to child-rearing.

2-1 C. Definitions

As used in this code:

1. **"Abandon"**: The failure of the parent, guardian or custodian to provide reasonable support and to maintain regular contact with a child. Failure to maintain a normal parental relationship with the child without just cause for a period of six (6) months shall constitute prima facie evidence of abandonment. Custody with extended family members or voluntary consent to placement does not constitute abandonment.

2. **"Abuse"**: The infliction of physical, emotional or mental injury on a child, or sexual abuse or sexual exploitation of a child and shall include failing to maintain reasonable care and treatment or exploiting or overworking a child to such an extent that his health, moods or emotional well-being is endangered.

3. **"Adult"**: A person eighteen (18) years of age or older, or otherwise emancipated by order of a court of competent jurisdiction.

4. **"Child"**: A person who is less than eighteen (18) years old and has not been emancipated by order of a court of competent jurisdiction.

5. **"Child Protection Team"**: A team established to involve and coordinate the child protection services of various agencies as set forth in chapter 2-7 of this code.

6. **"Court"** or **"Children's Court"**: The Children's Court of the _____ Tribe.

7. **"Custodian"**: A person, other than a parent or guardian, to whom legal custody of the child has been given.

8. **"Domicile"**: A person's permanent home, legal home or main residence. The domicile of a child is generally that of the custodial parent or guardian. Domicile includes the intent to establish a permanent home or where the parent or guardian consider to be their permanent home.

9. **"Emergency Foster Home"**: Placement with a family whose home has been licensed to accept emergency placements of children at any hour of the day or night (see "Foster Home").

10. **"Extended Family"**: Defined according to the tribal customs and traditions of the child's tribe.

11. **"Foster Home"**: Placement with a family whose home has been licensed under chapter 2-24 of this code.

12. **"Foster Home Inspector"**: A person appointed by the tribal council to inspect and license foster homes under chapter 2-24 of this code.

13. **"Guardian"**: A person assigned by a court of law, other than a parent, having the duty and authority to provide care and control of a child (see "Permanent Guardian," "Temporary Guardian," "Guardian Ad Litem," and "Guardian of Property").

14. **"Guardian Ad Litem"**: A person appointed by the court to represent the child's interests before the court.

15. **"Guardian of Property"**: A person appointed by the court to manage the property of a child or incompetent person as set forth in chapter 2-25 of this code.

16. **"He/His"**: The use of he/his means he or she, his or her, and singular includes plural.

17. **"Incompetent"**: An insane person or person who is for any cause mentally incompetent to take care of himself and to manage his property.

18. **"Indian"**: Any member of a federally recognized Indian tribe, band or community, or Alaska Natives, or a person considered by the community to be Indian.

19. **"Juvenile Counselor"**: The juvenile counselor or juvenile probation officer or other appropriately titled person who performs the duties and responsibilities set forth in section 2-5B of this code.

20. **"Juvenile Offender"**: A child who commits a "juvenile offense" prior to the child's eighteenth (18th) birthday (see Juvenile Justice Code).

21. **"Juvenile Offense"**: A criminal violation of the Tribal Code of the _____ Tribe which is committed by a person who is under the age of eighteen (18) at the time the offense was committed (see Juvenile Justice Code).

22. **"Juvenile Presenter"**: The juvenile presenter or juvenile presenting officer or any other person who performs the duties and responsibilities set forth in section 2-5C of this code .

23. **"Neglect"**: The failure of the parent, guardian or custodian to provide adequate food, clothing, shelter, medical care, education or supervision for the child's health and well-being. "Neglect" shall include "abandoned" children.

24. **"Parent"**: Includes a natural or adoptive parent, but does not include persons whose parental rights have been terminated, nor does it include the unwed father whose paternity has not been acknowledged or established.

25. **"Open Adoption"**: An adoption which is intended not to permanently deprive the child of connections to, or knowledge of, his or her natural family.

26. **"Permanent Guardian"**: A guardian who has been granted long term guardianship status as set forth in section 2-25B of this code.

27. **"Protective Services Worker"**: The protective services worker, social services worker, law enforcement personnel or any person who performs the duties and responsibilities set forth in chapter 2-6 of this code.

28. **"Reservation"**: The _____ Reservation in _____.

29. **"Temporary Guardianship"**: A guardian who has been granted temporary guardianship status as set forth in chapter 2-25 of this code.

30. **"Tribal Council"**: The tribal council of the _____ Tribe.

31. **"Tribal Court"**: The tribal court of the _____ Tribe.

32. **"Tribe"**: The _____ Tribe.

2-2 JURISDICTION OF THE CHILDREN'S COURT

2-2 A. General Jurisdiction

There is hereby established for the _____ Tribe of the _____ Reservation a court to be known as the _____ Children's Court. The jurisdiction of the children's court shall be civil in nature and shall include the right to issue all orders

necessary to insure the safety of children and incompetents within the boundaries of the reservation, as well as other children who have been declared to be wards of the children's court. The children's court shall also have the power to enforce subpoenas and orders of restriction, fines, contempt, confinement and other orders as appropriate.

The children's court shall have jurisdiction over the following persons:

1. Enrolled members of the tribe under the age of eighteen eighteen (18) years;

2. Persons under the age of eighteen (18) years who are eligible for enrollment in the tribe;

3. Indians, as defined in section 2-1C of this code, who are under the age of eighteen (18) years and who are residing within the exterior boundaries of the reservation;

4. Children of enrolled members of the tribe or other Indians, as defined in section 2-1C of this code, including adopted children, who reside within the exterior boundaries of the reservation;

5. Children residing within the exterior boundaries of the reservation, for whatever reason, in the home of an enrolled member of the tribe or other Indians, as defined in section 2-1C of this code, as long as the parents, guardians, or custodians have consented to the jurisdiction of the children's court. Such consent, once given, may be revoked only with permission of the children's court; and

6. Incompetent persons residing or domiciled within the exterior boundaries of the reservation.

2-2 B. Jurisdiction Over Extended Family

Where the children's court asserts jurisdiction over a person under section 2-2A above, the court shall also have jurisdiction over the person's extended family whenever that court deems it appropriate.

2-2 C. Continuing Jurisdiction

Where the children's court deems it appropriate, the court may retain jurisdiction over children and their extended families who leave the exterior boundaries of the reservation.

2-3 TRANSFER OF JURISDICTION

2-3 A. Application of the Indian Child Welfare Act

The children's court may apply the policies of the Indian Child Welfare Act, 25 U.S.C. §1901-1963, where they do not conflict with the provisions of this code. The procedures for state courts in the Indian Child Welfare Act shall not be binding upon the children's court unless specifically provided for in this code.

2-3 B. Transfer to State Court or Other Tribal Court

In any proceeding before the children's court, the court may transfer the proceedings to an appropriate state court or another tribal court where the state or the other Indian tribe have a significant interest in the child and the transfer would be in the best interest of the child.

2-3 C. Transfer from Other Courts

The children's court may accept or decline, under the procedures set forth in this code, transfers of child welfare cases from other federal, state or tribal courts.

2-3 D. Procedures for Transfer from State Court

1. **Receipt of Notice:** The tribal agent for service of notice of state court child custody proceedings, as defined by the Indian Child Welfare Act, shall be the tribal social service department.

2. **Investigation and Pre-Transfer Report by the Court Counselor:** The tribal social services department shall conduct an investigation and file a written report with the court within five (5) days of receipt of notice from the tribal agent for service of notice.

3. **Recommendations for Transfer or Intervention:** The court shall make written recommendations to the tribal attorney on whether or not the tribe should petition for transfer from or intervene in state court.

4. **Petition for Transfer:** The tribal petition for transfer shall be filed by the tribal attorney within five (5) days of receipt of recommendations from the court.

5. **Intervention in State Court Proceedings:**

   a. The tribe may intervene in state court child custody proceedings, as defined by the Indian Child Welfare Act, at any point in the proceedings, and;

   b. the tribal attorney or selected representatives shall file a motion to intervene within five (5) days of receipt of recommendations from the court.

6. **Acceptance of Transfer:** The court will not accept a transfer from state court unless:

   a. a parent or Indian custodian's petition to state court for transfer is granted, or;

   b. the tribe's petition to state court for transfer is granted, and;

   c. the tribal social services department's pre-transfer report recommends the acceptance of transfer, and;

   d. the tribal attorney recommends acceptance.

7. **Hearing(s):** Upon receipt of transfer jurisdiction from state court, the court counselor shall file a child/family protection petition, and appropriate hearing(s) shall be held in accordance with this code.

2-3 E. Full Faith and Credit; Conflict of Laws

1. **State Court Orders:** State child custody orders of other tribal courts involving children over whom the children's court could take jurisdiction may be recognized by the children's court only after a full independent review of such state proceedings has determined:

   a. the state court had jurisdiction over the child, and;

   b. the provisions of the Indian Child Welfare Act, 25 U.S.C. §1901-1963, were properly followed, and;

   c. due process was provided to all interested persons participating in the state proceeding, and;

   d. the state court proceeding does not violate the public policies, customs, or common law of the tribe.

2. **Court Orders of Other Tribal Courts:** Court orders of other tribal courts involving children over whom the children's court could take jurisdiction shall be recognized by the children's court after the court has determined:

   a. that the other tribal court exercised proper subject matter and personal jurisdiction over the parties, and;

   b. due process was accorded to all interested parties participating in the other tribal court proceeding.

3. **Tribal Interest:** Because of the vital interest of the tribe in its children and those children who may become members of the tribe, the statutes, regulations, public policies, customs and common law of the tribe shall control in any proceeding involving a child who is a member of the tribe.

2-4 PROCEDURES AND AUTHORIZATIONS

2-4 A. Rules of Procedure

The procedures in the children's court shall be governed by the rules of procedure for the tribal court which are not in conflict with this code.

2-4 B. Cooperation and Grants

The children's court is authorized to cooperate fully with any federal, state, tribal, public or private agency in order to participate in any foster care, shelter care, treatment or training program(s) and to receive grants-in-aid to carry out the purposes of this code. This authority is subject to the approval of the tribal council if it involves an expenditure of tribal funds.

2-4 C. Social Services

The children's court shall utilize such social services as may be furnished by any tribal, federal, or state agency provided that it is economically administered without unnecessary duplication and expense.

2-4 D. Contracts

The children's court may negotiate contracts with tribal, federal or state agencies and/or departments on behalf of the tribal council for the care and placement of children before the children's court subject to the approval of the tribal council before the expenditure of tribal funds;

2-5 CHILDREN'S COURT PERSONNEL

2-5 A. Children's Court Judge

1. Appointment

The children's court judge(s) shall be appointed or elected in the same manner as the tribal court judge(s).

2. Qualifications

The general qualifications for children's court judge(s) shall be the same as the qualifications for tribal court judge(s). In addition, children's court judges shall have significant prior training and/or experience in child welfare matters.

3. Powers and Duties

In carrying out the duties and powers specifically enumerated under this child/family protection code, judges of the children's court shall have the same duties and powers as judge of the tribal court, including, but not limited to, the contempt power, the power to issue arrest or custody warrants, and the power to issue search warrants.

4. Disqualification or Disability

The rules on disqualification or disability of a children's court judge shall be the same as those rules that govern tribal court judges.

2-5 B. Juvenile Counselor/Juvenile Probation Officer

1. Appointment

The court shall appoint juvenile counselor(s) or juvenile probation officer(s) to carry out the duties and responsibilities set forth in this code. The chief judge of the tribal court shall certify annually to the tribal council the number of qualified juvenile counselor(s) or juvenile probation officer(s) needed to carry

out the purpose of this code. The person(s) carrying out the duties and responsibilities set forth in this section may be labeled "juvenile counselors" or "juvenile probation officers" or any other title which the court finds appropriate so long as they perform the duties and responsibilities set forth in this section.

2. **Qualifications**

The juvenile counselor must have an educational background and/or prior experience in the field of delivering social services to youth.

3. **Resource Development**

The juvenile court counselor shall identify and develop resources on the reservation, in conjunction with the children's court and the tribal council, to enhance each tribal child's potential as a viable member of the tribal community.

4. **Duties:**

(a) make investigations as provided in this code or as directed by the court;

(b) make reports to the court as provided in this code or as directed by the children's court;

(c) provide counseling services; and

(d) perform such other duties in connection with the care, custody or transportation of children as the court may require.

5. **Prohibited Duties**

The juvenile counselor shall not be employed as or be required to perform the duties of a prosecutor, juvenile presenter or law enforcement official.

2-5 C. Juvenile Presenter

1. **Appointment**

The court shall appoint juvenile presenter(s) to carry out the duties and responsibilities set forth in this code. The chief judge of the tribal court shall certify annually to the tribal council the number of qualified juvenile presenter(s) needed to carry out the purpose of this code. The person(s) carrying out the duties and responsibilities set forth in this section may be labeled "juvenile presenters" or "juvenile presenting officers" or "juvenile petitioners" or any other title which the court finds appropriate so long as they perform the duties and responsibilities set forth in this section.

2. **Qualifications**

The qualifications of the juvenile presenter(s) shall be the same as the qualifications for the official who acts as prosecutor for the tribal court.

3. **Duties:**

(a) File petitions with the court as provided in this code;

(b) Represent the tribe in all proceedings under this code; and

(c) Perform such other duties as the court may order.

2-5 D. Guardian ad Litem

At any stage of the proceedings conducted under this code the children's court may appoint separate counsel for the child, without affecting the right to counsel of the parents, guardians or other legal custodians, to act as guardian ad litem representing the child's best interests.

2-5 E. Additional Court Personnel

The court may set qualifications and appoint additional juvenile court personnel such as guardians ad litem, court appointed special advocates (CASAs), children's court advocates, and/or referees whenever the court decides that it is appropriate to do so.

2-6 PROTECTIVE SERVICES WORKERS

2-6 A. Power and Duties:

1. Protective services workers shall be employed by the tribal social services department and/or the tribal law enforcement department.

2. The department(s) may cooperate with such state and community agencies as are necessary to achieve the purposes of this code. The department(s) may negotiate working agreements with other jurisdictions. Such agreements shall be subject to ratification by the tribal council or its designate.

3. A protective services worker shall:

a. Receive reports of neglected, abused or abandoned children and be prepared to provide temporary foster care for such children on a twenty-four (24) hour basis, and;

b. Receive from any source, oral or written, information regarding a child who may be in need of protective services.

c. Upon receipt of any report or information under paragraph (a) or (b) of this section, immediately:

1. notify the appropriate law enforcement agency, and;

2. make prompt and thorough investigation which shall include a determination of the nature, extent, and cause of any condition which is contrary to the child's best interests and the name, age, and condition of other children in the home.

d. Take a child into temporary custody if there are reasonable grounds to believe that the child is suffering from illness or injury or is in immediate danger from his surroundings and that his removal is necessary. Law enforcement officials shall cooperate with social services personnel to remove a child from the custody of his parents, guardian, or custodian when necessary.

e. After investigation, evaluate and assess the home environment of the child or children in the same home and the risk to such children if they continue to be subjected to the existing home environment, and all other facts or matters found to be pertinent. They shall determine whether any of such children is a child in need of protective services.

f. Offer to the family of any child found to be a child in need of protective services appropriate services which may include, but shall not be restricted to, protective services.

g. Within thirty (30) days after a referral of a potential child in need of protective services, submit a written report of his investigation and evaluation to the juvenile presenting officer and to a central registry maintained by the department(s).

h. No child shall remain in temporary custody for a period exceeding seventy-two (72) hours, excluding Saturdays, Sundays and holidays, unless a child/family protection petition is filed.

2-6 B. Limitations of Authority; Duty to Inform

1. Before offering protective services to a family, a worker shall inform the family that he has no legal authority to compel the family to receive such services and of his authority to initiate a petition in the children's court.

2. If the family declines the offered services, the worker may initiate a child/family protection petition in children's court alleging a child in need of protective services if he believes it to be in the child's best interest.

2-7 CHILD PROTECTION TEAM

The tribe shall establish a child protection team. Establishment of the child protection team is an attempt, through the involvement and coordination of various agencies, to prevent Indian children from being abused or neglected. In cases where children have been abused or neglected, efficient and effective protective services shall be provided so as to immediately secure the children's safety and health. Follow-up actions shall then to be taken to stabilize the circumstances for the long-term benefit of the children and, to the extent possible, their family members.

Prevention of child abuse and neglect is to be emphasized. The child protection team is intended to facilitate the identification of danger signs which will prompt immediate intervention and/or preventive actions to be taken. However, when a child's well-being is found to be endangered, the child protection team should initiate protective services as promptly, efficiently,

and effectively as possible. These services are to be provided so as to ensure the child's immediate safety and health. Once attained, to the extent possible, actions are to be taken to correct the problems which caused the abuse or neglect and prevent it from occurring again. The child protection team should facilitate the development and implementation of a plan to promote the long-term well-being of the child and the appropriate family members.

The child protection team is technical and advisory in nature. In no way is it intended to undermine the authorities and responsibilities of individual agencies. It is designed to promote cooperation, communication, and consistency among agencies. It is appropriate for the child protection team to debate what actions would best promote the well-being of a child and provide relevant information and advice to decision-making agencies. The child protection team shall facilitate (not hinder) the decision-making process. Confidentiality shall be maintained by all child protection team members.

The duties of the child protection team shall include the development and implementation of procedures for:

2-7 A. Providing Oversight

1. Monitor child abuse and neglect activities to ensure that adequate preventive, protective, and corrective services are provided.
2. Review and track all child abuse and neglect cases which have been referred.
3. Investigate cases to determine whether the best interests of the child are being met.
4. Review case plans for their adequacy.
5. Maintain confidentiality of information.
6. Send local child protection team data to area child protection teams.

2-7 B. Facilitating Provision of Services

1. Receive child abuse and neglect referrals. Assign case managers to track cases.
2. Identify available community resources, programs and services.
3. Provide recommendations to various pertinent agencies.
4. Promote cooperation, communication, and consistency among agencies.
5. Provide a forum for debating what actions would best promote the well-being of Indian children.
6. Respond to inquiries from the community, area child protection teams, and other individuals and groups.

2-7 C. Providing Technical Assistance

1. Develop procedures to provide effective and efficient preventive, protective, and corrective child abuse and neglect services.

2. Develop standards to determine which cases are to be investigated.

3. Provide information and technical recommendations to decision-making agencies.

4. Educate communities about child abuse and neglect problems and solutions.

5. Identify danger signs which prompt intervention and/or preventive actions.

5. Assist in the development and implementation of plans to promote the long-term well-being of children and their families.

6. Assist in the development and implementation of strategies by communities to create environments which provide opportunities for community members to lead meaningful, productive, self-fulfilling, and rewarding lives. These environments should promote the dignity, self-worth, self-respect, and self-sufficiency of community members.

2-8 DUTY TO REPORT CHILD ABUSE AND NEGLECT

2-8 A. Duty to Report

Any person who has a reasonable cause to suspect that a child has been abused, neglected or abandoned shall immediately report the abuse, neglect or abandonment to the tribal social services department and/or tribal law enforcement department.

2-8 B. Persons Specifically Required to Report

Those persons who are mandated to report suspected abuse or neglect include any physician, nurse, dentist, optometrist, or any other medical or mental health professional; school principal, school teacher, or other school official; social worker; child day care center worker or other child care staff including foster parents, residential care or institutional personnel; counselor; peace officer or other law enforcement official; judge, attorney, court counselor, clerk of the court, or other judicial system official.

2-8 C. Anonymous Reports

Any person who has a reasonable cause to suspect that a child has been abused, neglected or abandoned shall report the abuse, neglect or abandonment. Those persons reporting, except those specified in section 2-8B above, may remain anonymous.

2-8 D. Immunity from Liability

All persons or agencies reporting, in good faith, known or suspected instances of abuse or neglect shall be immune from civil liability and criminal prosecution.

2-8 E. Penalty for Not Reporting

Those persons mandated to report a case of known or suspected abuse or neglect who knowingly fail to do so or wilfully prevent someone else from doing so shall be subject to a civil cause of action proceeding in tribal court.

2-8 F. Abuse and Neglect Reports

1. **Form of Report:** Those persons mandated to report under section 2-8B above shall promptly make an oral report to the tribal social services department and then follow with a written report as soon thereafter as possible.

2. **Contents of Written Report:** The following information shall be included in the written report:

   a. Names, addresses, and tribal affiliation of the child and his parents, guardian, or custodian.

   b. The child's age.

   c. The nature and content of the child's abuse or neglect.

   d. Previous abuse or neglect of the child or his siblings, if known.

   e. The name, age, and address of the person alleged to be responsible for the child's abuse or neglect, if known.

   f. The name and address of the person or agency making the report.

3. **Photograph of Visible Trauma:** Persons reporting suspected abuse or neglect may photograph or cause X-Rays to be taken of the child suspected of abuse, and such photographs or X-Rays may be introduced into evidence at a hearing.

2-8 G. Central Registry

The department of social services and/or the law enforcement department shall maintain a central registry of reports, investigations and evaluations made under this code. The registry shall contain the information furnished by tribal personnel throughout the reservation, including protective service workers, probation officers, caseworkers and Indian Child Welfare Program employees. Data shall be kept in the central registry until the child concerned reaches the age of eighteen (18) years (unless the children's court orders that individual records shall be kept on file beyond that date in order to protect other siblings). Data and information in the central registry shall be confidential and shall be made available only with the approval of the director of the department to the children's court, social service agencies, public health and law enforcement agencies, licensed health practitioners, and health and educational institutions licensed or regulated by the tribe. A request for the release of information must be submitted in writing, and such request and its approval shall be made part of the child's file.

2-9 INVESTIGATION AND REMOVAL

2-9 A. Investigation

The child abuse or neglect report shall be investigated within one court working day by the social services department or other appropriate agency, unless the children's court directs otherwise.

2-9 B. Authority to Remove

If the person investigating a report of child abuse or neglect finds that the grounds for removal, listed in section 2-9C below, have been met, such person may remove the child from the home in which the child is residing and place the child in a temporary receiving home or other appropriate placement.

2-9 C. Grounds for Emergency Removal

No child shall be removed from the home of the child's parent, guardian or custodian without the consent of the parent, guardian or custodian absent a specific order of the children's court, except as follows:

1. When failure to remove the child may result in a substantial risk of death, permanent injury, or serious emotional harm, or;

2. When the parent, guardian or custodian is absent and it appears, from the circumstances, that the child is unable to provide for his own basic necessities of life, and that no satisfactory arrangements have been made by the parent, guardian or custodian to provide for such necessities.

2-9 D. Power to Remove

Any person shall have the power to remove a child pursuant to this section provided that:

1. Reasonable grounds existed at the time of the removal to believe the removal was necessary, and;

2. The person removing the child ensures the safety and well-being of the child, until such time as the children's court assumes control of the matter, and;

3. The person removing the child complies with the notice provisions contained in chapter 2-10 of this code.

2-10 NOTICE OF REMOVAL

2-10 A. Notice to the Children's Court

After a child is removed from his home, the person who removed the child shall attempt to contact the children's court within six (6) hours. The attempt to contact the court shall be documented. Actual notice to the court shall be made, by the removing person, no later than 12:00 p.m. (noon) the next court working day.

2-10 B. Notice to the Parent, Guardian or Custodian

The court shall make all reasonable efforts to notify the parents, guardian or custodian, within twelve (12) hours of the court knowing that the child was removed. Reasonable efforts shall include personal, telephone and written contacts at their residence, place of employment, or other location where the parent, guardian or custodian is known to fre-

quent with regularity. If the parent, guardian or custodian cannot be found, notice shall be given to members of the extended family of the parent, guardian or custodian and/or the extended family of the child.

2-11 RESTRICTIONS ON PLACEMENT OF CHILDREN

A child alleged to be neglected or abused shall not be detained in a jail or other facility intended or used for the incarceration of adults charged with criminal offenses or for the detention of children alleged to be juvenile offenders, but may be detained in the following community-based sheltercare facilities:

2-11 A. Licensed Foster Home

A licensed foster home or a home otherwise authorized under the law to provide foster care, group care, protective residence, or;

2-11 B. Other Licensed Facility

A facility operated by a licensed child welfare services agency, or;

2-11 C. Relatives

With a relative of the child who is willing to guarantee to the court that the child will not be returned to the alleged abusive or neglectful parent, guardian or custodian without the prior approval of the court, or;

2-11 D. Other Suitable Place

Any other suitable place, other than a facility for the care and rehabilitation of juvenile offenders to which children adjudicated as juvenile offenders may be confined and which meets the standards for shelter-care facilities established by the department.

2-12 FILING CHILD/FAMILY PROTECTION PETITION

2-12 A. Authorization to File Petition

Formal child/family protection proceedings shall be instituted by a child/family protection petition filed by the juvenile presenter on behalf of the tribe and in the best interests of the child.

2-12 B. Time Limitations

If a child has been removed from the home, then a child/family protection petition shall be filed with the children's court no later than 12:00 p.m. (noon) of the second court working day following the removal.

2-12 C. Contents of Petition

The child/family protection petition shall set forth the following with specificity:

1. The name, birthdate, sex, residence and tribal affiliation of the child;

2. The basis for the court's jurisdiction;

3. The specific allegations of abuse, neglect or abandonment;

4. A plain and concise statement of the facts upon which the allegations of abuse, neglect or abandonment are based, including the date, time and location at which the alleged facts occurred;

5. The names, residences and tribal affiliation of the child's parents, guardians or custodians, if known;

6. The names, relationship and residences of all known members of the child's extended family and all former care givers, if known, and;

7. If the child is placed outside of the home, where the child is placed, the facts necessitating the placement and the date and time of the placement.

2-13 INITIAL HEARING

2-13 A. Hearing Date

An initial hearing shall be held regarding the removal of a child before the end of the second working day following the filing of the child/family protection petition.

2-13 B. Purpose

The purpose of the initial hearing is to determine whether it is reasonable to believe that continuing absence from the home is necessary to protect the well-being of the child.

2-13 C. Advise of Rights

During the hearing, the court shall advise the party(s) of the reason for the hearing and of their basic rights as provided for in chapter 2-14 of this code.

2-13 D. Nature of Hearing

The hearing shall be informal in nature. Concerned parties may present evidence relating to the situation. Hearsay evidence will not be excluded at this hearing as long as it is otherwise admissible. The general public shall be excluded from the proceedings. Only the parties, their counsel, witnesses, the child's extended family and another persons determined to be appropriate by the court shall be admitted.

2-13 E. Possible Outcomes of the Initial Hearing:

1. The child/family protection petition may be dismissed and the child returned to the home.

2. The child may be returned to the home of the parents, guardian or custodian under the supervision of the court and other hearing held within thirty (30) days.

3. The child may be continued in the child's out-of-home placement and a thirty (30) day hearing will be held.

2-13 F. Notice of Initial Hearing

The court shall make all reasonable efforts to advise the parents, guardian or custodian of the time and place of the initial hearing. The court shall request that the parent, guardian or custodian be present for the hearing. Reasonable efforts shall include personal, telephone and written contacts at their residence, place of employment or other location where the person is known to frequent with regularity. If the court is unable to contact the parent, guardian or custodian, notice shall be given to members of the extended family of the parent, guardian or custodian and/or the extended family of the child.

2-13 G. Unresolved Issues

If the problems are not resolved at the initial hearing or the thirty (30) day hearing, the court will set a date for a formal hearing on the issues. Such date will be no later than ninety (90) days after the filing of the child/family protection petition.

2-14 NOTIFICATION OF RIGHTS

All parties have a right to be represented by an advocate/attorney at their own expense in all proceedings under this code, to introduce evidence, to be heard on his or her own behalf, to examine witnesses, and to be informed of possible consequences if the allegations of the petition are found to be true. All parties shall be entitled to advance copies of court documents, including petitions and reports, unless deemed inappropriate by the court.

2-15 THIRTY (30) DAY HEARING

2-15 A. Purpose

A second hearing will be held within thirty (30) days following the initial hearing. The purpose of this hearing is for the court to reassess whether continuing court intervention is necessary to protect the well-being of the child.

2-15 B. Hearing Procedure

The thirty (30)-day hearing shall be held according to sections 2-13C, 2-13D, 2-13E, 2-13F, and 2-13G of this code.

2-16 FORMAL TRIAL ON THE ISSUES

2-16 A. Time Limitation

The formal trial on the issues will be set for no later than ninety (90) days following the

filing of the child/family protection petition.

2-16 B. Admissibility

The records of the initial hiring and the thirty (30) day hearing shall not be admissible at the formal trial. This shall not be construed to prevent the admissibility of any evidence that was presented at these hearings which would normally be admissible under the court's rules of evidence.

2-16 C. Closed Hearing

The general public shall be excluded from the proceedings. Only the parties, their counsel, witnesses, the child's extended family, and other persons determined to be appropriate by the court shall be admitted.

2-16 D. Advise of Rights

During the hearing, the court shall advise the party(s) of the reason for the hearing and of their basic rights as provided for in chapter 2-14 of this code.

2-16 E. Child Witnesses

If the court determines that it is in the best interests of the child and does not violate the rights of a party, the court may allow the child to testify by means of a videotape deposition, closed circuit television or other appropriate method. If the court does allow these methods to be utilized, the court shall specifically set out the reasons for this determination on the record.

2-16 F. Burden of Proof

The burden of proof lies with the petitioner. The petitioner must prove that the allegations raised in the child/family protection petition are more likely true than not, that is, by the preponderance of the evidence, and that the best interests of the child will be served by continued court intervention.

2-16 G. Outcome of Hearing

The court will either find the allegations of the child/family protection petition to be ture or dismiss the child/family protection petition, unless the hearing shall be continued to a date certain to allow for the presentation of further evidence.

2-16 H. Return to Home

The court may find the allegations of the child/family protection petition to be true, but that out of home placement is not needed to protect the child. The court may, however, due to unresolved problems in the home, continue court intervention and supervision as appropriate.

2-16 I. Grounds for Continuing Removal From the Home

The court may find the allegations of the child/family protection petition to be true and order that the child remain out of the home. The grounds for continuing removal from the home of a parent, guardian or custodian are that:

1. A child has no parent, guardian or custodian available, willing and capable to care for the child.

2. The child has suffered, or is likely to suffer, a physical injury inflicted upon him by other than accidental means, which causes or creates a substantial risk of death, disfigurement or impairment of bodily functions.

3. The child has not been provided with adequate food, clothing, shelter, medical care, education or supervision by his/her parent, guardian or custodian, which is necessary for the child's health and well being.

4. The child has been sexually abused or sexually exploited.

5. The child has committed juvenile offenses as a result of parental pressure, guidance or approval.

6. The child has been emotionally abused or neglected.

7. The child has suffered, or is likely to suffer, emotional damage which causes or creates a substantial risk of impaired development.

2-16 J. Court Order for Continuing Removal

The court shall specify in its order the necessary intervention and appropriate steps, if any, the parent, guardian or custodian must follow to correct the underlying problem.

2-16 K. Return of Child to Parent, Guardian or Custodian

The court may find the allegations of the child/family protection petition to be true and out-of-home placement necessary, but with the accomplishment of specified actions by the parent, guardian or custodian, the child may be returned absent good cause to the contrary. The order of the court will specify actions, and the time frames for such actions, that parents, guardians, or custodians must accomplish before the child is returned. The order will also specify the responsibilities of any support agency or personnel to be involved.

2-16 L. Out-Of-Home Placement

The court may find the allegations of the child/family protection team petition to be true and that out-of-home placement continues to be necessary and further that the child may not be returned to the home, absent specific order of this court. The court shall specify what steps the parents shall take to demonstrate their abilities to care for their child, and specify to the parties what factors the court will consider at a subsequent hearing to determine whether or not the child should be returned.

2-16 M. Written Order

The court shall specify in writing the facts, grounds, and code sections upon which it relied to make its decisions.

2-17 NOTICE OF FORMAL TRIAL ON THE ISSUES

2-17 A. Summons

The court shall issue a summons to the parent, guardian or custodian and such other persons as appear to the court to be proper or necessary parties to the proceedings. The summons shall require them to appear personally before the court at the time set for the formal trial.

2-17 B. Attachments to Summons

A copy of the child/family protection petition shall be attached to each summons. The court shall also attach a notice to the parent, guardian or custodian which advises them of their rights under chapter 2-14 of this code.

2-17 C. Personal Service

If the parties to be served with a summons can be found within the exterior boundaries of the reservation, the summons, a copy of the child/family protection petition and the notice of rights shall be personally upon them at least fifteen (15) court days before the formal trial on the issues.

2-17 D. Mail Service

If the parties are within the exterior boundaries of the reservation but cannot be personally served, and if their address is known, the summons, petition and notice of rights may be served by registered mail with a return receipt requested, at least ten (10) days before the formal trial.

2-17 E. Notice to Extended Family

If the court cannot accomplish personal or mail service, the court shall attempt to notify the parent, guardian or custodian by contacting members of the extended family of the parent, guardian, custodian, and/or the extended family of the child.

2-17 F. Service of Summons

Service of summons may be made under the direction of the court by any person eighteen (18) years of age or older who is not a party to the proceedings.

2-17 G. Publication

In a child/family protection case where it appears within the body of the petition or within an accompanying statement that the parent, guardian or custodian is a non-resident of the reservation, or that their name, place of residence or whereabouts is unknown, as well as in all cases where after due personal service or service by registered mail has been unable to be effected, the court shall direct the clerk to publish legal notice in a newspaper, printed in the county or on the reservation, qualified to publish summons once a week for three consecutive weeks with the first publication of the notice to be at least twenty-one (21) days prior to the date fixed for the hearing. Such notice shall be directed to the parent, guardian or custodian if their names are known, or if unknown a phrase to whom it may concern, be used and applied to and be binding upon any such person whose names are unknown. The name of the court, name of the

child, the date of the filing of the petition, the date of the hearing, and the object of the proceeding in general terms, shall be set forth. There shall be filed with the clerk an affidavit showing publication of the notice. The publication of the notice shall be paid by the tribe. The publication of the notice shall be deemed equivalent to personal service upon all persons known or unknown who have been designated as provided in this section.

2-17 H. Contempt Warning

The summons issued by the court shall conspicuously display the words:

NOTICE, VIOLATION OF THIS ORDER IS SUBJECT TO PROCEEDINGS FOR CONTEMPT OF COURT PURSUANT TO TRIBAL CODE SECTION _____. THE COURT MAY FIND THE PARENT, GUARDIAN OR CUSTODIAN IN CONTEMPT FOR FAILURE TO APPEAR AT A COURT HEARING OR FOR FAILURE TO FOLLOW COURT ORDERS.

2-18 DEFAULT JUDGMENT

2-18 A. When Appropriate

If the parent, guardian or custodian fail to appear for the formal trial, the court may find the parent, guardian or custodian in default, and enter a default order of child/family protection and order necessary intervention and appropriate steps the parents, guardian or custodian must follow to correct the underlined problem.

2-18 B. Notice Determination

Prior to finding a parent, guardian, or custodian in default, the court must be satisfied actual notice has been given or that all reasonable possible steps have been taken to provide notice of the formal trial to the parent, guardian, or custodian. The court must also find that the petitioner can prove the elements of the child/family protection petition.

2-18 C. Written Order

If the parent, guardian or custodian is found in default, the court shall specify the facts, grounds, and code sections upon which it relied to make the decision.

2-19 SIX (6) MONTH REVIEW

2-19 A. Review Requirement

The status of all children subject to a child/family protection code shall be reviewed by the court at least every six (6) months at a hearing to determine whether court supervision shall continue, except that the first review following a formal trial on the issues shall be held within ninety (90) days of the formal trial on the issues.

2-19 B. Return to Home

A child shall be returned home at the review hearing unless the court finds that a reason for removal as set forth in section 2-16I of this code still exists. The court may, however, due to unresolved problems in the home, continue court intervention and supervision as appropriate.

2-19 C. Written Order

If continued court intervention is determined to be necessary, the court shall set forth the following in a written order:

1. What services have been provided or offered to the parent, guardian, or custodian, to help correct the underlying problem(s).

2. The extent to which the parent, guardian, or custodian has visited or contacted the child, any reason why such visitation and/or contact has been infrequent or not otherwise occurred.

3. Whether the parent, guardian or custodian is cooperative with the court.

4. Whether additional services should be offered to the parent, guardian or custodian.

5. Whether the parent, guardian or custodian should be required to participate in any additional programs to help correct the underlying problem(s).

6. When the return of the child can be expected.

2-19 D. Additional Steps

The court at the review hearing may order that a petition to terminate the parent/child relationship be filed, or that a guardianship petition be filed.

2-20 SOCIAL SERVICE REPORT

2-20 A. Requirement of a Social Study

To aid the court in its decision, a social study(ies) consisting of a written evaluation of matters relevant to the disposition of the case shall be made by the person or agencies filing the petition.

2-20 B. Contents of a Social Study

The social study shall include the following points, and be made available to the court, and the parties as deemed appropriate by the court, three (3) days prior to a child/family protection review hearing:

1. A summary of the problem(s).

2. What steps, if any, have the parent, guardian, custodian, or social services personnel already taken to correct the problem(s).

3. What services could be of benefit to the parent, guardian or custodian, but are not available in the community.

4. A report on how the child is doing in his/her current placement(s) since the last hearing. If there have been any moves, the report will contain the reason for such moves.

5. Dates of contacts with parent, guardian or custodian and the child since the first hearing was held, method of contact, duration and subjects discussed.

6. If there have been no contacts with the parent, guardian, custodian or social worker, what efforts have been made to contact such parties.

7. If there have been no contacts with the parent, guardian, custodian or social worker, what efforts have been made to contact such parties.

7. An assessment of when the child is expected to return home.

8. A list of who the extended family members are and a list of contacts, or attempts to contact such family members regarding placement of child.

9. The social services personnel shall develop a case plan and shall make recommendations for the next six (6) months. Such recommendations will include:

   a. A treatment plan for the parents.

   b. Future placement of the child.

   c. What services should be provided for the child, if services are needed.

2-21 PLACEMENT PREFERENCES

2-21 A. Least Restrictive Setting

If a child cannot be returned home, the child shall be placed in the least restrictive setting which most approximates a family and in which his special needs, if any, may be met. The child shall also be placed within reasonable proximity to his home, taking into account any special needs of the child. The placement restrictions set forth in chapter 2-11 of this code shall be followed.

2-21 B. Order of Preferences

Whenever appropriate, a child shall be placed in a home with the following characteristics, which shall be given preference in the following order:

1. Members of the extended family.

2. An Indian family of the same tribe as the child.

3. People who have a relationship with the child, but who are not related to the child.

4. An Indian family.

5. Any other family which can provide a suitable home for such a child.

2-22 EMANCIPATION

A child over the age of sixteen (16) may petition the court for emancipation. The court shall grant such status when the child proves to the court that the child is capable of functioning as an independent and responsible member of the community.

2-23 AUTHORIZATION OF MEDICAL TREATMENT

At any time whether or not a child is under the authority of the court, the court may authorize medical or surgical care for a child when:

2-23 A. Unavailability of Parent, Guardian or Custodian

A parent, legal guardian or custodian is not immediately available and cannot be found after reasonable effort in the circumstances of the case, or;

2-23 B. Life Endangerment

A physician informs the court orally or in writing that in his professional opinion, the life of the child would be greatly endangered without certain treatment and the parent, guardian or other custodian refuses or fails to consent. If time allows in a situation of this type, the court shall cause every effort to be made to grant the parent(s), guardian, or custodian an immediate informal hearing, but this hearing shall not be allowed to further jeopardize the child's life.

In making its order the court shall give due consideration to any treatment being given the child by prayer through spiritual means alone or through other methods approved by tribal customs or traditions or religions, if the child or his parent, guardian or legal custodian are adherents of a bona fide religious denomination that relies exclusively on this form of treatment in lieu of medical treatment, or practices in fact the tribal customs or traditions or religion upon which is relied for such treatment of the child.

After entering any authorization under this section, the court shall reduce the circumstances, finding and authorization in writing and enter it in the records of the court and shall cause a copy of the authorization to be given to the physician or hospital, or both, that was involved.

Oral authorization by the court is sufficient for care or treatment to be given and shall be accepted by any physician or hospital. No physician or hospital nor any nurse, technician or other person under the direction of such physician or hospital shall be subject to criminal or civil liability in the court for performance of care or treatment in reliance on the court's authoriza-

tion, and any function performed thereunder shall be regarded as if it were performed with the child's and the parent's authorization.

2-24 FOSTER HOME LICENSING PROCEDURES

2-24 A. Inspection and Licensing Procedures:

1. The tribal council shall appoint one or more member(s) of the tribe as the foster home inspector(s). The foster home inspector shall examine homes of tribal members and others who reside both on the reservation and within a seventy-five (75) mile radius of the reservation. The foster home inspector shall submit a recommendation to the tribal council which shall act upon said recommendation within thirty (30) days, and, if no action is taken, the recommendation of the foster home inspector shall be implemented.

2. Except under exceptional circumstances, or in order to preserve a family unit, no foster home may accept more than four (4) foster placements.

3. Any license issued by the foster home inspector shall apply only to the residence(s) where the family is living at the time application for a license is made, and a permanent change of residence automatically terminates the license. The foster care parents are required to notify the foster care inspector whenever a change of residence is contemplated.

4. The foster care parents must also notify the foster care inspector whenever a change in the household occurs. For example, if one of the foster care parents is convicted or is accused of a major crime or if one of the foster parents moves out of the residence, or if any other person moves into the residence, the foster care inspector must be informed within forty-eight (48) hours.

2-24 B. Foster Home Requirements

1. The home shall be constructed, arranged and maintained so as to provide for the health and safety of all occupants. The foster care inspector may, upon twenty-four (24) hours' notice, inspect a foster care dwelling at any time.

2. Heating, ventilation, and light shall be sufficient to provide a comfortable, airy atmosphere. Furnishings and housekeeping shall be adequate to protect the health and comfort of the foster child.

3. Comfortable beds shall be provided for all members of the family. Sleeping rooms must provide adequate opportunities for rest. All sleeping rooms must have a window of a type that may be opened readily and may be used for evacuation in case of fire.

4. Play space shall be available and free from hazards which might be dangerous to the life or health of this child.

2-24 C. The Foster Family:

1. All members of the household must be in such physical and mental health as will not adversely effect either the health of the child or the quality and manner of his care.

2. Members of the foster family shall be of good character and habits. They must never have been convicted of a sex offense and may not have any felony convictions within the last three (3) years. Exceptions concerning non-sexual felony convictions can be made providing adequate information is provided indicating that a change of character has occurred.

3. The person in charge of the foster home shall be of suitable temperament to care for the children, shall understand the special needs of the child as an Indian person and shall be capable of bringing the child up as an Indian person who is well adjusted and able to get along both within the tribal community and in the surrounding non-Indian community as well.

4. Foster parents shall be responsible, mature individuals who are, in the view of most community members, of good character. Foster parents must be at least twenty-one (21) years old (unless a member of the child's extended family), but there is no upper age level provided the foster parent has the physical and emotional stamina to deal with the care and guardianship of a foster child. The foster parent must be willing, when necessary, to cooperate with the biological parents and must be willing to help the family re-establish the necessary family ties.

5. A foster home does not necessarily have to have both a male and female foster parent. The foster care inspector may, at his discretion, certify a foster home with a single foster parent provided that foster parent displays the outstanding qualities necessary to raise a foster child.

6. The foster parents must have an income sufficient to care for all individuals in the foster home. The foster care inspector can take into account the state stipend when determining the financial ability of the foster care parents.

7. Any time a pre-school foster child is placed in a foster home there must be at least one (1) foster parent in full time attendance. For school age children the foster parent must show the arrangements which will be made for those periods of time when both foster parents are employed. Infants and young children shall never be left alone without competent supervision.

8. Without specific approval by the tribal council, a foster home shall not be licensed whenever any member of the family is mentally ill or on convalescent status from a mental hospital or is on parole or probation or is an inmate of a penal or correctional institution.

9. The standards the foster care inspector shall use in judging the above criteria shall be those of the reservation Indian community.

10. The foster care inspector is authorized to make a complete investigation to determine the adequacy of the foster care home. The inspector shall be authorized to

examine not only the potential foster care parents, but also any other tribal member who is familiar with the applicants and is familiar with the type of care they provide to their children.

2-24 D. The Foster Child:

1. The daily routine of a foster child shall be such as to promote good health, rest and play habits.

2. The responsibility for a child's health care shall rest with the foster parents. In case of sickness or accident to a child, immediate notice shall be given to the foster care inspector. Foster care parents may consent to surgery or other treatment in a medical emergency.

3. The foster care parents shall not subject the child to verbal abuse, derogatory remarks about himself, his natural parents or relatives, or to threats to expel the child from the foster home. No child shall be deprived of meals, mail or family visits as a method of discipline. When discipline or punishment must be administered, it shall be done with understanding and reason. The method of punishment will be that which is accepted by the people of the Reservation Indian community.

2-25 GUARDIANSHIP

2-25 A. Purpose

The children's court, when it appears necessary or convenient, may appoint guardians for the persons and/or property of either children under the court's jurisdiction or incompetents who have no guardian legally appointed by will or deed. Such appointment may be made on the petition of a relative or other person on behalf of the child or incompetent, or a petition of the child if at least fourteen (14) years of age. Before making such appointment, the court must cause such notice as the court deems reasonable to be given to any person having the care of the child, and to such other relatives of the child residing on the reservation as the court may deem proper, and in cases of adult incompetents, the court may cause notice to be given to the incompetent at least five (5) days before hearing the petition.

If a child is under the age of fourteen (14) years, the court may nominate or appoint his guardian. If he is fourteen (14) years of age or older, he may nominate his own guardian who, if approved by the court, must be appointed accordingly. If the guardian nominated by the child is not approved by the court, or if the child resides outside of the reservation, or if, after being duly cited by the court, he neglects for ten (10) days to nominate a suitable person, the court may nominate and appoint the guardian in the same manner as if the child were under the age of fourteen (14) years.

When a guardian has been appointed by the court for a child under the age of fourteen (14) years, the child, at any time after he attains that age, may nominate his own guardian, subject to the approval of the court. A guardian appointed may as specified by the court have the custody and care of the education of the child and the care and management of his property until such child arrives at the age of eighteen (18) marries, is emancipated by the court under chapter 2-22 of this code, or until the guardian is legally discharged, provided, however, that said guardian shall not have the authority,

without express written consent of the court, to dispose of any real or personal property of the child in any manner,including, but not limited to, the child's Individual Indian Money Account. Said guardian shall also have the authority to consent to the medical care and treatment of the child.

The court may order that the court disburse monthly reimbursement payments to the person or agency to whom custody is granted under this code, provided sufficient funds have been appropriated by the tribal council. Said disbursements must be used by the person or agency with custody of the child for the sole purpose of covering expenses incurred in the care and custody of said child and shall not be used for any other purpose. The use of said funds for any purpose other than that described in this section shall subject said person or agency to contempt of court and to any criminal and civil penalties or remedies provided by the tribal code.

2-25 B. Types of Guardianship

The types of guardianship shall include guardianship of property and/or guardianship of the person. Guardianship of the person shall include both temporary guardianship and permanent guardianship.

2-25 C. Guardianship of Property

The court may appoint a guardian of the property of a child or incompetent person under such terms and conditions as the court sets forth in the written order. The guardianship may cover all property until the child reaches eighteen (18) years of age or until the incompetent person becomes competent or it may be limited to only specific property or a specific legal action as set forth in the written order. A temporary or permanent guardianship of the person may also include guardianship of the child's property if set forth in the written order.

2-25 D. Permanent Guardianship

The court may appoint a permanent guardian for the child under such terms and conditions as the court sets forth in the written order. Permanent guardianship provides for permanent custody of a child to someone other than the parent(s), although there is no termination of the parental rights of the parents. There shall be a presumption of continued permanent guardianship in order to provide stability for the child. Permanent guardianship shall only be terminated based upon the unsuitability of the permanent guardian(s) rather than the competency or suitability of the parent(s). The parent(s) and the child's extended family shall be granted liberal visitation rights unless deemed inappropriate by the court.

2-25 E. Temporary Guardianship

The court may appoint a temporary guardian under such terms and conditions as the court sets forth in the written order. A temporary guardianship may be terminated if the court determines that it is in the best interests of the child to change custody from the temporary guardian to a new guardian or to return the child to the parent, guardian or custodian. The parent(s) and the child's extended family shall be granted liberal visitation rights unless deemed inappropriate by the court.

2-25 F. Who May File Guardianship Petition

Any person may file a petition for guardianship. The petition shall be initiated either by the proposed guardian or by the child if at least fourteen (14) years of age.

2-25 G. Contents of Guardianship Petition

The petition for guardianship shall include the following, to the best information and belief of the petitioner:

1. The full name, address and tribal affiliation of the petitioner;

2. The full name, sex, date and place of birth, residence and tribal affiliation of the proposed ward;

3. The basis for the court's jurisdiction;

4. The relationship of the proposed guardian to the proposed ward;

5. The name and address of the person or agency having legal or temporary custody of the proposed ward;

6. The type of guardianship requested;

7. In the case of alleged incompetent persons, the grounds for incompetency under section 2-25K; and

8. A full description and statement of value of all property owned, possessed, or in which the proposed ward has an interest (if guardianship of property is requested).

All petitions must be signed and dated by the petitioners, and must be notarized or witnessed by a clerk of the court.

2-25 H. Guardianship Report

Upon the filing of a guardianship petition, the court shall immediately request that the social services department or other qualified agency conduct a guardianship report on the proposed guardian and report on the proposed ward. The guardianship report shall contain all pertinent information necessary to assist the court in determining the best interests of the proposed ward.

No determination can be made on a petition for guardianship until the report has been completed and submitted to and considered by the court. The guardianship report shall be submitted to the court no later than ten (10) days before the hearing. The court may order additional reports as it deems necessary.

2-25 I. Guardianship Procedures

The procedures for guardianship hearings shall be in accordance with sections 2-13C, 2-13D, 2-13F, 2-14, 2-20 and 2-21 of this code.

2-25 J. Management of Property

In the event that any guardian shall receive any money or funds of any child or incompetent person during his or her term of office as guardian, before taking and receiving into custody such money or funds, the court must require of such person a bond with sufficient surety to be approved by the court and in such sum as he shall order, conditioned that the guardian will faithfully execute the duties of his trust, and the following conditions shall form the part of such bond without being expressed therein:

1. To make an inventory of all the estate of his ward that comes into his possession or knowledge and to return the same within such time as the court may order, and;

2. To dispose of and manage the estate according to law and for the best interests of the ward, and faithfully to discharge his trust in relation thereto, and also in relation to the care, custody and education of the ward, and;

3. To render an account on oath of the property, estate and money of the ward in his hands and all the proceeds or interests derived therefor, and of the management and disposition of the same, within three (3) months after his appointment, and at such other times as the court directs, and at the expiration of his trust, to settle his accounts with the court or judge or with the ward if he be of full age, or his legal representative, and to pay over and deliver all the estate, monies and effects remaining in his hands, or due from him on such settlement to the person who is legally entitled thereto.

The funds of any child or incompetent must be used by his guardian solely for the support and education of such child and for the support of such incompetent, and shall be expended by the guardian in a reasonable manner according to the circumstances and station in life of such ward, and in such manner as can reasonably be afforded according to the income and estate of said ward.

If determined to be appropriate by the court, the written order may set forth that the child's property may not be used for the child's care, but rather to be managed for the child until the child reaches the age of eighteen (18) or is emancipated by the court.

2-25 K. Incompetent Persons

In case of incompetent persons, if after a full hearing and examination upon such petition, and upon further proof by the certificates of at least two qualified physicians showing that any person is incompetent as defined in this code, it appears to the court that the person in question is not capable of taking care of himself and of managing his property, such court must appoint a guardian of his person and estate within the powers and duties specified in this chapter.

Every guardian of an incompetent person appointed as provided herein has the care and custody of the person of his ward and the management of his estate until such guardian is legally discharged; he must give bond to such ward in like manner and with like conditions as before specified with respect to the guardianship of a child.

A person who has been declared insane or incompetent or the guardian, or any relative of such person within the third degree or any friend, may apply by petition to the court in which he was declared insane, to have the fact of his restoration to capacity judicially

determined. The petition shall be verified and shall state that such person is then sane or competent. The court shall require notice to be given of a hearing upon said petition at some date after said petition has been filed; and at the hearing upon said petition, witnesses shall be examined and a determination made by the court as to whether the petition should be granted and the insane or incompetent person be declared of sound mind and capable of taking care of himself and his property, his restoration to capacity shall be adjudged and the guardianship of such person, if such person shall not be a child, shall cease.

2-26 TERMINATION OF PARENTAL RIGHTS

2-26 A. Purpose

The purpose of this chapter is to provide for the voluntary and involuntary termination of the parent/child relationship and for the substitution of parental care and supervision by judicial process. This chapter shall be construed in a manner consistent with the philosophy that all parties shall be secured their rights as enumerated in the Indian Civil Rights Act of 1968 and that the family unit is of most value to the community and the individual family members when that unit remains united and together, and that termination of the parent-child relationship is of such vital importance that it should be used only as a last resort when, in the opinion of the court, all efforts have failed to avoid termination and it is in the best interests of the child concerned to proceed under this chapter.

2-26 B. Grounds for Involuntary Termination:

1. **Abandonment.** If the parent has not contacted the child by telephone, letter or in person, or provided any financial support for more than one (1) year without a break, or have had only marginal contacts for twenty-four (24) out of the latest forty-eight (48) months, a presumption shall exist that there is no parental relationship existing. The burden shall then be up to the parent to provide that such a relationship does exist. The evidence necessary to rebut this presumption may include, but shall not be limited to, information about efforts to maintain the parent-child relationship, including a showing of regular visits, telephone calls, letters, other contacts, or monetary support.

2. **Physical Injuries.** Wilful and repeated physical injuries.

3. **Sexual Abuse.** Wilful and repeated acts of sexual abuse or sexual exploitation.

4. **Emotional Harm.** The return of the child may result in serious permanent emotional damage as support by the best evidence available in the field of child development.

2-26 C. Pre-Filing Requirements.

A petition seeking involuntary termination of the parent-child relationship must establish the following:

1. The child has been found to be an abandoned or neglected child under the code for at least a one year period of time, and has been removed

from their parent at the time of this termination hearing for a period of one year or more;

2. The court has entered an order which states what the parent was required to accomplish to correct their underlying problem(s);

3. The social service agency involved has made a good faith attempt to offer or provide all court ordered and/or necessary services that are reasonably available in the community and which are capable of helping the parent resolve his or her underlying problem(s);

4. There is little likelihood the conditions will be remedied so that the child can be returned to the parents in the near future;

5. Continuation of the parent-child relationship clearly diminishes the child's prospects for successful placement into a permanent and stable home; and

6. Not returning the child to their parent is the least detrimental alternative that can be taken.

2-26 D. Who May File Termination Petition

A petition may be filed by:

1. Either parent when termination is sought with respect to the other parent.

2. The juvenile presenter.

3. Any other person possessing a legitimate interest in the matter.

4. A parent may file a petition for the voluntary termination of his parental rights.

No parental rights may be terminated unless a petition has first been filed, notice has been given, and a hearing held in accordance with the provisions of this chapter.

2-26 E. Contents of Termination Petition

The petition for termination of parental rights shall include the following to the best information and belief of the petitioner:

1. The name, place of residence and tribal affiliation of the petitioner (if other than juvenile presenter);

2. The full name, sex, date and place of birth, residence and tribal affiliation of the child;

3. The basis for the court's jurisdiction.

4. The relationship of the petitioner to the child, or the fact that no relationship exists;

5. The names, addresses, tribal affiliation, and dates of birth of the child's parents;

6. Where the child's parent is himself a child, the names and addresses of the parents' parents or guardian; and where the parent has no parent or guardian, the members of the parent's extended family.

7. The name and address of the person or agency having legal or temporary custody of the child;

8. The grounds on which the termination is sought under section 2-26B of this code (unless voluntary termination);

9. A statement that the pre-filing requirements set forth in section 2-26C of this code have been met (unless involuntary termination), and;

10. A list of the assets of the child together with a statement of the value thereof.

When any of the facts required by this section are unknown, the petition shall so state. The petitioner shall sign and date the petition.

2-26 F. Notice

After a petition for the involuntary termination of parental rights has been filed, the court shall set the time and place for hearing and shall cause notice thereof to be given to the petitioner, the parents of the child, the guardian of the person of the child, the person having legal custody of the child, and the child's extended family as determined by the court.

Where the child's parent is himself a child, notice shall also be given to the parent's parents or guardian of the person unless the court is satisfied, in exercise of its discretion, that said notice is not in the best interest of the parent and that it would serve no useful purpose.

Notice shall be given by personal service. If service cannot be made personally, the court may authorize service by registered mail at the last known address of the person to be served. If notice cannot be served by registered mail, the court may authorize service by publication in either the tribal newspaper of the reservation, or a newspaper of general circulation in the county where the court is located, once a week for three consecutive weeks. All notices served whether personally or by registered mail shall be received by the person named therein no less than ten (10) days prior to the date set for the hearing. No hearing can be held sooner than ten (10) days after the last publication where service is made.

Notice and appearance may be waived by a parent in writing before the court in the presence of, and witnessed by, a clerk of the court, in the presence of, and witnessed by, a clerk of the court, provided that such parent has been apprised by the court of the meaning and consequences of the termination action. The parent who has executed such a waiver shall not be required to appea at the hearing. Where the parent is a minor, the waiver shall be effective only upon approval by the court.

2-26 G. Pre-Termination Report

Upon the filing of a petition under this chapter for the involuntary termination of parental rights, the court shall request that the social services department or other qualified agency prepare and submit to the court a report in writing. The report shall be submitted to the court no later than ten (10) days before the hearing with copies given to the parents. The purpose of the report is to aid the court in making a determination on the petition and shall be considered by the court prior thereto. The court may request additional reports where it deems necessary.

The report shall include the circumstances of the petition, the investigation, the present condition of the child and parents, proposed plans for the child, and other such facts as may be pertinent to the parent and child relationship, and the report submitted shall include a recommendation and the reasons therefor as to whether or not the parent and child relationship should be terminated.

2-26 H. Relinquishment of Parental Rights (Voluntary Termination of Parental Rights)

Parental rights may be relinquished (voluntarily terminated) by a parent in writing, if signed by the parent in the presence and with approval of the court. Relinquishment shall not be accepted or acknowledged by the court prior to ten (10) days after birth of the child. The court shall ensure that the parent understands the consequences of the voluntary termination prior to approving it. A parent who wishes to relinquish his parental rights shall be provided an interpreter if he does not understand English.

2-26 I. Hearing Procedures

The procedures for termination of parental rights hearings shall be in accordance with sections 2-16B, 2-16C, 2-16D and 2-16E of this code.

2-26 J. Burden of Proof

The burden of proof lies with the petitioner to prove that the allegations in the termination petition are supported by clear, cogent and convincing evidence, and that the best interests of the child will be served by termination of parental rights.

2-26 K. Findings of Fact and Conclusions of Law

The court will make formal findings of fact and conclusions of law as a basis for the written order terminating the parent-child relationship.

2-26 L. Result of Termination Order

Upon the termination of parental rights, all rights, powers, privileges, immunities, duties and obligations including any rights to custody, control visitation or support existing between the child and parent shall be severed and terminated unless otherwise directed by the court. The parent shall have no standing to appear at any future legal proceeding concerning the child. Any support obligation existing prior to the effective date of the order terminating parental rights shall not be severed or terminated. The rights of one parent may be terminated without affecting the rights of the other parent. A termination order shall not prevent a child from inheriting property or interest in the same

manner as any other natural child from the natural parent. A natural parent may not, however, inherit from a natural child after termination.

2-26 M. Child's Continued Right to Benefits

An order terminating the parent-child relationship shall not disentitle a child to any benefit due the child from any third person, agencies, state or the United States, nor shall any action under this code be deemed to affect any rights and benefits that the child derives from the child's descent from a member of a federally recognized Indian tribe.

2-26 N. Custody After Termination Order

If upon entering an order terminating the parental rights of a parent there remains no parent having parental rights, the court shall commit the child to the custody of a social services agency for the purpose of placing the child for adoption, or in the absence of an adoptive home the agency may place the child in a licensed foster home or with a relative, or take other suitable measures for the care and welfare of the child. The custodian shall have the authority to consent to the adoption of the child, the marriage of the child, the enlistment of the child in the armed forces of the United States, necessary surgical and other medical treatment for the child and consent to such matters as might normally be required of the child's parent.

2-26 O. Future Review Hearings

If a child has not been adopted or permanently placed within six (6) months of the termination order, another six (6) month review hearing will be held. Such six (6) month hearings will continue until the child is adopted or permanently placed.

2-27 ADOPTIONS

2-27 A. Open Adoptions

Adoptions under this code shall be in the nature of "Open Adoptions." The purpose of such open adoptions is not to permanently deprive the child of connections to, or knowledge of, the child's natural family. The purpose of adoptions shall be to give the adoptive child a permanent home. To this and the following shall apply and be contained in all adoptive orders and decrees:

1. The adoptive parents and adoptive child shall be treated under the law as if the relationship was that of a natural child and parent, except as set forth herein.

2. The adoptive child shall have an absolute right, absent a convincing and compelling reason to the contrary, to information and knowledge about his natural family and his tribal heritage.

3. The adoptive child and members of the child's natural extended family (including parents) shall have a right of reasonable visitation with each other, subject to reasonable controls of the adoptive parents.

4. Adoption shall not serve to prevent an adoptive child from inheriting from a natural parent in the same manner as any other natural child. The natural parents shall not be entitled to inherit from an adoptive child in the same manner as parents would otherwise be entitled to inherit. An adoptive child shall be entitled to inherit from adoptive parents, and vice versa, in the same manner as if natural parents and child.

2-27 B. Consent to Adoption

1. **When not required:** Written consent to an adoption is not required if:

   a. The parent has abandoned his child;

   b. The parent's rights have been terminated;

   c. The parent has relinquished his parental rights;

   d. The parent has been declared incompetent.

2. **When required:** Written consent to an adoption is required of:

   a. The biological or adoptive mother;

   b. The biological, adoptive, or acknowledged father;

   c. The custodian, if empowered to consent;

   d. The court, if the custodian is not empowered to consent;

   f. The child, if he is over twelve (12) years of age.

2-27 C. Execution of Consent to Adopt

Written consent to an adoption shall be executed and acknowledged before the court. Consent shall not be accepted or acknowledged by the court prior to ten (10) days after birth of the child. An interpreter shall be provided if the person consenting to the adoption does not understand English. Consents of a child over the age of twelve (12) years shall be made orally either in open court, or in chambers with only the judge and any other person(s) he deems necessary, and the child present.

2-27 D. Who May File An Adoption Petition

Any person may file a petition for adoption. The petition shall be initiated by the person proposing to adopt. In the case of married persons maintaining a home together, the petition shall be the joint petition of husband and wife, except that if one of the spouses is the natural or adopted parent of the proposed adoptee, said parent shall not be required to join in the petition.

2-27 E. Contents of Adoption Petition

The petition for adoption shall include the following, to the best information and belief of the petitioner:

1. The full name, address, and tribal affiliation of the petitioner;

2. The full name, sex, residence, date and place of birth, and tribal affiliation of the proposed adoptee;

3. The name by which the proposed adoptee shall be known if the petition is granted;

4. The basis for the court's jurisdiction;

5. If the proposed adoptee is a child, a full description and statement of value of all property owned, possessed or in which the child has an interest;

6. The relationship of the petitioner to the proposed adoptee; and

7. The names and addresses of any person or agency whose consent to aid adoption is necessary.

Where there is more than one proposed adoptee, and these proposed adoptees are siblings, only one petition shall be required for the adoption of all or any combination of the siblings, provided that each sibling proposed to be adopted be named in the petition.

All petitions must be signed and dated by the petitioner, and must be notarized or witnessed by a clerk of the court.

2-27 F. Notice

Notice shall be provided in accordance with the notice procedures set forth in section 2-26F of this code except that the court may determine that it is unnecessary to give notice to specific individuals, including a parent whose parental rights have been terminated.

2-27 G. Homestudies

When a petition for the adoption of a child is filed with the court, the court shall immediately request that the social services department or other qualified agency conduct a home study on the petitioner and report on the child. The homestudy and report shall relate the circumstance of the home, the petitioner and his ability, both physical and mental, to assume the responsibilities of a parent of the child. The homestudy shall contain other pertinent information designed to assist the court in determining the best placement for the child. The homestudy will also address the issue of whether or not the home most closely resembles that of the child's culture, identity, and where applicable, his tribal affiliation. The homestudy or report shall not be required where the proposed adoptee is an adult.

No determination can be made on a petititon for adoption until the homestudy and report has been completed and submitted to and considered by the court. The homestudy shall be submitted to the court no later than ten (10) days before the hearing. The homestudy and report may be consolidated into one document. The court may order additional homestudies or reports as it deems necessary.

2-27 H. Withdrawal of Consents

Any consent given under the provisions of this chapter may be withdrawn by the person or agency which gave the consent at any time prior to the entry of a final decree of adoption. No reason need be stated and no hearing need be held on such withdrawal.

All withdrawals must be in writing and notarized or witnessed by a clerk of the court, with the original being filed with the court.

Within two (2) years after the entry of a decree of adoption, said decree may be vacated upon a petition being filed and a showing that the consent which made the adoption possible was obtained through fraud or duress. Upon such a showing the court shall vacate the decree and return the adopted person to that status he had prior to entry of the decree.

2-27 I. Adoption Preferences

The preference of placement in adoption shall be in the following order unless the court determines that the child's best interests require deviation from the preferences:

1. Extended family member;
2. A tribal member or person eligible for tribal membership;
3. Other Indian person(s), and;
4. If this order of preference cannot be met, then placement may be made with any person who has some knowledge of the child's tribal affiliation and his special needs.

2-27 J. Hearing Procedures

An adoption hearing shall be held within ninety (90) days of receipt of an adoption petition from the prospective parent(s). The court shall conduct the hearing to determine if it is in the best interests of the child to be placed with the petitioners. In determining the best interests of the child, the court shall examine:

1. Validity of written consent;
2. Termination of parental rights order;
3. Length of time of the child's wardship by the court;
4. Special conditions of the child;
5. Parent communication with his child;
6. Minor's consent to adoption, if he is over twelve (12) years of age;
7. Homestudies or other reports, and;
8. Order of preference of placement.

The petitioner and the proposed adoptee shall appear personally at the hearing. During the hearing the court shall advise the party(s) of their basic rights as provided in chapter 2-14 of this code. The judge shall examine all persons separately, and may, if satisfied that all other requirements of this chapter have been met, enter a final decree of adoption, or may place the person to be adopted, if a child, in the legal custody of the petitioner for a period not to exceed six (6) months prior to entering a final decree of adoption.

If the court is satisfied that the adoption will not be in the child's best interest, or finds that all of the requirements of this chapter have not been met, it may deny the petition and make any other order it deems necessary for the care and custody of the child not inconsistent with this code.

Proceedings for termination of the parent-child relationship and proceedings for adoption may be consolidated and determined at one (1) hearing provided that all the requirements of this chapter as well as chapter 26 of this code governing termination are complied with fully.

The hearing shall be informal in nature. Concerned parties may present evidence relating to the situation. Hearsay evidence will not be excluded from the proceedings. Only the parties, their counsel, witnesses, the child's extended family and other persons determined to be appropriate by the court shall be admitted.

2-27 K. Adoption Decree

If the court finds that the requirements of this chapter have been met and that the child's best interests will be satisfied, a final decree of adoption may be entered.

A person, when adopted, may take the name of the person adopting, and the two shall thenceforth sustain toward each other the legal relation of parent and child, and shall have all the rights and shall be subject to all the duties of that relation, including all of the rights of a child of the whole blood to inherit from any person, in all respects, under the provisions of inheritance and succession of this code.

2-28 MODIFICATION, REVOCATION OR EXTENSION OF COURT ORDERS

2-28 A. Motion to Modify, Revoke or Extend Court Order

The court may hold a hearing to modify, revoke or extend a court order under this code at any time upon the motion of;

1. the child;
2. the child's parent, guardian or custodian;
3. the prospective adoptive parent(s) upon court order;
4. the child's counsel or guardian ad litem;
5. the juvenile counselor;

6. the juvenile presenter;

7. the institution, agency, or person vested with the legal custody of the child or responsibility for protective supervision, or;

8. the court on its own motion.

2-28 B. Hearing Procedure

Any hearing to modify, revoke or extend a court order shall be held in accordance with the procedures established for the order at issue.

2-29 CHILD/FAMILY PROTECTION RECORDS

2-29 A. Children's Court Records

A record of all hearings under this code shall be made and preserved. All children's court records shall be confidential and shall not be open to inspection to any but the following:

1. the child;

2. the child's parent, guardian or custodian;

3. the prospective adoptive parent(s);

4. the child's counsel or guardian ad litem;

5. the children's court personnel directly involved in the handling of the case;

6. any other person by order of the court, having legitimate interest in the particular case or the work of the court.

2-29 B. Law Enforcement and Social Services Records

Law enforcement records and files concerning a child shall be kept separate from the records and files of adults. All law enforcement and social services records shall be confidential and shall not be open to inspection to any but the following:

1. the child;

2. the child's parent, guardian or custodian;

3. the child's counsel or guardian ad litem;

4. law enforcement and social services personnel directly involved in the handling of the case;

5. the children's court personnel directly involved in the handling of the case;

6. any other person by order of the court, having legitimate interest in the particular case or the work of the court.

2-30 CHILDREN'S COURT APPEALS

2-30 A. Who Can Appeal

Any party to a children's court hearing may appeal a final children's court order.

2-30 B. Time Limit for Appeal

Any party seeking to appeal a final children's court order shall file a written notice of appeal with the court within thirty (30) days of the final order.

2-30 C. Record

For purposes of appeal, a record of proceedings shall be made available to the child, his parent, guardian or custodian, the child's counsel and others upon court order. Costs of obtaining this record shall be paid by the party seeking the appeal.

2-30 D. Stay of Appeal

A court order may be stayed by such appeal.

2-30 E. Conduct of Proceedings

All appeals shall be conducted in accordance with the tribal code and tribal court rules of procedure as long as those provisions are not in conflict with the provisions of this children's code.

TRIBAL CHILD/FAMILY PROTECTION CODE

Commentary

COMMENTARY

INTRODUCTION

This commentary is intended to serve as a tool in understanding the tribal child/family protection code. It is also intended to serve as a tool to use in adapting the code to meet the needs of an individual community. Each section number of the commentary corresponds to the same section number of the tribal child/family protection code. (Note that not all sections have a commentary.) The most efficient way to use this commentary is to read it together with the tribal child/family protection code. This code covers civil child abuse and neglect, child custody, foster care licensing, guardianship, termination of parental rights and adoption proceedings.

CIVIL/CRIMINAL PROCEDURES

Although this code does not cover criminal child abuse and neglect proceedings, actual or threatened criminal child abuse and neglect actions can often impinge upon civil child abuse and neglect proceedings. These problems are sometimes increased in tribal court situations due to the fact that more than one jurisdiction may be involved in sexual abuse proceedings because federal courts have jurisdiction to prosecute alleged sex abuse offenders under the Major Crimes Act (18 U.S.C. §1153).

The following section from the American Bar Association's publication *Child Abuse and Neglect Litigation -- A Manual for Judges* sets out some of the issues involved in the discussion of whether to proceed in a criminal and/or a civil proceeding and steps to take in coordinating these actions:

> Although prosecution of parents takes place outside the juvenile courts, it can impinge seriously upon cases brought there. These effects, which comprise many of the arguments against prosecuting parents, will be examined. There is a need for correlation between the prosecutor and the child protective agency in cases where prosecution is, or may be, attempted.
>
> **A. Arguments For and Against Prosecution**
>
> *1. Arguments for criminal prosecution include:*
>
> The goals of criminal prosecution in general apply to abuse and neglect cases. These goals are rehabilitation of the defendant, deterrence of both the defendant and other potential child abusers, removal of the defendant from society, and retribution. Retribution is exceptionally important in view of the public perception of child abuse as a heinous act.
>
> Criminal sanctions against parents are available to coerce them into accepting services.
>
> Police and district attorney investigations may be helpful in ferreting out all the facts in a particularly serious and complex case of abuse.

2. *Reasons against prosecution include:*

Criminal prosecutions in abuse and neglect cases are difficult because of evidentiary problems, the standard of proof required (beyond a reasonable doubt), and the prohibition against self-incrimination.

Criminal prosecution may make the parent less cooperative in remedial procedures.

Prosecution is less likely to deter child abuse than other criminal acts.

Criminal courts do not have power to order treatment for family members who are not defendants (particularly the spouse and child). They also often lack of the necessary support services to implement effective supervision and treatment.

3. *Most professionals in the child abuse and neglect field advise against prosecution except in unusual circumstances.*

Prosecution is more likely in cases of sexual abuse, severe injury or death, and abuse by non-parents.

B. Effects of Prosecution on the Juvenile Court

1. *Juvenile court proceedings are often suspended when there is criminal prosecution. The resulting delay can be considerable.*

2. *The possibility of prosecution may affect parents' testimony in the child protective hearing.*

Parents may be less candid with the court.

If prosecution is actually threatened, the parents can remain silent under the self-incrimination privilege. Courts, however, can grant "use immunity" to the parents so that their testimony cannot be used against them in a criminal prosecution.

3. *Fear of prosecution may lead parents to coerce their children not to testify about the parents' acts.*

4. *Prosecution and a resulting jail sentence can hinder attempts to improve the child's care and to provide better family life.*

C. Steps Toward Coordination of Civil and Criminal Functions

1. *Various means to coordinate activities of child protective agencies, police and prosecutors are:*

Establishing guidelines for when child abuse and neglect reports should be referred for police investigation and possible prosecution.

Coordinating remedial efforts by the prosecutor and child protective agencies in cases where criminal prosecution is or may be initiated.

2. *Suggestions for coordination between juvenile and criminal courts are:*

Permitting prosecution only upon request of the juvenile court once a petition has been filed. (The juvenile court should request prosecution only if it believes prosecution will not harm the child nor hinder remedial actions.)

Appointing a guardian *ad litem* to monitor and represent the child in criminal court actions.

Chapter 2-1 Short Title, Purpose and Definitions

2-1 A. Short Title

This section sets out the official title of the code: "The Child/Family Protection Code."

2-1 B. Purpose

This section sets out the purpose and philosophy of this child/family protection code. Note that Purpose #1 and Purpose #7 need to be completed based upon the tribe(s) and reservation covered.

2-1 C. Definitions

The definitions are set out in alphabetical order and most of these definitions are self-explanatory with the following exceptions:

* The definition for "extended family" needs to be filled out according to the tribal customs and traditions. Two possible definitions are as follows:

  1. "A person who has reached the age of eighteen (18) and who is the child's parent, grandparent, aunt or uncle, brother or sister, brother-in-law, or sister-in-law, niece or nephew, first or second cousin, or stepparent."

  2. "Mother, father, aunt, uncle, cousin, grandparent, step parent, great aunt, great uncle, great grandparent, and relatives by marriage."

* The definitions for "Court" or "Children's Court," "Juvenile Officer," "Reservation," "Tribal Council," "Tribal Court" and "Tribe" need to be completed with the appropriate information.

Chapter 2-2 Jurisdiction

This chapter sets forth a broad range of children's court jurisdictions. Note that this chapter provides for jurisdiction over the child and the extended family including any non-Indians. Some tribes may be restricted by the tribal code and/or constitution with regard to civil jurisdiction over non-Indians.

Chapter 2-3 Transfer of Jurisdiction

This chapter provides for transfer of jurisdiction to other courts and from other courts. Section 2-3A provides that the policies of the Indian Child Welfare Act (ICWA) may be applied by the children's court as long as they do not conflict with the provisions of this code. Further, the section provides that the ICWA procedures for state courts are not binding unless specifically provided for in the code. Section 2-3B allows for transfer to an appropriate state or tribal court as long as the transfer would be in the best interests of the child. Section 2-3C allows the court to accept or decline transfers. Section 2-3D sets out procedures for transfers from state courts under ICWA (note that a department other than social services can be designated for receipt of notice and other provisions as appropriate). Section 2-3E sets forth guidelines for full faith and credit (the enforcement of another court's order) and conflicts of law. Different procedures are established for state and tribal court orders and the vital tribal interest in tribal members is established.

Chapter 2-4 Procedures and Authorizations

This chapter establishes the rules of procedure for the children's court. It also provides authority for the court to utilize social services agencies and enter into cooperative agreements, grants and contracts. The flexibility set forth in this chapter is necessary for the court to be able to use all possible resources to meet the needs of the children and families who appear before the children's court. (In addition, if the children's court is to be considered a tribal organization under P.L. 93-638, it could be set out in this chapter.)

As currently drafted, the code makes this authority subject to the approval of the tribal council if it involves an expenditure of tribal funds. This restriction may not be necessary if the administrative structure of the tribe provides for children's court control over their budget.

Chapter 2-5 Children's Court Personnel

2-5 A. Children's Court Judge

This subsection establishes that children's court judges shall be treated in the same manner as tribal court judges with regard to appointment, qualifications, powers and duties, and disqualification or disability. Rather than include separate sections in this code with regard to the contempt power, the power to issue arrest or custody orders and the power to issue search warrants, the code simply provides that judges of the children's court shall have the same duties and powers as tribal court judges with regard to these and other duties and powers.

(Additional, more specific appointment procedures, qualifications, powers and duties, etc., could be set out in this section.)

2-5 B. Juvenile Counselor/Juvenile Probation Officer

This code uses the title "juvenile counselor" for the person who performs the duties and responsibilities set forth in this section. However, it is made clear both in this section and in the definitions section that the persons carrying out these duties and responsibilities may be labeled "juvenile counselor," "juvenile probation officer," or any other title which the court finds appropriate.

This subsection establishes that "the court" shall appoint the juvenile counselor(s) and that the "chief judge" of the tribal court shall certify annually to the tribal council the number

of qualified juvenile counselor(s) needed." If the appointment and reporting procedures are handled differently for a specific tribe, these provisions should be modified accordingly. Additionally, a provision requiring budgetary primacy for the children's court could be inserted here.

The juvenile counselor as established in this code is a distinct position from that of a law enforcement officer or that of a prosecutor or juvenile presenter. This is necessary so that the juvenile presenter can open up lines of communication with the child and gain the trust of the child and family.

(Additional, more specific appointment procedures, qualifications, powers and duties, etc., could be set out in this section.)

2-5 C. Juvenile Presenter

This code uses the title "juvenile presenter" for the person who performs the duties and responsibilities set forth in this section. The title "juvenile presenter" is used to avoid confusing juvenile proceedings and child/family protection proceedings with adult criminal proceedings. However, it is made clear both in this section and in the definitions section that the person carrying out these duties and responsibilities may be labeled "juvenile presenter" or "juvenile presenting officer" or "juvenile petitioner" or any other title the court finds appropriate.

This section establishes that "the court" shall appoint the juvenile presenter(s) and that "the chief judge of the tribal court shall certify annually to the tribal council the number of qualified juvenile presenters needed." If the appointment and reporting procedures are handled differently for a specific tribe, these provisions should be modified accordingly.

(Additional, more specific appointment procedures, qualifications, powers and duties, etc., could be set out in this section.)

2-5 D. Guardian Ad Litem

This section authorizes the court to appoint a guardian ad litem. A tribe should consider the possibility of mandating guardians ad litem at least in certain proceedings such as termination of parental rights proceedings.

(More specific provisions concerning guardians ad litem could be set out in this section.)

2-5 E. Additional Court Personnel

This section gives the Court wide latitude in appointing additional court personnel whenever the court decides that it is appropriate to do so.

(More specific provisions concerning these positions could be set out in this section.)

Although the Indian Civil Rights Act only provides that a defendant is entitled to counsel "at their own expense," a number of tribes provide defense advocates without charge, at least for persons who cannot afford council. If the tribe provides defense advocates or juvenile advocates, the code should probably be modified to also include a section setting forth the provisions for the appointment, qualifications, and duties of juvenile advocates.

Chapter 2-6 Protective Services Workers

This chapter sets out the powers and duties and limitations upon protective services workers. A protective services worker can be employed by a social services agency, a law enforcement agency or a hybrid of the two agencies. If a specific title or department is responsible for these duties in a specific tribe, that agency should be identified in this chapter. (This chapter has been adopted from the Navajo Nation Children's Code.)

Chapter 2-7 Child Protection Team

This chapter is taken directly from the Bureau of Indian Affairs (BIA) Child Protection Team guidelines. Child protection teams are so vital that it is important to include guidelines in the tribal code.

According to the BIA guidelines, each local CPT should be composed of, but not limited to, members from the following agencies:

BIA
Social Services
Law Enforcement
Judicial Services
Education

IHS
Social Services
Mental Health Rep.
and/or Physician
Community Health Nurse

Tribal
Tribal Judicial Services
Tribal Education
Tribal Police
Tribal Social Service Programs

Other
State/County Social Services

However, in order to assure effective group interaction, it is suggested in the memo that membership should be limited to eight or less. Other agency representatives may serve as resources for the CPT. Confidentiality is a vitally important issue to address at the onset of the CPT's development. Confidentiality shall be maintained and the tribal code or relevant federal law will be the basis for any legal action required in response to a child abuse/neglect referral.

Chapter 2-8 Duty to Report Child Abuse and Neglect

This chapter sets forth a mandatory reporting law. It establishes a duty to report suspected abuse or neglect, specifies persons required to report, allows anonymous reports, establishes immunity for good faith reports, provides a civil cause of action against specified persons who fail to report (civil rather than criminal penalty so that the court can exercise jurisdiction over non-Indians due to *Oliphant* prohibition against criminal penalties for non-Indians), sets forth written report requirements, and provides for a central registry.

The Federal Child Abuse Prevention and Treatment Act, P.L. 93-247 (amended in P.L. 95-266), contains specific requirements that states must fulfill to receive federal money under the Act. Two of these requirements are that they have a mandatory reporting law and that there is immunity for good faith reporting. Tribes do not have to follow the requirements of the Act but if reporting is to be mandated it is necessary that the Tribe have a mandatory reporting law.

The BIA child protection team guidelines set forth the following requirements for reporting child abuse and neglect:

Mandatory Reporting: All IHS, Bureau and Tribal contract employees shall report any known or suspected instances of child abuse and neglect to the designated law enforcement/social services staff in their respective communities. This is necessary in order to prevent child abuse and neglect referrals from "falling through the cracks" due to insufficient coordination between IHS, Bureau provided services, tribally contracted programs, or if applicable, state programs.

Note that sections 2-8A and 2-8G provide that the report shall be made to the tribal social services department and/or tribal law enforcement department and that one of these departments is responsible for maintaining the central registry. Before enacting a child protection code, the tribe should determine which agency is the primary agency for reporting and registry purposes. The resulting policy should be clearly explained to the appropriate agencies and the community. It should also be clearly set out in this code.

Chapter 2-9 Investigation and Removal

This chapter sets forth requirements for investigation and removal, including investigation, authority to remove, grounds for emergency removal, and power to remove.

The BIA child protection team guidelines set forth the following requirements concerning investigation:

Timeframes for Investigation: All child abuse and neglect (CA/N) investigations referred to the BIA shall be initiated within 24 hours of referral. All investigations shall be jointly referred to the Division of Law Enforcement and the Division of Social Services. Primary responsibility will be assigned to one of the offices with the concurrence of the Superintendent. If BIA Social Services staff are not available, IHS Social Services staff may be asked to investigate or assist with the investigation of a CA/N referral with the concurrence of the IHS Service Unit Director. The attached CPT Intake form will be completed on all referrals by Bureau personnel (see BIA guidelines). Prior to initiating a joint investigation, the assigned Bureau Law Enforcement Officer (LEO) and Social Service Worker (SSW) shall coordinate with each other, and request from the other, any additional information that may be available.

Within 72 hours of initiating an investigation, the investigating LEO or SSW should review their findings with the other Division and/or the Child Protection Team.

Chapter 2-10 Notice of Removal

This chapter establishes requirements for notice of removal to the children's court and the parents, guardian, or custodian.

Chapter 2-11 Restrictions on Placement of Children

This chapter establishes restrictions on the placement of children. In particular, it provides that "a child alleged to be neglected or abused shall not be detained in a jail or other facility intended or used for the incarceration of adults charged with criminal offenses or for

the detention of children alleged to be juvenile offenders." This provision is necessary to comply with the requirements of the Juvenile Justice and Delinquency Prevention Act.

The Juvenile Justice and Delinquency Prevention Act of 1974 as amended (P.L. 96-509) provided that (1) juvenile status offenders and non-offenders are not to be placed in secure detention facilities; (2) suspected or adjudicated juvenile delinquents are not to be detained or confined in facilities allowing regular contact with incarcerated adults; and (3) that no juvenile is to be detained or confined in any jail or lock-up for adults by 1985 except in low population density areas or where appropriate facilities are unavailable. Many tribal juvenile justice systems have had difficulty meeting the requirements of this Act.

The specific provisions of the Juvenile Justice Delinquency Prevention Act are as follows:

Section 223(a) (12)(A) providing that juveniles who are status offenders or nonoffenders such as dependent or neglected children "shall not be placed in secure detention facilities or secure correctional facilities";

Section 223(a)(13) providing that juveniles suspected or judged to be delinquent according to Section 223(a)(12)(A) "shall not be detained or confined in any institution in which they have regular contact with adult persons incarcerated because they have been convicted of a crime or are awaiting trial on criminal charges"; and

Section 223(a)(14) providing that within five years of the Juvenile Justice Amendments of 1980 becoming law, that "no juvenile shall be detained or confined in any jail or lockup for adults, except that the Administrator shall promulgate regulations which (A) recognize the special needs of areas characterized by low population density with respect to the detention of juveniles; and (B) shall permit the temporary detention in such adult facilities of juveniles accused of serious crimes against persons, subject to the provisions of paragraph (13), where no existing acceptable alternative placement is available."

Chapter 2-12 Filing Child/Family Protection Petition

This chapter establishes authorization, time limitations and contents for child/family protection petitions.

Chapter 2-13 Initial Hearing

This chapter sets out the procedures for the initial hearing, including hearing date, purpose, advise of rights, nature of hearing, possible outcomes of initial hearing, notice of initial hearing and unresolved issues.

Chapter 2-14 Notification of Rights

This chapter establishes certain rights of which parties must be notified in all hearings under this code.

Chapter 2-15 Thirty (30) Day Hearing

This chapter establishes purpose and hearing procedures for a hearing within thirty (30) days of the initial hearing to reassess whether continuing court intervention is necessary to protect the well-being of the child.

Chapter 2-16 Formal Trial on the Issues

This chapter establishes the procedures for the formal trial on the issues, including time limitation, admissibility, closed hearing, advise of rights, child witnesses, burden of proof, outcome of hearing, return to home, grounds for continuing removal from the home, court order for continuing removal, return of child to parent, out of home placement and written order.

Section 2-16E allows the court to establish special procedures for child witnesses such as testimony videotaped depositions or closed circuit television. These procedures have been suggested in order to protect the child from further trauma as a result of the courtroom process. This goal, however, must be balanced with the right of the accused to full due process under the Indian Civil Rights Act. If the court decides to utilize any of these special procedures, it is recommended that the court set out in the record the individual circumstances of the case which require the use of these special procedures. Moreover, the court should take a close look at the U.S. Supreme Court's 1988 decision in *Coy v. Iowa*, 56 U.S.L.W. 4931.

Chapter 2-17 Notice of Formal Trial on the Issues

This chapter establishes procedures for notice of the formal trial on the issues, including summons, attachments to summons, personal service, mail service, notice to extended family, service of summons, publication and contempt warning.

Chapter 2-18 Default Judgment

This chapter establishes procedures for default, judgments, including when appropriate, notice determination, and written order.

Chapter 2-19 Six (6) Month Review

This chapter sets forth the requirement for a review every six (6) months and procedures for the hearing.

Chapter 2-20 Social Services Report

This chapter sets out the requirement of a social study or studies and the contents of the study. The social study should be prepared before all review hearings, including initial hearing, thirty (30) day hearing, formal trial on the issues, and sixty (60) day review hearings.

Chapter 2-21 Placement Preferences

This chapter requires that the child shall be placed in the least restrictive setting and establishes a listing of preferences. These preferences are provided only as a guide for the court. The court is not strictly bound to follow them if a strict following of the preferences would be inappropriate.

Chapter 2-22 Emancipation

This chapter provides that a child over the age of sixteen (16) may be granted emancipation status if the court finds that the child is capable of functioning as an independent and responsible member of the community.

Chapter 2-23 Authorization of Medical Treatment

This chapter establishes procedures for medical treatment authorization if the parent is unavailable or the child's life is endangered.

Chapter 2-24 Foster Home Licensing Procedures

This chapter establishes foster home licensing procedures, including inspection and licensing, foster home requirements, the foster family and the foster child.

Under the placement priorities established in the Indian Child Welfare Act, 25 U.S.C. 1915(b)(ii), a state court must place an Indian child in a tribally-licensed foster home if no extended family placement can be found. As long as the state court judge made the placement, the county would be obliged to pay the foster care stipend.

The specific ICWA provision is as follows:

> *(b) Any child accepted for foster care or preadoptive placement shall be placed in the least restrictive setting which most approximates a family and in which his special needs, if any, may be met. The child shall also be placed within reasonable proximity to his or her home, taking into account any special needs of the child. In any foster care or preadoptive placement, a preference shall be given, in the absence of good cause to the contrary, to a placement with - (i) a member of the Indian child's extended family; (ii) a foster home licensed, approved, or specified by the Indian child's tribe;...*
> (Underlining added)

Since the county would be relieving the financial burden caused by the child, such an arrangement would benefit the foster parent. More importantly, it would strengthen tribal sovereignty because the tribe, rather than the state, would dictate where its own children were placed.

Since the authority of the tribe to adopt these licensing standards is grounded upon its own inherent sovereignty and not upon a grant of authority from the state, the tribe's licensing standards would not have to conform to state standards. The tribe could develop independent standards which reflected tribal concerns and values. The primary concerns of the state and the

tribe will both revolve around the needs of the child but the tribe will be able to define for itself how those concerns should be met.

The Indian Child Welfare Act provides that tribes and states can enter into mutual agreements with respect to the care and custody of Indian children and jurisdiction over child custody proceedings (see 25 U.S.C. 1919). Development of tribal foster care guidelines could serve as a firm foundation for a more comprehensive tribal/state agreement.

The important aspects are that licensing Indian foster care homes will ease the burden of child placements, will strengthen tribal sovereignty and, most importantly, will not cost tribes a significant amount of money to implement.

Chapter 2-25 Guardianship

This chapter sets out guardianship procedures for both children and incompetents, including general guidelines, types of guardianship, guardianship of property, permanent guardianship, temporary guardianship, management of property, and incompetent persons.

The concept of permanent guardianship (section 2-25D) should be particularly noted as an alternative to termination of parental rights and adoption. Permanent guardianship is being tried by a number of tribes throughout the country. It provides permanent custody of a child to someone other than the birth parents, although there is no termination of the birth parents' parental rights.

The terms of the permanent guardianship should be spelled out in a formal contract signed in court. The contract specifies what responsibilities the guardians will undertake and those that the parent(s) will retain. Responsibility for physically caring for the child becomes that of the permanent guardian. Assignment of other responsibilities will vary case by case and state by state. The child, however, legally remains the child of its birth parents.

How easily a permanent guardianship contract can be terminated is not clear. Section 2-25D deals with the issue of termination as follows: "There shall be a presumption of continued permanent guardianship in order to provide stability for the child. Permanent guardianship shall only be terminated based upon the unsuitability of the permanent guardian(s) rather than the competency or suitability of the parent(s)."

The tribe may also decide to establish guardianship preferences (see sections 2-21B and 2-27I of this code, and section 1915 of the Indian Child Welfare Act.)

Chapter 2-26 Termination of Parental Rights

This chapter establishes procedures for termination of parental rights, including purpose, grounds for involuntary termination, prefiling requirements, who may file termination petition, relinquishment of parental rights, contents of termination petition, notice, pretermination report, hearing procedures, burden of proof, findings of fact and conclusions of law, result of termination order, child's continued rights to benefits, custody after termination order, and future review hearings.

When legal custody is allowed to someone other than the parent, the parent still has some rights including the right of visitation, the right to consent to adoption, and the duty to support. However, termination of parental rights automatically cancels all legal ties between the parent and child.

The court is not concerned with the acts of the child but, rather, with the acts or failure to act by the parent. Because of this and the severe consequences of termination, the court must insure that all legal rights of the parents are protected. The court cannot allow itself to be overly persuaded by the desire to "rescue" every child or "punish" every parent simply because it is the judge's personal opinion that the parents are less than desirable. The court must balance the best interests of the child with the legal and cultural rights of a parent to the care and custody of the child.

These proceedings should not be confused with adoption proceedings. Termination of parental rights must be completed prior to adoption, but the adoption itself must be a separate proceeding or separate portion of the hearing.

The legal concept of termination of parental rights may come into conflict with tribal customs and traditions. Consequently, it may be necessary for an individual tribe to modify or even totally eliminate this chapter.

The Indian Child Welfare Act established strict procedures with regard to state court termination of parental rights proceedings as follows:

> **§1912(f) Parental rights termination orders; evidence; determination of damage to child**
>
> No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.
>
> **§1913. Parental rights, voluntary termination -- Consent; record; certification matters; invalid consents**
>
> (a) Where any parent or Indian custodian voluntarily consents to a foster care placement or to termination of parental rights, such consent shall not be valid unless executed in writing and recorded before a judge of a court of competent jurisdiction and accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian. The court shall also certify that either the parent or Indian custodian fully understood the explanation in English or that it was interpreted into a language that the parent or Indian custodian understood. Any consent given prior to, or within ten days after, birth of the Indian child shall not be valid....
>
> **Voluntary termination of parental rights or adoptive placement; withdrawal of consent; return of custody.**
>
> (c) In any voluntary proceeding for termination of parental rights to, or adoptive placement of, an Indian child, the consent of the parent may be withdrawn for any reason at any time prior to the entry of a final decree of termination or adoption, as the case may be, and the child shall be returned to the parent.

Although this code includes many of the ICWA procedures, we did not include all of the procedures beause it is assumed that a tribal court would generally be more protective of the parents' rights and tribal customs and traditions. A specific tribe, however, may choose to incorporate more of the ICWA protections (such as proof beyond a reasonable doubt and withdrawal of consent procedures) into this chapter.

Chapter 2-27 Adoptions

This chapter establishes adoption procedures, including open adoptions, consent to adoption, execution of consent to adopt, who may file adoption petition, contents of adoption petition, notice, homestudies, withdrawal of consents, adoption preference, hearing procedures, and adoption decree.

Adoption is a social and legal process creating new relationships while the legal relationship between the child and the biological parents is severed. Society's policy is that adoption should be a positive process which makes family life possible for the child whose parents cannot or choose not to rear him. A child needs a sense of permanency, especially after the child's parents have had their parental rights terminated. A policy expressing commitment to serve all children for successful adoptions including those of older children, minority children, handicapped (physical, emotional and mental) children and children who need to be with siblings should be the basis of all adoptions.

A positive attitude toward addressing all the needs of all adopted children has been developed in the Model State Adoption Act and Model State Adoption Procedures. The Model State Adoption Act and Model State Adoption Procedures were drafted, pursuant to the Child Abuse Prevention and Treatment and Adoption Reform Act of 1978, P.L. 95-266. This Model Act and Procedures recognize Tribes and the Indian Child Welfare Act. A tribe may wish to look at this Model Act when adding a tribal adoption section to their children's code.

The concept of open adoption set forth in section 2-27A is being used for a high percentage of Indian children being placed in adoptive homes. In an open adoption, a child is legally placed in an adoptive home, but the adoptive agreement through which the child is relinquished includes a provision that the birth family has the right to retain contact with the child. The type and extent of contact is often spelled out. It may be limited to an exchange of letters or it may provide for periodic, or even more ongoing, visitation.

Indian families are generally more comfortable in consenting to adoption if they can be assured that they may maintain contact with the child. This is helpful in situations where extended family members don't want to lose a child but are, at the same time, unable to parent the child themselves.

A serious problem is being encountered with some open adoptions, however. The adoption laws of most states do not provide a means for enforcing the contact terms of an open adoption. Even though a contact agreement may be signed, if the adoptive family changes its mind, in many states there is no legal means to make the family keep its agreement except possibly contempt of court for violation of court order.

Section 2-17I establishes general adoption procedures, but a tribe should carefully examine these references to determine if they correspond with the tribe's customs and traditions. (Also, refer to section 2-21B of this code and section 1915 of the Indian Child Welfare Act.)

Chapter 2-28 Modification, Revocation or Extension of Court Order

This chapter establishes procedures for modification, revocation or extension of court orders.

Chapter 2-29 Child/Family Protection Records

This section sets forth provisions with regard to children's court records, law enforcement records, and social services records. The primary objective of this chapter is to ensure confidentiality of all children's court, law enforcement and social services records concerning child/family protection proceedings. The free access given to the child; the child's parent, guardian or custodian; and the child's counsel is necessary to ensure that the parent, guardian or custodian can prepare an adequate defense, correct false information, and prepare alternative recommendations. Access to these records is limited to those children's court, law enforcement, and social services personnel who are "directly involved in the handling of the case." (The tribe may also decide to include provisions concerning the destruction of some child abuse and neglect records when the child reaches the age of eighteen (18) years old.)

Chapter 2-30 Children's Court Appeals

This chapter sets out procedures for children's court appeals, including who can appeal, time limit for appeal, record, stay of appeal, and conduct of proceedings.

APPENDIX C

TRIBAL JUVENILE JUSTICE CODE

Legal Education Series

TRIBAL JUVENILE JUSTICE CODE

NATIONAL INDIAN JUSTICE CENTER

NATIONAL INDIAN JUSTICE CENTER

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A non-profit corporation

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The National Indian Justice Center, Inc. (the Center) is an Indian owned and operated non-profit corporation with principal offices in Petaluma, California, (707) 762-8113. The Center was created through the combined efforts of those concerned with the improvement of tribal court systems and the administration of justice in Indian country. Its goals are to design and deliver legal education, research, and technical assistance which promote this improvement.

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The Center provides a broad range of training and technical services to Indian Tribes and their court systems, including legal education programs, court planning assistance, court evaluation services, assistance in selecting court personnel, code drafting and revision services, publications and resource services. For brochures and additional information concerning these programs, please call or write to the Center.

A major activity of the Center is the design and delivery of regional training sessions for tribal court personnel under contracts with the Bureau of Indian Affairs. Since May 1983, the Center has designed and delivered more than 100 training sessions for more than 5,500 tribal court personnel and others. These training sessions have included the following topics: Alcohol and Substance Abuse, Child Abuse and Neglect, Tribal Court Probation, Indian Civil Rights Act, Indian Youth and Family Law, Juvenile Justice Systems, Basic Criminal Law, Criminal Procedure, Advanced Criminal Law, Civil Procedure, Contracts and Personal Injury, Tribal Court Management, Evidence and Objections, Legal Writing/Ethics, Opinion Writing/Ethics, Legal Research and Analysis, and Indian Housing Law, Child Sexual Abuse, Appellate Court Systems and Tribal Court Clerks Training.

PUBLICATION SERVICES

The Center offers for sale many of the written training materials that are employed in our educational programs. In the near future, the Center will publish self-study materials to aid Indian justice personnel who are unable to attend the Center's training programs. The Center also publishes a quarterly newsletter, *The Tribal Court Record*.

The following is a list of the Center's training publications which may be obtained by mailing the enclosed publication order form or by calling or writing to the Center.

* Indian Civil Rights Act
* Indian Probate Law
* Indian Youth and Family Law
* Contracts and Personal Injury
* Criminal Procedure
* Advanced Criminal Law
* Evidence and Objections
* Tribal Court Management/Tribal Court Operations and Procedures Manual
* Indian Housing Law
* Legal Writing/Ethics
* Opinion Writing/Ethics
* Juvenile Justice Systems
* Child Abuse and Neglect
* Alcohol and Substance Abuse
* Tribal Court Probation
* Civil Procedure in Indian Country
* Legal Research and Analysis
* Child Sexual Abuse
* Appellate Court Systems
* Alternative Methods of Dispute Resolution

TRIBAL JUVENILE JUSTICE CODE

This tribal juvenile justice code was developed by Jerry Gardner and Joseph Myers of the National Indian Justice Center, James Bell of the Youth Law Center in San Francisco, California, and others. It was developed for the Bureau of Indian Affairs in order to comply with the requirements of the Indian Alcohol and Substance Abuse Prevention and Treatment Act of 1986.

This juvenile justice code covers juvenile delinquency proceedings (referred to in the code as "juvenile offenses" or "juvenile offender" proceedings) and a narrow range of status offenses (referred to in the code as "family in need of services" proceedings). It does not cover child abuse and neglect, guardianship and adoption proceedings. A tribal child/family protection code which covers these proceedings has also been developed by the Center.

This tribal juvenile justice code was developed in July 1987. It has undergone an extensive review and comment process since that time. This final version of the tribal juvenile justice code reflects modifications to the code as of March 1989 as a result of the review and comment process.

This juvenile justice code should be read in conjunction with the commentary which follows the code. Any tribe considering the adoption of this code should carefully review the code and the accompanying commentary to determine the extent to which the code meets the needs of their individual community and then make any necessary changes to the code before enacting it. (Note that the tribal juvenile justice code is available on floppy disks or we can make the modifications for you on the Center's word processor. Check with us concerning the cost of these services.)

Please contact us if you have any questions concerning the tribal juvenile justice code or the tribal child/family protection code.

TRIBAL JUVENILE JUSTICE CODE

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TRIBAL JUVENILE JUSTICE CODE

1-1 SHORT TITLE, PURPOSE AND DEFINITIONS

1-1 A. Short Title

Title 1 (Chapters 1-1 through 1-21) shall be entitled "The Juvenile Justice Code" (code).

1-1 B. Purpose

The Juvenile Justice Code shall be liberally interpreted and construed to fulfill the following expressed purposes:

1. To preserve and retain the unity of the family whenever possible and to provide for the care, protection, and wholesome mental and physical development of children coming within the provisions of this code;

2. To recognize that alcohol and substance abuse is a disease which is both preventable and treatable;

3. To remove from children committing juvenile offenses, the legal consequences of criminal behavior and to substitute therefore a program of supervision, care, and rehabilitation consistent with the protection of the _____ Community;

4. To achieve the purposes of this code in a family environment whenever possible, separating the child from the child's parents only when necessary for the child's welfare or in the interests of public safety;

5. To separate clearly in the judicial and other processes affecting children under this code the "juvenile offender" and the "family in need of services," and to provide appropriate and distinct dispositional options for treatment and rehabilitation of these children and families;

6. To provide judicial and other procedures through which the provisions of this code are executed and enforced and in which the parties are assured a fair hearing and their civil and other legal rights recognized and enforced;

7. To provide a continuum of services for children and their families from prevention to residential treatment, with emphasis whenever possible on prevention, early intervention and community-based alternatives; and;

8. To provide a forum where an Indian child charged to be "delinquent" or a "status offender" in other jurisdictions may be referred for adjudication and/or disposition.

1-1 C. Definitions

As used in this code:

1. **"Adjudicatory Hearing"**: A proceeding in the juvenile court to determine whether a child has committed a specific "juvenile offense" or is a "child whose family is in need of services" as set forth in a petition.

2. **"Adult"**: An individual who is eighteen (18) years of age or older (see the definition of "transfer to tribal court").

3. **"Alcohol or Substance Abuse Emergency Shelter or Halfway House"**: An appropriately licensed and supervised emergency shelter or halfway house for the care and treatment of juveniles with regard to alcohol and/or substance abuse problems.

4. **"Child"**: An individual who is less than eighteen (18) years old (see the definition of "transfer to tribal court").

5. **"Consent Decree"**: A court order which suspends a "juvenile offender" or "family in need of services" proceeding prior to adjudication and continues the child or the family under supervision under terms and conditions negotiated with the juvenile counselor and agreed to by all parties.

6. **"Counsel"**: An advocate or attorney.

7. **"Court" or "Juvenile Court"**: The Juvenile Court of the _____ Tribe.

8. **"Curriculum Change"**: Includes but is not necessarily limited to: (a) a change in a child's instructor, if available; (b) a change in the scheduling of a child's classes, if available; (c) reassignment of a child into another class section, if available; (d) a change in the content of a child's course of instruction, if available; and (e) a change in the child's school, if available. (See the definition of "family in need of services".)

9. **"Custodian"**: A person, other than a parent or guardian, to whom legal custody of the child has been given.

10. **"Detention"**: Exercising authority over a child by physically placing them in any juvenile facility designated by the court and restricting the child's movement in that facility.

11. **"Dispositional Hearing"**: A proceeding in the juvenile court to determine how to resolve a case after it has been determined at the adjudicatory hearing that the child has committed a specific "juvenile offense(s)" or is a child whose "family is in need of services".

12. **"Domicile"**: A person's permanent home, legal home or main residence. The domicile of a child is generally that of the custodial parent or guardian. Domicile includes the intent to establish a permanent home or where the parent or guardian consider to be their permanent home. Domicile for purposes of jurisdiction is established at the time of the alleged acts.

13. **"Emergency Foster Home"**: Placement with a family whose home has been licensed to accept emergency placements of children at any hour of the day or night.

14. **"Family in Need of Services"**: Means:

    (a) a family whose child, while subject to compulsory school attendance, is habitually and without justification absent from school; or

    (b) a family wherein there is allegedly a breakdown in the parent-child relationship based on the refusal of the parents, guardian, or custodian to permit a child to live with them or based on the child's refusal to live

with his parents, guardian or custodian; and

(c) in either of the foregoing situations:

(1) the conduct complained of presents a clear and substantial danger to the child's life or health **and** the intervention of the juvenile court is essential to provide the treatment, rehabilitation or services needed by the child or his family; **or**

(2) the child or his family are in need of treatment, rehabilitation or services not presently being received **and** the intervention of the juvenile court is essential to provide this treatment, rehabilitation or services.

(See chapters 1-16 through 1-19 of this code for specific "family in need of services" procedures).

15. **"Foster Home"**: Placement with a family whose home has been licensed to accept placement of children under the age of eighteen (18).

16. **"Guardian"**: A person assigned by a court of law, other than a parent, having the duty and authority to provide care, shelter, and control of a child.

17. **"Group Home"**: A residential detention facility which is licensed to care for children under the age of eighteen (18).

18. **"He/His"**: The use of he/his means he or she, his or her, and singular includes plural.

19. **"Interim Care"**: The status of temporary physical control of a child whose family is "in need of services" (see the definition of "family in need of services").

20. **"Juvenile Counselor"**: The juvenile counselor or the juvenile probation officer or any other appropriately titled person who performs the duties and responsibilities set forth in section 1-6B of this code.

21. **"Juvenile Facility"**: Any juvenile facility (other than a school) that cares for juveniles or restricts their movement, including secure juvenile detention facilities, alcohol or substance abuse emergency shelter or halfway houses, foster homes, emergency foster homes, group homes, and shelter homes (see individual definitions).

22. **"Juvenile Offender"**: A child who commits a "juvenile offense" prior to the child's eighteenth (18th) birthday.

23. **"Juvenile Offense"**: A criminal violation of the Law and Order Code of the _____ Tribe which is committed by a person who is under the age of eighteen (18) at the time the offense was committed.

24. **"Juvenile Presenter"**: The juvenile presenter or juvenile presenting officer or juvenile petitioner or any other person who performs the duties and responsibilities set forth in section 1-6C of this code.

25. **"Juvenile Shelter Care Facility"**: Any juvenile facility other than a secure juvenile detention facility (see the definitions of "juvenile facility" and "secure juvenile detention facility").

26. **"Parent"**: Includes a natural or adoptive parent, but does not include persons whose parental rights have been legally terminated, nor does it include the unwed father whose paternity has not been acknowledged or established.

27. **"Probation"**: A legal status created by court order whereby a "juvenile offender" is permitted to remain in his home under prescribed conditions and under the supervision of a person designated by the court. A "juvenile offender" on probation is subject to return to court for further proceedings in the event of his failure to comply with any of the prescribed conditions of probation.

28. **"Protective Supervision"**: A legal status created by court order under which a "juvenile offender" is permitted to remain in his home or is placed with a relative or other suitable individual and supervision and assistance is provided by the court, a health or social services agency or some other agency designated by the court.

29. **"Restitution"**: Financial or other reimbursement by the child to the victim, and is limited to easily ascertainable damages for injury to or loss of property, actual expenses incurred for medical, psychiatric and psychological treatment for injury to persons, and lost wages resulting from injury, which are a direct and proximate result of the delinquent act. Restitution does not include reimbursement for damages for mental anguish, pain and suffering, or other intangible losses.

30. **"Secure Juvenile Detention Facility"**: A facility which (a) contains locked cells or rooms which are separated by sight and sound from any adult inmates; (b) restricts the movement of those placed in the locked cells or rooms, and (c) complies with the other requirements of the Juvenile Justice and Delinquency Prevention Act, 42 U.S.C. 5601 et. seq.

31. **"Shelter Home"**: A residential facility which is licensed to care for children under the age of eighteen (18) in an unrestricted setting.

32. **"Transfer to Tribal Court"**: Transferring a child from the jurisdiction of the juvenile court to the jurisdiction of the tribal court according to chapter 1-3 of this code which results in the termination of the juvenile court's jurisdiction over that offense.

33. **"Tribal Council"**: The tribal council of the _____ Tribe.

34. **"Tribal Court"**: The adult court for the _____ Tribe.

1-2 JURISDICTION OF THE JUVENILE COURT

There is hereby established for the _____ Tribe of the _____ Reservation a court to be known as the _____ Juvenile Court. The juvenile court has exclusive original jurisdiction over all proceedings established in this code in which an Indian child residing in or domiciled on the reservation is:

1-2 A. Juvenile Offender

Alleged to be a "juvenile offender" as defined in section 1-1C of this code, unless the juvenile court transfers jurisdiction to the tribal court according to chapter 1-3 of this code; **or**

1-2 B. Family In Need of Services

Alleged to be a child whose family is "in need of services" as defined in section 1-1C of this 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.

1-3 E. Pre-Hearing Report in Transfer Proceedings

At least three (3) days prior to the transfer hearing, the petitioner shall prepare a pre-hearing report for the juvenile court and make copies of that report available to the child and the child's advocate, parent, guardian or custodian. The pre-hearing report shall address the issues described in sections 1-3C and 1-3D above.

1-3 F. Written Transfer Order

A child may be transferred to tribal court only if the juvenile court issues a written order after the conclusion of the transfer hearing which contains specific findings and reasons for the transfer in accordance with sections 1-3C and 1-3D above. This written order terminates the jurisdiction of the juvenile court over the child with respect to the juvenile offense(s) alleged in the petition. No child shall be prosecuted in the tribal court for a criminal offense unless the case has been transferred to tribal court as provided in this chapter.

1-4 JUVENILE COURT PROCEDURE

1-4 A. Non-Criminal Proceedings

No adjudication upon the status of any child in the jurisdiction of the juvenile court shall be deemed criminal or be deemed a conviction of a crime unless the juvenile court transfers jurisdiction to the tribal court according to chapter 1-3 of this code.

1-4 B. Use in Other Proceedings

The adjudication, disposition, and evidence presented before the juvenile court shall be inadmissible as evidence against the child in any proceeding in another court, including the tribal court.

1-4 C. Rules of Procedure

The procedures in the juvenile court shall be governed by the rules of procedure for the tribal court which are not in conflict with this code.

1-5 RELATIONS WITH OTHER AGENCIES

1-5 A. Cooperation and Grants

The juvenile court is authorized to cooperate fully with any federal, state, tribal, public or private agency in order to participate in any diversion, rehabilitation or training program(s) and to receive grants-in-aid to carry out the purposes of this code. This authority is subject to the approval of the tribal council if it involves an expenditure of tribal funds.

1-5 B. Social Services

The juvenile court shall utilize such social services as may be furnished by any tribal, federal, or state agency provided that it is economically administered without unnecessary duplication and expense;

1-5 C. Contracts

The juvenile court may negotiate contracts with tribal, federal or state agencies and/or departments on behalf of the tribal council for the care and placement of children whose status is adjudicated by the juvenile court subject to the approval of the tribal council before the expenditure of tribal funds;

1-5 D. Transfers from Other Courts

The juvenile court may accept or decline transfers from other states or tribal courts involving alleged delinquent children or alleged status offenders for the purposes of adjudication and/or disposition.

1-6 JUVENILE COURT PERSONNEL

1-6 A. Juvenile Court Judge

1. **Appointment**

The juvenile court judge(s) shall be appointed or elected in the same manner as the tribal court judge(s).

2. **Qualifications**

The general qualifications for juvenile court judge(s) shall be the same as the qualifications for tribal court judge(s). In addition, juvenile court judges shall have significant prior training and/or experience in juvenile matters.

3. **Powers and Duties**

In carrying out the duties and powers specifically enumerated under this juvenile justice code, judges of the juvenile court shall have the same duties and powers as judge of the tribal court, including, but not limited to, the contempt power, the power to issue arrest or custody warrants, the power to issue subpoenas, and the power to issue search warrants.

4. **Disqualification or Disability**

The rules on disqualification or disability of a juvenile court judge shall be the same as those rules that govern tribal court judges.

1-6 B. Juvenile Counselor/Juvenile Probation Officer

1. Appointment

The court shall appoint juvenile counselor(s) or juvenile probation officer(s) to carry out the duties and responsibilities set forth in this code. The chief judge of the tribal court shall certify annually to the tribal council the number of qualified juvenile counselor(s) or juvenile probation officer(s) needed to carry out the purpose of this code. The person(s) carrying out the duties and responsibilities set forth in this section may be labeled "juvenile counselors" or "juvenile probation officers" or any other title which the court finds appropriate so long as they perform the duties and responsibilities set forth in this section.

2. Qualifications

The juvenile counselor must have an educational background and/or prior experience in the field of delivering social services to youth.

3. Resource Development

The juvenile court counselor shall identify and develop resources on the reservation, in conjunction with the juvenile court and the tribal council, to enhance each tribal child's potential as a viable member of the tribal community.

4. Duties:

(a) Make investigations as provided in this code or as directed by the court;

(b) Make reports to the court as provided in this code or as directed by the juvenile court;

(c) Conduct informal adjustments;

(d) Provide counseling services;

(e) Perform such other duties in connection with the care, custody or transportation of children as the court may require.

5. Prohibited Duties

The juvenile counselor shall not be employed as or be required to perform the duties of a prosecutor, juvenile presenter or law enforcement official.

1-6 C. Juvenile Presenter

1. Appointment

The court shall appoint juvenile presenter(s) to carry out the duties and responsibilities set forth in this code. The chief judge of the tribal court shall certify annually to the tribal council the number of qualified juvenile presenter(s) needed to carry out the purpose of this code. The person(s) carrying out the duties and responsibilities set forth in this section may be labeled "juvenile presenters" or "juvenile presenting officers" or "juvenile petitioners" or any other

title which the court finds appropriate so long as they perform the duties and responsibilities set forth in this section.

2. **Qualifications**

The qualifications of the juvenile presenter(s) shall be the same as the qualifications for the official who acts as prosecutor for the tribal court.

3. **Duties:**

(a) File petitions with the court as provided in this code;

(b) Represent the tribe in all proceedings under this code; and

(c) Perform such other duties as the court may order.

1-6 D. Additional Court Personnel

The court may set qualifications and appoint additional juvenile court personnel such as guardians ad litem, court appointed special advocates (CASAs), juvenile advocates, and/or referees whenever the court decides that it is appropriate to do so.

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. Admissibility of Evidence

In a proceeding on a petition alleging that a child is a "juvenile offender" or a child whose family is "in need of services":

1. an out-of-court statement that would be inadmissible in a criminal matter in tribal court shall not be received in evidence;

2. evidence illegally seized or obtained shall not be received in evidence to establish the allegations of a petition;

3. unless advised by counsel, the statements of a child made while in custody to a juvenile counselor, including statements made during a preliminary inquiry, informal adjustment or predispositional study, shall not be used against the child in determining the truth of allegations of the petition;

4. a valid out-of-court admission or confession by the child is insufficient to support a finding that the child committed the acts alleged in the petition unless it is

corroborated by other evidence;

5. neither the fact that the child has at any time been a party to a "family in need of services" proceeding nor any information obtained during the pendency of such proceedings shall be received into evidence.

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--TAKING INTO CUSTODY

1-8 A. Taking A Child Into Custody

A law enforcement officer may take a child into custody when:

1. the child commits a "juvenile offense" in the presence of the officer; or

2. the officer has a reasonable suspicion to believe a "juvenile offense" has been committed by the child being detained; or

3. an appropriate custody order or warrant has been issued by the court authorizing the taking of a particular child.

1-8 B. Provision of Rights

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 counsel during questioning, and;

4. the child has a right to an advocate or attorney at his own expense.

1-8 C. Release or Delivery from Custody

A law enforcement officer taking a child into custody shall give the warnings listed in section 1-8B to any child he takes into custody prior to questioning and then shall do one of the following:

1. release the child to the child's parent, guardian or custodian and issue verbal counsel or warning as may be appropriate; or

2. release the child to a relative or other responsible adult tribal member if the child's parent, guardian or custodian consents to the release. (If the child is ten (10) years of age or older, the child and his parent, guardian or custodian must both consent to the release); or

3. deliver the child to the juvenile counselor, or to a juvenile facility as designated by the court, or to a medical facility if the child is believed to need prompt medical treatment, or is under the influence of alcohol or other chemical substances.

1-8 D. Review by Juvenile Counselor or Juvenile Facility

The juvenile counselor or juvenile official at the juvenile facility (as designated by the court) shall, immediately upon delivery of the child for custody, review the need for continued custody and shall release the child to his parent, guardian or custodian in order to appear at the hearing on a date to be set by the court, unless:

1. the act is serious enough to warrant continued detention and;

2. there is probable cause to believe the child has committed the offense(s) alleged; and

3. there is reasonable cause to believe the child will run away so that he will be unavailable for further proceedings; or

4. there is reasonable cause to believe that the child will commit a serious act causing damage to person or property.

1-8 E. Notification of Family

If a child is taken into custody and not released to his parent, guardian or custodian, the person taking the child into custody shall immediately attempt to notify the child's parent, guardian or custodian. All reasonable efforts shall be made to advise the parent, guardian or custodian of the reason for taking the child into custody and the place of continued custody. Such reasonable efforts shall include telephone and personal contacts at the home or place of employment or other locations where the person is known to frequent. If notification cannot be provided to the child's parent, guardian or custodian, the notice shall be given to a member of the extended family of the parent, guardian or custodian and to the child's extended family.

1-8 F. Criteria for Selecting Juvenile Facility

If the juvenile counselor or juvenile official at the juvenile facility (as designated by the court) determines that there is a need for continued custody of the child in accordance with section 1-8D of this code, then the following criteria shall be used to determine the appropriate juvenile facility for the child:

1. A child may be detained in a **Secure Juvenile Detention Facility** (as defined in section 1-1C of this code) as designated by the court only if one or more of the following conditions are met:

   (a) the child is a fugitive from another jurisdiction wanted for a felony offense; or

   (b) the child is charged with murder, sexual assault, or a crime of violence with a deadly weapon or which has resulted in a serious bodily injury; or

   (c) the child is uncontrollable and has committed a serious physical assault on the arresting officer or on other security personnel while resisting arrest or detention; or

   (d) the child is charged with committing one of the following acts which would be an offense if the child were an adult: vehicular homicide, abduction, rape, arson, burglary or robbery or

   (e) the child is already detained or on conditioned release for another "juvenile offense,"

   (f) the child has a demonstrable recent record of willful failures to appear at juvenile court proceedings; or

   (g) the child has made a serious escape attempt; or

   (h) the child requests in writing that he be given protection by being confined in a secure confinement area and there is a present and immediate threat of serious physical injury to the child.

2. A child may be housed in a **Juvenile Shelter Care Facility** (as defined in section 1-1C of this code) as designated the the court only if one of the following conditions exist:

   (a) one of the conditions described in section 1-8F(1) above exists; or

(b) the child is unwilling to return home or to the home of an extended family member; or

(c) the child's parent, guardian, custodian, or an extended family member is unavailable, unwilling, or unable to permit the child to return to his home;

(d) there is an evident and immediate physical danger to the child in returning home, and all extended family members are unavailable, unwilling, or unable to accept responsibility for temporary care and custody of the child.

3. A child may be referred to an **Alcohol or Substance Abuse Emergency Shelter or Halfway House** (as defined in section 1-1C of this code) if it is determined that there is a need for continued custody of the child in accordance with section 1-8D of this code and (1) the child has been arrested or detained for a "juvenile offense" relating to alcohol or substance abuse, (2) there is space available in an alcohol or substance abuse emergency shelter or halfway house designated by the court; and (3) the child is not deemed to be a danger to himself or others.

1-9 JUVENILE OFFENDER--DETENTION HEARING

1-9 A. Requirement of Detention Hearing

Where a child who has been taken into custody is not released, a detention hearing shall be convened by the court within forty-eight (48) hours, inclusive of holidays and weekends, of the child's initial detention under chapter 1-8 of this code.

1-9 B. Purpose of Detention Hearing

The purpose of the detention hearing is to determine:

1. whether probable cause exists to believe the child committed the alleged "juvenile offense"; and

2. whether continued detention is necessary pending further proceedings.

1-9 C. Notice of Detention Hearing

Notice of the detention hearing shall be given to the child and the child's parent, guardian or custodian and the child's counsel as soon as the time for the detention hearing has been set. The notice shall contain:

1. the name of the court;

2. the title of the proceedings;

3. a brief statement of the "juvenile offense" the child is alleged to have committed; and

4. the date, time, and place of the detention hearing.

1-9 D. Detention Hearing Procedure

Detention hearings shall be conducted by the juvenile court separate from other proceedings. At the commencement of the detention 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. The general public shall be excluded from the proceedings. Only the parties, their counsel, witnesses, and other persons requested by the parties or the court shall be admitted.

1-9 E. Standards to be Considered at Detention Hearing

The court shall consider the evidence at the detention hearing as it pertains to the detention criteria set forth in sections 1-8D and 1-8F of this code.

1-9 F. Finding at Detention Hearing

The court shall issue a written finding stating the reasons for release or continued detention of the child. If the court determines that there is a need for continued detention, the court shall specify where the child is to be placed until the adjudicatory hearing.

1-9 G. Rehearing the Detention Matter

If the child is not released at the detention hearing, and a parent, guardian, or custodian or a relative was not notified of the hearing and did not appear or waive appearance at the hearing the court shall rehear the detention matter without unnecessary delay upon the filing of a motion for rehearing and a declaration stating the relevant facts.

1-10 JUVENILE OFFENDER--INITIATION OF PROCEEDINGS

1-10 A. Investigation by the Juvenile Counselor

The juvenile counselor shall make an investigation within twenty-four (24) hours of the detention hearing or the release of the child to his parent, guardian or custodian, to determine whether the interests of the child and the public require that further action be taken. Upon the basis of his investigation, the juvenile counselor shall:

1. recommend that no further action be taken; or

2. suggest to the child and the child's parent, guardian or custodian that they appear for an informal adjustment conference under sections 1-10B and 1-10C of this code; or

3. request the juvenile presenter to begin transfer to adult tribal court proceedings under chapter 1-3 of this code; or

4. recommend that the juvenile presenter file a petition under section 1-10D of this code. The petition shall be filed within forty-eight (48) hours if the child is in custody. If the child has been previously released to his parent, guardian, custodian, relative or responsible adult, the petition shall be filed within ten (10) days.

1-10 B. Informal Adjustment

1. During the course of the preliminary investigation to determine what further action shall be taken, the juvenile counselor shall confer with the child and the child's parent, guardian or custodian for the purpose of effecting adjustments or agreements that make the filing of the petition unnecessary.

2. The juvenile counselor shall consider the following factors in determining whether to proceed informally or to file a petition:

   (a) nature and seriousness of the offense;

   (b) previous number of contacts with the police, juvenile counselor or the court;

   (c) age and maturity of the child;

   (d) attitude of the child regarding the offense;

   (e) willingness of the child to participate in a voluntary program, and;

   (f) participation and input from the child's parent, guardian or custodian.

1-10 C. Informal Conference

1. After conducting a preliminary investigation, the juvenile counselor shall hold an informal conference with the child and the child's parent, guardian or custodian to discuss alternative courses of action in the particular case.

2. The juvenile counselor shall inform the child, the child's parent, guardian or custodian of their basic rights under chapter 1-7 of this code. Statements made by the child at the informal conference shall not be used against the child in determining the truth of the allegations in the petition.

3. At the informal conference, upon the basis of the information obtained during the preliminary investigation, the juvenile counselor may enter into a written agreement with the child and the child's parent, guardian or custodian specifying particular conditions to be observed during an informal adjustment period, not to exceed six (6) months. The child and the child's parent, guardian or custodian shall enter into the agreement with the knowledge that consent is voluntary and that they may terminate the adjustment process at any time and petition the court for a hearing in the case.

4. The child shall be permitted to be represented by counsel at the informal conference.

5. If the child does not desire to participate voluntarily in a diversion program, the juvenile counselor shall recommend that the juvenile presenter file a petition under section 1-10D of this code.

6. Upon the successful completion of the informal adjustment agreement, the case shall be closed and no further action taken in the case.

7. If the child fails to successfully complete the terms of his informal adjustment

agreement, the juvenile counselor may recommend that a petition be filed in the case under section 1-10D of this code.

1-10 D. Filing and Content of Petition

Formal "juvenile offender" proceedings shall be instituted by a petition filed by the juvenile presenter on behalf of the tribe and in the interests of the child. The petition shall be entitled, "In the matter of _____, a child" and shall set forth with specificity:

1. the name, birthdate, residence, and tribal affiliation of the child;

2. the names and residences of the child's parent, guardian or custodian;

3. a citation to the specific section(s) of this code which give the court jurisdiction over the proceedings;

4. a citation to the criminal statute or other law or ordinance which the child is alleged to have violated;

5. a plain and concise statement of facts upon which the allegations are based, including the date, time and location at which the alleged acts occurred; and

6. whether the child is in custody and, if so, the place of detention and time he was taken into custody.

1-10 E. Issuance of Summons

After a "juvenile offender" petition has been filed, the court shall direct the issuance of summons to:

1. the child;
2. the child's parent, guardian or custodian;
3. the child's counsel;
4. appropriate medical and/or alcohol rehabilitation experts, and;
5. any other person the court deems necessary for the proceedings.

1-10 F. Content of the Summons

The summons shall contain the name of the court, the title of the proceedings, and the date, time, and place of the hearing. The summons shall also advise the parties of their applicable rights under chapter 1-7 of this code. A copy of the petition shall be attached to the summons.

1-10 G. Service of the Summons

The summons shall be served upon the parties at least five (5) days prior to the hearing. The summons shall be delivered personally by a law enforcement official or appointee of the court. If the summons cannot be delivered personally, the court may deliver it by registered mail. If the summons cannot be delivered by registered mail, it may be by publication. A party, other than the child, may waive service of summons by written stipulation or by voluntary appearance at the hearing.

1-11 JUVENILE OFFENDER--CONSENT DECREE

1-11 A. Availability of Consent Decree

At any time after the filing of a "juvenile offender" petition, and before the entry of a judgment, the court may, on motion of the juvenile presenter or that of counsel for the child, suspend the proceedings and continue the child under supervision in his own home under terms and conditions negotiated with the juvenile counselor and agreed to by all the parties affected. The court's order continuing the child under supervision under this section shall be known as a "consent decree."

1-11 B. Objection to Consent Decree

If the child objects to a consent decree, the court shall proceed to findings, adjudication and disposition of the case. If the child does not object, but an objection is made by the juvenile presenter after consultation with the juvenile counselor, the court shall, after considering the objections and the reasons given, proceed to determine whether it is appropriate to enter a consent decree and may, in its discretion, enter the consent decree.

1-11 C. Duration of Consent Decree

A consent decree shall remain in force for six (6) months unless the child is discharged sooner by the juvenile counselor. Prior to the expiration of the six (6) months period, and upon the application of the juvenile counselor or any other agency supervising the child under a consent decree, the court may extend the decree for an additional six (6) months in the absence of objection to extension by the child. If the child objects to the extension the court shall hold a hearing and make a determination on the issue of extension.

1-11 D. Failure to Fulfill Terms and Conditions

If, either prior to a discharge by the juvenile counselor or expiration of the consent decree, the child fails to fulfill the terms of the decree, the juvenile presenter may file a petition to revoke the consent decree. Proceedings on the petition shall be conducted according to chapter 1-14 of this code. If the child is found to have violated the terms of the consent decree, the court may:

1. extend the period of the consent decree; or

2. make any other disposition which would have been appropriate in the original proceeding.

1-11 E. New Juvenile Offense Complaint

If, either prior to discharge or expiration of the consent decree, a new "juvenile offender" complaint is filed against the child and the juvenile counselor has conducted a preliminary inquiry and authorized the filing of a petition upon a finding that informal adjustment is not in the best interest of the child and public, the juvenile presenter may:

1. file a petition to revoke the consent decree in accordance with the section 1-11D of this code; or

2. file a petition on the basis of the new complaint which has been filed against the child.

1-11 F. Dismissal of Petition

A child who is discharged by or who completes a period under supervision without reinstatement of the original "juvenile offense" petition shall not again be proceeded against in any court for the same offense alleged in the petition or an offense based upon the same conduct, and the original petition shall be dismissed with prejudice. Nothing in this section precludes a civil suit against the child for damages arising from this conduct.

1-12 JUVENILE OFFENDER--ADJUDICATION PROCEEDINGS

1-12 A. Purpose and Conduct of Adjudicatory Hearing

Hearings on "juvenile offender" petitions shall be conducted by the juvenile court separate from other proceedings. The court shall conduct the adjudicatory hearing for the sole purpose of determining whether the child has committed a "juvenile offense" At the adjudicatory hearing, the child and the child's parent, guardian or custodian shall have the applicable rights listed in chapter 1-7 of this code. The general public shall be excluded from the proceedings. Only the parties, their counsel, witnesses, and other persons requested by the parties shall be admitted.

1-12 B. Time Limitations on Adjudicatory Hearings

If the child remains in custody, the adjudicatory hearing shall be held within ten (10) days of receipt of the "juvenile offender" petition by the juvenile court. If the child is released from custody or was not taken into custody, then the adjudicatory hearing shall be held within thirty (30) days of receipt of the "juvenile offender" petition by the juvenile court.

1-12 C. Notice of Hearing

Notice of the adjudicatory hearing shall be given to the child and the child's parent, guardian or custodian, the child's counsel and any other person the court deems necessary for the hearing at least five (5) days prior to the hearing in accordance with sections 1-10F and 1-10G of this code.

1-12 D. Denial of Allegations

If the allegations in the "juvenile offender" petition are denied, the juvenile court shall set a date, in accordance with section 1-12B above, to hear evidence on the petition.

1-12 E. Admission of Allegations

If the child admits the allegations of the petition, the juvenile court shall consider a disposition only after a finding that:

1. the child fully understands his rights under chapter 1-7 of this code, and fully understands the consequences of his admission;

2. the child voluntarily, intelligently, and knowingly admits all facts necessary to constitute a basis for juvenile court action; and

3. the child has not, in his statements on the allegations, set forth facts, which if found to be true, would be a defense to the allegations.

1-12 F. "Juvenile Offender" Finding After Admission

If the court finds that the child has validly admitted the allegations contained in the petition, the court shall make and record its finding and schedule a disposition hearing in accordance with chapter 1-14 of this code. Additionally, the court shall specify in writing whether the child is to be continued in an out of the home placement pending the disposition hearing.

1-12 G. "Juvenile Offender" Finding After Hearing

If the court finds on the basis of proof **beyond a reasonable doubt** that the allegations contained in the petition are true, the court shall make and record its finding and schedule a disposition hearing in accordance with chapter 1-14 of this code. Additionally, the court shall specify in writing whether the child is to be continued in an out of home placement pending the disposition hearing.

1-12 H. Dismissal of Petition

If the court finds that the allegations on the "juvenile offender" petition have not been established **beyond a reasonable doubt** it shall dismiss the petition and order the child released from any detention imposed in connection with the proceeding.

1-13 JUVENILE OFFENDER -- PREDISPOSITION STUDIES: REPORTS AND EXAMINATIONS

1-13 A. Predisposition Study and Report

The court shall direct the juvenile counselor to prepare a written predisposition study and report for the court concerning the child, the child's family, environment, and any other matter relevant to need for treatment or other appropriate disposition of the case when:

1. the child has been adjudicated as a "juvenile offender"; or

2. a notice of intent to admit the allegations of the petition has been filed.

1-13 B. Contents of Predisposition Study and Report

The report shall contain a specific plan for the child, aimed at resolving the problems presented in the petition. The report shall contain a detailed explanation showing the necessity for the proposed plan of disposition and the benefits to the child under the proposed plan. Preference shall be given to the dispositional alternatives which are least restrictive of the child's freedom and are consistent with the interests of the community.

1-13 C. Medical Assessment and Treatment for Alcohol or Substance Abuse

The juvenile court may order a medical assessment of a child arrested or detained for a "juvenile offense" relating to or involving alcohol or substance abuse to determine the mental or physical state of the child so that appropriate steps can be taken to protect the

child's health and well-being.

1-13 D. Pre-Adjudication Examination of Emotionally or Developmentally Disabled Child

Where there are indications that the child may be emotionally disturbed or developmentally disabled, the court, on a motion by the juvenile presenter or that of counsel for the child, may order the child to be tested by a qualified psychiatrist, psychologist, or licensed psychometrician prior to a hearing on the merits of the petition. An examination made prior to the hearing, or as a part of the predisposition study and report, shall be conducted on an outpatient basis unless the court finds that placement in a hospital or other appropriate facility is necessary.

1-13 E. Pre-Disposition Examinations

The court may order an examination of a child adjudicated as a "juvenile offender" by a physician, psychiatrist or psychologist. The court may also, following the adjudicatory hearing, order the examination by a physician, psychiatrist or psychologist of a parent or custodian who gives his consent and whose ability to care for or supervise a child is an issue before the court at the dispositional hearing.

1-13 F. Transfer for Diagnosis

The court may order that a child adjudicated as a "juvenile offender" be transferred to an appropriate facility for a period of not more than sixty (60) days for purposes of diagnosis with direction that the court be given a written report at the end of that period indicating the disposition which appears most suitable.

1-13 G. Submission of Reports

Evaluations, assessments, dispositional reports and other material to be considered by the court in a juvenile hearing shall be submitted to the court and to the parties no later than three (3) days before the scheduled hearing date. A declaration including reasons why a report has not been completed shall be filed with the court no later than three (3) days before the scheduled hearing date if the report will not be submitted before the deadline. The court may in its discretion dismiss a petition if the necessary reports, evaluations or other material have not been submitted in a timely manner.

1-14 JUVENILE OFFENDER--DISPOSITION PROCEEDINGS

1-14 A. Purpose and Conduct of Disposition Hearing

Disposition hearings shall be conducted by the juvenile court separate from other proceedings. The court shall conduct the disposition hearing to determine how to resolve a case after it has been determined at the adjudicatory hearing that the child has committed a specific "juvenile offense." The court shall make and record its dispositional order in accordance with sections 1-14E and 1-15 of this code. At the disposition hearing, the child and the child's parent, guardian or custodian shall have the applicable rights listed in chapter 1-7 of this code. The public shall be excluded from the proceedings. Only the parties, their counsel, witnesses, and persons requested by the parties shall be admitted.

1-14 B. Time Limitations on Disposition Hearings

If the child remains in custody, the disposition hearing shall be held within ten (10) days after the adjudicatory hearing. If the child is released from custody or was not taken into custody, then the disposition hearing shall be held within twenty (20) days after the adjudicatory hearing.

1-14 C. Notice of Disposition Hearing

Notice of the disposition hearing shall be given to the child and the child's parent, guardian or custodian, the child's counsel and any other person the court deems necessary for the hearing at least five (5) days prior to the hearing in accordance with sections 1-10F and 1-10G of this code.

1-14 D. Evidence and Reports

In the disposition hearing, the court may consider all relevant and material evidence determining the questions presented, including oral and written reports, and may rely on such evidence to the extent of its probative value even though not otherwise competent. The court shall consider any predisposition report, physician's report or social study it may have ordered and afford the child, the child's parent, guardian or custodian and the child's counsel an opportunity to controvert the factual contents and conclusions of the report(s). The court shall also consider the alternative predisposition report or recommendations prepared by the child or the child's counsel, if any.

1-14 E. Disposition Alternatives

If a child is found by the court to be a "juvenile offender," the court may make and record any of the following orders of disposition for the child's supervision, care and rehabilitation:

1. permit the child to remain with his parent, guardian or custodian, subject to such conditions and limitations as the court may prescribe;

2. place the child in the legal custody of a relative or other suitable person, subject to such conditions and limitations as the court may prescribe;

3. order the child to pay restitution (as defined in section 1-1C of this code);

4. place the child under protective supervision (as defined in section 1-1C of this code) under such conditions and limitations as the court may prescribe;

5. place the child on probation (as defined in section 1-1C of this code) under such conditions and limitations as the court may prescribe; or

6. place the child in a juvenile facility designated by the court, including alcohol or substance abuse emergency shelter or halfway house, emergency foster home, foster home, group home, shelter home, or secure juvenile detention facility (see section 1-1C of this code for individual definitions).

1-15 JUVENILE OFFENDER -- REVIEW, MODIFICATION, REVOCATION, EXTENSION OR TERMINATION OF DISPOSITIONAL ORDERS

1-15 A. Mandatory Review of Disposition Order

Dispositional orders are to be reviewed at the court's discretion at least once every six (6) months.

1-15 B. Modification, Revocation, or Extension of Disposition Order

The court may hold a hearing to modify, revoke, or extend a disposition order at any time upon the motion of;

1. the child;
2. the child's parent, guardian or custodian;
3. the child's counsel;
4. the juvenile counselor;
5. the juvenile presenter;
6. the institution, agency or person vested with the legal custody of the child or responsibility for protective supervision; or
7. the court on its own motion.

1-15 C. Hearing to Modify, Revoke or Extend Disposition Order

A hearing to modify, revoke or extend the disposition order shall be conducted according to sections 1-14A, 1-14C, 1-14D and 1-14E of this code.

1-15 D. Automatic Termination of Disposition Order

When the child reaches eighteen (18) years of age, all disposition orders shall automatically terminate, unless the original disposition order was made within one (1) year of the child's eighteenth (18th) birthday or after the child had reached eighteen (18) years of age, in which case the disposition order may not continue for more than one (1) year. The records concerning the child shall be destroyed according to section 1-20C of this code.

1-16 FAMILY IN NEED OF SERVICES -- INTERIM CARE

1-16 A. Limitation on Taking Into Custody

No child whose family is the subject of a proceeding alleging that the family is "in need of services" (as defined in section 1-1C of this code) may be taken into custody unless such taking into custody is in accordance with provision for "interim care" (as defined in section 1-1C of this code) set forth in sections 1-16A through 1-16J of this code.

1-16 B. Interim Care Without Court Order

A child may be taken into interim care by a law enforcement officer without order of the court only when:

1. the officer has reasonable grounds to believe that the child is in circumstances

which constitute a substantial danger to the child's physical safety; or

2. an agency legally charged with the supervision of the child has notified a law enforcement agency that the child has run away from a placement ordered by the court under chapter 1-19 of this code.

1-16 C. Procedure for Interim Care

A law enforcement official taking a child into custody under the interim care provisions of this code shall immediately:

1. inform the child of the reasons for the custody;

2. contact the juvenile counselor who shall designate placement of the child in an appropriate juvenile shelter care facility as designated by the court;

3. take the child to the placement specified by the juvenile counselor, or in the event of the unavailability of a juvenile counselor, to an appropriate juvenile shelter care facility as designated by the court; and,

4. inform the child's family in accordance with section 1-16D of this code.

1-16 D. Notification of Family

The law enforcement officer or the juvenile counselor shall immediately notify the child's parent, guardian or custodian of the child's whereabouts, the reasons for taking the child into custody, and the name and telephone number of the juvenile counselor who has been contacted. Efforts to notify the child's parent, guardian or custodian shall include telephone and personal contacts at the home or place of employment or other locations where the person is known to frequent with regularity. If notification cannot be provided to the child's parent, guardian or custodian, the notice shall be given to a member of the extended family of the parent, guardian or custodian and to the child's extended family.

1-16 E. Time Limitation on Interim Care

Under no circumstances shall any child taken into interim care under section 1-16B of this code be held involuntarily for more than forty-eight (48) hours.

1-16 F. Restrictions on Placement

A child taken into interim care shall not be placed in a jail or other facility intended or used for the incarceration of adults charged or convicted of criminal offenses. If a child taken into interim care is placed in a facility used for the detention of "juvenile offenders" or alleged "juvenile offenders," he must be detained in a room separate from the "juvenile offenders" or alleged "juvenile offenders."

1-16 G. Restriction on Transportation

A child taken into interim care shall not be placed or transported in any police or other vehicle which at the same time contains an adult under arrest, unless this section cannot be complied with due to circumstances in which any delay in transporting the child to an appropriate juvenile shelter care facility would be likely to result in substantial danger to the child's physical safety. Said circumstances shall be described in writing to

the supervisor of the driver of the vehicle within forty-eight (48) hours after any transportation of a child with an adult under arrest.

1-16 H. Voluntary Services

The juvenile counselor shall offer and encourage the child and the child's family, guardian or custodian to voluntarily accept social services.

1-16 I. Voluntary Return Home

If a child has been taken into interim care under the provisions of section 1-16B of this code and the child's parent, guardian or custodian agree to the child's return home, the child shall be returned home as soon as practicable by the child's parent, guardian or custodian or as arranged by the juvenile counselor.

1-16 J. Shelter and Family Services Needs Assessment

If the child refuses to return home and if no other living arrangements agreeable to the child and to the child's parent, guardian or custodian can be made, a juvenile counselor shall offer the child shelter in an appropriate juvenile shelter care facility as designated by the court which is located as close as possible to the residence of the child's parent, guardian or custodian. The juvenile counselor also shall refer the child and his family to an appropriate social services agency for a family services needs assessment.

1-17 FAMILY IN NEED OF SERVICES -- INITIATION OF PROCEEDINGS

1-17 A. Who May Submit Requests

Requests stating that a family is "in need of services" may be submitted by the child; the child's parent, guardian or custodian; an appropriate social services agency; and/or the juvenile counselor. A request stating that a child is habitually and without justification absent from school may also be submitted by an authorized representative of a local school board or governing authority of a private school but only if the request is accompanied by a declaration in which the authorized representative swears that the school has complied with each of the steps set forth in section 1-17G of this code.

1-17 B. Referral of Requests to Juvenile Counselor

Requests stating that a family is "in need of services" shall be referred to the juvenile counselor, who shall assist either a child or a child's parent, guardian or custodian in obtaining appropriate and available services as well as assisting in any subsequent filing of a petition alleging that the family is "in need of services".

1-17 C. Withdrawal of Request

A request stating that a family is "in need of services" may be withdrawn by the party submitting the request at any time prior to the adjudication of any petition filed in the proceedings.

1-17 D. Authorization to File Petition

A petition alleging that a family is "in need of services" shall not be filed unless the juvenile presenter has determined and endorsed upon the petition that the filing of the petition is in the best interest of the child and his family.

1-17 E. Petition--Required Signatures

A petition alleging that a family is "in need of services" shall be signed by both the juvenile presenter and the party submitting the request as authorized in section 1-17A of this code.

1-17 F. Petition--Form and Contents

A petition alleging that a family is "in need of services" shall be entitled, "In the Matter of the Family of ....., a child," and shall set forth with specificity:

1. the name, birthdate and residence address of the child and whether the child is the complainant or respondent in the proceedings;

2. the name and residence address of the parents, guardian or custodian of the child and whether the parents, guardian or custodian are the complainant or respondent in the proceedings;

3. that the family is a "family in need of services" as defined in section 1-1C of this code;

4. that the petitioner has exhausted or the respondent has refused appropriate and available services as evidenced by a report which shall be prepared and submitted by the juvenile counselor at the same time the petition is filed, or, in the case of petition based upon a child's alleged habitual and unjustifiable absence from school, that a declaration as required under section 1-17A of this code has been filed by a school official; and

5. the court intervention is necessary to secure services which are accessible to the court; and

6. the additional required allegations set forth in either section 1-17G or section 1-17H of this code.

1-17 G. Petition--Additional Required Allegations for School Absence

In addition to the allegations required under section 1-17F of this code, a petition alleging that a child is habitually and without justification absent from school shall also allege the following:

1. that the school and a child's parent, guardian or custodian have held a meeting or the child's parent, guardian or custodian has refused to attend a meeting to discuss the child's habitual and unjustified absence from school;

2. that the school has provided an opportunity for counseling to determine whether a curriculum change (as defined in section 1-1C of this code) would resolve the child's problem and if the local school board or governing authority of a private

school provides an alternative education program, that the child has been provided with an opportunity to enroll in the alternative education program;

3. that the school has conducted a review of the child's educational status which may include medical, psychological and/or educational testing of the child in accordance with the school regulations to determine whether learning problems may be a cause of the child's absence from school and, if so, what steps have been taken to overcome the learning problems;

4. that the social worker or other appropriate official of the child's school has conducted an investigation to determine whether social problems may be a cause of the child's absence from school and, if so, that appropriate action has been taken; and

5. that the school has sought assistance from appropriate agencies and resources available to the local school board or private school, or has referred the matter to a local social services agency for the purpose of utilizing and coordinating such agencies and resources.

1-17 H. Petition--Additional Required Allegations for Breakdown In The Parent-Child Relationship

In addition to the allegations required under section 1-17F of this code, a petition alleging that there is a breakdown in the parent-child relationship shall also allege that the filing of the petition was preceded by complying with each of the following that are applicable and appropriate:

1. the child and his family have participated in counseling or either the child or his family has refused to participate in family counseling;

2. the child has been placed in the home of a relative, if available, or the child has refused placement in the home of a relative;

3. the child has sought assistance at an appropriate juvenile shelter care facility for runaways or the child has refused assistance from such a facility; and

4. the child has been placed in a foster home or the child has refused placement in a foster home.

1-17 I. Summons in a Family in Need of Services Proceeding

After a petition alleging that a family is "in need of services" has been filed, summonses shall be issued directed to the child, the child's parent, guardian or custodian, their counsel and to such other persons as the court considers proper or necessary parties. The content and service of the summons shall be in accordance with sections 1-10F and 1-10G of this code.

1-18 FAMILY IN NEED OF SERVICES -- CONSENT DECREE

1-18 A. Availability of Consent Decree

At any time after the filing of a petition alleging that a family is "in need of services,"

and before the entry of a judgment, the court may, on motion of the juvenile presenter or that of the child, his parents, guardian or custodian, or their counsel, suspend the proceedings and continue the family under supervision under terms and conditions negotiated with juvenile counselor and agreed to by all the parties affected. The court's order continuing the family under supervision under this section shall be known as a "consent decree."

1-18 B. Objection to Consent Decree

If the child or his parents, guardian or custodian object to a consent decree, the court shall proceed to findings, adjudication and disposition of the case.

1-18 C. Court Determination of Appropriateness

If the child or his parents, guardian or custodian do not object, the court shall proceed to determine whether it is appropriate to enter a consent decree and may, in its discretion, enter the consent decree.

1-18 D. Duration of Consent Decree

A consent decree shall remain in force for six months unless the family is discharged sooner by the juvenile counselor. Prior to the expiration of the six months period, and upon the application of the juvenile counselor or any other agency supervising the family under a consent decree, the court may extend the decree for an additional six months in the absence of objection to extension by the child or his parents, guardian or custodian. If the child or his parents, guardian or custodian object to the extension the court shall hold a hearing and make a determination on the issue of extension.

1-18 E. Failure to Fulfill Terms and Conditions

If, either prior to discharge by the juvenile counselor or expiration of the consent decree, the child or his parents, guardian or custodian fail to fulfill the express terms and conditions of the consent decree, the petition under which the family was continued under supervision may be reinstated in the discretion of the juvenile presenter in consultation with the juvenile counselor. In this event, the proceeding on the petition shall be continued to conclusion as if the consent decree had never been entered.

1-18 F. Dismissal of Petition

After a family is discharged by the juvenile counselor or completes a period under supervision without reinstatement of the petition alleging that the family is in need of services, the petition shall be dismissed with prejudice.

1-19 FAMILY IN NEED OF SERVICES -- HEARINGS AND DISPOSITION

1-19 A. Conduct of Hearings

"Family in need of services" hearings shall be conducted by the juvenile court separate from other proceedings. At all hearings, the child and the child's family, guardian or custodian shall have the applicable rights listed in chapter 1-7 of this code. The general public shall be excluded from the proceedings. Only the parties, their counsel, witnesses, and other persons requested by the parties shall be admitted.

1-19 B. Notice of Hearings

Notice of all "family in need of services" hearings shall be given to the child, the child's parent, guardian or custodian, their counsel, and any other person the court deems necessary for the hearing at least five (5) days prior to the hearing in accordance with sections 1-10F and 1-10G of this code.

1-19 C. Adjudicatory Hearing

The court, after hearing all of the evidence bearing on the allegations contained in the petition, shall make and record its findings as to whether the family is a "family in need of services." If the court finds on the basis of clear and convincing evidence that the family is a "family in need of services," the court may proceed immediately or at a postponed hearing to make disposition of the case. if the court does not find that the family is a "family in need of services" it shall dismiss the petition.

1-19 D. Predisposition Studies, Reports and Examinations

The court may order any appropriate predisposition study, report or examination under chapter 1-13 of this code.

1-19 E. Disposition Hearing

In that part of the hearing on dispositional issues all relevant and material evidence helpful in determining the questions presented, including oral and written reports, may be received by the court and may be relied upon to the extent of its probative value even though not competent had it been offered during the part of the hearings on adjudicatory issues. The court shall consider any predisposition report, physician's report or social study it may have ordered and afford the child, the child's parent, guardian or custodian and the child's counsel an opportunity to controvert the factual contents and conclusions of the report(s). The court shall also consider the alternative predisposition report or recommendations prepared by the child or the child's counsel if any.

1-19 F. Disposition Alternatives

If the court finds that a family is a "family in need of services," the court may make and record any of the following orders of disposition, giving due weight to the need to preserve the unity of the family whenever possible:

1. permit the child to remain with his parents, guardian or custodian subject to those conditions and limitations the court may prescribe, including the protective supervision (as defined in section 1-1C of this code) of the child by a local social services agency;

2. referral of the child and his parents, guardian or custodian to an appropriate social services agency for participation in counseling or other treatment program as ordered by the court;

3. transfer legal custody of the child to any of the following if the family is found to be a "family in need of services" due to a breakdown in the parent-child relationship:

(a) a relative or other individual who, after study by the juvenile counselor or other agency designated by the court, is found by the court to be qualified to receive and care for the child, or;

(b) an appropriate agency for placement of the child in an appropriate juvenile shelter care facility (as defined in section 1-1C of this code) for a period not to exceed thirty (30) days;

with simultaneous directed referral of the family to a social services agency for counseling and/or other social assistance. A child may be placed under this section for an additional period not to exceed ninety (90) days after a hearing to determine the necessity of an additional placement.

1-19 G. Restriction on Dispositional Placements

The child shall not be confined in an institution established for the care and rehabilitation of "juvenile offenders" unless a child whose family is found to be "in need of services" is also found to be a "juvenile offender". Under no circumstances shall a child whose family is found to be "in need of services" be committed or transferred to a penal institution or other facility used for the execution of sentences of persons convicted of crimes.

1-19 H. Modification, Revocation or Extension of Disposition Order

The court may hold a hearing to modify, revoke or extend a disposition order at any time upon the motion of:

1. the child
2. the child's parent, guardian, or custodian;
3. the child's counsel;
4. the juvenile counselor;
5. the juvenile presenter;
6. the institution, agency or person vested with legal custody of the child or responsibility for protective supervision; or
7. the court on its own motion.

1-19 I. Termination of Disposition Order

Any disposition order concerning a "family in need of services" shall remain in force for a period not to exceed six (6) months. The disposition order concerning a child whose family is found to be "in need of services" shall also automatically terminate when the child reaches his eighteenth (18th) birthday or is legally emancipated by the court.

1-20 JUVENILE RECORDS

1-20 A. Juvenile Court Records

A record of all hearings under this code shall be made and preserved. All juvenile court records shall be confidential and shall not be open to inspection to any but the following:

1. the child;
2. the child's parent' guardian or custodian;
3. the child's counsel;
4. the juvenile court personnel directly involved in the handling of the case; or
5. any other person by order of the court, having a legitimate interest in the particular case or the work of the court.

1-20 B. Law Enforcement Records

Law enforcement records and files concerning a child shall be kept separate from the records and files of adults. All law enforcement records shall be confidential and shall not be open to inspection to any but the following:

1. the child;
2. the child's parent' guardian or custodian;
3. the child's counsel;
4. law enforcement personnel directly involved in the handling of the case;
5. the juvenile court personnel directly involved in the handling of the case; or
6. any other person by order of the court, having a legitimate interest in the particular case or the work of the court.

1-20 C. Destruction of Records

When a child who has been the subject of any juvenile court proceeding reaches his eighteenth (18th) birthday, or the disposition order is terminated if the disposition order extends beyond his eighteenth (18th) birthday, the court shall order the clerk of the court to destroy both the law enforcement records and the juvenile court records. The clerk of the court shall respond to all records inquiries as if no records had ever existed.

1-21 JUVENILE APPEALS

1-21 A. Who Can Appeal

Any party to a juvenile court hearing may appeal a final juvenile court order, including all transfer, adjudication and/or disposition orders except that the tribe cannot appeal an adjudication order.

1-21 B. Time Limit for Appeal

Any party to appeal a final juvenile court order or disposition shall file a written notice of appeal with the court within thirty (30) days of the final order or disposition.

1-21 C. Record

For purposes of appeal, a record of proceedings shall be made available to the child, his parent, guardian or custodian, and the child's counsel. Costs of obtaining this record

shall be paid by the party seeking the appeal.

1-21 D. Stay of Appeal

A final court order or disposition of a hearing may be stayed by such appeal.

1-21 E. Conduct of Proceedings

All appeals shall be conducted in accordance with the tribal code and tribal court rules of procedure so long as those provisions are not in conflict with the provisions of this juvenile code.

TRIBAL JUVENILE JUSTICE CODE

Commentary

COMMENTARY

INTRODUCTION

This commentary is intended to serve as a tool in understanding the tribal juvenile justice code. It is also intended to serve as a tool to use in adapting the code to meet the needs of an individual community. Each section number of the commentary corresponds to the same section number of the tribal juvenile justice code. (Note that not all sections have a commentary.) The most efficient way to use this commentary is to read it together with the tribal juvenile justice code.

This juvenile justice code covers juvenile delinquency proceedings (referred to in the code as "juvenile offenses" or "juvenile offender" proceedings) and a narrow range of status offenses (referred to in the code as "family in need of services" proceedings). It does not cover child abuse and neglect, guardianship and adoption proceedings. A tribal child/family protection code which covers these proceedings has also been developed by the National Indian Justice Center.

Chapters 1-1 through 1-7, chapter 1-20, and chapter 1-21 apply to both "juvenile offender" and "family in need of services" proceedings. Chapters 1-8 through 1-15 apply only to "juvenile offender" proceedings. Chapters 1-16 through 1-19 apply only to "family in need of services" proceedings.

JUVENILE OFFENDERS

"Juvenile offender" proceedings concern alleged criminal offenses committed by a person who is under the age of eighteen (18) at the time the offense was committed. Most juvenile codes define juvenile delinquent acts as acts which, if committed by an adult, would be a crime. Most juvenile codes label this juvenile as a "delinquent," but in some cases a less stigmatizing label of "offender" is used. We have decided to use the less stigmatizing label of "offender" or "juvenile offender" in this code. A basic philosophy of juvenile law is that children are more amenable to treatment or rehabilitation than are adults. This assumption supports the practice of treating children in a different and special way.

FAMILY IN NEED OF SERVICES

This code includes detailed provisions for handling a narrow range of status offense cases. These provisions represent the emerging trend in many juvenile justice systems to limit and yet make more effective the court's jurisdiction over the child who has committed a "status" offense, that is, behavior which is an offense only for persons who have not attained adult status. Truancy, running away and ungovernability represent the more common "status" offenses.

The movement toward decreasing the role of the juvenile court in the status offense area is based on recognition of the fact that a status offense is seldom, if ever, solely the fault of the child and/or that the juvenile justice system is ill suited to deal with this type of problem. A growing number of states and tribes have enacted juvenile codes which decrease judicial involvement in status offense cases. A number of model juvenile codes have been developed which recommend the total elimination of status offense provisions.

One emerging concept is that the status offender cannot be adequately or fairly dealt with by looking at the child in isolation, but rather that the focus must be on the family unit as a whole. Consequently, juvenile codes have used terms such as "family in conflict," "family in need of assistance" or "family in need of services" to reinforce this concept.

After considering the varying approaches, we have decided to use the term "family in need of services" (or "FINS") and to draft a limited and more effective process for handling these types of cases. We decided that most tribal court systems would still need to handle this narrow range of status offense cases. (However, if a tribe decides that they want to totally eliminate these types of cases from their juvenile code, they should delete chapters 1-16 through 1-19 of this code and all references to "family in need of services" remaining in the code.)

Chapter 1-1 Short Title, Purpose and Definitions

1-1B Purpose

This section sets out the purpose and philosophy of this juvenile justice code. (Note that purpose #2 is taken from the Indian Health Service/Bureau of Indian Affairs agreement implementing the Indian Alcohol and Substance Abuse Prevention and Treatment Act of 1986.) Any tribe which is considering adopting this code should carefully review these identified purposes to determine whether these purposes are consistent with the needs of their community and should also list any additional purposes which reflect the needs of their individual community. If the code is adopted, it is important that the court keep these purposes in mind throughout the juvenile court proceedings.

1-1C Definitions

The definitions are set out in alphabetic order and most of these definitions are self-explanatory with the following exceptions:

* The definition for "family in need of services" encompasses two types of families. The first type is the family whose child "habitually and without justification" is absent from school. The second type is the family which demonstrates a breakdown in the parent-child relationship, either by the parent's refusal to allow the child to live in the home or the child's refusal to do so. Before either type of family can be defined as a FINS, the second part of the definition must also be met: (1) the conduct must be a "clear and substantial danger to the child" and court intervention is essential to resolve the problem, OR (2) the family needs "treatment, rehabilitation or services not presently being received" and court intervention is essential to provide it. (It should also be noted that the definitions for "curriculum change" and "interim care" also refer to "family in need of services" proceedings.)

* The definition for "Secure Juvenile Detention Facility" requires that these facilities comply with the requirements of the Juvenile Justice and Delinquency Prevention Act. This code is required to include these requirements (see section 4221 of the Indian Alcohol and Substance Abuse Prevention and Treatment Act of 1986). Since many tribes have experienced difficulty in complying with all of the requirements of the Juvenile Justice and Delinquency Prevention Act it may be necessary to take a close look at these requirements. (See the commentary concerning chapter 1-8 of this code).

* The definition of "restitution" makes a distinction between special and general damages. The first sentence sets out the special damages which are compensable whereas the second sentence describes general damages which are not. The reason for this distinction is that restitution is generally ordered by the court as a part of a child's disposition with no hearing held on the issue. Unlike a defendant in a civil action who can contest the amount of damages he may have to pay, the child cannot contest the amount of restitution. Therefore to eliminate any possibility that the restitution may constitute a taking of property without due process of law, restitution is limited to those special damages set out in the first sentence which are easily ascertainable. This means the victim of the delinquent act must present proof of his or her loss by means of bills or other written verified statement such as an employer's state of wage loss. As another safeguard, these special damages must be a direct and proximate result of the delinquent act. This would require a victim to present evidence such as a doctor's report which would verify that the victim's injuries were directly and proximately caused by the child's act.

* "Child" is defined as "an individual who is less than eighteen (18) years old," but it is possible to define a "child" as "an unemancipated individual who is less than eighteen (18) years old" if the tribe decides that emancipated youth do not need the special services of the juvenile court.

Chapter 1-2 Jurisdiction of the Juvenile Court

This chapter sets forth exclusive original jurisdiction for the juvenile court over all proceedings in which an Indian child residing or domiciled on the reservation is alleged to be a "juvenile offender" or a child whose "family is in need of services." If a tribe needs to establish more detailed or different jurisdictional provisions, these provisions should be included in this chapter. For instance, the tribe may want to consider (1) authorizing the juvenile court to transfer a case to another juvenile court upon a showing of good cause for the transfer; (2) providing for continuing jurisdiction over a person who is 18 years old or older but emotionally immature or otherwise in need of the special treatment provided in juvenile court; and/or (3) establishing for routine handling of minor traffic offenses by the adult court.

Chapter 1-3 Transfer to Tribal Court

This chapter sets out detailed provisions for the transfer of jurisdiction from the juvenile court to the adult criminal court in very limited circumstances. The transfer can only occur if the child is at least sixteen (16) years old, the child is alleged to have committed an act which would have been considered a serious crime if committed by an adult, and all of the provisions of chapter 1-3 are complied with. The provisions in this chapter are designed to comply with the requirements of the Indian Civil Rights Act and the U.S. Supreme Court decisions in *Kent v. U.S.*, 383 U.S. 541 (1966) and other relevant cases.

This chapter does not define a "serious" crime because the exact criminal provisions vary from tribal code to tribal code. What is intended is only very serious crimes such as those included in the Major Crimes Act. A tribe may want to list out what constitutes a "serious" crime in more detail either in this chapter or in the definitions section.

Chapter 1-4 Juvenile Court Procedure

This chapter contains three provisions with regard to juvenile court procedure:

1. juvenile court proceedings are non-criminal in nature;

2. the adjudication, disposition and evidence presented in juvenile court are inadmissible in any other proceeding; and

3. juvenile court rules of procedure should be the same as the tribal court rules of procedure unless they are in conflict with other provisions of the juvenile code.

Chapter 1-5 Relations With Other Agencies

This chapter provides the juvenile court with a great deal of flexibility in dealing with other agencies. This type of flexibility is needed for the juvenile court to be able to use all possible resources to meet the needs of the children and families who appear before the juvenile court.

As currently drafted, the code makes this authority subject to the approval of the tribal council if it involves an expenditure of tribal funds. This restriction may not be necessary if the administrative structure of the tribe provides for juvenile court control over their budget. In addition, if the juvenile court is to be considered a tribal organization under P.L. 93-638, it could be set out in this chapter. (It would also require an authorizing tribal council resolution.)

Chapter 1-6 Juvenile Court Personnel

1-6 A. Juvenile Court Judge

This section establishes that juvenile court judges shall be treated in the same manner as tribal court judges with regard to appointment, qualifications, powers and duties, and disqualification or disability. Rather than include separate sections in this code with regard to the contempt power, the power to issue arrest or custody orders the power to issue subpoenas, and the power to issue search warrants, the code simply provides that judges of the juvenile court shall have the same duties and powers as tribal court judges with regard to these and other duties and powers. (Additional, more specific appointment procedures, qualifications, powers and duties, etc., could be set out in this section.)

1-6 B. Juvenile Counselor/Juvenile Probation Officer

This code uses the title "juvenile counselor" for the person who performs the duties and responsibilities set forth in this section. However, it is made clear both in this section and in the definitions section that the persons carrying out these duties and responsibilities may be labeled "juvenile counselor," "juvenile probation officer," or any other title which the court finds appropriate.

This section establishes that "the court" shall appoint the juvenile counselor(s) and that the "chief judge" of the tribal court shall certify annually to the tribal council the number of qualified juvenile counselor(s) needed." If the appointment and reporting procedures are handled differently for a specific tribe, these provisions should be modified accordingly. Additionally, a provision requiring budgetary primacy for the juvenile court could be inserted here.

The juvenile counselor as established in this code is a distinct position from that of a law enforcement officer or that of a prosecutor or juvenile presenter. This is necessary so that the juvenile presenter can open up lines of communication with the child and gain the trust of the child. (Additional, more specific appointment procedures, qualifications, powers and duties, etc., could be set out in this section.)

1-6 C. Juvenile Presenter

This code uses the title "juvenile presenter" for the person who performs the duties and responsibilities set forth in this section. The title "juvenile presenter" is used to avoid confusing juvenile proceedings with adult criminal proceedings. However, it is made clear both in this section and in the definitions section that the person carrying out these duties and responsibilities may be labeled "juvenile presenter" or "juvenile presenting officer" or "juvenile petitioner" or any other title the court finds appropriate.

This section establishes that "the court" shall appoint the juvenile presenter(s) and that "the chief judge of the tribal court shall certify annually to the tribal council the number of qualified juvenile presenters needed." If the appointment and reporting procedures are handled differently for a specific tribe, these provisions should be modified accordingly. Again, a provision requiring budgetary primacy for the juvenile court could be inserted here. (Additional, more specific appointment procedures, qualifications, powers and duties, etc., could be set out in this section.)

1-6 D. Additional Court Personnel

This section gives the court wide latitude in appointing additional court personnel whenever the court decides that it is appropriate to do so. (More specific provisions concerning these positions could be set out in this section.)

Although the Indian Civil Rights Act only provides that a defendant is entitled to counsel "at their own expense," a number of tribes provide defense advocates. If the tribe provides defense advocates or juvenile advocates, the code should probably be modified to also include a section setting forth the provisions for the appointment, qualifications, and duties of juvenile advocates.

Chapter 1-7 Rights of Parties in Juvenile Proceedings

This chapter sets out the rights of the child and his parent, guardian or custodian during all phases of juvenile court proceedings. This chapter is designed to comply with the requirements of the Indian Civil Rights Act and the purposes of this juvenile justice code. It should be read in conjunction with the training materials on Civil Rights and Juvenile Justice in the National Indian Justice Center's training manual on Juvenile Justice Systems.

Although the Indian Civil Rights Act only provides that a defendant is entitled to counsel "at their own expense," a number of tribes provide defense advocates. If the tribe does provide defense advocates or juvenile advocates, then sections 1-7D and 1-7E should be changed to reflect this fact.

Similarly, the Indian Civil Rights Act has not been interpreted to require jury trials in juvenile proceedings. However, if the tribe does choose to provide jury trials, then chapter 1-7 should be modified accordingly.

Chapter 1-8 Juvenile Offender-Taking Into Custody

This chapter sets out the procedure for taking an alleged "juvenile offender" into custody. Section 1-8A sets out the only instance in which a law enforcement officer may take an alleged "juvenile offender" into custody. Section 1-8B sets out the rights which the officer must read to the alleged "juvenile offender". (Note that if the tribe provides juvenile advocates, then section 1-8B should be modified accordingly.)

Section 1-8C gives the law enforcement officer discretion with regard to releasing the child to his parent or relative or delivering the child to the juvenile counselor, a juvenile facility or a medical facility.

Section 1-8D provides that the child shall be released unless the criteria in section 1-8D are met. This section provides that it is the juvenile counselor or the designated official at the juvenile facility--and not the law enforcement official--who makes the decision at this point with regard to continued custody.

Section 1-8E sets out detailed requirements with regard to notification of the family.

Section 1-8F sets out detailed criteria for determining the appropriate juvenile facility for the child if continued custody is appropriate under Section 1-8D. Again, this section provides that it is the juvenile counselor or the designated official at the juvenile facility--not the law enforcement official--who makes the decision with regard to the selection of the appropriate juvenile facility.

It should be noted that this section requires the juvenile court to designate the appropriate juvenile facilities for various types of alleged "juvenile offenders" and to also designate the appropriate juvenile official at these facilities to make detention decisions. Furthermore, the juvenile court needs to communicate this information to the law enforcement agencies, juvenile counselors and the juvenile facilities.

The detention of juvenile offenders must comply with the Juvenile Justice and Delinquency Prevention Act of 1974 (P.L. 96-509) which provides that (1) juvenile status offenders and non-offenders are not to be placed in secure detention facilities; (2) suspected or adjudicated juvenile delinquents are not to be detained or confined in facilities allowing regular contact with incarcerated adults; and (3) that no juvenile is to be detained or confined in any jail or lock-up for adults by 1985 except in low population density areas or where appropriate facilities are unavailable. Many tribal juvenile justice systems have had difficulty meeting the requirements of this Act.

The specific provisions of the Juvenile Justice Delinquency Prevention Act are as follows:

> *Section 223(a)(12)(A) providing that juveniles who are status offenders or nonoffenders such as dependent or neglected children "shall not be placed in secure detention facilities or secure correctional facilities";*
>
> *Section 223(a)(13) providing that juveniles suspected or judged to be delinquent according to Section 223(a)(12)(A) "shall not be detained or confined in any institution in which they have regular contact with adult persons incarcerated because they have been convicted of a crime or are awaiting trial on criminal charges"; and*
>
> *Section 223(a)(14) providing that within five years of the Juvenile Justice Amend-*

ments of 1980 becoming law, that "no juvenile shall be detained or confined in any jail or lockup for adults, except that the Administrator shall promulgate regulations which (A) recognize the special needs of areas characterized by low population density with respect to the detention of juveniles; and (B) shall permit the temporary detention of such adult facilities of juveniles accused of serious crimes against persons, subject to the provisions of paragraph (13), where no existing acceptable alternative placement is available."

(See also sections 1-1C(30), 1-16F, and 1-19G and the corresponding commentary sections for other provisions of this code which relate to the Juvenile Justice and Delinquency Provision Act.)

Chapter 1-9 Juvenile Offender-Detention Hearing

This chapter sets out the requirement of a detention hearing, the purposes of a detention hearing, the notice of detention hearing, detention hearing procedure, standards to be considered at the detention hearing, finding at detention hearing, and rehearing the detention matter.

Chapter 1-10 Juvenile Offender-Initiation of Proceedings

Section 1-10A provides that the juvenile counselor shall make an investigation to determine what action should be taken. This is the juvenile counselor's most important and difficult duty. Although the juvenile counselor decides whether to proceed or not, he can ask for advice and professional opinions. He should consult with social workers, teachers, officials with local juvenile rehabilitation programs, the juvenile presenter, and others.

Sections 1-10B and 1-10C provide for an informal adjustment and informal conference in appropriate cases. The informal adjustment is a critical stage in the juvenile proceedings and places a great deal of responsibility on the juvenile counselor. An informal adjustment diverts a child away from the judicial system. If an informal adjustment is made, the child does not appear in court and is not labeled a "juvenile offender." Procedural protections to safeguard the rights of the child have been incorporated into section 1-10C. No child may be forced to participate in an informal agreement. If a child protests and denies any wrongdoing, a petition should be filed so that the court may hear the facts and enter an order. In this way, the child has had his "day in court" and will not feel aggrieved by an informal adjustment.

Section 1-10D sets out the filing procedures for "juvenile offender" petitions and the contents of these petitions. The juvenile court should consider developing standard forms for petitions and other pleadings. Sections 1-10E, 1-10F and 1-10G set out the information with regard to the issuance, contents and service of summons.

Chapter 1-11 Juvenile Offender--Consent Decree

This chapter sets forth provisions with regard to a consent decree, that is, a court order which suspends a "juvenile offender" proceeding prior to adjudication and continues the child under terms and conditions negotiated with the juvenile counselor and agreed to by all parties. The consent decree basically provides the court with another opportunity in appropriate cases for an informal adjustment or diversion even after the petition has been filed.

Chapter 1-12 Juvenile Offender--Adjudication Proceedings

This chapter sets forth provisions with regard to "juvenile offender" adjudication proceedings.

One matter of particular importance is the issue of whether adjudicatory and other juvenile court proceedings should be public or closed proceedings. Traditionally, juvenile courts have been closed hearings because it has been felt that the notoriety and publicity of an open hearing would interfere with the rehabilitative "case work" atmosphere of the juvenile court system. However, there has been a recent trend to open at least some types of juvenile court proceedings (such as all delinquency hearings or at least the adjudicatory hearing) to the public or to give the alleged delinquent the option as to whether the hearings should be public or closed. It has been argued that closed proceedings may encourage some judges to be lax in their application of the law, that the benefits of closed hearings are unproven and that opening juvenile court hearings will generate community support for the court.

We have tentatively decided to provide for closed hearings in this code because it is the current practice in most tribal court systems. However, we would encourage each tribe to carefully examine the arguments for and against open hearings with regard to the needs of your individual communities.

Chapter 1-13 Juvenile Offender--Pre-Disposition Studies; Reports and Examinations

This chapter provides the juvenile court with a great deal of flexibility with regard to predisposition studies, reports and examinations while at the same time protecting the rights of the child in the preadjudication stage of the proceedings. The juvenile court should consider developing standard forms and procedures with the various service agencies.

Chapter 1-14 Juvenile Offender--Disposition Proceedings

This chapter sets forth provisions with regard to the purpose and conduct of disposition hearings, time limitations on disposition hearings, notice of disposition hearings, evidence and reports in disposition hearings, and disposition alternatives. The disposition alternatives in section 1-14E are designed to give the court wide latitude in fashioning an appropriate disposition for the individual "juvenile offender."

Chapter 1-15 Juvenile Offender--Review, Modification, Revocation, Extension or Termination of Dispositional Orders

This chapter sets forth provisions with regard to the review, modification, revocation, extension or termination of dispositional orders. Dispositional orders are to be reviewed at least once every six (6) months. Section 1-15B lists the parties who can move to modify, revoke or extend a disposition order. Section 1-15C provides that a hearing to modify, revoke or extend a disposition order shall be conducted according to sections 1-14A, 1-14C, 1-14D and 1-14E of this code (that is, conducted the same way as the initial disposition hearing with the same notice requirements, the same rules with regard to evidence and reports and the same disposition alternatives).

Chapter 1-16 Family In Need of Services--Interim Care

This chapter contains the interim care provisions for "family in need of services" proceedings. It authorizes crisis intervention without a court order and restraint of children only when they are in substantial danger or they have run away from an out-of-home placement authorized under the FINS disposition section.

Section 1-16A emphasizes the relationship between the interim care provisions and the FINS provisions. Interim care provides guidelines for taking the status offender into custody without a court order whereas the FINS provisions specify the procedures for judicial intervention in a status offense situation. This section makes it clear that the only method for taking the status offender into custody must be in accordance with interim care and not because there may be grounds for the filing of a FINS petition.

Section 1-16B sets forth the conduct and situation of the child which must exist before a law enforcement officer can take the child into custody. It also is the basis of the standard of care the officer must exercise so as not to falsely imprison or detain the child.

Section 1-16C insures that the officer taking the child into interim care will either immediately notify the juvenile counselor, if available, or if not, take the child to an appropriate juvenile shelter care facility as designated by the court without unnecessary delay.

Notification to the child and his or her parents is also required. Section 1-16D mandates that the law enforcement officer give the child and parent the reason for the interim care custody. Such notice does not place an unreasonable burden on the officer while at the same time it does alert both the child and parent to the justification for the state's intervention.

Section 1-16E sets out the time limits for interim care. Many model codes and state codes require a six-hour limit or different variations for different types of cases. We decided to provide that this time period be increased to forty-eight (48) hours to relieve the pressures a six-hour time limit would put on law enforcement officials on isolated reservations. Any longer time limit would be subject to challenge in federal court. a tribe, however, should carefully examine this time limit and their resources and consider reducing it to twenty-four (24) hours if possible.

Sections 1-16F and 1-16G place restrictions on the placement and transportation of a child in interim care. Neither a jail nor other correctional facility can be utilized nor can the child be placed in a vehicle containing an adult under arrest. The restriction on the facility where the child may be placed is in accord with the federal Juvenile Justice and Delinquency Prevention Act of 1974. (See the commentary concerning chapter 1-8 of this code.) The restitution on transporting the child with an adult arrestee protects not only the child from any potential danger of assault but also eliminates any law enforcement liability which could result if the child were injured. However, a provision has been added which allows a child to be placed in the same vehicle with an adult under arrest if, and only if, a delay in transporting the child "would be likely to result in substantial danger to the child's physical safety." The reasons for such delay must be in writing and submitted to the driver's supervisor within forty-eight (48) hours.

Section 1-16H corresponds to the goal of diverting children and their families from court proceedings. It also gives guidance and care to the child, helps to strengthen family ties, and prevents further exacerbation of a problem in its early stages. Section 1-16I provides for the child's return home if both the child and parents agree. The purpose of section 1-16J is to authorize as much available social service support for the child and his family as is possible without court intervention.

Chapter 1-17 Family In Need of Services--Initiation of Proceedings

This chapter sets forth provisions with regard to initiation of FINS proceedings. Section 1-17A provides that a child; the child's parent, guardian or custodian; an appropriate social service agency; and/or the juvenile counselor may submit a request stating that the "family is in need of services." It also provides that a truancy request may also be submitted by a school, but only if it is accompanied by a declaration stating that the school has complied with each of the steps set forth in section 1-17G.

Section 1-17B provides that all FINS requests for services must be referred to the juvenile counselor. The intent is to have the juvenile counselor provide the case planning function for all FINS cases.

Section 1-17C provides that a FINS request for services can be withdrawn at any time prior to adjudication of the petition. This is to encourage the informal resolution of family disputes and not to force a family to go through a judicial proceeding which may be inappropriate to the family's needs.

Sections 1-17D and 1-17E emphasize the role the juvenile presenter is to play in the initiation of a FINS proceeding. All FINS petitions must have the endorsement by the juvenile presenter that the filing is in the best interests of both the child and the family. Both the party submitting the request for services and the juvenile presenter must sign the petition. By requiring the requesting party to also sign, the importance of the proceeding will be emphasized to that person, whether it be the child, parent or school official.

Sections 1-17F, 1-17G, and 1-17H set out the form and contents of a FINS petition. Besides the parties' names and addresses, various allegations must be made. In all petitions, the FINS definition outlined in section 1-1C must be set out, as well as that "appropriate and available" services have been pursued and that the intervention of the court is now necessary to obtain further services. Once the petition is filed, the juvenile counselor must prepare a report of all the services which the parties have pursued prior to coming to the court for assistance. However, in the case of a truancy petition, an affidavit of a school official, as required under section 1-17A, can take the place of the report. (The juvenile court should consider developing standard forms for FINS petitions.)

If the petition is based on truancy, five further allegations are required (section 1-17G). These include a meeting between the school and parents, academic counseling, psychological and/or educational testing, an investigation by a social worker, as well as assistance from appropriate outside agencies. These requirements reflect the belief that the child's school is the most appropriate agency to handle educational problems, not the juvenile court.

If the petition alleges a family breakdown, the petition must contain an allegation that the parties have either pursued or refused counseling, placement of the child with a relative (if available), as well as shelter care and foster care, if any of these are appropriate (section 1-17H).

All of these allegations reflect the belief that all possible resources should be pursued before the court is involved. It is felt that a true family problem is best resolved on a voluntary basis, rather than by resort to a court's mandating that the parties obtain help.

Finally, section 1-17I sets out the procedure for issuing and serving FINS summons.

Chapter 1-18 Family in Need of Services--Consent Decree

This chapter sets forth provisions with regard to a consent decree; that is, a court order which suspends a FINS proceeding prior to adjudication and continues the family under terms and conditions negotiated with the juvenile counselor and agreed to by all parties. The FINS consent decree basically provides the court with the same opportunity as provided in "juvenile offender" cases for an informal adjustment or diversion in appropriate cases even after the petition has been filed.

Chapter 1-19 Family in Need of Services--Hearings and Disposition

This chapter contains general provisions for the conduct of all FINS hearings, notice of all FINS hearings, adjudicatory hearings, predisposition studies, reports and examinations, disposition hearings, disposition alternatives, restrictions on disposition placements, modification, revocation, or extension of disposition orders and termination of disposition orders. Basically, this section tracks the general hearing procedure for "juvenile offender" proceedings with the provision of different disposition alternatives in FINS cases.

It should be noted that this chapter does not set out time limits for each of the steps in a FINS proceeding because of concern that time limits might force the court to go through with formal proceedings rather than taking adequate time to explore possible informal resolutions of the problem. However, a tribe should carefully examine this issue before adopting this code. Even if this code is adopted without FINS proceeding time limits, it may become necessary to amend the code at a later time to add time limits if families begin to suffer due to unnecessary delays.

Chapter 1-20 Juvenile Records

This chapter sets forth provisions with regard to juvenile court records, law enforcement records, and destruction of records. The primary objective of this chapter is to ensure confidentiality of all juvenile court and law enforcement records concerning juvenile offenders and FINS proceedings. The free access given to the child; the child's parent, guardian or custodian; and the child's counsel is necessary to insure that the child and his counsel can prepare an adequate defense, correct false information, and prepare alternative disposition recommendations. Access to these records is limited to those juvenile court and law enforcement personnel who are "directly involved in the handling of the case."

Section 1-20C provides that both the juvenile court and the law enforcement records shall be destroyed at the child's eighteenth birthday or at the termination of the disposition order. Retention of records can be harmful because the child may later suffer job discrimination, denial of educational opportunities, and denial of military service. Destroying the records will give the child the opportunity to start over without the shadow of his juvenile record trailing him.

Section 1-20C provides for the court to automatically destroy these records. The child does not have to request that the court destroy the records. Once the records have been destroyed, the juvenile court and law enforcement can respond to inquiries by stating that no records exist. It should be noted that section 1-20C does not apply to "juvenile offender" cases which are transferred to adult criminal court according to chapter 1-3 of this code.

It is possible that a tribe may decide to modify section 1-20C to allow keeping "family in need of services" records when there are other minors still residing in the home as long as the records are never used against the juvenile who has turned eighteen (18) years of age.

Chapter 1-21 Juvenile Appeals

This chapter sets out the procedure for handling juvenile court appeals.

APPENDIX D

SALT RIVER CHILDREN'S BILL OF RIGHTS

Salt River

PIMA-MARICOPA INDIAN COMMUNITY

ROUTE 1, BOX 216 / SCOTTSDALE, ARIZONA 85256-9722 / PHONE (602) 941-7277

MEMORANDUM

TO: All Departments and Staff

DATE: December 21, 1990

FROM: Mr. Frank Mertely
Community Manager

SUBJECT: COUNCIL POLICY STATEMENT AND ORDINANCE

The Community Council has recently approved an ordinance titled "Bill of Rights for Children Who Are Victims or Witnesses of Crime". The ordinance is attached for your guidance.

Along with this ordinance, the Council approved a policy statement requiring that child care personnel and certain other personnel be fingerprinted prior to employment and a policy statement regarding the Children's Bill of Rights. These statements are also attached and will be published later in a policy statement format. Your employees should be made aware of this policy guidance from the Council.

lj

xc: Ivan Makil
Merna Lewis
Administration File

CHILDREN'S BILL OF RIGHTS
PREAMBLE

The Salt River Pima-Maricopa Indian Community Council is concerned with the general welfare of all of its members. That concern is particularly strong for children who cannot provide for or protect themselves. In this document the Salt River Pima-Maricopa Indian Community reflects this special concern by recognizing that its children have certain legal rights that the Community will respect and defend.

In enumerating these rights and thereby proclaiming the Community's special responsibility to its children, the Community Council continues to recognize and affirm that:

(1) The Family is the societal unit that first has primary care and protective responsibility for children;

(2) The interests of the Community's children are best served within the environment of the Community's
(3) cultural values and heritage;

(4) Every child has the right to a permanent home that affords affection, love and guidance through nurturing, caring family members;

(5) All children have the right to be a useful member of their Community and their specific tribe and to be involved in its culture;

(6) Every child has the right to be a unique person and to individual expression of choice;

(7) Every child has the right to competent health and medical care and the promotion of a healthy, wholesome lifestyle;

(8) Every child has the right to a safe, protective environment which provides an adequate standard of living;

(9) Every child has the right to be protected against all forms of neglect, cruelty, abuse and exploitation;

(10) Every child has the right to an education with maximum opportunity for preparation for earning a livelihood, family life and citizenship; and

(11) Every child has the right to enjoy these rights in a spirit of peace, maintained by meaningful relationships with all those people who are important to him or her.

CHILD CARE PERSONNEL, FINGERPRINTING FOR SCREENING OF CRIMINAL HISTORY BY THE DEPARTMENT OF PUBLIC SAFETY

A. Child care personnel shall be fingerprinted prior to employment in any Day Care Center including Child Protective Services, Social Services, Health and Mental Health Care, Education (whether or not directly involved in teaching), Foster Care, Residential Care, Recreational or Rehabilitative, Detention or Treatment Services.

B. Employment Applications - All employment applications for individuals who are seeking work for any position listed in subsection A. shall contain the following questions:

1. Whether the individual has ever been arrested for or charged with a crime involving a child, and if so, the disposition of that arrest or charge;

2. Whether the individual is a parent or guardian of a child adjudicated to be a dependent child as defined in Chapter 11, Article II of the Salt River Indian Community Code of Ordinances; and

3. Whether the individual has ever been denied a license to operate a facility for the care of children in this state or another state of jurisdiction or had a license or certificate to operate such a facility revoked, and if so, the reason for such denial or revocation.

C. The Department of Health and Human Services shall make documented, good faith efforts to contact previous employers of the applicants to obtain information or recommendations which may be relevant to an individual's fitness for work in any position involving contact with children.

D. The employment application, background inquiries and fingerprint criminal history check shall be confidential.

E. For the purpose of screening child care personnel, the Salt River Department of Public Safety shall provide background information based on a set of the applicant's fingerprints to be obtained by a law enforcement officer to the Department of Health and Human Services.

The criminal history check shall be:

1. Based on such fingerprints and other identifying information.

2. Conducted through the identification division of the Federal Bureau of Investigation, as well as through all state criminal history repositories, and tribal jurisdictions that the employee or applicant lists as residences on their employment applications.

SALT RIVER PIMA-MARICOPA
INDIAN COMMUNITY
Route 1, Box 216
Scottsdale, Arizona 85256

ORDINANCE NO. SRO-136-91

In order to establish a bill of rights for children who are victims or witnesses of crime:

BE IT ENACTED BY:

Section 1. The Salt River Pima-Maricopa Indian Community recognizes that it is important that child victims and child witnesses of crime cooperate with law enforcement and prosecutorial agencies and that their assistance contributes to Community enforcement efforts and the general effectiveness of the criminal justice system of this Community. Therefore, it is the intent of the Community Council by means of this act, to ensure that all child victims and witnesses of crime are treated with sensitivity, courtesy and special care in order that their rights may be protected by law enforcement agencies, social agencies, protection afforded the adult victim, witness or criminal defendant.

Section 2. Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

(1) "Crime" means an act punishable under the laws of this Community or equivalent federal or State law.

(2) "Child" means any person under the age of eighteen years.

(3) "Victim" means any person against whom a crime has been committed.

(4) "Witness" means a person who has been or is expected to be summoned to testify for the prosecution in a criminal action, or a person who is subject to call or likely to be called as a witness for the prosecution by reason of having relevant information, whether or not an action or proceeding has been commenced.

(5) "Family member" means child, parent, legal guardian, or extended family member.

(6) "Advocate" means any person, including a family member not accused of a crime, who provides support to a child victim or child witness during any legal proceeding.

Section 3. There shall be every reasonable effort made by law enforcement agencies, prosecutors and judges to assure that child victims and witnesses are afforded the rights enumerated in this section. The enumeration of these rights shall be construed to create substantive rights and duties, and the application of an enumerated right in an individual case is not subject to the discretion of the law enforcement agency, prosecutor or judge. Child victims and witnesses have the following rights:

(1) To have explained in language easily understood by the child, all legal proceedings and/or police investigations in which the child may be involved;

(2) To be provided, whenever possible, a secure waiting area during court proceedings and to have an advocate or support person remain with the child prior to and during any court proceedings;

(3) To prevent the disclosure of the names, addresses or photographs of the living child victim or witness by any law enforcement agency, prosecutor's office or state agency without the written permission of the child victim, child witness, parents or legal guardians to anyone except another law enforcement agency, prosecutor, defense counsel or tribal or private agency that provides services to the child victim or witness;

(4) To allow an advocate to make recommendations to the prosecuting attorney about the ability of the child to cooperate with prosecution and the potential effect of the proceedings on the child;

(5) To allow an advocate to provide information to the court concerning the child's ability to understand the nature of the proceedings;

(6) To be provided information or appropriate referrals to social service agencies to assist the child and/or the child's family with the emotional impact of the crime, the subsequent investigation and judicial proceedings in which the child is involved;

(7) To allow an advocate to be present in court while the child testifies in order to provide emotional support to the child;

(8) To provide information to the court as to the need for the presence of other supportive persons at the court proceeding while the child testifies in order to promote the child's feelings of security and safety;

(9) To allow law enforcement agencies the opportunity to enlist the assistance of other professional personnel such as child protection services, victim advocates or prosecutorial staff trained in the interviewing of child victims;

(10) To be provided with coordinated tribal services so as to decrease any duplication of services and to minimize the number of interviews with the child victim or witness;

(11) To be provided with the use of closed circuit television or other such similar recording device for the purposes of interviewing or court testimony when appropriate, and to have an advocate remain with the child prior to and during any recording sessions. The use of closed circuit television or other such similar recording device is appropriate when the trial court, after hearing evidence, determines this procedure is necessary to protect the particular child witness' welfare; and specifically finds the child would be traumatized, not by the courtroom generally, but by the defendant's presence and finds that the emotional distress suffered by the child in the defendant's presence is more than de minimus.

Section 4. The failure to provide notice to a child victim or witness under this chapter of the rights enumerated in Section 3 of this act shall not result in civil liability so long as the failure to notify was in good faith and without gross negligence. The failure to make a reasonable effort to assure that child victims and witnesses are afforded the rights enumerated in Section 3 of this act shall not result in civil liability so long as the failure to make a reasonable effort was in good faith and without gross negligence.

C_E_R_T_I_F_I_C_A_T_I_O_N

Pursuant to authority contained in Article VII, Section 1 (c) of the Constitution of the Salt River Pima-Maricopa Indian Community ratified by the Tribe, February 28, 1990, and approved by the Secretary of the Interior, March 19, 1990, the foregoing ordinance was adopted this 28th day of November, 1990 in a duly called meeting held by the Community Council in Salt River, Arizona at which a quorum of 7 members were present by a vote of 7 for; 0 opposed; 2 excused.

SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY COUNCIL

Ivan Makil

Ivan Makil, President

ATTEST:

Lonita Jim, Secretary

Salt River

PIMA-MARICOPA INDIAN COMMUNITY

ROUTE 1, BOX 216 / SCOTTSDALE, ARIZONA 85256-9722 / PHONE (602) 941-7277

MEMORANDUM

TO: All Departments and Staff

DATE: December 21, 1990

FROM: Mr. Frank Mertely
Community Manager

SUBJECT: COUNCIL POLICY STATEMENT AND ORDINANCE

The Community Council has recently approved an ordinance titled "Bill of Rights for Children Who Are Victims or Witnesses of Crime". The ordinance is attached for your guidance.

Along with this ordinance, the Council approved a policy statement requiring that child care personnel and certain other personnel be fingerprinted prior to employment and a policy statement regarding the Children's Bill of Rights. These statements are also attached and will be published later in a policy statement format. Your employees should be made aware of this policy guidance from the Council.

lj

xc: Ivan Makil
Merna Lewis
Administration File

APPENDIX E

DURO AND CONGRESSIONAL *DURO*-FIX

The Tribal Court
RECORD
Published by the National Indian Justice Center

Volume 3 Number 2 Petaluma, California Spring/Summer 1990

Tribal Courts Stripped Of Criminal Jurisdiction Over Non-Member Indians

TRIBAL LEADERS STRUGGLE TO COPE WITH IMPACT OF DURO DECISION

by Jerry Gardner

The United States Supreme Court ruled on May 29 in the case of *Duro v. Reina* that tribal courts have no criminal jurisdiction over non-member Indians. Since the *Duro* decision, numerous meetings between tribal leaders, tribal court personnel, law enforcement personnel, tribal attorneys, BIA officials, Indian organizations and others reflect efforts to cope with the devastating impact of the jurisdictional void created by the decision. *(For related articles, see Page 2 and court syllabus in Recent Cases of Interest, this issue.)*

The response by Wendell Chino, outspoken president of the Mescalero Apache Tribe, was typical of tribal leader reaction to the *Duro* decision. Chino told the *Record*, "I'm incensed. The *Duro* decision ignores the constitutional recognition of Indians. In my opinion, the Supreme Court disregarded not only the Constitution but vital historical facts concerning Indian tribes and their members. It has no constitutional authority to deracialize any group of people; this opinion continues to subject Indian tribes and their members to the tyranny of the majority." Indian tribes stand for sovereignty and want to protect it, Chino said, adding, "Obviously the Supreme Court decision runs counter to the Indian Civil Rights Act which recognizes Indian tribes and their members without limiting their 'Indianness' only to their respective reservations." Chino is currently working with members of the Navajo, Jicarilla, and Laguna Pueblo tribes toward a response to the *Duro* decision. He anticipates a request to Congress to enact legislation to lay aside the decision. He stated, "We are ready to challenge the *Duro* opinion and the harm it will cause in Indian country."

Justice William Brennan points out in his dissent that the "legal" jurisdictional void created by the *Duro* decision, in which no sovereign has the power to prosecute an entire class of criminals, is a "far cry" from the "practical" jurisdictional void created by the *Oliphant* decision in which non-Indians were not likely to be prosecuted by federal or state authorities for most misdemeanor offenses. Because of the Indian-against-Indian provisions of the General Crimes Act, federal courts have no jurisdiction over non-member Indian crimes which are not one of the 16 offenses covered by the Major Crimes Act. It has long been accepted that non-Public Law 280 states do not have the power to exercise criminal jurisdiction over crimes involving Indians on the reservation. Now, tribal courts have been stripped of criminal jurisdiction over non-member Indians. Consequently, under the *Duro* decision, the tribe, the federal government, and the state each lack jurisdiction to prosecute non-member Indians for most crimes.

Wendell Chino condemns Duro decision

The consequences of this jurisdictional void are profound because many reservations have sizable populations of non-member Indians. The broad scope of the problem will become more clear when efforts to collect statistics on the number of non-member Indians living on reservations and the number of non-member Indian criminal cases handled by tribal courts pre-*Duro* are completed. (Note that statistics concerning

(Continued on page 3, Leaders)

Opinion

TRIBAL SOVEREIGNTY AT RISK

by James Zion

On May 29, the United States Supreme Court made a ruling the American tribal court community feared: Tribal courts have no criminal jurisdiction over non-member Indians who commit crimes on reservations other than their own.

Albert Duro allegedly murdered a member of Arizona's Gila River tribe in a June 1984 shooting on the Salt River Reservation. Duro is a member of the Martinez Band of Cahuilla Mission Indians of southern California. The U.S. Attorney charged Duro with murder in the federal district court for Arizona. Charges were later dismissed on the motion of the U.S. Attorney.

Officials of the Salt River Pima-Maricopa Reservation, frustrated by the failure of federal officials to punish murder, charged Duro with illegally firing a weapon on the reservation. When the tribal court refused to dismiss the charge for lack of jurisdiction, Duro took his case to the federal courts, finally arguing before the Supreme Court in November 1989.

The Supreme Court's decision by Justice Kennedy joined by Rehnquist, White, Blackmun, Stevens, O'Connor and Scalia, examines four areas of Indian law: the inherent sovereignty of Indian tribes, the history of American Indian policy, the rights of Indians as citizens, and the implications of a jurisdictional void where criminals will go free.

Looking to recent precedents, the Court ruled that Indian tribes have been stripped of the basic attribute of territorial sovereignty, the "power to enforce laws against all who come within the sovereign's territory, whether citizens or aliens." Relying upon two 1978 decisions, *Oliphant* and *Wheeler*, the Court held that criminal jurisdiction of tribes is limited to tribal members only. Duro, it said, cannot be a tribal member of Salt River, hold Salt River tribal office, or serve on a Salt River jury — so he should not be subjected to criminal jurisdiction of the Salt River Reservation. Despite the fact that the court recognized that Indian tribes are "a good deal more than 'private voluntary organizations,' " and despite a review of decisions upholding civil jurisdiction and governmental authority over non-members, the court implied that an Indian government is actually nothing more than a private club, with powers over members only.

Many Indian organizations and support groups argued the history of Indian policy, so the Court addressed it. Despite the fact that most American Indian statutes treat Indians as an "undifferentiated class" or general group under federal Indian law, the Court held that general powers over "Indians" are federal and not tribal powers. As for American tribal courts since the passage of the Indian Reorganization Act of 1934, the Court said that they have the powers of internal self-government only. That ruling ignores decades of federal court decisions which uphold the inherent authority of tribal courts over matters within general tribal jurisdiction and the holding that their powers do not come from a federal statute such as the Indian Reorganization Act.

The opinion then reached the matter of Duro's status as a United States citizen. In 1924, American Indians became citizens by an act of Congress, so — says the Court — Congress did not intend that American citizens would fall within tribal criminal jurisdiction. The reasoning of this section of the opinion echoes recent attacks upon tribal courts by the U.S. Civil Rights Commission. The Court hinted that tribal courts are unfair and unjust, and the opinion mentioned the 1957 decision in *Reid v. Covert*, which held civilians cannot be tried by military courts because they lack constitutional protections as a matter of right. Another reason for denying tribes criminal powers over non-member Indians was that they are citizens without rights to vote, hold public office, or sit on a tribal jury and that U.S. citizens owe their allegiance to the United States, while tribal powers flow only from the consent of their members. Since Duro had not given his specific, and not implied, consent to be tried for a crime, the Salt River Tribal Court had no jurisdiction over him.

The Court recognized there is now a jurisdictional void where crimes go unpunished. It said that since there are often more non-Indians than non-member Indians who live on reservations, that is too bad. The alternative remedies offered were Major Crimes Act prosecutions (which are not often brought), exclusion, submission to state jurisdiction under Public Law 280, reciprocal agreements with neighboring tribes, or going to Congress.

Duro is another example of Indian affairs policy made by federal courts. Despite the fact that Article I, Section 8 of the Constitution gives Congress the authority to set Indian policy, and then only to "regulate Commerce... with the Indian tribes," the Supreme Court has again decided to strip tribes of fundamental powers by sweeping jurisdictional implication, something which is not within judicial authority.

Where do we go from here? The *Duro* opinion contains implications which supporters of Indian governmental powers must study for future planning. There were several issues the Court posed but carefully said it would not decide, and there were others which appear to be judge-made suggestions for future action.

Where do we go from here? The Duro opinion contains several implications which supporters of Indian governmental power must study for future planning.

The Court stressed voting, holding public office, and jury duty as rights non-members do not have, and "citizenship" was a major theme of the opinion. The Court cut away

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many long-protected tribal powers in the opinion, but hinted that Congress could, to limited extent, give tribes jurisdictional powers as a matter of delegated authority rather than retained and inherent sovereignty. It hinted at the power of tribes to set policy to be enforced in federal law, such as the power to prohibit alcohol, which was upheld in the *Mazurie* decision. There is a possibility of "formal acquiescence to tribal jurisdiction," or consent, particularly in exchange for an agreement not to use the tribal exclusion authority. Reciprocal governmental agreements with neighboring jurisdictions were particularly mentioned. Finally, the court mentioned the use of the tribal exclusion power, adoption of nonmembers, and a fuller extension of civil jurisdiction. The options offered of federal law enforcement under the Major Crimes Act and submission to state jurisdiction under Public Law 280 detract from the federal recognition of self-determination of tribal governments.

And it warns that the Major Crimes Act could be interpreted to foreclose tribes from entering areas of federal concern expressed in law.

The strategy now must be to get Indian governmental powers questions out of the courts and into Congress, where it must exercise its constitutional primacy in support of tribal government. We should consider:

- A comprehensive Tribal Court Improvement Act
- Non-member "formal acquiescence to tribal jurisdiction" in both criminal and civil matters by Indian immigration and citizenship laws, residence permits, or formal consent documents
- Reciprocal agreements and compacts among tribes and with state entities
- Expanded civil jurisdiction in areas previously covered by criminal law
- Use of traditional adoption law
- Expanded uses of Indian common (customary) law similar to that used in the Navajo tribal courts
- Use of Indian Self-Determination Act provisions to contract BIA law enforcement and judicial powers, and expansion of the concept into other areas of federal law enforcement (e.g., taking over roles of the F.B.I. and the U.S. Attorneys in the prosecution of crimes in federal courts)
- Fully and finally controlling the geography of reservations by acquisition of non-member lands, by purchase or by eminent domain
- Using cooperative creativity for federal legislation which will help tribes and their neighbors: organizing and not agonizing

We have now entered an era of assimilation and the destruction of Indian tribes by the federal courts. *Duro* is a setback, but it is one which should turn our attention and energy to Congress for effective legislative change. One such change should be to limit the jurisdiction of the Supreme Court in both the power to decide Indian cases and tinker with substantive law. Is it time for John Collier's Indian Court, proposed in 1934?

(James Zion is an attorney with 15 years of Indian law practice in the U.S. and Canada. He has contributed scholarly articles on Indian common law, Indian affairs policy, and the human rights of Indians under national and international human rights law. He currently practices law in Arizona)

LEADERS

(continued from page 1)

reservation populations and tribal court caseloads should be forwarded to the BIA Judicial Branch as soon as possible.)

Although most observers contend that Congressional legislation is the only permanent solution to this jurisdictional void, a number of different temporary or stopgap methods have been suggested. Each of these methods has serious limitations, drawbacks, and risks including lack of feasibility and potentially diminished tribal sovereignty. Moreover, most of these temporary methods are politically subject to court challenges on due process, equal protection, and various other legal grounds.

The BIA has proposed the appointment of special CFR magistrates on Indian reservations currently exercising criminal jurisdiction over non-member Indians; that is, federally delegated courts operating under criminal codes published in the Code of Federal Regulations. Tribal leaders, however, have raised numerous objections to the establishment of CFR courts, including the erosion of tribal sovereignty, the cost of providing legal representation for defendants, due process and equal protection problems, etc.

Justice Kennedy suggested in his opinion that tribes could give the states jurisdiction under Public Law 280 or enter into reciprocal agreements with other tribes giving each jurisdiction over the other's members. Most tribal leaders find the P.L. 280 recommendation offensive and impractical. (For instance, Arizona's constitution specifically prohibits state jurisdiction over Indian country crimes.) Reciprocal agreements appear to be impractical due to the difficulty of reaching agreements between at least 150 different tribes. There is also the question of whether a tribe can consent to jurisdiction on behalf of its members.

Many tribal leaders have suggested utilizing exclusion and consent to jurisdiction with the threat of exclusion. Exclusion, however, is difficult to implement and a harsh penalty for someone who has family, property, and/or equipment on a reservation. Additionally, it is questionable whether a person can consent to jurisdiction when the court apparently lacks subject matter jurisdiction.

Other suggested methods include the use of alternative methods of dispute resolution, changing criminal offenses to civil actions, and use of traditional adoption laws. Each of these methods has its own limitations, drawbacks, and risks. Despite the problems posed by these various temporary methods to cope with the *Duro* decision, tribes must quickly choose one or more of these methods or risk facing what has been termed a "looming state of anarchy."

RECENT CASES OF INTEREST

The following summaries of recent federal, state or tribal court opinions are of special interest to tribal courts. Please refer to the *Indian Law Reporter* for the complete opinions.

UNITED STATES SUPREME COURT

Tribal Courts: Criminal Jurisdiction over Non-Indians

Duro v. Reina, et al., No. 88-6546, 17 Indian L. Rep. 1025 (U.S. Sup. Ct., May 29, 1990)

The following is the syllabus for the Duro decision:

While living on one Indian tribe's reservation, petitioner Duro, an enrolled member of another tribe, allegedly shot and killed an Indian youth within the reservation's boundaries. He was charged with the illegal firing of a weapon on the reservation under the tribal criminal code, which is confined to misdemeanors. After the tribal court denied his petition to dismiss the prosecution for lack of jurisdiction, he filed a habeas corpus petition in the federal district court. The court granted the writ, holding that assertion of jurisdiction by the tribe over a non-member Indian would constitute discrimination based on race in violation of the equal protection guarantees of the Indian Civil Rights Act, since, under *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, non-Indians are exempt from tribal courts' criminal jurisdiction. The Court of Appeals reversed. It held that the distinction drawn between a tribe's members and nonmembers throughout *United States v. Wheeler*, 435 U.S. 313 — which, in upholding tribal criminal jurisdiction over tribe members, stated that tribes do not possess criminal jurisdiction over "nonmembers" — was "indiscriminate" and should be given little weight. Finding the historical record "equivocal," the court held that the applicable federal criminal statutes supported the view that the tribes retain jurisdiction over minor crimes committed by Indians against other Indians without regard to tribal membership. It also rejected Duro's equal protection claim, finding that his significant contacts with the prosecuting tribe, such as residing with a tribe member on the reservation and working for the tribe's construction company — justified the exercise of the tribe's jurisdiction. Finally, it found that the failure to recognize tribal jurisdiction over Duro would create a jurisdictional void, since the relevant federal criminal statute would not apply to this charge, and since the state had made no attempt, and might lack the authority, to prosecute him.

Held: An Indian tribe may not assert criminal jurisdiction over a nonmember Indian.

(a) The rationale of *Oliphant, Wheeler* and subsequent cases compels the conclusion that Indian tribes lack jurisdiction over nonmembers. Tribes lack the power to enforce laws against all who come within their borders, *Oliphant, supra*. They are limited sovereigns, necessarily subject to the overriding authority of the United States, yet retaining the sovereignty needed to control their own internal relations and preserve their own unique customs and social order, *Wheeler, supra*. Their power to prescribe and enforce rules of conduct for their own members falls outside that part of their sovereignty that they implicitly lost by virtue of their dependent status, but the power to prosecute an outsider would be inconsistent with this status and could only come from a delegation by Congress. The distinction between members and nonmembers and its relation to self-governance is recognized in other areas of Indian law. See, *e.g., Moe v. Salish & Kootenai Tribes*, 425 U.S. 463; *Montana v. United States*, 450 U.S. 544. Although broader retained tribal powers have been recognized in the exercise of civil jurisdiction, such jurisdiction typically involves situations arising from property ownership within the reservation or consensual relationships with the tribe or its members, and criminal jurisdiction involves a more direct intrusion on personal liberties. Since, as a nonmember, Duro cannot vote in tribal elections, hold tribal office, or sit on a tribal jury, his relationship with the tribe is the same as the non-Indians in *Oliphant*.

(b) A review of the history of the modern tribal courts and the opinions of the Solicitor of the Department of the Interior on the tribal codes at the time of their enactment also indicates that tribal courts embody only the powers of internal self-governance. The fact that the federal government treats Indians as a single large class with respect to federal programs is not dispositive of a question of tribal power to treat them by the same broad classification.

(c) This case must be decided in light of the fact that all Indians are now citizens of the United States. While Congress has special powers to legislate with respect to Indians, Indians like all citizens are entitled to protection from unwarranted intrusions on their personal liberty.

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This court's cases suggest constitutional limits even on the ability of Congress to subject citizens to criminal proceedings before a tribunal, such as a tribal court, that does not provide constitutional protections as a matter of right. In contrast, retained jurisdiction over members is accepted by the court's precedents and justified by the voluntary character of tribal membership and the concomitant right of participation in a tribal government. Duro's enrollment in one tribe says little about his consent to the exercise of authority over him by another tribe. Tribes are not mere fungible groups of homogenous persons among whom any Indian would feel at home, but differ in important aspects of language, culture and tradition. The rationale of adopting a "contacts" test to determine which nonmember Indians must be subject to tribal jurisdiction would apply to non-Indian residents as well and is little more than a variation of the argument, already rejected for non-Indians, that any person entering the reservation is deemed to have given implied consent to tribal criminal jurisdiction.

(d) This decision does not imply endorsement of a jurisdictional void over minor crime by nonmembers. Congress is the proper body to address the problem if, in fact, the present jurisdictional scheme proves insufficient to meet the practical needs of reservation law enforcement.

851 F. 2d 1136, reversed

KENNEDY, J., delivered the opinion of the Court, in which Rehnquist, C.J., and White, Blackmun, Stevens, O'Connor, and Scalia, JJ., joined. Brennan, J., filed a dissenting opinion, which Marshall, J., joined.

Customs, Traditions and Culture: Religion

Reversing the Oregon Supreme Court's 1988 decision in this matter (763 P.2d 146), the United States Supreme Court holds that the free exercise clause permits the state to prohibit sacramental peyote use and thus to deny unemployment benefits to persons discharged for such use. **Employment Division, Department of Human Resources of Oregon, et al., v. Smith, et al., No. 88-1213, 17 Indian L. Rep. 1008 (U.S. Sup. Ct., Apr. 17, 1990).**

Criminal Law and Procedure

Child Abuse

Face-to-face confrontation that Sixth Amendment's Confrontation Clause contemplates will ordinarily occur between trial witness and criminal defendant will be dispensed with when preventing such confrontation is necessary to further important public policy and reliability of witness's testimony is otherwise assured; state's interest in protecting victims of alleged child abuse from trauma resulting from testifying face-to-face with their alleged abusers is sufficiently important public policy to justify dispensing with face-to-face confrontation; finding of necessity that must be made in such case must include finding that denial of defendant's right to face-to-face confrontation is necessary to protect child witness's welfare, that child witness would be traumatized by testifying in defendant's presence, and taht trauma child witness would suffer would be more than *de minimis*; Maryland procedure that permits child witness to testify live under oath out of defendant's presence via one-way video upon finding by trial court that child witness will, of forced to testify in defendant's presence, suffer serious emotional distress preventing child witness from reasonably communicating, and that ensures that child witness will be subject to cross-examination by defense counsel and that judge, jury, and defednant will be able to observe child witness during testimony, satisfies Confrontation Clause; Confrontation Clause does not requre that child witness first attempt to testify in defendant's presence or that trial court explore less restrictive measures before resorting to one-way video scheme. Maryland v. Craig, No. 89-478 (U.S. Supt. Ct., June 27, 1990).

Criminal Law and Procedure

Child Abuse

Hearsay statements made by suspected child victim of sex abuse to her treating pediatrician, and offered for admission under residual exception to hearsay rule did not, when evaluated in light of totality of circumstances surrounding making of statements, have "particularized guarantees of trustworthiness" that Sixth Amendment's Confrontation Clause requires for admission of out-of-court statements under hearsay exceptions that are not firmly rooted; existence of other evidence corroborating profered hearsay does not bear on whether hearsay is sufficiently trustworthy to be admitted. **Idaho v. Wright, No. 89-260 (U.S. Sup. Ct., June 27, 1990).**

UNITED STATES COURTS OF APPEALS

Public Law 280

State Jurisdiction

Reversing and remanding to the district court to enter judgment in favor of plaintiff tribes, the Eighth Circuit holds that: (1) 1961 legislation of the state of South Dakota did not validly provide for state jurisdiction over highways traversing Indian reservation within the terms of Public Law 280; (2) the self-governmental interest of the plaintiff tribes had become vested at the time of the passage by the United States Congress of the 1968 amendment to Public Law 280 requiring tribal consent to an assumption of jurisdiction by a state over certain activities on Indian lands, and accordingly, it was improper for the Supreme Court of South Dakota to apply the U.S. Supreme Court's holding in *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463 (1979)

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NATIONAL AMERICAN INDIAN
COURT JUDGES ASSOCIATION

1000 Connecticut Ave. N.W.
Suite 401 1206
Washington, D.C. 20036
Telephone: (202) 296-0685

M E M O

TO: TRIBAL COURT JUDGES, TRIBAL LEADERS

FROM: Judge Elbridge Coochise, President E Coochise

DATE: October 30, 1990

RE: Congress passes statute to overturn Duro decision for a year and statute will expire 9/30/91

The 101st Congress passed a bill which will temporarily overturn the Supreme Court decision in Duro v. Reina No. 88-6546 (5/29/90) until September 30, 1991. The bill was an amendment that was inserted by Senator Inouye in the Defense appropriations bill. The language is amended by adding to the Act entitled "An Act to prescribe penalties for certain acts of violence or intimidation and for other purposes", (a) Section 201 (2) the following: "means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians".

Also, further defined Indian to mean any person who is an Indian for purposes for federal jurisdiction.

The overall impact of this legislation is overturning the Duro decision for a one year period. Further legislation must be enacted next year before September 30, 1991 to make this issue of jurisdiction over non-member Indians permanent.

We need to gather and submit information to assist the Congress in rectifying this issue prior to this next year and support permanent legislation to overturn Duro.

Enclosed are copies of: Senate Amendment, Conference Report dated October 24, 1990, and Statement of Managers Conference Report on S. 3189.

Amendment No. 311: Deletes House language and adds Senate language which increases authority to collect from third party payers of reasonable health care service costs.

Amendment No. 312: Restores House language which requires the Department of Defense to absorb pay raises within levels appropriated in this Act. Identical Senate language was included in amendment no. 244.

Amendment No. 313: Deletes Senate language which reduced permanent change of station costs of military personnel by $200,000,000.

Amendment No. 314: Inserts and amends Senate language concerning incentive payments authorized by section 304 of the Indian Financing Act of 1974.

Sections 8077(b) and (c) are included in the bill to address an emergency situation in Indian country that is the result of a recent holding of the Supreme Court in a case known as *Duro* v. *Reina*, No. 88-6546 (May 29, 1990). Reversing two hundred years of the exercise by tribes of criminal misdemeanor jurisdiction over all Indians residing on their reservations, the Court held that tribes had lost their inherent power to exercise criminal misdemeanor jurisdiction over Indians who commit criminal misdemeanors on tribal lands but are not members of the tribe upon whose reservation the misdemeanors were committed. In at least twenty states with substantial Indian populations, the Court's decision has created a jurisdictional void in which neither a tribe, a state, or the Federal government is exercising jurisdiction over crimes committed by non-tribal member Indians in Indian country.

Unless authority to exercise jurisdiction in Indian country is delegated to the states by the Federal government and assumed by the states, as has been done in eleven states pursuant to the provisions of Public Law 83-280, states do not have jurisdiction over crimes committed by or against Indians in Indian country. The Federal government exercises jurisdiction only over major crimes committed in Indian country when either the victim or the perpetrator of a crime is an Indian. Traditionally, tribes have exercised criminal misdemeanor jurisdiction over all Indians on their reservations.

With the Court's ruling in *Duro* v. *Reina*, this traditional pattern of jurisdiction has been altered, and unless the Congress acts to fill this jurisdictional void, those who identify themselves as Indian and are recognized under Federal law (18 U.S.C. 1153) as Indian, may come onto an Indian reservation, commit a criminal misdemeanor, and know that there is no governmental entity that has the jurisdiction to prosecute them for their criminal acts. Such is the situation across Indian country since the Court's ruling in May.

In an effort to assure that until Congress is able to enact comprehensive legislation addressing the conditions which have arisen in the aftermath of the Court's decision, law and order can be restored and preserved in Indian country, sections 8077(b) and (c) recognize and affirm the inherent power of tribes to exercise criminal misdemeanor jurisdiction over all Indians on their respective reservations. Such recognition is consistent with the plenary power over Indian affairs that is vested in the Congress under Article I, section 3, clause 8 of the United States Constitution, and with two hundred

years of Federal law enacted by the Congress which recognizes the jurisdiction of tribal governments over Indians in Indian country.

This recognition is supported by Federal policy and practice which in many instances, established Indian reservations on which several tribes were to be settled under the governance of a single tribal government. Throughout the history of this country, the Congress has never questioned the power of tribal courts to exercise misdemeanor jurisdiction over non-tribal member Indians in the same manner that such courts exercise misdemeanor jurisdiction over tribal members. Instead the Congress has recognized that tribal governments afford a broad array of rights and privileges to non-tribal members. Non-tribal member Indians own property on Indian reservations, their children attend tribal schools, their families receive health care from tribal hospitals and clinics. Federally-administered programs and services are provided to Indian people because of their status as Indians, without regard to whether their tribal membership is the same as their reservation residence. The issue of who is an Indian for purposes of Federal law is well-settled as a function of two hundred years of Constitutional and case law and Federal statutes.

Section 8077(d) was added in conference to make clear that the effects of sections 8077(b) and (c) as those sections affect the criminal misdemeanor jurisdiction of tribal courts over non-member Indians shall have no effect after September 30, 1991, based upon the intent of the relevant committees of the Congress to work with the Indian nations, the Departments of Interior and Justice, and the states, to develop more comprehensive legislation within the coming year to clarify the intent of the Congress on the issue of tribal power to exercise criminal misdemeanor jurisdiction over Indians.

Amendment No. 315: Deletes center heading.

Amendment No. 316: Amends section number.

Amendment No. 317: Restores House language which allows funds for the care of animals covered under a Department of Defense contract with Louisiana State University Medical Center.

The conferees agree that payments allowed under this provision may be used to feed those animals covered by the contract and therefore owned by the Department of Defense at the time of enactment of this Act. Funds shall not be used to purchase or feed additional animals.

Amendment No. 318: Deletes center heading.

Amendment No. 319: Amends section number.

Amendment No. 320: Deletes House language which prohibits the procurement of air circuit breakers outside the United States since similar language has been included in the National Defense Authorization Act, 1991. The conferees expect that any waivers submitted in accordance with that Act shall also be provided the Committee on Appropriations.

Amendment No. 321: Restores House language which changes the management of "M" and Surplus Fund accounts

Amendment No. 322: Restores House language which requires the Secretary of Defense to submit a complete review of installations selected for base closure or realignment

INDIAN CIVIL RIGHTS ACT OF 1968 -- 25 USC §1301 - §1303

§1301. Definitions For purposes of this subchapter, the term:

1. "Indian tribe" means any tribe, band, or other group of Indians subject to the jurisdiction of the United States and recognized as possessing powers of self-government.

2. "powers of self-government" means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses; and **means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians;**

3. "Indian court" means any Indian tribal court or court of Indian offense, and;

4. **"Indian" means any person who would be subject to the jurisdiction of the United States as an Indian under section 1153, title 18, United States Code, if that person were to commit an offense listed in that section in Indian country to which that section applies."**

§1302. Constitutional Rights No Indian tribe in exercising powers of self-government shall:

1. make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;

2. violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;

3. subject any person for the same offense to be twice put in jeopardy;

4. compel any person in any criminal case to be a witness against himself;

5. take any property for a public use without just compensation;

6. deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;

7. require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of one year or a fine of $5,000 or both;

8. deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

9. pass any bill of attainder or ex post facto law; or

10. deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

§1303. Habeas corpus

The privilege of the writ of *habeas corpus* shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.

NATIONAL CONGRESS OF AMERICAN INDIANS

Est. 1944

*** PRESIDENT SIGNS DURO BILL! ***

October 29, 1991

To: All Tribal Leaders, Intertribal Organizations, NCAI Executive Comm.
From: A. Gay Kingman, NCAI Executive Director

Last night, President Bush signed H.R.972 (Duro) into law, now known as P.L.102-137. Tribal criminal misdemeanor jurisdiction over nonmember Indians is restored permanently! As Tribes know, the process of getting H.R.972 passed was literally a roller-coaster of events. Tribes witnessed the gamut of the political process, including a victorious passage early on in the House, agreements reached in the Senate which resulted in an amended bill providing for a two-year extension, a Conference Committee which reached a deadlock vote, and finally a reconvened Conference Committee which agreed to proceed with the permanent language called for by the House. The NCAI took the lead in keeping tribes and organizations apprised of the almost daily turn of events, resulting in a unaminous lobbying effort by Indian tribes. Several organizations opposing the Duro legislation were also active. Ultimately, the President signed the bill into law. Duro was one of the greatest tribal sovereignty battles, but the war is not over yet.

On November 20, 1991, the Senate Select Committee on Indian Affairs has scheduled the first in a series of hearings which will explore various tribal court and sovereignty issues, per Senator Inouye's agreement with Senator Gorton. The first is an Oversight Hearing on Federal Court Review of Tribal Court Rulings in Actions Arising Under the Indian Civil Rights Act. If you would like your tribe's views pursuant to this topic included in the hearing record, please send via mail or fax a statement to the Senate Select Committee on Indian Affairs. The NCAI would also appreciate receiving a copy of your statements. The NCAI will keep tribes apprised of the hearing schedule. It is the NCAI's understanding that the House Interior and Insular Affairs Committee does not intend to hold similar hearings.

There are many people who were instrumental in working toward the permanent restoration of nonmember Indian jurisdiction, all of whom deserve a sincere thank you. Most Members of the Senate Select Committee on Indian Affairs and particularly Senators Domenici, Inouye, and McCain should be singled out for outstanding commitment to resolving the issue. Congressman George Miller and also Congressman John J. Rhodes need to be commended for getting H.R.972 through the House, listening to the request of tribes for permanent restoration, and standing firm with the Senate on maintaining only permanent language. Congressman Bill Richardson deserves a round of applause for taking the bull by the horns and introducing the legislation early in the legislative session. The NCAI wishes to express its appreciation to various esteemed legal educators for their commitment outside of the classroom to this issue, including Sam Deloria, Nell Newton, Rick Colins and Frank Pommershein. And finally, there are also certain attorneys and lobbyists both in and outside of the beltway who provided invaluable assistance to the NCAI throughout this battle. Tribes know who they are. These particular individuals and firms are serving you well.

The NCAI thanks all Indian tribes nationwide for their perseverance and very hard work. The legislation would never have passed were it not for the commitment of Indian tribes nationwide to defending tribal sovereignty. The NCAI pledges to continue fulfilling its mission of serving Tribes and maintaining that there is no compromise for sovereignty. Pila Unyapi!

APPENDIX F

CONCURRENT JURISDICTION OVER MAJOR CRIMES

UNITED STATES GOVERNMENT

memorandum

DATE: APR 2 0 1987

FROM: Phoenix ACTING Area Director

REPLY TO ATTN OF: Tribal Operations (FTS 261-2314)

SUBJECT: Decision of the Assistant Secretary - Indian Affairs Regarding the Major Crimes Act, 18 U.S.C. §1153

TO: All Agency Superintendents and Officers In Charge, Phoenix

Attached for your information and use is a copy of the Assistant Secretary - Indian Affairs' April 8, 1987, letter rendering a decision on the March 21, 1984, administrative appeal filed by Peter J. Sferrazza on behalf of the Washoe Tribe.

The Assistant Secretary - Indian Affairs overturned the Acting Assistant Area Director's February 22, 1984, decision to affirm the Western Nevada Agency Superintendent's October 26, 1983, refusal to approve Washoe Tribal Council Resolution No. 83-W-32 enacted on October 14, 1983, which approved Title 5 of the Washoe Law and Order Code. The refusal to approve said resolution was based on the fact that Law and Order Code, Title 5, Criminal Offenses, contained several offenses listed in the Major Crimes in which it was determined the tribe lacks jurisdiction.

Because of the inadequacy of prosecutions of major crimes in the federal courts and the support of various important policy considerations, the Washington Office has made a decision to permit the approval of tribal ordinances asserting concurrent jurisdiction over offenses listed in the Major Crimes Act.

Please make this information available to all tribes under your jurisdiction.

Attachments

OPTIONAL FORM NO. 10
(REV. 1-80)
GSA FPMR (41 CFR) 101-11.6
5010-114

GPO : 1984 O - 446-117

United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

APR 8 1987

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Mr. Peter J. Sferrazza
1547 South Virginia
Suite 5
Reno, Nevada 89509

Dear Mr. Sferrazza:

This letter is the decision of the Assistant Secretary - Indian Affairs on your appeal from the decision of the Acting Area Director, Phoenix, dated February 22, 1984, to disapprove Washoe Tribal Council Resolution No. 83-W-32, enacted on October 14, 1983. For the reasons explained below, the decision of the Acting Assistant Area Director is reversed.

Resolution No. 83-W-32 approved the adoption of various titles of the Washoe Tribal Law and Order Code. The Acting Assistant Area Director affirmed the Western Nevada Superintendent's October 26, 1983, refusal to approve Resolution No. 83-W-32 because he determined that some of the offenses listed under Title 5 of the proposed code, namely criminal homicide, assault, kidnapping, statutory rape, arson, burglary, and robbery were outside tribal jurisdiction and exclusively under federal jurisdiction pursuant to the Major Crimes Act, 18 U.S.C. § 1153, which reads as follows:

> § 1153. Offenses committed within Indian country
>
> Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, rape, carnal knowledge of any female, not his wife, who has not attained the age of sixteen years, assault with intent to commit rape, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and larceny within Indian country, shall be subject to the same laws and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.
>
> As used in this section, the offenses of burglary and incest shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.

RECEIVED
APR 8 0 1987
DIVISION OF INDIAN SERVICES
BRANCH OF TRIBAL
OPERATIONS

BUREAU OF INDIAN AFFAIRS
RECEIVED
APR 17 1987
PHOENIX AREA DIRECTOR

> In addition to the offenses of burglary and incest, any other of the above offenses which are not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.

Although the lower federal courts have addressed the issue of tribal jurisdiction over offenses listed in § 1153 in dictum on several occasions, Felicia v. United States, 495 F.2d 353, 354 (8th Cir. 1974); Glover v. United States, 219 F. Supp. 19 (D. Mont. 1963); In Re Carmen's Petition, 165 F. Supp. 942 (N.D. Cal. 1958), aff'd sub nom., Dickson v. Carmen, 270 F.2d 609 (9th Cir. 1959), cert. denied, 361 U.S. 934 (1960); United States v. Cardish, 145 F. 242, 246 (E.D. Wisc. 1906), we are aware of no federal court decision explicitly based on a holding that Indian tribes lack jurisdiction to punish offenses made punishable by 18 U.S.C. § 1153. In 1978 the United States Supreme Court twice took note of this issue and explicitly reserved judgment on it. United States v. Wheeler, 435 U.S. 313, 325 (1978); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 203 n.14 (1978)

The Solicitor of the Interior Department addressed the question of tribal jurisdiction over the major crimes briefly in his 1934 Opinion, "Powers of Indian Tribes," 55 I.D. 14, 59-60, 1 Op. Sol. on Indian Affairs, 445, 473, (U.S.D.I. 1979):

> Although the statute [18 U.S.C. § 1153] does not expressly terminate tribal jurisdiction over the enumerated crimes, and might, if the question were an original one, be interpreted as conferring only a concurrent jurisdiction upon the federal courts, it has been construed for many years as removing all jurisdiction over the enumerated crimes from the Indian tribal authorities.
>
> Thus, in the case of United States v. Whaley (37 Fed. 145), which arose soon after the passage of the statute in question, it had appeared fitting to the tribal council of the Tule River Reservation that a medicine man who was believed to have poisoned some twenty-one deceased patients should be executed and he was so executed. The four tribal executioners were found guilty of manslaughter, in the Federal court, on the theory that the act of March 3, 1885, had terminated tribal jurisdiction over murder cases.

Just two years later, however, the Solicitor concluded that the simple fact that a particular offense is punishable under federal law does not preclude tribal prosecution. He noted that theft, which is punishable as larceny under the Major Crimes Act, is also punishable under the Department's regulations for courts of Indian offenses. He observed, "The regulations provide that the reservation court shall defer to Federal authorities in cases where the latter are willing to exercise jurisdiction. Where such jurisdiction is declined the bare fact of concurrent Federal jurisdiction does not exclude tribal action." Solicitor's Opinion, November 17, 1936, 1 Sol. Op. on Indian Affairs 699 (U.S.D.I. 1979).

The 1942 edition of the Handbook of Federal Indian Law expressed uncertainty on this issue:

> Although the statute covering the "10 major crimes" does not expressly terminate tribal jurisdiction over the enumerated crimes, and may be

> interpreted as conferring only a concurrent jurisdiction upon the federal courts, it is arguable that the statute removed all jurisdiction over the enumerated crimes from the tribal authorities.
>
> Some support is given this argument by the decision in United States v. Whaley . . .
>
> In opposition to the argument that the 1885 act limits tribal jurisdiction over crimes, it may be said that concurrent jurisdiction of federal and tribal authorities is clearly recognized by section 218 of title 25 of the United States Code, above set forth, which exempts from federal punishment otherwise merited persons who have "been punished by the local law of the tribe," and that the current Indian Law and Order Regulations recognize concurrent federal-tribal jurisdiction over crime.

Cohen, Handbook of Federal Indian Law, 147 (1942 ed.)(Footnotes omitted.)

The 1958 edition of the Handbook, however, flatly asserts at page 449:

> Although the statute covering the "10 major crimes" does not expressly terminate tribal jurisdiction over the enumerated crimes, it obviously preempts all jurisdiction over such crimes.

Dictum in United States v. Cardish, 145 F. 242, 246 (E.D. Wisc. 1906), as well as United States v. Whaley are cited in support of that proposition.

Despite that statement, however, the Department did not change its regulations governing courts of Indian offenses, which continue to this day to include theft as an offense even though it is also listed as one of the "major crimes." 25 C.F.R. § 11.42 (1983).

The 1982 edition of the Handbook, which, unlike the earlier editions, does not necessarily represent the views of the Department, analyzed the issue at some length and concluded, "Major Crimes Act preemption of concurrent tribal jurisdiction seems doubtful." Cohen, Handbook of Federal Indian Law, 341 (1982 ed.).

There is certainly no clear indication that Congress implicitly deprived Indian tribes of their power to punish those offenses listed in § 1153. Ambiguities of this sort in federal law are construed generously in order to comport with traditional notions of sovereignty and the federal policy of encouraging tribal independence. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 152 (1982), quoting White Mountain Apache v. Bracker, 448 U.S. 136, 143-144 (1980).

Our decision to permit the approval of tribal ordinances asserting concurrent jurisdiction over offenses listed in the Major Crimes Act is supported by a number of important policy considerations. Indian tribes, the Interior Department, the Justice Department and the U.S. Civil Rights Commission have all commented on the inadequacy of prosecutions of major crimes in the federal courts.

The BIA, at page 80 of a report entitled Indian Reservation Criminal Justice Task Force Analysis (1974-1975), noted that the cumbersome federal criminal justice machinery often causes undue delays in the prosecution of offenses committed by

Indians on Indian reservations and cases are often declined without taking into account the legitimate concerns of the Indian community.

The National American Indian Court Judges Association (NAICJA) reported at pages 42 and 43 of its study, "Federal Prosecution of Crimes Committed on Indian Reservations," Justice and the American Indian, vol. 5, that of 250 major crimes investigated by the BIA in 1973, federal prosecution was declined in 177 cases. That study concluded, "Declination carries with it many side effects which are harmful to Indian communities . . . . It fosters . . . a communal anger when residents see an individual set free without having been punished for his crime . . . . This anger and frustration often leads to dissatisfaction with the entire law and order system. Many Indians now feel that the authorities in the criminal justice system do not care about crimes committed on the reservation."

The NAICJA has repeated this criticism at page 33 of its 1978 study, Indian Courts and the Future:

> On almost all reservations there is great dissatisfaction with the current situation regarding prosecution of major crimes violations. The federal government has explicit jurisdiction over fourteen major crimes, but, as with state enforcement in Public Law 280 jurisdictions, federal enforcement of major crimes violations on the reservation has been inadequate. The rate of declinations to prosecute by U.S. Attorneys is very high. Investigation of crimes by the FBI is slow, and many Indians believe that prosecution and investigation are more vigorous when non-Indians are involved. The crimes investigated under the Major Crimes Act tend to be those in which the offense had 'high visibility.'

The problem was examined in detail the Justice Department's 1975 Report of the Task Force on Indian Matters. That report analyzed the problem from the prosecutor's point of view at pages 46 and 47:

> Communication is difficult due to language and cultural differences. Indians usually regard federal court as a distant institution and may seek to avoid having anything to do with it. U.S. Attorneys are committed to bringing cases they can win. Regardless of the seriousness of the offense, Indian cases present a range of problems any one of which often defeats successful prosecution. Against these odds, it is difficult for a U.S. Attorney to justify great expenditures of time given the competing demands on his resources.

The United States Commission on Civil Rights also studied the problem and recommended increased reliance on the tribal criminal justice system. Indian Tribes - A Continuing Quest for Survival at pages 154-164 (1981). Given the admitted inadequacy of prosecutions under the Major Crimes Act, a rule that permits tribes to prosecute those individuals who have violated that Act but are not going to be prosecuted under it can contribute significantly to the maintenance of law and order on Indian reservations.

We are unfortunately aware that tribal courts cannot impose punishment exceeding one year in jail and $5,000.00 for any single offense pursuant to the Indian Civil Rights Act, 25 U.S.C. § 1302(7), as amended by Section 4217, the Anti-Drug Abuse Act of 1986 (Public Law 99-570). It has been suggested that because such punishment is inappropriate for conviction of certain major offenses, concurrent tribal court

jurisdiction in such cases is also inappropriate. Although we agree that the imprisonment and fine limitations under the Indian Civil Rights Act are inappropriate in such cases, we nevertheless believe that the solution to this problem does not lie in barring tribal court prosecution in instances where a crime might otherwise go unpunished, but in effectively amending the Indian Civil Rights Act to strengthen tribal court systems by enabling them to assess appropriate fines and terms of imprisonment in all cases over which such courts have jurisdiction. Additionally, the problems caused by the limitations of the Indian Civil Rights Act with respect to fines and imprisonment are mitigated by the U.S. Supreme Court's decision in Wheeler, supra, which permits federal prosecution following tribal prosecution for the same crime.

For the foregoing reasons, the decision of the Acting Assistant Area Director is reversed with direction to reconsider Resolution No. 83-W-32 in a manner consistent with this decision.

Sincerely,

/S/ Ross O. Swimmer

Assistant Secretary - Indian Affairs

cc: Chairman, Washoe Tribe of Nevada and California
Phoenix Area Director
Superintendent, Western Nevada Agency
Field Solicitor, Phoenix

CHAPTER 53—INDIANS

§ 1153. Offenses committed within Indian country

(a) Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnaping, maiming, rape, involuntary sodomy, felonious sexual molestation of a minor, carnal knowledge of any female, not his wife, who has not attained the age of sixteen years, assault with intent to commit rape, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

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

(As amended May 15, 1986, Pub.L. 99-303, 100 Stat. 438.)

1986 Amendment. Pub.L. 99-303 inserted section designation and heading inadvertently omitted in the amendment by section 1009 of Pub.L. 98-473, designated undesignated first paragraph as subsec. (a), and in subsec. (a) as so designated, inserted "felonious sexual molestation of a minor," after "involuntary sodomy,", struck out undesignated second paragraph, which provided that, as used in this section, the offenses of burglary, involuntary sodomy, and incest be defined and punished in accordance with the laws of the State in with such offense was committed as are in force at the time of such offense, and designated undesignated third paragraph as subsec. (b), and in subsec. (b) as so designated, substituted "Any offense referred to in subsection (a) of this section that is" for "In addition to the offenses of burglary, involuntary sodomy, and incest, any other of the above offenses which are".

Legislative History. For legislative history and purpose of Pub.L. 99-303, see 1986 U.S.Code Cong. and Adm.News, p. 1298.

APPENDIX G

ABA RECOMMENDATIONS

RECOMMENDATIONS FOR IMPROVING LEGAL INTERVENTION IN INTRAFAMILY CHILD SEXUAL ABUSE CASES

National Legal Resource Center for
Child Advocacy and Protection
Young Lawyers Division
American Bar Association

Reporter
Josephine Bulkley

October, 1982

4th Printing, April 1985

RECOMMENDATIONS

PART I. GENERAL PRINCIPLES

1.1 Innovative Approaches

Innovative approaches in the legal system's handling of intrafamily child sexual abuse cases should be adopted which protect the child from further abuse, prevent additional trauma to the child and family, and provide treatment for the child, the family, and where appropriate, the offender.

1.2 Interdisciplinary Approach

An interdisciplinary approach should be established among agencies responsible for handling intrafamily child sexual abuse cases.

1.3. Coordinated Court Proceedings

Procedures should be developed for coordinating child protection, criminal and other judicial proceedings involving intrafamily child sexual abuse.

1.4 Reducing Trauma to the Child

Procedures should be established for reducing trauma to the child caused by legal intervention in child sexual abuse cases.

1.4.1 Providing an Advocate

In intrafamily child sexual abuse cases, a guardian *ad litem* or legal counsel should be appointed to represent the child in juvenile court proceedings. A victim/witness advocate, guardian *ad litem*, or other special advocate should be appointed to assist the child in criminal proceedings.

1.4.2 Interviewing the Child

Procedures should be developed to prevent duplicative interviews with the child and to provide a suitable environment for interviewing child sexual abuse victims.

1.4.3 Vertical Prosecution

In civil and criminal cases involving child sexual abuse, prosecutors' offices should institute "vertical prosecution," where one prosecutor is assigned to handle a case at all stages of the proceedings.

1.4.4 Child's Testimony

In criminal cases, a child sexual abuse victim should testify at preliminary hearings or grand jury proceedings only if needed. Where necessary to prevent trauma to the child, procedures should be developed to avoid the need for the child's testimony in open court in criminal and civil trials, taking into account any constitutional limitations.

1.5 Training and Specialization

All professionals who deal with intrafamily child sexual abuse cases should receive training regarding the psychological, social and legal issues of such abuse, the basic principles of child protection and development, and interviewing techniques. Where possible, agencies should establish special units responsible for handling such cases.

1.6 Specific Statutory Definitions

Criminal statutes should specifically define sexual abuse of a child. Juvenile court statutes and child abuse and neglect reporting statutes should include and specifically define sexual abuse of a child, or define such abuse by reference to the definition in the criminal statute. The following acts should constitute sexual abuse of a child:

(1) any penetration, however slight, of the vagina or anal opening of one person by the penis of another person, whether or not there is the emission of semen; or

(2) any sexual contact between the genitals or anal opening of one person and the mouth or tongue of another person; or

(3) any intrusion by one person into the genitals or anal opening of another person, including the use of any object for this purpose, EXCEPT that, it shall not include acts intended for a valid medical purpose; or

(4) the intentional touching of the genitals or intimate parts (including the breasts, genital area, groin, inner thighs, and buttocks) or the clothing covering them, of either the child or the perpetrator, EXCEPT that, it shall not include:
   (a) acts which may reasonably be construed to be normal caretaker responsibilities, interactions with, or affection for a child; or
   (b) acts intended for a valid medical purpose; or

(5) the intentional masturbation of the perpetrator's genitals in the presence of a child; or

(6) the intentional exposure of the perpetrator's genitals in the presence of a child, or any other sexual act, intentionally perpetrated in the presence of a child, if such exposure or sexual act is for the purpose of sexual arousal or gratification, aggression, degradation, or other similar purpose; or

(7) sexual exploitation which includes allowing, encouraging or forcing a child to:
   (a) solicit for or engage in prostitution; or
   (b) engage in the filming, photographing, videotaping, posing, modeling, or performing before a live audience, where such acts involve exhibition of the child's genitals or any sexual act with the child as defined in subsections (1)-(6) of this recommendation.

1.7 Juvenile Offenders

Therapeutic dispositions should be authorized, and specialized treatment available for juvenile child sex offenders who are the subject of criminal, delinquency, status offense, or child protection proceedings.

PART II. CIVIL PROCEEDINGS

2.1 Including the Parent Who Did Not Commit the Sexual Abuse as a Party in a Child Protection Proceeding

In a child protection proceeding involving sexual abuse, the following factors should be considered in deciding whether to include the parent who did not commit the abuse as a party:

(1) whether such parent knew or had reasonable cause to believe the child had been abused and failed to take reasonable steps to prevent it;

(2) the actions such parent took to protect, support and care for the child following disclosure of the abuse; and

(3) whether such parent voluntarily agreed to participate in a specialized counseling or treatment program, and to accept other protective services.

2.2 Civil Protection Orders

Statutory provisions should be enacted to permit judicial issuance of civil protection orders in intrafamily child sexual abuse cases. Such orders should be made available in civil protection order proceedings, as well as child protection and custody actions. Statutes should specifically authorize courts to require the perpetrator to do or refrain from doing one or more of the following:

(1) Vacate the home;

(2) Limit contact or communication with the child victim, or other children in the home, or any other child;

(3) Refrain from further abuse;

(4) Obtain counseling or participate in a specialized treatment program;

(5) Stay away from the home, neighborhood, school, or other place the child frequents;

(6) Have limited or supervised visitation with the child;

(7) Pay temporary support for the child or other family members, and the costs of therapy for the perpetrator, child victim, or other family members.

The statute also should allow the court to order temporary custody of the child to the parent who did not commit the sexual abuse, or, in its discretion, any other relief it deems necessary for the protection of the child. In addition, the statute should authorize the court to recommend counseling for the non-participating parent, the

child, or other family members. Violation of a civil protection order should be a separate criminal offense.

PART III CRIMINAL PROCEEDINGS

3.1 Intrafamily Sexual Abuse of Children

Criminal child sexual abuse statutes should include a provision specifically prohibiting intrafamily sexual abuse of children. "Intrafamily sexual abuse" means sexual abuse committed by a parent, caretaker, or adult household member in a position of authority or control over the child.

3.2 Statutory Degrees of Offenses Based Upon Certain Factors

Criminal statutes should establish degrees of sexual abuse of a child based upon the following factors:

(1) the nature and duration of the abuse;
(2) the age of the child;
(3) the age of the perpetrator;
(4) the relationship of the perpetrator to the child;
(5) the use of force, threats, or other forms of coercion; and
(6) the existence of prior sexual offense convictions or juvenile court adjudications of sexual abuse.

3.3 Alternatives to Traditional Prosecution and Sentencing

Alternatives to traditional criminal prosecution and sentencing should be statutorily authorized for intrafamily child sexual abuse cases. These should include, but not be limited to, pretrial diversion and post-conviction alternatives, conditioned upon mandatory treatment and other protection orders. Specific criteria and mechanisms should be set forth for determining whether treatment is appropriate, and if so, what type of approach should be utilized.

3.4 Sexual Psychopath Statutes

Sexual psychopath statutes should be repealed or their applicability limited in intrafamily child sexual abuse cases.

3.5 Prosecution of Participating Parent

A parent should be held criminally responsible when the other parent commits sexual abuse upon their child, only if such parent participated in committing the abuse, or had actual knowledge of the abuse and intentionally failed to take reasonable steps to prevent its commission or future occurrence. Where such parent is criminally liable, dispositions providing for specialized treatment should be authorized.

PART IV. EVIDENTIARY ISSUES

4.1 Competency

Child victims of sexual abuse should be considered competent witnesses and should be allowed to testify without prior qualification in any judicial proceeding. The trier of fact should be permitted to determine the weight and credibility to be given to the testimony.

4.2 Corroboration

Corroborative evidence of the victim's testimony should not be required to establish a *prima facie* case in any criminal or civil proceeding involving child sexual abuse.

4.3 Out-of-Court Statements of Sexual Abuse

A child victim's out-of-court statement of sexual abuse should be admissible into evidence where it does not qualify under an existing hearsay exception, as long as: (1) the child testifies; or (2) in the event the child does not testify, there is other corroborative evidence of the abuse. Before admitting such a statement into evidence, the judge should determine whether the general purposes of the evidence rules and interests of justice will best be served by admission of the statement into evidence. In addition, the court should consider the age and maturity of the child, the nature and duration of the abuse, the relationship of the child to the offender, the reliability of the assertion, and the reliability of the child witness in deciding whether to admit such a statement.

A statement may only be admitted under this exception if the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it.

4.4 Marital Privilege

The marital privilege should not apply in any criminal or civil proceeding involving intrafamily child sexual abuse, and the spouse of the offending parent should be considered a compellable witness.

4.5 Expert Testimony

In intrafamily child sexual abuse cases, prosecutors should make use of expert witnesses who qualify under the rules of evidence, to aid the trier of fact in resolving issues relating to the dynamics of intrafamily child sexual abuse and principles of child development.

4.6 Prior Sexual Acts

Courts should have discretion to admit evidence of prior sexual acts between the offending parent and child to show either: (1) a depraved or lustful disposition of the parent; or (2) a plan, scheme, design, motive or *modus operandi*. Evidence of sexual acts by the offending parent with other children also should be admissible to show plan, scheme, design, motive or *modus operandi*.

4.7 Sexually Abused Child Syndrome

Consideration should be given by the legal profession to the evidentiary viability of a "sexually abused child syndrome," which may be analogous to the "battered child syndrome."

APPENDIX H

VICTIM IMPACT STATEMENTS

U.S. Department of Justice
National Institute of Justice

National Institute of Justice / Research in Brief

August 1987

Victim Appearances at Sentencing Under California's Victims' Bill of Rights

Edwin Villmoare and Virginia V. Neto

Should the victim of a crime be given the right to initiate or intervene in a criminal prosecution? According to Professor Abraham S. Goldstein of Yale Law School:

> [T]he victim deserves a voice in our criminal justice system, not only in hearings on the amount of restitution to be paid him but also on the offenses to be used as the basis for such restitution....[T]he victim should have a right to participate in hearings before the court on dismissals, guilty pleas, and sentences....[1]

1. "Defining the Role of the Victim in Criminal Prosecution," 52 *Mississippi Law Journal* 515, 518 (1982).

The December 1982 Report of the President's Task Force on Victims of Crime encouraged victim participation but recommended a more limited approach:

> Judges should allow for, and give appropriate weight to, input at sentencing for victims of violent crime....[E]very victim must be allowed to speak at the time of sentencing. The victim, no less than the defendant, comes to court seeking justice....Defendants speak and are spoken for often at great length, before sentence is imposed. It is outrageous that the system should contend it is too busy to hear from the victim.

By the time the Task Force report was published, the voters of California had already enacted legislation giving victims the right to allocution at felony sentencing hearings, i.e., the right to speak. Proposition 8, California's Victims' Bill of Rights, includes Penal Code Section 1191.1, which specifies the following:

> The victim of any crime, or the next of kin of the victim if the victim has died, has the right to attend all sentencing proceedings under this chapter and shall be given adequate notice by the probation officer of all sentencing proceedings concerning the person who committed the crime.

From the Director

The past decade has seen a dramatic rekindling of public concern for the needs of the victims of crime, a concern richly supported by continuing research into the questions of what those needs are and how they can best be met.

When California voters in 1982 enacted Proposition 8, called the Victims' Bill of Rights, that new law included a provision that the victim or the victim's surviving kin would be permitted to address the court before any felony sentencing.

The National Institute of Justice then sponsored research by the McGeorge School of Law at the University of the Pacific to study the implementation of this "right to allocution." If we learned how allocution worked in the early days of its implementation in California, other States considering victim legislation would benefit from the California experience.

This *Research in Brief* gives the results of that investigation. Although few victims availed themselves of this right and some judges were skeptical of its value, an overwhelming four-fifths of the victims and two-thirds of the prosecuting attorneys thought the victim's right to allocution was a proper and necessary contribution to justice.

Like other National Institute research into victim problems, this study's findings again stress the victim's need and desire to know what is going on in the case against his or her criminal assailant, and how important it is for the victim to be a full partner with the criminal justice system from the very start of that case. Thus the study recommends that procedures for notifying victims of the progress of a case and their allocution right be improved, and that victim participation in the case be encouraged at an earlier stage than sentencing. Thoughtful legislative draftsmanship, supported by sound research and experience, can continue to ease the traumas of the victims of crime and hasten achievement of our ideals of justice.

James K. Stewart
Director
National Institute of Justice

> The victim or next of kin has the right to appear, personally or by counsel, at the sentencing proceeding and to reasonably express his or her views concerning the crime, the person responsible, and the need for restitution. The court in imposing sentence shall consider the statements of victims and next of kin made pursuant to this section and shall state on the record its conclusion concerning whether the person would pose a threat to public safety if granted probation....

To study California's implementation of the new right to allocution at felony sentencing, the National Institute of Justice sponsored an exploratory study by the Center for Research, McGeorge School of Law, University of the Pacific. This *Research in Brief* highlights the study's findings.

Major findings

Effects. In California, victim appearances seem to have had little effect on the criminal justice system or on sentencing. The vast majority of victims surveyed for this project did not use the allocution right. In fact, in less than 3 percent of the cases did the victim appear. The possible impact of the victim allocution right is severely limited by the high percentage of cases plea bargained, by California's determinate sentencing law, and by victims' lack of awareness of the right.

Victim desire for information. In general, victims are more interested in information about their cases than they are in the right to participate. Some victims, in fact, exercised the allocution right at sentencing primarily to find out what was going on in their cases.

However, 80 percent of the victims interviewed indicated existence of the right was important. Many victims showed limited understanding of the criminal justice system and had trouble ascertaining what stage a case had reached or why a particular action had been taken.

Notice problems. Form letters sent by probation departments are an inadequate means of communicating the existence of the allocution right. More personal and direct communication is required if victims are to learn about and understand the right.

Victim impact statements. Victim impact statements included in the presentence reports prepared by the local probation departments provide many victims with a satisfactory opportunity to express their views. An informal interview with a sympathetic probation officer is often preferable to a recitation in open court.

Scope and methods

The project had two major objectives: to study the implementation of the allocution right by State and local agencies, and to assess the extent of victims' awareness of the right and their use and reaction to it.

Agency survey. In the fall of 1982, the project surveyed agencies statewide to learn about the activities and attitudes of officials related to the allocution right. Questionnaires were sent to probation departments, district attorneys, and Superior Court presiding judges in all of California's 58 counties and to all 35 victim-witness programs operating in mid-1983.

The questionnaires covered four major issues:

- victim notification of the allocution right,
- assistance to victims by the criminal justice system in the exercise of the right,
- the extent of victim appearances, and
- perceptions by officials of the new right and its implementation.

Forms were returned by 33 probation departments (57 percent), 25 district attorneys (43 percent), 33 Superior Courts (57 percent), and 22 victim-witness programs (63 percent). According to the survey results, 3 percent or fewer of felony crime victims make statements at sentencing hearings.

Case surveys. To assess victim response statewide, the project sought to identify and interview two groups of victims: Those who exercised the right and those who were entitled to but did not. There were major obstacles in locating victims: County agencies did not maintain systematic data, such as victim names and addresses, and many district attorneys and police tended to "protect" victims and inhibit researchers' access to them.

To overcome these difficulties, the project surveyed victims in three cooperating counties with computerized recordkeeping systems: Alameda, Fresno, and Sacramento. The computerized systems enabled project staff to review large numbers of files and extract victim data that were otherwise inaccessible or unavailable.

At the project's request, the district attorney's offices and the Superior Court clerks in each of the three counties generated a list of felony cases resulting in conviction and sentencing for a year and a half that overlapped to some extent the statewide agency survey.

There was a total of 1,293 cases generated by the 3 counties that contained the information needed to identify and contact victims. The data included the names and addresses of the victims. Next of kin were identified primarily by searching district attorney and coroner files. The felonies were principally burglary, robbery, assault, rape, child molestation, kidnapping, and homicide. Burglary was included to compare responses to property and personal injury crimes.

The project analysis identified 59 cases in which victims (or next of kin) made statements at sentencing. The percentage of victims identified as exercising their allocution right in the case surveys compared to the total number of sentencings in the three counties is similar to the 3 percent appearance finding of the statewide agency survey.

Victim interviews. Project staff succeeded in locating and interviewing 171 victims. The district attorneys' case survey accounted for 147 of the 171 victims, and the sentencing orders sent by the Superior Court clerks accounted for the remaining 24.

Each of the 171 victims was interviewed by telephone. The interviewers asked about details of the crime and characteristics of the victim; the source and degree of the victim's knowledge of the appearance right; and the de-

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The Assistant Attorney General, Office of Justice Programs, coordinates the criminal and juvenile justice activities of the following program Offices and Bureaus: National Institute of Justice, Bureau of Justice Statistics, Bureau of Justice Assistance, Office of Juvenile Justice and Delinquency Prevention, and Office for Victims of Crime.

gree, kind and circumstances of victim participation. The effects of participation and nonparticipation on the victims were part of the interview.

Interviews were conducted with both victims who appeared at sentencing (29 of 171 victims) and those who did not. Their responses were then compared. Besides the 29 victims who actually appeared at sentencing, only 47 of the remaining 142 indicated they knew of the allocution right. (It should be noted that the 171 victims interviewed were not necessarily typical victims. Hence, their responses may not be representative.)

Legal framework

The victim's opportunity to exercise the allocution right is constrained by legal factors. Penal Code Section 1191.1 confines the right to allocution to felony sentencing in Superior Court. There is no right to allocution in Municipal Court, where almost all misdemeanor cases are tried. California operates under a determinate sentencing law that limits sentencing choices. Further, in cases involving a plea, the sentencing judge considers only the crime(s) that the defendant pleads to.

Thus, the only real opportunity for the victim to affect the sentence by allocution is in a case that reaches Superior Court, and only to the extent permitted by determinate sentencing and plea bargaining. In instances where crimes are not charged, or charged but later dismissed or dropped, victims have no allocution right.

It should be noted that allocution is not a victim's only way to communicate with the sentencing judge. Since the 1920's, presentence reports prepared by probation departments have included victim impact statements. These statements became mandatory in 1978. Victims may also write the court directly.

Agency implementation

Probation departments. Nearly all departments appeared to be sending notification announcements to victims of the allocution right as required by the Code. The departments reported only a minimal increase in their workloads.

Notification almost always consisted of form letters. Contents of the notice were not uniform among the probation departments due to the vagueness of Section 1191.1, the lack of central administrative or legislative guidelines, and the need to implement notification procedures quickly.

Despite differences in the style of notification letters, victim appearance rates at sentencing did not differ noticeably from one county to another. Some form letters were less personal than the letters and phone calls used to solicit victim impact statements.

Probation departments reported difficulty in locating some victims because of incorrect names or addresses provided by other law enforcement agencies. No followup notices were sent. Eighty-five of 149 victims (57 percent) who responded to the question in the victim survey about the notice did not remember receiving one.

Superior Court. In the statewide agency survey, some judges expressed concern about possible lack of due process in the allocution process. The statute does not address the procedures under which victims are to be heard. Consequently, judges' practices differ.

Of the judges responding, nearly half indicated they allow cross-examination of the victim by the defense. One-fifth of the judges also require the victim to speak under oath, especially when facts of the case or details of the crime are discussed. Some judges accept comments from victims without an oath unless facts of the case or details of the crime are raised. Two-fifths of the district attorneys said that, in their experience, victims spoke under oath. No systematic records of the procedures used in victim allocution are maintained.

District attorneys. District attorneys, who have the most contact with victims after an arrest and often consider themselves victim advocates, were not mandated to inform or assist victims regarding allocution. Nevertheless, according to the victim interviews, the district attorney was the most common source of information on the allocution right.

Victim-witness programs. While less than one-third of the victims interviewed remembered any contact with a victim-witness program, over half of the victims knew about the victim-witness program. Relatively few victims recalled learning about the right to allocution from victim-witness programs.

Victims and allocution

Despite the great amount of publicity about the Victims' Bill of Rights, mandatory notification of victims, and victims' contact with various agency personnel, only 44 percent of the 171 victims interviewed were aware of the right to appear at sentencing. (What the actual level of knowledge was among all victims in the three counties can only be estimated, but it probably was much lower, considering that the 171 victims interviewed were a more economically stable and highly educated sample than is typical of felony victims.)

Approximately half of the victims who were aware of the right first learned about it from district attorneys, 21 percent from the probation officer, 15 percent from victim-witness programs, and 10 percent from other criminal justice personnel such as police. Only a few mentioned the Victims' Bill of Rights as their source of information.

Although probation departments in California are legally responsible for notifying victims of their allocution right, the sequence of events in criminal proceedings may account for the higher proportion of victims who recalled being informed of the right by district attorneys' offices. When someone is charged with a crime, the victim may begin a series of meetings, phone calls, and correspondence with the district attorney. Not until there has been a conviction does probation prepare a presentence report and send notification of the right to allocution and the schedule of the sentencing hearing.

Reasons for not exercising the right. Of the 47 victims interviewed who knew of the right but did not exercise it, 43 explained their reasons for not doing so. Thirty-seven percent were satisfied with the criminal justice system's response. This was especially true in burglaries. Some of these victims were satisfied by district attorney's assurances that the criminal would receive the maximum sentence possible. Thirty percent believed that their appearance before the judge would make no difference.

For 28 percent the reasons for not appearing were more personal: they were either too upset, afraid of retaliation, or confused. One victim, who was also a witness in the case, thought that being barred from the courtroom during the trial precluded her involvement at the sentencing hearing.

Some were discouraged by a district attorney or probation officer, only to regret later that they had not expressed their views. (In the statewide agency survey, some officials indicated concern that an oral statement might be counterproductive, fearing, for example, that a victim might become hysterical.) For another 5 percent, an appearance was considered too costly in lost wages, child care, or travel expenses.

Victims often presented themselves to project interviewers in a passive mode, explaining that "no one told me I should," or "they don't seem to care," or "I was busy."

Reasons for exercising the right. Of the victims interviewed who made a written or oral statement, 34 percent said their primary reason was a desire to express their feelings to the judge, 32 percent to perform their "duty," and 26 percent to achieve a sense of justice or to influence the sentence.

One victim of a terrifying armed robbery wanted to show the criminals that the victims could make life miserable for them. Another man, whose brother was unable to care for himself after a severe assault, said, "I needed to say something because my brother is unable to speak for himself."

Several victims who knew their attackers personally asked the court to provide psychological help for the offenders, usually for the good of the offenders as well as the safety of others. A man assaulted by a friend advocated probation and restitution because he knew the high costs of incarceration and the undesirable conditions in prison.

Bound up with victims' *reasons* for making a statement at sentencing were the *results* they sought: 56 percent sought a long or maximum sentence; 15 percent emotional relief; 12 percent financial restitution; and 17 percent a variety of other objectives, including a light sentence.

Content of victims' statements. Of all the points raised in victims' statements, the most common (made by 47 percent of victims interviewed) was that the perpetrator should be punished or locked up. Twenty-five percent stressed one or more of the following: the effects of the crime, qualities of the criminal (usually highly negative ones), good qualities of the victim, or details of the crime. A few mentioned the need to protect society; others suggested alternative sentences, such as probation and restitution.

Nearly half the persons preparing statements received some help, most frequently from family members or friends, sometimes from a victim support group such as Mothers Against Drunk Drivers, and occasionally from a private attorney or the district attorney.

Was Section 1191.1 necessary or effective?

Victims' perspectives. The victims interviewed indicated that making a statement at sentencing had two main potential effects—an emotional effect on the victim and a perceived effect on the sentence. Over half the appearing victims (54 percent) reported they felt different after making their statement to the judge. Of these, 59 percent expressed positive feelings of satisfaction or relief, 25 percent felt angry, fearful or helpless, and 10 percent felt dissatisfied.

Less than half (45 percent) of those victims who spoke at sentencing felt their participation affected the sentence. Even those who felt they had an effect were inclined to view the sentence as too lenient. In fact, they held this view in the same proportion as persons who had no involvement in sentencing at all. Most discouraged were those who made statements but felt they were not heeded: 82 percent of these victims thought the sentence was too light. Victims who spoke at sentencing were often the victims of serious crimes, yet as a group they reported a higher frequency of probation sentences in their cases than those who did not appear. (It should be noted that victims seeking restitution in California are forced to request a sentence that excludes a prison term. Direct restitution to the victim is available only when probation is granted.)

Despite infrequent use of the allocution right and mixed reactions to it, over 80 percent of all victims interviewed indicated that the existence of the right was important. Victims also expressed a strong desire for more information about the right and the progress and dispositions of their cases.

Officials' perspective. Two-thirds of the judges saw no need for the allocution right. An equally large majority of district attorneys thought it was needed. Judges pointed out that the presentence report provides all the necessary information. One judge wrote:

> Any review of the impact of victim's statements should not fail to take into account the rules of court sentencing criteria. By the time that the victim comes to court, a well-prepared probation report having been reviewed by a well-prepared judge leaves little room for modification of an intended decision. A victim's emotional appeal to the court cannot carry more weight in place of the facts and criteria.

When asked whether the right was "effective," 81 percent of probation officers answered "minimally or not at all" (often because of the role of victim impact statements) compared with 69 percent of judges and 48 percent of prosecutors; less than 2 percent indicated that the right had been very successful. Sixty-six percent of district attorneys, compared with 40 percent of judges, thought that victim appearances increased the amount (as opposed to the frequency) of restitution awarded.

Judges indicated that, while the actual appearances had little overall impact on the sentences, they believed the right had benefits:

- It does allow victims to air their grievances or "get it off their chest." To this extent they may feel the system is paying more attention to them.
- Prop. 8 has been a real significant step toward victim recognition and awareness. It is as important as a public statement as it is as a court tool.

Prosecutors wrote:

- — Judges are constrained by law, logic, and justice. In a majority of cases nothing the victim says is really going to impact.
- — Members of the judiciary who were responsive to victims' rights before, continue to be so, and others who place defendant's rights paramount...also continue.

Conclusion

Allocution at sentencing will be a modest right wherever it is established because plea bargaining effectively resolves the vast majority of all sentences before the victim can have a say. In fact, since plea bargaining may result in the dismissal of criminal charges, plea bargaining deprives some victims of the right to allocution altogether. If the intent behind the allocution right is to give victims an opportunity to comment on and influence the sentences for the crimes committed against them, victim participation must exist at earlier stages in the prosecution of cases. This is particularly true within a determinate sentencing system.

There is no doubt that victims deserve much greater attention and assistance than they have received in the past or are currently receiving. Victim participation in the prosecution of crimes raises complex legal and social issues. If victim participation is to be more than symbolic, additional resources will have to be invested in the criminal justice system and a number of existing procedures changed. Victims' rights cannot be grafted onto the existing system without generally remaining simply cosmetic, nor can they be made potent without creating profound changes throughout the entire system.

The question remains as to whether society is prepared to embark upon a process so potentially complex, expensive, and unpredictable.

Edwin Villmoare served as project director and Virginia V. Neto as project coordinator for Victim Appearances at Sentencing Hearings Under the California Victims' Bill of Rights. *The full report of this study, prepared under a grant to the McGeorge School of Law, University of the Pacific, can be purchased from the Superintendent of Documents, U.S. Government Printing Office (stock number 027–000–02171–01), and is available in free microfiche (NCJ 104915) from the National Institute of Justice/NCJRS (phone 800–851–3420 or, from Maryland, Alaska, and the Metropolitan Washington, D.C., area, 301–251–5500).*

Previous studies

Recent literature on victims has focused on the importance of victim involvement and satisfaction with the criminal justice system. For some victims, appearing at sentencing hearings is the culmination of a series of actions after the crime. Their participation may stem from satisfaction or displeasure with prior criminal justice contacts. Similarly, their appearance at sentencing may leave them with positive or negative feelings about the system.

A study of victim involvement in communities near Toronto (Hagen, 1982) analyzed various activities—contact with police and prosecutor, knowledge of the case outcome—in terms of their relationship to victims' attitudes toward the disposition. The findings indicated that victims who attend court are more likely to reduce their demands for severe sentences, suggesting a link between involvement and acceptance of case disposition.

A survey conducted of New York victims by Lou Harris and Associates (Bucuvalas, 1984) reported that overall victim satisfaction with the police and the district attorney is enhanced if the victim receives victim services. Victim-witness agencies, however, have continued to be concerned about the lack of witness cooperation. In evaluating this "persistent phenomenon," Davis (1983) suggested that victims might be more cooperative if they were given a chance to have their opinions heard in court.

A National Institute of Justice study, *The Criminal Justice Response to Victim Harm* (Forst and Hernon, 1984), found that victims expressed more satisfaction with the system if they had knowledge of the case outcome and if they felt they had influenced the disposition of the case. In general, victims placed more emphasis on being informed than on participating in the process. The same study reported that judges consider the presentence investigation report useful information about victim harm: however, much of the presentence investigation report is based on information obtained from second-hand sources, not from the victim. Thus, even from the judicial perspective, it may not be a true alternative to the right of allocution at sentencing.

An NIJ experiment, Structured Plea Negotiation (Clark et al. 1984) called for victim participation in plea bargaining. Evaluation of the research indicated that most victims tended to be satisfied with their attendance, but believed their presence, statement, or both at the plea negotiation conference had no impact on case disposition. These findings echo the results reported (Heinz and Kerstetter 1980) on a similar experiment in Dade County, Florida, in 1977.

SAMPLE
VICTIM IMPACT STATEMENT

TO ASSIST THE COURT IN ITS EFFORT TO WEIGH ALL FACTORS PRIOR TO IMPOSING SENTENCE, WE REQUEST YOU VOLUNTARY COOPERATION IN COMPLETING THIS FORM. THIS STATEMENT IS INTENDED TO BE SUBMITTED TO THE JUDGE IMPOSING SENTENCE.

Name of Victim: _____
Address: _____
_____
Date of birth: _____

1. Please describe the nature of the incident in which you were involved.

_____
_____
_____
_____
_____

2. As a result of this incident, were you physically injured? _____
If yes, please describe the extent of your injuries. _____
_____
_____
_____

3. Did you require medical treatment? _____
If yes, please describe the treatment received and the length of time treatment was or is required. _____
_____
_____
_____

4. Amount of expenses incurred to date as a result of medical treatment received:
$ _____
Anticipated future expenses:
$ _____

5. Were you psychologically injured as a result of this incident? _
If yes, please describe the psychological impact which the incident has had on you. _____
_____
_____
_____

6. Have you received any counseling or therapy as a result of this incident? _____ If yes, please describe the length of time you have or will be undergoing counseling or therapy, and the type of treatment you have received. _____
_____
_____
_____

7. Amount of expenses incurred to date as a result of counseling or therapy received.

$ _____

8. Has this incident affected your ability to earn a living? _____ If yes, please describe your employment, and specify how and to what extent your ability to earn a living has been affected, days lost from work, etc. _____

9. Have you incurred any other expenses or losses as a result of this incident? ____ If yes, please describe. _____

10. Did insurance cover any of the expenses incurred? _____ If yes, please specify the amount and nature of the reimbursement. _____

11. Has the incident in any way affected your lifestyle or your families lifestyle? _____ If yes, please explain. _____

12. Are there any other continuing effects of this incident which are now being experienced by you or members of your family. _____

13. Please explain what being a victim of crime has meant to you and your family. _____

14. What are your feelings about the criminal justice system? Have your feelings changed as a result of this incident? Explain. _____

15. Do you have any thought or suggestions on the sentence which the Court should consider? Please explain, indicating whether you favor imprisonment. _____

THIS FORM IS SWORN BY THE VICTIM AS TRUE UNDER THE PENALTY OF PERJURY. THE INFORMATION AND THOUGHTS YOU HAVE PROVIDED ARE VERY MUCH APPRECIATED.

Date: _____

_____
Signature

VICTIM IMPACT STATEMENT F-06.REG

NAME: _____

UNITED STATES VS. _____

1. How were you or members of your family affected by this crime?

Please continue your statement on an additional sheet of paper if you wish.

2. Have you or members of your family received counseling or therapy as a result of this crime? Please explain.

A. Damages

1. List property lost, destroyed or damaged and its value. (Wherever possible, attach supporting documents such as receipts, repair bills, etc.)

_____....$_____
_____....$_____

2. List medical expenses (and again attach supporting receipts).

_____....$_____
_____....$_____

If physically injured, will you be experiencing long term medical treatment? _____

3. List lost income or wages.....$_____

4. List miscellaneous expenses (type & amount). Include such items as child care during court appearances, transportation costs during the investigation, etc.

_____....$_____
_____....$_____

5. List expenses for counseling or therapy.....$_____

Are you currently in therapy? _____

Total Loss .....$_____

B. Reimbursement received (please attach receipts).

1. Property insurance.....$_____

2. Medical insurance.....$_____

3. Other (list source and amount).....$_____
_____$_____
_____$_____

Total Reimbursement.....$_____

The information and thoughts you have provided are very much appreciated.

Date: _____ Signature: _____

APPENDIX I

INDIAN CIVIL RIGHTS ACT
INCREASE IN SENTENCING AUTHORITY

United States Department of the Interior

BUREAU OF INDIAN AFFAIRS
WESTERN NEVADA AGENCY
1300 SOUTH CURRY STREET
CARSON CITY, NEVADA 89701-5146

RECEIVED
Date MAY 2 8 1987
Walker River Paiute Tribe

IN REPLY REFER TO:

Tribal Operations
(702) 887-3589

RECEIVED BY WALKER RIVER
TRIBAL COURT
MAY 27 1987

May 28, 1987

Mr. Edmund Reymus, Chairman
Walker River Tribal Council
P. O. Box 220
Schurz, Nevada 89427

Dear Mr. Reymus:

As stated in a previous letter dated May 12, 1987, tribal courts now have the opportunity to impose jail terms of up to one year and/or impose fines up to $5,000 for crimes committed within their jurisdiction. Attached is supportive documentation from the Office of the Solicitor.

Tribes will need to amend their Law & Order Codes to provide the appropriate punishment.

If technical assistance or further information is necessary, please advise.

Sincerely,

Acting Superintendent

Enclosure

COPY

UNITED STATES GOVERNMENT

memorandum

DATE: MAY 12 1987

ACTING

REPLY TO ATTN OF: Phoenix Area Director
Tribal Operations (FTS 261-2314)

SUBJECT: Maximum Criminal Penalties That Can Be Imposed by Tribal Court

TO: All Agency Superintendents and Officers In Charge, Phoenix

Attached is a copy of the April 9, 1987, opinion of the Field Solicitor. That opinion states, inasmuch as Section 4217 of the Anti-Drug Abuse Act specifically amends the general penalty provisions of the Indian Civil Rights Act without limitation to the types of crimes involved, tribal courts now have the authority to impose jail terms of up to one year and/or impose fines up to $5,000 for crimes committed within their jurisdiction.

Please advise the tribes under your administrative jurisdiction of this opinion. You should further advise the tribes, they will need to amend their law and order codes to provide the appropriate punishment.

Walter R. Mills

Attachment

COPY

OPTIONAL FORM NO. 10
(REV. 1-80)
GSA FPMR (41 CFR) 101-11.6
5010-114

GPO : 1984 O - 446-111

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
PHOENIX FIELD OFFICE
L'AIGLON COURTS
505 NORTH 2ND STREET, SUITE 150
PHOENIX, ARIZONA 85004
COMM. (602) 261-4756
FTS: 261-4756

April 9, 1987

Memorandum

To: Area Director, Phoenix Area Office, Bureau of Indian Affairs
Attention: Law Enforcement

From: Field Solicitor, Phoenix

Subject: Maximum Criminal Penalties that can be Imposed by Tribal Courts

Several tribes and tribal attorneys have inquired whether the sentencing and fines section of the Anti-Drug Abuse Act of 1986, P.L. 99-570, Title IV, Subtitle C, Part V, Section 4217, is applicable to non-drug related crimes. While the Anti-Drug Abuse Act deals primarily with drug related crimes, the provision in question is not limited to such crimes.

The section reads: "To enhance the ability of tribal governments to prevent and penalize the traffic of illegal narcotics on Indian reservations, paragraph (7) of section 202 of the Act of April 11, 1969 (25 U.S.C. 1302) is amended by striking out "for a term of six months and a fine of $500, or both" and inserting in lieu thereof "for a term of one year and a fine of $5,000 or both." The referenced statute, 25 U.S.C. 1302, is the Indian Civil Rights Act and paragraph (7) is a general limitation on penalties that can be imposed by tribal courts for all types of crimes.

Inasmuch as section 4217 of the Anti-Drug Abuse Act specifically amends the general penalties provision of the Indian Civil Rights Act, without any limitation as to the types of crimes covered, the expanded authority applies to types of crimes. Thus, tribal courts now have the authority to impose jail terms of up to one year and/or impose fines of up to $5,000 for all crimes committed in their jurisdictions.

Fritz L. Goreham
Field Solicitor

Wayne C. Nordwall

Wayne C. Nordwall
For the Field Solicitor

cc: Rodney Lewis, P.O. Box 416, Sacaton, Arizona 85247

(1) the various programs established by Federal law providing law enforcement or judicial services for Indian tribes, and

(2) tribal and State and local law enforcement and judicial programs and systems,

to determine their applicability and relevance in carrying out the purposes of this subtitle.

(b) DISSEMINATION OF REVIEW.—The results of the review conducted pursuant to subsection (a) shall be made available to every Indian tribe as soon as possible for their consideration and use in the development and modification of a Tribal Action Plan.

SEC. 4216. ILLEGAL NARCOTICS TRAFFIC ON THE PAPAGO RESERVATION; SOURCE ERADICATION

(a)(1) INVESTIGATION AND CONTROL.—The Secretary of the Interior shall provide assistance to the Papago Indian Tribe (Tohono O'odham) of Arizona for the investigation and control of illegal narcotics traffic on the Papago Reservation along the border with Mexico. The Secretary shall ensure that tribal efforts are coordinated with appropriate Federal law enforcement agencies, including the United States Customs Service.

(2) AUTHORIZATIONS.—For the purpose of providing the assistance required by subsection (a), there is authorized to be appropriated $500,000 for each of the fiscal years 1987, 1988, and 1989.

(b)(1) MARIJUANA ERADICATION.—The Secretary of the Interior, in cooperation with appropriate Federal, tribal, and State and local law enforcement agencies, shall establish and implement a program for the eradication of marijuana cultivation within Indian country as defined in section 1152 of title 18, United States Code. The Secretary shall establish a priority for the use of funds appropriated under subsection (b) for those Indian reservations where the scope of the problem is most critical, and such funds shall be available for contracting by Indian tribes pursuant to the Indian Self-Determination Act.

(2) AUTHORIZATIONS.—To carry out subsection (a), there is authorized to be appropriated such sums as may be necessary for each of the fiscal years 1987, 1988, and 1989.

PART V—BUREAU OF INDIAN AFFAIRS LAW ENFORCEMENT

SEC. 4217. TRIBAL COURTS, SENTENCING AND FINES.

To enhance the ability of tribal governments to prevent and penalize the traffic of illegal narcotics on Indian reservations, paragraph (7) of section 202 of the Act of April 11, 1969 (25 U.S.C. 1302) is amended by striking out "for a term of six months and a fine of $500, or both" and inserting in lieu thereof "for a term of one year and a fine of $5,000, or both".

SEC. 4218. BUREAU OF INDIAN AFFAIRS LAW ENFORCEMENT AND JUDICIAL TRAINING.

(a) IN GENERAL.—The Secretary of the Interior shall ensure, through the establishment of a new training program or through the supplement of existing training programs, that all Bureau of Indian Affairs and tribal law enforcement and judicial personnel shall have available training in the investigation and prosecution of offenses relating to illegal narcotics and in alcohol and substance

United States Department of the Interior
BUREAU OF INDIAN AFFAIRS
PHOENIX AREA OFFICE
P.O. Box 7007
Phoenix, Arizona 85011

IN REPLY REFER TO:
Tribal Operations
(602) 241-2314
FTS 261-2314

MAY 14 1987

Through: Superintendent, Western Nevada Agency

Mr. Edmund D. Reymus

Chairman, Walker River Paiute Tribal Council

Dear Mr. Reymus:

On April 20, 1987, the Walker River Paiute Tribal Council enacted Ordinance No. WR-21-87 which was approved by the Western Nevada Agency Superintendent on April 30, 1987.

The purpose of Ordinance No. WR-21-87 is to amend Section 5-90-010 Sentences for Classes of Offenses under Title 5 - Code of Criminal Offenses of the Walker River Paiute Tribe's Law and Order Code, to conform with the amendment to the Indian Civil Rights Act contained in P.L. 99-750, also known as "Omnibus Anti Drug Abuse Act of 1986" which expands the authority of the Tribal Court to impose jail terms up to one year and/or impose fines up to $5,000.

Section 5-90-010 (a) (1) which currently reads:

> (1) If the offense is a Class A Offense, to a term of imprisonment not to exceed six (6) months, to a fine not to exceed $500.00, or to both such imprisonment and fine.

has been revised to read:

> (1) If the offense is a Class A Offense, to a term of imprisonment not to exceed one (1) year, to a fine not to exceed $5,000.00, or to both such imprisonment and fine.

In our technical review, we find no reason to rescind the Superintendent's April 30, 1987, approval. Therefore, Ordinance No. WR 21-87 remains in full force and effect as of April 30, 1987.

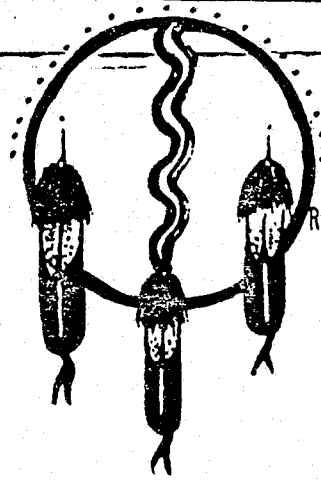
Sincerely,

Walter R Mills

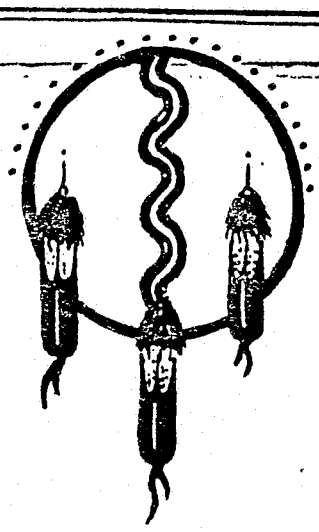
ACTING Area Director

COPY

Enclosure



Walker River Paiute Tribe
Walker River Indian Reservation
P.O. Box 220
Schurz, Nevada 89427
(702) 773-2306



ORDINANCE OF THE GOVERNING BODY OF THE WALKER RIVER PAIUTE TRIBE

ORDINANCE NO. WR 21-87

BE IT ENACTED BY THE TRIBAL COUNCIL OF THE WALKER RIVER PAIUTE TRIBE THAT:

WHEREAS, Article VI, Section 1, Part Q, of the Constitution and By-Laws of the Walker River Paiute Tribe, gives the authority to the Tribal Council to promulgate and enforce ordinances which among others things governs the conduct of members of the Walker River Reservation in Nevada, and

WHEREAS, the Walker River Paiute Tribe has a Law and Order Code, Code of Criminal Offenses governing criminal offenses within the exterior boundaries of the Walker River Indian Reservation, and

WHEREAS, the Walker River Tribal Council amends the Code of Criminal Offenses, Title 5-90-010, Sentences for Classes of Offenses, a.1, to conform to the U.S. Congress' amendment to the Indian Civil Rights Act (25 U.S.C., Subsection 1302) which expands the authority of the Tribal Court to impose jail sentences of up to one year for conviction of offenses; the previous maximum allowed was six months. In addition, the amount of fine that can be assessed by a Tribal Court has been increased from $500.00 to $5,000.00.

NOW THEREFORE BE IT RESOLVED that the Walker River Paiute Tribal Council does hereby amend the current Code Of Criminal Offenses, Title 5-90-010, Sentneces for Classes of Offenses, a.1, to read; (1) If the offense is a Class A Offense, to a term of imprisonment not to exceed one (1) year, to a fine not to exceed $5,000.00, or both such imprisonment and fine.

BE IT FURTHER RESOLVED that this amendment shall become effective upon the date of approval by the Secretary of the Interior.

CERTIFICATION

It is hereby certified that the foregoing ordinance of the Walker River Paiute Tribal Council of the Walker River Paiute Tribe, composed of seven members, of whom 6 constituting a quorum were present at a meeting held on the 20th day of April, 1987, and that the foregoing Ordinance NO. WR 21-87 was adopted by the affirmative vote of 6 FOR and 0 AGAINST, pursuant to the authority contained in the Constitution and By-Laws of the Walker River Paiute Tribe of Nevada, approved on March 26, 1937.

Edmund D. Reymus
Edmund D. Reymus, Tribal Chairman
Walker River Tribal Council

Approval Recommended: Robert H. Hunter
Superintendent

Date: APRIL 30, 1987

INDIAN CIVIL RIGHTS ACT OF 1968 -- 25 USC §1301 - §1303

§1301. Definitions For purposes of this subchapter, the term:

1. "Indian tribe" means any tribe, band, or other group of Indians subject to the jurisdiction of the United States and recognized as possessing powers of self-government.

2. "powers of self-government" means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses; and **means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians;**

3. "Indian court" means any Indian tribal court or court of Indian offense, and;

4. **"Indian" means any person who would be subject to the jurisdiction of the United States as an Indian under section 1153, title 18, United States Code, if that person were to commit an offense listed in that section in Indian country to which that section applies."**

§1302. Constitutional Rights No Indian tribe in exercising powers of self-government shall:

1. make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;

2. violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;

3. subject any person for the same offense to be twice put in jeopardy;

4. compel any person in any criminal case to be a witness against himself;

5. take any property for a public use without just compensation;

6. deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;

7. require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of one year or a fine of $5,000 or both;

8. deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

9. pass any bill of attainder or ex post facto law; or

10. deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

§1303. Habeas corpus

The privilege of the writ of *habeas corpus* shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.

APPENDIX J

INDIAN CHILD ABUSE AND FAMILY VIOLENCE PREVENTION ACT

United States Department of the Interior

BUREAU OF INDIAN AFFAIRS
WASHINGTON, D.C. 20240

IN REPLY REFER TO:

DEC 5 '990

Memorandum

To: DAS/IA - Operations
DAS/IA - Trust & Economic Development
DAS/IA - Tribal Services
DAS/IA - Education Programs
All Area Directors

From: Director, Congressional & Legislative Affairs Staff

Subject: New Public Law

On November 28, 1990, the President approved enrolled bill H.R. 3703, "To authorize the Rumsey Indian Rancheria to convey a certain parcel of land." It is now Public Law 101-630, (104 Stat. 4531).

Titles I and II

Public Law 101-630 contains five titles. Title I, entitled the Rumsey Indian Rancheria, authorizes the Rumsey Indian Rancheria (the Rancheria) to convey certain property, known as lot 23, Sierra Meadows subdivision, Unit 5A, Washoe County, Nevada, to any bona fide purchaser for value. Proceeds from the sale may be used only for the economic development and social welfare of the Rancheria.

Title II amends the Act of August 9, 1955, 25 U.S.C. 415, to provide leasing authority to the Mille Lacs Indian Reservation to allow the Reservation to enter into a 99-year lease with the Minnesota Historical Society to allow construction of a proposed museum to house Indian artifacts and promote Indian culture.

Title III

Title III of Public Law 101-630, entitled Indian Forest and Woodlands, sets forth numerous provisions regarding the management of Indian forest lands. Section 301 requires the Secretary of the Interior (the Secretary) to undertake forest land management activities on Indian forest land according to seven management objectives. Section 306 requires the Secretary to withhold a reasonable deduction from the gross proceeds of sales of forest products harvested from Indian forest land. The deduction (a forest management deduction) is to be used to cover the cost of managing and protecting such forest land, and is not to exceed the lesser of (1) 10 percent of gross proceeds or (2) the percentage of gross proceeds collected by the Secretary as forest management deductions on the date of enactment of this Act on sales of Indian forest products. The forest management deduction is to be expended according to a plan approved by the Secretary and the appropriate Indian tribe for forest land management activities on the reservation from which the deduction is collected.

Section 307 directs the Secretary to issue regulations within 18 months of enactment establishing civil penalties for Indian forest trespass, designating responsibility within the Department for detection and investigation of Indian forest trespass and setting forth procedures for assessment and collection of civil penalties. Civil penalty proceeds are to be treated as proceeds from the sale of forest products from the Indian forest lands where the trespass occurred, and Indian tribes are given concurrent jurisdiction to enforce this section and the regulations issued thereunder.

The Secretary is directed by section 308 to issue regulations, within one year from the date of enactment, providing for payment of receipts from Indian forest product sales. If requested by a tribe, the Secretary is to direct the purchaser of Indian forest products to make direct payments of the gross sales proceeds, less the forest management deduction, into a bank depository account designated by the requesting tribe.

Section 309 requires the Secretary to comply with the tribal laws pertaining to Indian forest lands. Under section 310, at the request of a tribe, the Secretary is authorized to establish a special Indian forest land assistance account within the tribe's trust fund account to fund the tribe's forest land management activities. Section 311 requires the Secretary to establish within the Bureau of Indian Affairs (Bureau) a program to provide financial support to forestry programs of Indian tribes. Section 312 provides that the Secretary, within one year from the date of enactment, is to enter into a contract with a non-Federal entity knowledgeable in forest management practices to conduct an independent assessment of Indian forest lands and practices. The Secretary of Agriculture is authorized to provide technical assistance to complete these assessments.

Section 314 establishes programs for Indian and Alaska Native forestry education assistance. It provides for a forestry intern program, a cooperative education program and a scholarship program. Persons benefiting from these programs are requires to enter into obligated service agreements for varying numbers of years. The programs are to be continued until there are adequate numbers of qualified professional Indian foresters to manage the Bureau and tribal forestry programs. Section 315 requires the Secretary to establish a program to attract Indian and Alaska Native professional foresters and forester technicians for employment in either Bureau or tribal forestry programs. These persons may be employed in exchange for the assumption of outstanding student loans.

Section 318 authorizes the appropriation of such sums as are necessary to carry out the purposes of this Title.

Section 321 provides that nothing in this Title shall be construed to diminish or expand the trust responsibility of the United States toward Indian forest lands.

Title IV

Title IV of Public Law 101-630, Indian Child Protection, deals with incidents of child abuse on Indian reservations. Section 404(a)(1) amends 18 U.S.C. 53

by adding a new section requiring a specified list of persons, such as physicians, surgeons, teachers, child day care workers, mental health professionals, etc., if they have knowledge or a reasonable suspicion that a child is being abused in Indian country or that actions are about to be taken that will result in abuse, to report such abuse to abusive actions to the local child protective services agency or local law enforcement agency. If a person fails to report the abuse or abusive actions, such person will be fined not more than $5,000 or imprisoned for six months or both. Any person who supervises or has authority over persons listed in section 404(a) and prevents such persons from reporting abuse or abusive actions will be fined not more that $5,000 or imprisoned for not more than six months or both. Persons making good faith reports of abuse or abusive actions under this section will be immune from civil or criminal liability.

Section 404(a)(2) further amends 18 U.S.C. 53 by adding a new section requiring a local law enforcement agency or local child protective services agency, upon receiving an initial report of abuse or abusive actions, to immediately notify the other agency and to prepare a written report within 36 hours regarding the child and the abuse or abusive actions. If the report involves an Indian child or the alleged abuser is an Indian, an preliminary investigations indicate a criminal violation has occurred, the local law enforcement agency or local child protective services agency receiving a report alleging abuse or abusive actions shall immediately initiate an investigation of the allegation and take immediate steps to secure the safety and well-being of the children involved.

Section 405 directs the Secretary, in consultation with the Secretary of Health and Human Services (HHS) and the Attorney General of the United States, to prepare a written study on the feasibility and need for establishment of a Central Register for reports or information on the abuse of children in Indian country. The study, along with recommendations and draft legislation to implement the recommendations, is to be submitted to the Congress within 180 days after enactment of this Act.

Section 408 directs the Secretary and the Secretary of HHS to compile a list of all positions within their respective departments that involve regular contact with Indian children. They are to investigate the character of each individual employed in such positions, and of those being considered for employment, and prescribe regulations establishing minimum standards of character for such individuals. Each Indian tribe or tribal organization receiving funds under the Indian Self-Determination and Education Assistance Act or the Tribally Controlled Schools Act of 1988 is to do the same.

The Secretary of HHS is to establish an Indian Child Abuse Treatment Grant Program under section 409 that provides grants to any Indian tribe or inter-tribal consortium for the establishment of treatment programs on Indian reservations for Indians who have been victims of child sexual abuse. The maximum amount of any grant awarded under this section is not to exceed $500,000. Appropriations of $10,000,000 are authorized for each of fiscal years 1992 through 1995 to carry out this section.

Section 410 requires the Secretary to establish an Indian Child Resource and Family Services Center within each area office of the Bureau. The Secretary and the Secretary of HHS are to enter into a Memorandum of Agreement providing

for the staffing of these Centers. Each Center is to be staffed by a multi-disciplinary team with experience and training in child abuse and neglect. Appropriations of $3,000,000 are authorized for each of fiscal years 1992 through 1995 to carry out this section.

Under section 411, the Secretary is to establish an Indian Child Protection and Family Violence Prevention Program within the Bureau to provide financial assistance to any Indian tribe, tribal organization, or inter-tribal consortium for development of an Indian Child Protection and Family Violence Prevention program. The Secretary is to promulgate regulations setting forth a formula for base support funding for these programs. Appropriations of $30,000,000 for each of fiscal years 1992 through 1995 are authorized to carry out this section.

Title V

Title V of Public Law 101-630 is cited as the "Indian Health Care Amendments of 1990. Section 503 amends Title II of the Indian Health Care Improvement Act (25 U.S.C. 1601 et seq.) by adding a new section 209 which, in part, directs the Secretary and the Secretary of HHS to, within 180 days of enactment of this Act, develop and enter into a Memorandum of Agreement (MOA). This new section 209 outlines what the MOA must include.

The new section 209(d) also authorizes the governing body of any Indian tribe to adopt a resolution for the establishment of a community mental health plan providing for the identification and coordination of available resources and programs to identify, prevent, or treat mental illness or dysfunctional and self-destructive behavior, including child abuse and family violence, among its members. At the request of a tribe, the Bureau and the Indian Health Service shall provide technical assistance to the tribe in the development and implementation of such plan. There is authorized to be appropriated $500,000 for the fiscal year 1991 and $1,000,000 for fiscal year 1992 to carry out this subsection.

For your ready reference, a copy of the enrolled bill as approved by the President is attached.

Marge Wilkins

Attachment

CC: ALO
SOL/IA
Codes 440; 430; 450; 220; 230; 600; 700

MWilkins:gb:12/4/90
MWChron
Holdup

H.R. 3703

Pub. L. 101-630
104 Stat. 4531
Act of 11/28/90

One Hundred First Congress of the United States of America

AT THE SECOND SESSION

Begun and held at the City of Washington on Tuesday, the twenty-third day of January, one thousand nine hundred and ninety

An Act

To authorize the Rumsey Indian Rancheria to convey a certain parcel of land.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I—RUMSEY INDIAN RANCHERIA

SECTION 101. FINDINGS.

The Congress finds that—

(1) the Rumsey Indian Rancheria, a part of the Wintun Tribe of Indians, is a federally recognized Indian tribe, located in Rumsey, California, where eighty-three and thirty-nine hundredths acres of land are held in trust for the Rancheria by the United States;

(2) in February, 1987, fee simple title to property located at lot 23, Sierra Meadows subdivision, unit 5A, Washoe County, Nevada, commonly known as 978 O'Callahan Street, Sparks, Nevada, was transferred to the Rancheria which it presently holds under the name Wintun Indian Tribe;

(3) such property is located approximately one hundred twenty-five miles from the Rancheria trust land base in California, and ownership of such land, which is in a residential area, provides no significant benefit for the tribal members;

(4) the most beneficial use of such land is to sell it at its present market value and to utilize the proceeds for the improvement of the tribe's economic and social welfare; and

(5) section 2116 of the Revised Statutes (25 U.S.C. 177) prohibits the conveyance of any lands owned by Indian tribes without the consent of Congress.

SEC. 102. CONVEYANCE OF LAND.

(a) AUTHORITY.—Notwithstanding section 2116 of the Revised Statutes (25 U.S.C. 177), Rumsey Indian Rancheria is authorized to convey that land known as lot 23, Sierra Meadows subdivision, unit 5A, Washoe County, Nevada, commonly known as 978 O'Callahan Street, Sparks, Nevada, to any bona fide purchaser for value.

(b) PROCEEDS.—Proceeds from the conveyance of land pursuant to subsection (a) may be used only for the economic development and social welfare of the Rumsey Indian Rancheria.

(c) SAVINGS CLAUSE.—Nothing in this title shall be construed to limit the authority of the Secretary to enter into cooperative agreements otherwise authorized by law.

SEC. 317. OBLIGATED SERVICE; BREACH OF CONTRACT.

(a) OBLIGATED SERVICE.—Where an individual enters into an agreement for obligated service in return for financial assistance under any provision of this title, the Secretary shall adopt such regulations as are necessary to provide for the offer of employment to the recipient of such assistance as required by such provision. Where an offer of employment is not reasonably made, the regulations shall provide that such service shall no longer be required.

(b) BREACH OF CONTRACT; REPAYMENT.—Where an individual fails to accept a reasonable offer of employment in fulfillment of such obligated service or unreasonably terminates or fails to perform the duties of such employment, the Secretary shall require a repayment of the financial assistance provided, prorated for the amount of time of obligated service performed, together with interest on such amount which would be payable if at the time the amounts were paid they were loans bearing interest at the maximum legal prevailing rate, as determined by the Treasurer of the United States.

SEC. 318. AUTHORIZATIONS.

There are authorized to be appropriated such sums as may be necessary to carry out the purposes of this title.

SEC. 319. REGULATIONS.

Except as otherwise provided by this title, the Secretary is directed to promulgate final regulations for the implementation of the title within eighteen months from the date of its enactment. All regulations promulgated pursuant to this title shall be developed by the Secretary with the participation of the affected Indian tribes.

SEC. 320. SEVERABILITY.

If any provision of this title, or the application of any provision of this title to any person or circumstance, is held invalid, the application of such provision or circumstance and the remainder of this title shall not be affected thereby.

SEC. 321. TRUST RESPONSIBILITY.

Nothing in this title shall be construed to diminish or expand the trust responsibility of the United States toward Indian forest lands, or any legal obligation or remedy resulting therefrom.

TITLE IV—INDIAN CHILD PROTECTION

SEC. 401. SHORT TITLE.

This title may be cited as the "Indian Child Protection and Family Violence Prevention Act".

SEC. 402. FINDINGS AND PURPOSE.

(a) FINDINGS.—The Congress, after careful review of the problem of child abuse on Indian reservations and the historical and special relationship of the Federal Government with Indian people,

(1) finds that—

(A) incidents of abuse of children on Indian reservations are grossly underreported;

(B) such underreporting is often a result of the lack of a mandatory Federal reporting law;

(C) multiple incidents of sexual abuse of children on Indian reservations have been perpetrated by persons employed or funded by the Federal Government;

(D) Federal Government investigations of the background of Federal employees who care for, or teach, Indian children are often deficient;

(E) funds spent by the United States on Indian reservations or otherwise spent for the benefit of Indians who are victims of child abuse or family violence are inadequate to meet the growing needs for mental health treatment and counseling for victims of child abuse or family violence and their families; and

(F) there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and the United States has a direct interest, as trustee, in protecting Indian children who are members of, or are eligible for membership in, an Indian tribe; and

(2) declares that two major goals of the United States are to—

(A) identify the scope of incidents of abuse of children and family violence in Indian country and to reduce such incidents; and

(B) provide funds for mental health treatment for Indian victims of child abuse and family violence on Indian reservations.

(b) PURPOSE.—The purposes of this title are to—

(1) require that reports of abused Indian children are made to the appropriate authorities in an effort to prevent further abuse;

(2) establish a reliable data base for statistical purposes and to authorize a study to determine the need for a central registry for reported incidents of abuse;

(3) authorize such other actions as are necessary to ensure effective child protection in Indian country;

(4) establish the Indian Child Abuse Prevention and Treatment Grant Program to provide funds for the establishment on Indian reservations of treatment programs for victims of child sexual abuse;

(5) provide for technical assistance and training related to the investigation and treatment of cases of child abuse and neglect;

(6) establish Indian Child Resource and Family Services Centers in each Bureau of Indian Affairs Area Office which will consist of multi-disciplinary teams of personnel with experience and training in the prevention, identification, investigation, and treatment of child abuse and neglect;

(7) provide for the treatment and prevention of incidents of family violence;

(8) establish tribally operated programs to protect Indian children and reduce the incidents of family violence in Indian country; and

(9) authorize other actions necessary to ensure effective child protection on Indian reservations.

SEC. 402. DEFINITIONS.

For the purposes of this title, the term—

(1) "Bureau" means the Bureau of Indian Affairs of the Department of the Interior;

(2) "child" means an individual who—

(A) is not married, and

(B) has not attained 18 years of age;

(3) "child abuse" includes but is not limited to—

(A) any case in which—

(i) a child is dead or exhibits evidence of skin bruising, bleeding, malnutrition, failure to thrive, burns, fracture of any bone, subdural hematoma, soft tissue swelling, and

(ii) such condition is not justifiably explained or may not be the product of an accidental occurrence; and

(B) any case in which a child is subjected to sexual assault, sexual molestation, sexual exploitation, sexual contact, or prostitution;

(4) "child neglect" includes but is not limited to, negligent treatment or maltreatment of a child by a person, including a person responsible for the child's welfare, under circumstances which indicate that the child's health or welfare is harmed or threatened thereby;

(5) "family violence" means any act, or threatened act, of violence, including any forceful detention of an individual, which—

(A) results, or threatens to result, in physical or mental injury, and

(B) is committed by an individual against another individual—

(i) to whom such person is, or was, related by blood or marriage or otherwise legally related, or

(ii) with whom such person is, or was, residing;

(6) "Indian" means any individual who is a member of an Indian tribe;

(7) "Indian child" has the meaning given to such term by section 4(4) of the Indian Child Welfare Act of 1978 (25 U.S.C. 1903(4));

(8) "Indian country" has the meaning given to such term by section 1151 of title 18, United States Code;

(9) "Indian reservation" means any Indian reservation, public domain Indian allotment, former Indian reservation in Oklahoma, or lands held by incorporated Native groups, regional corporations, or village corporations under the provisions of the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.);

(10) "Indian tribe" and "tribal organization" have the respective meanings given to each of such terms under section 4 of the Indian Self Determination and Education Assistance Act (25 U.S.C. 450b);

(11) "Inter-tribal consortium" means a partnership between—

(A) an Indian tribe or tribal organization of an Indian tribe, and

(B) one or more Indian tribes or tribal organizations of one or more other Indian tribes;

(12) "local child protective services agency" means that agency of the Federal Government, of a State, or of an Indian tribe that has the primary responsibility for child protection on any Indian reservation or within any community in Indian country;

(13) "local law enforcement agency" means that Federal, tribal, or State law enforcement agency that has the primary responsibility for the investigation of an instance of alleged child abuse within the portion of Indian country involved;

(14) "persons responsible for a child's welfare" means any person who has legal or other recognized duty for the care and safety of a child, including—

(A) any employee or volunteer of a children's residential facility, and

(B) any person providing out-of-home care, education, or services to children;

(15) "related assistance"—

(A) includes counseling and self-help services to abusers, victims, and dependents in family violence situations (which shall include counseling of all family members to the extent feasible) and referrals for appropriate health-care services (including alcohol and drug abuse treatment), and

(B) may include food, clothing, child care, transportation, and emergency services for victims of family violence and their dependents;

(16) "Secretary" means the Secretary of the Interior;

(17) "shelter" means the provision of temporary refuge and related assistance in compliance with applicable Federal and tribal laws and regulations governing the provision, on a regular basis, of shelter, safe homes, meals, and related assistance to victims of family violence or their dependents; and

(18) "Service" means the Indian Health Service of the Department of Health and Human Services.

SEC. 404. REPORTING PROCEDURES.

(a) REPORT TO LOCAL LAW ENFORCEMENT AGENCY.—(1) Chapter 53 of title 18, United States Code, is amended by adding at the end thereof the following new section:

"§ 1169. Reporting of child abuse

"(a) Any person who—

"(1) is a—

"(A) physician, surgeon, dentist, podiatrist, chiropractor, nurse, dental hygienist, optometrist, medical examiner, emergency medical technician, paramedic, or health care provider,

"(B) teacher, school counselor, instructional aide, teacher's aide, teacher's assistant, or bus driver employed by any tribal, Federal, public or private school,

"(C) administrative officer, supervisor of child welfare and attendance, or truancy officer of any tribal, Federal, public or private school,

"(D) child day care worker, headstart teacher, public assistance worker, worker in a group home or residential or day care facility, or social worker,

"(E) psychiatrist, psychologist, or psychological assistant,

"(F) licensed or unlicensed marriage, family, or child counselor,

"(G) person employed in the mental health profession, or

"(H) law enforcement officer, probation officer, worker in a juvenile rehabilitation or detention facility, or person

employed in a public agency who is responsible for enforcing statutes and judicial orders;

"(2) knows, or has reasonable suspicion, that—

"(A) a child was abused in Indian country, or

"(B) actions are being taken, or are going to be taken, that would reasonably be expected to result in abuse of a child in Indian country; and

"(3) fails to immediately report such abuse or actions described in paragraph (2) to the local child protective services agency or local law enforcement agency,

shall be fined not more than $5,000 or imprisoned for not more than 6 months or both.

"(b) Any person who—

"(1) supervises, or has authority over, a person described in subsection (a)(1), and

"(2) inhibits or prevents that person from making the report described in subsection (a),

shall be fined not more than $5,000 or imprisoned for not more than 6 months or both.

"(c) For purposes of this section, the term—

"(1) 'abuse' includes—

"(A) any case in which—

"(i) a child is dead or exhibits evidence of skin bruising, bleeding, malnutrition, failure to thrive, burns, fracture of any bone, subdural hematoma, soft tissue swelling, and

"(ii) such condition is not justifiably explained or may not be the product of an accidental occurrence; and

"(B) any case in which a child is subjected to sexual assault, sexual molestation, sexual exploitation, sexual contact, or prostitution;

"(2) 'child' means an individual who—

"(A) is not married, and

"(B) has not attained 18 years of age;

"(3) 'local child protective services agency' means that agency of the Federal Government, of a State, or of an Indian tribe that has the primary responsibility for child protection on any Indian reservation or within any community in Indian country; and

"(4) 'local law enforcement agency' means that Federal, tribal, or State law enforcement agency that has the primary responsibility for the investigation of an instance of alleged child abuse within the portion of Indian country involved.

"(d) Any person making a report described in subsection (a) which is based upon their reasonable belief and which is made in good faith shall be immune from civil or criminal liability for making that report.".

(2) The table of contents for chapter 53 of title 18, United States Code, is amended by adding at the end thereof the following new item:

"1169. Reporting of child abuse.".

(b) NOTIFICATION OF CHILD ABUSE REPORTS.—(1) When a local law enforcement agency or local child protective services agency receives an initial report from any person of—

(A) the abuse of a child in Indian country, or

(B) actions which would reasonably be expected to result in abuse of a child in Indian country, the receiving agency shall immediately notify appropriate officials of the other agency of such report and shall also submit, when prepared, a copy of the written report required under subsection (c) to such agency.

(2) Where a report of abuse involves an Indian child or where the alleged abuser is an Indian and where a preliminary inquiry indicates a criminal violation has occurred, the local law enforcement agency, if other than the Federal Bureau of Investigation, shall immediately report such occurrence to the Federal Bureau of Investigation.

(c) WRITTEN REPORT OF CHILD ABUSE.—(1) Within 36 hours after receiving an initial report described in subsection (b), the receiving agency shall prepare a written report which shall include, if available—

(A) the name, address, age, and sex of the child that is the subject of the report;

(B) the grade and the school in which the child is currently enrolled;

(C) the name and address of the child's parents or other person responsible for the child's care;

(D) the name and address of the alleged offender;

(E) the name and address of the person who made the report to the agency;

(F) a brief narrative as to the nature and extent of the child's injuries, including any previously known or suspected abuse of the child or the child's siblings and the suspected date of the abuse; and

(G) any other information the agency or the person who made the report to the agency believes to be important to the investigation and disposition of the alleged abuse.

(2)(A) Any local law enforcement agency or local child protective services agency that receives a report alleging abuse described in section 503(3) shall immediately initiate an investigation of such allegation and shall take immediate, appropriate steps to secure the safety and well-being of the child or children involved.

(B) Upon completion of the investigation of any report of alleged abuse that is made to a local law enforcement agency or local child protective services agency, such agency shall prepare a final written report on such allegation.

(d) CONFIDENTIALITY OF INFORMANT.—The identity of any person making a report described in subsection (b)(1) shall not be disclosed, without the consent of the individual, to any person other than a court of competent jurisdiction or an employee of an Indian tribe, a State or the Federal Government who needs to know the information in the performance of such employee's duties.

SEC. 106. CENTRAL REGISTRY.

(a) PREPARATION OF STUDY.—The Secretary, in consultation with the Secretary of Health and Human Services and the Attorney General of the United States, is hereby authorized and directed to prepare a written study on the feasibility of, and need for, the establishment of a Central Register for reports or information on the abuse of children in Indian country.

(b) CONTENT OF STUDY.—The study conducted pursuant to subsection (a) shall include, but shall not be limited to—

(1) the need for, and purpose of, a Central Register;

(2) the examination of due process implication of the maintenance of such a register;

(3) the extension of access to information contained in the register;

(4) the need and process for expunging information from the register;

(5) the types, and duration of maintenance, of information in the register; and

(6) the classes of persons who should be covered by such register.

(c) The Secretary shall complete the study conducted pursuant to this section and shall submit such study, together with recommendations and draft legislation to implement such recommendations, to the Congress within 180 days after the date of enactment of this title.

SEC. 406. CONFIDENTIALITY.

Pursuant to section 552a of title 5, United States Code, the Family Educational Rights and Privacy Act of 1974 (20 U.S.C. 1232g), or any other provision of law, agencies of any Indian tribe, of any State, or of the Federal Government that investigate and treat incidents of abuse of children may provide information and records to those agencies of any Indian tribe, any State, or the Federal Government that need to know the information in performance of their duties. For purposes of this section, Indian tribal governments shall be treated the same as other Federal Government entities.

SEC. 407. WAIVER OF PARENTAL CONSENT.

(a) EXAMINATIONS AND INTERVIEWS.—Photographs, x-rays, medical examinations, psychological examinations, and interviews of an Indian child alleged to have been subject to abuse in Indian country shall be allowed without parental consent if local child protective services or local law enforcement officials have reason to believe the child has been subject to abuse.

(b) INTERVIEWS BY LAW ENFORCEMENT AND CHILD PROTECTIVE SERVICES OFFICIALS.—In any case in which officials of the local law enforcement agency or local child protective services agency have reason to believe that an Indian child has been subject to abuse in Indian country, the officials of those agencies shall be allowed to interview the child without first obtaining the consent of the parent, guardian, or legal custodian.

(c) PROTECTION OF CHILD.—Examinations and interviews of a child who may have been the subject of abuse shall be conducted under such circumstances and with such safeguards as are designed to minimize additional trauma to the child and, where time permits, shall be conducted with the advise, or under the guidance, of a local multidisciplinary team established pursuant to section 411 or, in the absence of a local team, a multidisciplinary team established pursuant to section 410.

(d) COURT ORDERS.—Upon a finding of reasonable suspicion that an Indian child has been the subject of abuse in Indian country, a Federal magistrate or United States District Court may issue an order enforcing any provision of this section.

SEC. 408. CHARACTER INVESTIGATIONS.

(a) BY SECRETARY OF THE INTERIOR AND THE SECRETARY OF HEALTH AND HUMAN SERVICES.—The Secretary and the Secretary of Health and Human Services shall—

(1) compile a list of all authorized positions within their respective departments the duties and responsibilities of which involve regular contact with, or control over, Indian children,

(2) conduct an investigation of the character of each individual who is employed, or is being considered for employment, by the respective Secretary in a position listed pursuant to paragraph (1), and

(3) prescribe by regulations minimum standards of character that each of such individuals must meet to be appointed to such positions.

(b) CRIMINAL RECORDS.—The minimum standards of character that are to be prescribed under this section shall ensure that none of the individuals appointed to positions described in subsection (a) have been found guilty of, or entered a plea of nolo contendere or guilty to, any offense under Federal, State, or tribal law involving crimes of violence; sexual assault, molestation, exploitation, contact or prostitution; or crimes against persons.

(c) INVESTIGATIONS BY INDIAN TRIBES AND TRIBAL ORGANIZATIONS.—Each Indian tribe or tribal organization that receives funds under the Indian Self-Determination and Education Assistance Act or the Tribally Controlled Schools Act of 1988 shall—

(1) conduct an investigation of the character of each individual who is employed, or is being considered for employment, by such tribe or tribal organization in a position that involves regular contact with, or control over, Indian children, and

(2) employ individuals in those positions only if the individuals meet standards of character, no less stringent than those prescribed under subsection (a), as the Indian tribe or tribal organization shall establish.

SEC. 409. INDIAN CHILD ABUSE TREATMENT GRANT PROGRAM.

(a) ESTABLISHMENT OF GRANT PROGRAM.—The Secretary of Health and Human Services, acting through the Service and in cooperation with the Bureau, shall establish an Indian Child Abuse Treatment Grant Program that provides grants to any Indian tribe or intertribal consortium for the establishment on Indian reservations of treatment programs for Indians who have been victims of child sexual abuse.

(b) GRANT APPLICATIONS.—(1) Any Indian tribe or intertribal consortium may submit to the Secretary of Health and Human Services an application for a grant under subsection (a).

(2) Any application submitted under paragraph (1)—

(A) shall be in such form as the Secretary of Health and Human Services may prescribe;

(B) shall be submitted to such Secretary on or before the date designated by such Secretary; and

(C) shall specify—

(i) the nature of the program proposed by the applicant,

(ii) the data and information on which the program is based,

(iii) the extent to which the program plans to use or incorporate existing services available on the reservation, and

(iv) the specific treatment concepts to be used under the program.

(c) MAXIMUM GRANT AMOUNT.—The maximum amount of any grant awarded under subsection (a) shall not exceed $500,000.

(d) GRANT ADMINISTRATION AND FINAL REPORT.—Each recipient of a grant awarded under subsection (a) shall—

(1) furnish the Secretary of Health and Human Services with such information as such Secretary may require to—

(A) evaluate the program for which the grant is made, and

(B) ensure that the grant funds are expended for the purposes for which the grant was made, and

(2) submit to such Secretary at the close of the term of the grant a final report which shall include such information as the Secretary may require.

(e) there is hereby authorized to be appropriated to carry out the provisions of this section $10,000,000 for each of the fiscal years 1992, 1993, 1994, and 1995.

SEC. 418. INDIAN CHILD RESOURCE AND FAMILY SERVICES CENTERS.

(a) ESTABLISHMENT.—The Secretary shall establish within each area office of the Bureau an Indian Child Resource and Family Services Center.

(b) MEMORANDUM OF AGREEMENT.—The Secretary and the Secretary of Health and Human Services shall enter into a Memorandum of Agreement which provides for the staffing of the Centers established under this section.

(c) CENTER STAFFING.—Each Center established under subsection (a) shall be staffed by a multidisciplinary team of personnel with experience and training in prevention, identification, investigation, and treatment of incidents of family violence, child abuse, and child neglect.

(d) CENTER RESPONSIBILITIES AND FUNCTIONS.—Each Center established under subsection (a) shall—

(1) provide advice, technical assistance, and consultation to Indian tribes, tribal organizations, and inter-tribal consortia upon request;

(2) provide training to appropriate personnel of Indian tribes, tribal organizations, the Bureau and the Service on the identification and investigation of cases of family violence, child abuse, and child neglect and, to the extent practicable, coordinate with institutions of higher education, including tribally controlled community colleges, to offer college-level credit to interested trainees;

(3) develop training materials on the prevention, identification, investigation, and treatment of incidents of family violence, child abuse, and child neglect for distribution to Indian tribes and to tribal organizations;

(4) develop recommendations to assist Federal and tribal personnel to respond to cases of family violence, child abuse, and child neglect; and

(5) develop policies and procedures for each agency office of the Bureau and service unit of the Service within the area which, to the extent feasible, comply with tribal laws pertaining to cases of family violence, child abuse, and child neglect, including any criminal laws, and which provide for maximum cooperation with the enforcement of such laws.

(e) MULTIDISCIPLINARY TEAM PERSONNEL.—Each multidisciplinary team established under this section shall include, but is not limited to, personnel with a background in—

(1) law enforcement,

(2) child protective services,

(3) juvenile counseling and adolescent mental health, and

(4) domestic violence.

(f) CENTER ADVISORY BOARD.—The Secretary, in consultation with the Secretary of Health and Human Services, shall establish, for each Indian Child Resource and Family Services Center, an advisory board to advise and assist such Center in carrying out its activities under this Act. Each advisory board shall consist of 7 members appointed by the Secretary from Indian tribes and human service providers served by an area office of the Bureau. Members shall serve without compensation, but may be reimbursed for travel and other expenses while carrying out the duties of the board. The advisory board shall assist the Center in coordinating programs, identifying training materials, and developing policies and procedures relating to family violence, child abuse, and child neglect.

(g) APPLICATION OF THE INDIAN SELF-DETERMINATION ACT TO CENTERS.—Indian Child Resource and Family Services Centers established under subsection (a) shall be subject to the provisions of the Indian Self-Determination Act. If a Center is located in an area office of the Bureau which serves more than one Indian tribe, any application to enter into a contract to operate the Center pursuant to such Act must have the consent of each of the other tribes to be served under the contract, except that, in the Juneau Area, only the consent of such tribes or tribal consortia that are engaged in contracting of Indian Child Protection and Family Violence Prevention programs pursuant to such Act shall be required. This section shall not preclude the designation of an existing child resource and family services center operated by a tribe or tribal organization as a Center if all of the tribes to be served by the Center agree to such designation.

(h) APPROPRIATIONS.—There are authorized to be appropriated to carry out the provisions of this section $3,000,000 for each of the fiscal years 1992, 1993, 1994, and 1995.

SEC. 411. INDIAN CHILD PROTECTION AND FAMILY VIOLENCE PREVENTION PROGRAM.

(a) ESTABLISHMENT.—The Secretary shall establish within the Bureau an Indian Child Protection and Family Violence Prevention Program to provide financial assistance to any Indian tribe, tribal organization, or inter-tribal consortium for the development of an Indian Child Protection and Family Violence Prevention program.

(b) INDIAN SELF-DETERMINATION ACT AGREEMENTS.—The Secretary is authorized to enter into agreements with Indian tribes, tribal organizations, or inter-tribal consortia pursuant to the Indian Self-Determination Act for the establishment of Indian Child Protection and Family Violence Prevention programs on Indian reservations.

(c) INVESTIGATION AND TREATMENT AND PREVENTION OF CHILD ABUSE AND FAMILY VIOLENCE.—An Indian tribe operating an Indian Child Protection and Family Violence Prevention program established under this section shall designate the agency or officials which shall be responsible—

(1) for the investigation of reported cases of child abuse and child neglect; and

(2) for the treatment and prevention of incidents of family violence; and

(3) for the provision of immediate shelter and related assistance for victims of family violence and their dependents.

(d) PROGRAM RESPONSIBILITIES AND FUNCTIONS.—Funds provided pursuant to this section may be used for—

(1) the establishment of a child protective services program which may include—

(A) the employment of child protective services staff to investigate cases of child abuse and child neglect,

(B) training programs for child protective services personnel, law enforcement personnel, and judicial personnel in the investigation, prevention, and treatment of cases of child abuse and child neglect, and

(C) purchase of equipment to assist in the investigation of cases of child abuse and child neglect;

(2) the establishment of a family violence prevention and treatment program which may include—

(A) the employment of family violence prevention and treatment staff to respond to incidents of family violence,

(B) the provision of immediate shelter and related assistance for victims of family violence and their dependents,

(C) training programs for family violence prevention and treatment personnel, law enforcement personnel, and judicial personnel in the investigation, prevention, and treatment of cases of family violence; and

(D) construction or renovation of facilities for the establishment of family violence shelters;

(3) the development and implementation of a multidisciplinary child abuse investigation and prosecution program which may—

(A) coordinate child abuse prevention, investigation, prosecution, treatment, and counseling services,

(B) develop protocols among related agencies to ensure that investigations of child abuse cases, to the extent practicable, minimize the trauma to the child victim, and

(C) provide for the coordination and cooperation of law enforcement agencies, courts of competent jurisdiction, and other tribal, Federal, and State agencies through intergovernmental or interagency agreements that define and specify each party's responsibilities;

(4) the development of tribal child protection codes and regulations;

(5) the establishment of training programs for—

(A) professional and paraprofessional personnel in the fields of medicine, law, education, social work, and other relevant fields who are engaged in, or intend to work in, the field of prevention, identification, investigation, and treatment of family violence, child abuse, and child neglect,

(B) instruction in methods of protecting children from abuse and neglect for persons responsible for the welfare of Indian children, including parents of, and persons who work with, Indian children, or

(C) educational, identification, prevention and treatment services for child abuse and child neglect in cooperation

with preschool, elementary and secondary schools, or tribally controlled community colleges (within the meaning of section 2 of the Tribally Controlled Community College Act of 1978 (25 U.S.C. 1801));

(6) other community education efforts for tribal members (including school children) regarding issues of family violence, child abuse, and child neglect; and

(7) such other innovative and culturally relevant programs and projects as the Secretary may approve, including programs and projects for—

(A) parental awareness and self-help,

(B) prevention and treatment of alcohol and drug-related family violence, child abuse, and child neglect, or

(C) home health visitor programs,

that show promise of successfully preventing and treating cases of family violence, child abuse, and child neglect.

(f) SECRETARIAL REGULATIONS; BASE SUPPORT FUNDING.—(1) The Secretary, with the participation of Indian tribes, shall establish, and promulgate by regulations, a formula which establishes base support funding for Indian Child Protection and Family Violence Prevention programs.

(2) In the development of regulations for base support funding for such programs, the Secretary shall develop, in consultation with Indian tribes, appropriate caseload standards and staffing requirements which are comparable to standards developed by the National Association of Social Work, the Child Welfare League of America and other professional associations in the field of social work and child welfare. Each level of funding assistance shall correspond to the staffing requirements established by the Secretary pursuant to this section.

(3) Factors to be considered in the development of the base support funding formula shall include, but are not limited to—

(A) projected service population of the program;

(B) projected service area of the program;

(C) projected number of cases per month; and

(D) special circumstances warranting additional program resources, such as high incidence of child sexual abuse, high incidence of violent crimes against women, or the existence of a significant victim population within the community.

(4) The formula established pursuant to this subsection shall provide funding necessary to support—

(A) one child protective services or family violence caseworker, including fringe benefits and support costs, for each tribe; and

(B) an additional child protective services and family violence caseworker, including fringe benefits and support costs, for each level of assistance for which an Indian tribe qualifies.

(5) In any fiscal year that appropriations are not sufficient to fully fund Indian Child Protection and Family Violence Prevention programs at each level of assistance under the formula required to be established in this subsection, available funds for each level of assistance shall be evenly divided among the tribes qualifying for that level of assistance.

(g) MAINTENANCE OF EFFORT.—Services provided under contracts made under this section shall supplement, not supplant, services from any other funds available for the same general purposes, including, but not limited to—

(1) treatment, including, but not limited to—
(A) individual counseling,
(B) group counseling, and
(C) family counseling;
(2) social services and case management;
(3) training available to Indian tribes, tribal agencies, and Indian organizations regarding the identification, investigation, prevention, and treatment of family violence, child abuse, and child neglect; and
(4) law enforcement services, including investigations and prosecutions.

(h) CONTRACT EVALUATION AND ANNUAL REPORT.—Each recipient of funds awarded pursuant to subsection (a) shall—
(1) furnish the Secretary with such information as the Secretary may require to—
(A) evaluate the program for which the award is made, and
(B) ensure that funds are expended for the purposes for which the award was made; and
(2) submit to the Secretary at the end of each fiscal year an annual report which shall include such information as the Secretary may require.

(i) APPROPRIATIONS.—There are authorized to be appropriated to carry out the provisions of this section $30,000,000 for each of the fiscal years 1992, 1993, 1994, and 1995.

SEC. 412. REPORT.

On or before March 1, 1991, and March 1 of each calendar year thereafter, the Secretary shall submit to the Congress a report involving the administration of this title during the calendar year preceding the calendar year in which such report is submitted.

TITLE V—INDIAN HEALTH CARE

SEC. 501. SHORT TITLE.

This title may be cited as the "Indian Health Care Amendments of 1990".

SEC. 502. REFERENCES.

Except as may otherwise be specifically provided, whenever in this title an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of the Indian Health Care Improvement Act (25 U.S.C. 1601 et seq.).

SEC. 503. MENTAL HEALTH PREVENTION AND TREATMENT SERVICES.

(a) PURPOSES.—The purposes of this section are to—
(1) authorize and direct the Indian Health Service to develop a comprehensive mental health prevention and treatment program;
(2) provide direction and guidance relating to mental illness and dysfunctional and self-destructive behavior, including child abuse and family violence, to those Federal, tribal, State, and local agencies responsible for programs in Indian communities in areas of health care, education, social services, child and

APPENDIX K

CHILD VICTIM WITNESS PROTECTION RESOURCE MATERIALS

AMERICAN BAR ASSOCIATION

GUIDELINES FOR THE FAIR TREATMENT OF CHILD WITNESSES IN CASES WHERE CHILD ABUSE IS ALLEGED

<<<<<<<<<<>>>>>>>>>>

APPROVED BY THE HOUSE OF DELEGATES
JULY 10, 1985

(202) 331-2250
ABA/net: ABA 376

AMERICAN BAR ASSOCIATION
National Legal Resource Center for
Child Advocacy and Protection

1800 M Street, NW
Washington, DC 20036

Howard A. Davidson
Director

American Bar Association

GUIDELINES FOR THE FAIR TREATMENT OF CHILD WITNESSES IN CASES WHERE CHILD ABUSE IS ALLEGED

A TEAM APPROACH

1. A multidisciplinary team involving the prosecutor, police, and social services resource personnel should be utilized in the investigation and prosecution of cases where a child is alleged to be the victim of or witness to abuse in order to reduce the number of times that a child is called upon to recite the events involved in the case as well as to create a feeling of trust and confidence in the child.

a) Members of such teams should receive specialized training in the investigation and prosecution of cases where children are alleged victims and witnesses of abuse.

b) Whenever possible, the same prosecutor should handle all aspects of a case involving an alleged child victim or witness including related proceedings outside the criminal justice system.

A SPEEDY TRIAL

2. In all proceedings involving an alleged child victim, the court should take appropriate action to ensure a speedy trial in order to minimize the length of time a child must endure the stress of his or her involvement in the proceeding. In ruling on any motion or request for a delay or continuance of a proceeding involving an alleged child victim, the court should consider and give weight to any potential adverse impact the delay or continuance may have on the well-being of a child.

PROCEDURAL REFORM

3. In criminal cases and juvenile delinquency and child protection proceedings where child abuse is alleged, court procedures and protocol should be modified as neeessary to accommodate the needs of child witnesses including:

a) If the competency of a child is in question, the court should evaluate competency on an individual basis without resort to mandatory or arbitrary age limitations.

b) Leading questions may be utilized on direct examination of a child witness subject to the court's direction and control.

c) To avoid intimidation or confusion of a child witness, examination and cross-examination should be carefully monitored by the presiding judge.

d) When necessary, the child should be permitted to testify from a location other than that normally reserved for witnesses who testify in the particular courtroom.

e) A person supportive of the child witness should be permitted to be present and accessible to the child at all times during his or her testimony, but without influencing the child's testimony.

f) The child should be permitted to use anatomically correct dolls and drawings during his or her testimony.

g) When necessary, the child should be permitted to testify via closed-circuit television or through a one-way mirror or any other manner, so long as the defendant's right to confrontation is not impaired.

h) Persons not necessary to the proceedings should be excluded from the courtroom at the request of a child witness or his or her representative during pretrial hearings in cases where the child is alleged to be the victim of physical, emotional, or sexual abuse.

i) At pretrial hearings and in child protection proceedings the court, in its discretion, if necessary to avoid the repeated appearance of a child witness, may allow the use of reliable hearsay.

j) When necessary the court should permit the child's testimony at a pretrial or noncriminal hearing to be given by means of a videotaped deposition.

LEGISLATIVE INITIATIVE

4. State legislatures should, where necessary, enact appropriate legislation to permit modification of court procedures and evidentiary rules as suggested herein and in addition should:

a) extend the statute of limitations in cases involving the abuse of children;

b) establish programs to provide special assistance to child victims and witnesses or enhance existing pro-

grams to improve the handling of child abuse cases and minimize the trauma suffered by child victims, in cooperation with local communities and the federal government.

MEDIA RESPONSIBILITY

5. The public has a right to know and the news media has a right to report about crimes where children are victims and witnesses; however, the media should use restraint and prudent judgment in reporting such cases and should not reveal the identity of a child victim.

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(The above guidelines were approved by the American Bar Association's House of Delegates at its meeting in Washington, D.C. on July 10, 1985 and represent the official policy of the American Bar Association. The following commentary, while not official ABA policy, is designed to assist in the interpretation of the guidelines.)

AMERICAN ACADEMY OF CHILD PSYCHIATRY STATEMENT ON PROTECTING CHILDREN UNDERGOING ABUSE INVESTIGATIONS AND TESTIMONY

Adopted by Council
February 9, 1986

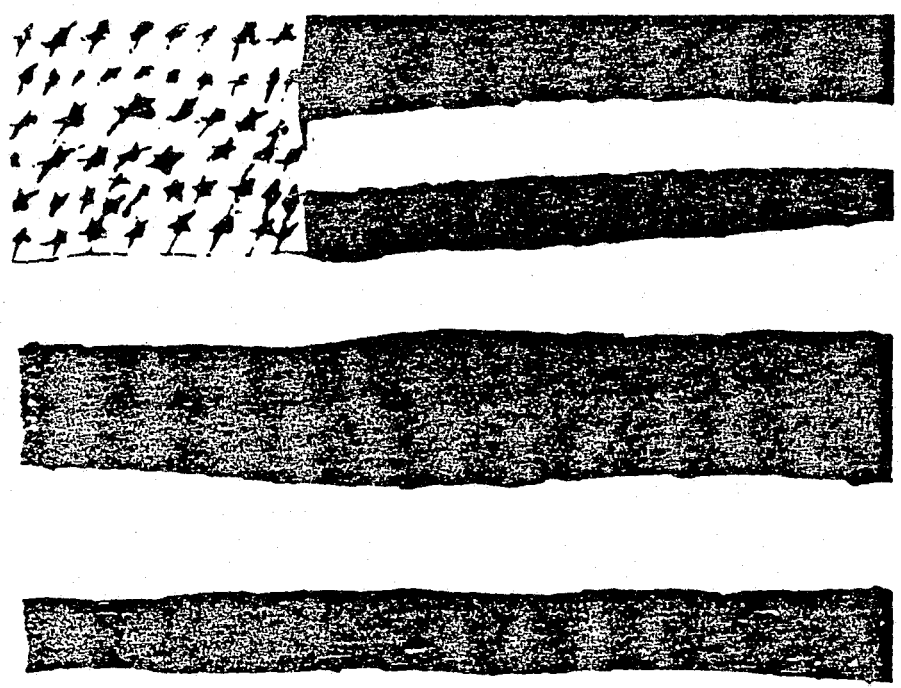
There is a growing public awareness of child sexual abuse which is increasing the number of cases reported and the number of children undergoing investigation and courtroom procedures. Based on the seriousness, stress, and potential trauma of investigations and testimony for sexually abused children, the Academy recommends modifications to allow children a safe and just way to participate in the legal system.

Child sexual abuse cases require special judicial treatment because:

1. Young victims may not be able to understand the trial procedures that have been designed for adults.
2. The atmosphere of the courtroom can be threatening, confusing, and frightening for children.
3. Additional emotional stress for sexually abused children can result from direct testimony in public.
4. Insensitive and repetitive cross examination of abused children can be misperceived by them as further abuse.
5. Face-to-face confrontations by a child victim with the perpetrator may result in severe additional trauma.
6. The judicial process may be blocked when testimony is withheld because of fear or confusion.
7. The complexities and potential harm to child and parent that arise when false allegations of sexual abuse are made in the context of custody or visitation disputes are apparent.

Recognizing that young children have special needs and modes of self-expression, the following modifications in legal proceedings for cases of child sexual abuse are urgently recommended:

1. Provide a reasonable limit on the number of times a child is interviewed, record or videotape the first interview, and have adequately trained professionals do the first interview.
2. Coordinate and expedite juvenile and criminal court proceedings by means of single, but thorough, investigations, and shared information between civil and criminal cases.
3. Use child psychiatrists and other adequately trained adults to support and interpret for children during investigations and testimony.
4. Use child psychiatrists and other qualified professionals to evaluate:
   a) the competency of the child to testify,
   b) the credibility of the child's allegations,
   c) whether the child is emotionally disturbed and in need of treatment,
   d) whether the child will be able to cope with the stress of giving testimony,
   e) whether the child would be psychologically further damaged by giving testimony,
   f) to ensure that the child receives psychological preparation to appear in court, and
   g) to further evaluate if it is in the child's best interest to have contact with the alleged perpetrator and under what circumstances if any, prior to court proceedings, particularly if the perpetrator is a relative.
5. Modify hearsay and other evidentiary restrictions with appropriate safeguards to enable judges to better protect child witness-victims and allow appropriate out of court statements.
6. Exclude spectators from the courtroom except as necessary to the trial.
7. Make alterations of the courtroom setting to be more comfortable and familiar to small children including testimony in judges' chambers, bathroom breaks, snack breaks, age-appropriate testimony duration, child-sized furniture, the use of toys, dolls, drawings and other communication aids,
8. Allow the child the option not to look at the accused, and allow the use of live two-way closed circuit television for grand jury appearances and in certain cases during the actual trial.
9. Give priority to child abuse cases on court schedules.
10. Provide training by child psychiatrists and other qualified mental health professionals for police, judges, involved attorneys, and in age-appropriate language and procedures for children.
11. Allow criminal courts the authority to grant civil orders to protect children from further abuse, grant juvenile courts the authority to enforce treatment orders, enhance the existence and public awareness of treatment options.
12. Conduct a limited model program to consider the elimination or extension of the statute of limitations in cases of child sexual abuse to allow legal recourse for minors when they reach the age of majority, thus fostering justice, protection and healing.



U.S. Department of Justice
National Institute of Justice

NIJ

National Institute of Justice / Research in Brief

November 1985

Prosecution of Child Sexual Abuse: Innovations in Practice

Debra Whitcomb

Child sexual abuse occurs with alarming frequency. The National Center on Child Abuse and Neglect (a division of the U.S. Department of Health and Human Services) estimates that in 1983 nearly 72,000 children were reported as sexually maltreated by a parent or household member.[1] Local law enforcement agencies also receive a large and growing number of reports of child sexual abuse although the FBI's Uniform Crime Reports do not tabulate sexual assaults by age of victim.

Perhaps even more disturbing is that an unknown number of similar cases never reach the attention of authorities.

1. U.S. Department of Health and Human Services, National Center on Child Abuse and Neglect, *National Study on Child Neglect and Abuse Reporting* (Denver: American Humane Association, 1984).

Very young children may lack the verbal capacity to report an incident or the knowledge that an incident is inappropriate or criminal; older children may be too embarrassed. Many child victims are threatened into silence. When they do confide in a trusted adult, their reports may be dismissed as fantasy or outright lies.

Even if the child's story is believed, parents and health and social services professionals have been reluctant to enlist the aid of enforcement agencies, largely for fear of the adverse effects of the criminal justice process on child victims and their families.

Even cases that are filed with police may not result in prosecution for a variety of reasons. These include inability to establish the crime, insufficient evidence, unwillingness to expose the child to additional trauma, and the belief that child victims are incompetent, unreliable, or not credible as witnesses. Yet, public sentiment increasingly favors criminal justice intervention in these cases.

This Research in Brief discusses some problems faced and posed by child victims in the criminal justice system. It reviews legislative revisions, local reforms, and new techniques to alleviate these problems.

Child victims in the criminal justice system

By definition, children are immature in their physical, cognitive, and emo-

From the Director

More than 90 percent of all child abuse cases do not go forward to prosecution. In many of these cases, the decision not to proceed is based on concerns about the child's possible performance on the witness stand or the impact of the court process on the child victim's recovery. The unfortunate result is that many suspects are released without the imposition of justice. They not only escape any penalty but have the opportunity for further abuse of their initial victim or other children.

Both community members and criminal justice professionals are increasingly concerned about our apparent ineffectiveness in dealing adequately with the crime of child sexual abuse.

The National Institute of Justice commissioned Abt Associates, Inc., to review research and experience in dealing with child victims. This *Research in Brief* summarizes the findings discussed in an *Issues and Practices* report, *When the Victim Is a Child*. Included in this *Brief* is a 50-State analysis of relevant statutes enacted as of December 1984.

The *Brief* also suggests new and creative ways of reducing the trauma of trial preparation and court appearances on child sexual abuse victims. At the same time, the approaches outlined maintain the rights of the accused and the integrity of the judicial system.

James K. Stewart
Director
National Institute of Justice

tional development. This immaturity takes its toll when children are involved in court proceedings. From the time an incident of child sexual abuse is revealed, the victim is interviewed repeatedly by adults representing different agencies with overlapping information needs. Continuances are freely granted, causing delays that erode the children's memories and undermine therapeutic efforts to help them get on with their lives.

Children often do not understand the reasons for repeated interviews and delays. Many choose to end the process by recanting the accusation before their cases can be adjudicated.

When these cases do go to court, an entirely different set of problems arises for children who are called to testify. Judges may seem to loom large and powerful over small children who may feel isolated in the witness stand. Attorneys often use language children do not understand and seem to argue over everything the children say. Defense attorneys ask questions intended to confuse them for reasons children cannot comprehend. Many people are watching every move the child witness makes—especially the defendant.

Under such conditions, children cannot be expected to behave on a par with adults. It is not unusual for them to recant or freeze on the witness stand, refusing to answer further questions. At best, this behavior weakens the Government's case; at worst, it leads to dismissals for lack of evidence.

The problems of immaturity are compounded when the child is a victim of sexual abuse. Generally, the child is the only witness to this abuse, and often there is no physical evidence. Consequently, the case becomes a matter of the child's word against the adult's. This fact is all too obvious to offenders and is very simple for defense attorneys to exploit.

Incest, in particular, traps the child in an extremely precarious position. Children are taught to obey and respect their elders, and incestuous offenders often command secrecy with threats that range from withdrawal of love to death of the child, mother, or other loved ones.

Visions of the father in jail, the mother distraught, the family on welfare, and the children placed in foster care typically suffice to prevent a victim from divulging the incestuous situation, often for years, sometimes forever. A child who reports promptly is by far the exception, not the rule.

If the child's situation becomes known and the child protection or law enforcement authorities intervene in the family, the child may be under intense pressure to retract the allegation. Regardless of whether the father or the child is removed from the home, dissolution of the family appears imminent and the child may shoulder the blame. Such pressure to recant is further intensified the longer the case is delayed, becoming strongest when the child faces the defendant from the witness stand.

A call for change

If child victims are treated insensitively while their allegations are investigated and adjudicated, their participation in the process is likely to suffer, in turn weakening the government's case.

Victim advocates and prosecutors across the country are experimenting with a variety of measures intended to reduce the stress on child victims who become entangled in the complexities of the child protection and criminal justice systems. Several States have already adopted laws that permit alternative—and some very controversial—techniques.

Included in this Research in Brief is a chart analyzing selected provisions of pertinent legislation that had been enacted as of December 1984. The reform measures are listed in two categories: (1) those seeking to alleviate the perceived trauma of giving live, in-court testimony (hearsay exceptions, exclusion of spectators); and (2) those authorizing mechanical interventions to obtain the child's testimony (videotape and closed-circuit television). The chart includes extensive footnotes providing important clarifications or elaborations of its contents.

Also included in this Research in Brief are statutory citations for selected issues in child witness testimony including competency, abused child hearsay exceptions, exclusion of spectators from the courtroom, and the admissibility of videotaped testimony.

This brief discusses some practical concerns surrounding the actual implementation of proposed reforms. The findings are based largely on personal interviews conducted with judges, prosecutors, victim advocates, protective services workers, and law enforcement officers in Des Moines, Iowa; Milwaukee, Wisconsin; Orlando, Florida; and Ventura, California. Each jurisdiction possessed a different array of innovative statutes and procedures, thereby enabling researchers to examine a broad range of alternative techniques.

The results of this study suggest that many of the new reforms have been rarely used. Many unresolved questions about their ability to withstand judicial scrutiny (not addressed by this study) in addition to a number of practical concerns tend to dissuade prosecutors from taking full advantage of the measures.

Practical concerns with the new techniques

The plight of child victims in the courtroom has generated considerable media attention, much of it focused on the potential of modern technology to alleviate the stress of testifying. Videotape and closed circuit television, in particular, have received much media coverage, and legislators have felt pressured to adopt these controversial measures with limited opportunity for reflection and study.

The findings of this study suggest that these techniques can be used only in a small fraction of child sexual abuse cases, and that there are less obtrusive, and less controversial, ways of achieving similar effects for all but the most seriously traumatized children.

Perhaps the most radical of the proposed reform measures is the use of closed circuit television to broadcast the child's live testimony from another room adjacent to the trial courtroom. As of December 1984, this technique was statutorily authorized in only four States: Kentucky, Louisiana, Oklahoma, and Texas.

These laws permit the attorneys and a supportive adult (e.g., victim assistant or close relative) to be present with the child during the broadcast. The defendant and equipment operators may also be present, but the child is not allowed to see or hear them.

Whether the use of closed circuit television satisfies the defendant's constitutional right of confronting his or her accuser has not yet been resolved. But prosecutors and judges question the value of this technique from another standpoint: What effect does the new medium have on jurors' perceptions?

Although there is some empirical evidence to suggest that televised trial materials have no markedly negative effect on courtroom communication between trial participants and jurors,[2] these findings are far from conclusive.

The primary purpose of closed circuit television is to avoid direct confrontation between the child and the defendants, but there are other means to this end. Some prosecutors use their own bodies to block the victim's view of the defendant during the direct examinations. Others simply instruct children to look elsewhere while they testify, or to look for a supportive family member or victim advocate in the courtroom audience. One victim advocate encourages children to tell the judge if the defendant is making faces.

Such instructions may not completely eradicate the child's fear of seeing the defendant in court, but at least they impart a small sense of control in a situation that may seem overpowering to a child.

Videotaping testimony is another technique that is highly praised, yet seldom used where it is authorized. At this writing, at least 14 States have adopted laws authorizing the introduction of videotaped testimony taken at a deposition or preliminary hearing in lieu of live testimony at trial. But some prosecutors point out that the environment at a deposition can be more traumatic than that of a trial courtroom. Depositions take place in small rooms, thereby bringing the child and the defendant into closer physical proximity than in the trial courtroom. The judge may not be there to monitor the behavior of the defendant or his counsel, and victim advocates may not be permitted to attend.

If a court finding of emotional trauma or unavailability is prerequisite to a videotape substitution for live testimony, the child may be subjected to a battery of medical and/or psychiatric tests by examiners for the State and the defense. Some prosecutors also believe that a child who successfully endures all the proceedings leading up to the deposition or preliminary hearing can succeed at trial as well; indeed, by that point the videotaped deposition merely substitutes one formal proceeding for another.

The purpose of the videotape statutes is to spare the child the presumed trauma of a public appearance in court. Yet, many interview respondents observed that the courtroom audience is *not* a major concern for most children. They also noted that there rarely is a general audience; when spectators are present, they can often be persuaded to leave voluntarily by simple request of the prosecutor. Existing statutes for closing courtrooms—another popular remedial technique—are seldom invoked.

At least three States—Texas, Louisiana, and Kentucky—have adopted laws permitting a videotape taken of the child's first statement to be introduced into evidence. For the taping, the child must have been questioned by a non-attorney, and both the interviewer and child must be available for cross-examination. The principal goal of these statutes is to reduce the number of interviews the child must give, but they allow for other benefits as well.

Videotaping the child's first statement can capture the child's most candid reaction to the incident. Prosecutors and victim advocates report that the technique encourages guilty pleas.[3] Police, social workers, and prosecutors in many jurisdictions are already using videotape to achieve these goals, even in the absence of laws authorizing introduction into evidence at trial.

There are drawbacks to these videotape statutes, however. Since child victims must be available for cross-examination, the laws do not protect them from the presumed trauma of testifying at trial and confronting the defendant. And, unless the court places them under a protective order, the videotapes may become public property, perhaps even appear on media broadcasts, causing incalculable trauma for the child and family. Also, the tapes become a liability if the child volunteers contradictory information, or if improper questioning techniques were used to elicit responses.

Useful and effective techniques

Much attention has been focused on technological aids intended to help child victims in the adjudication process. Some of the most useful and effective techniques, however, do not involve advanced technology. Statutes creating special exceptions to hearsay for certain out-of-court statements of child sexual abuse victims fall into this category.

Child sexual abuse victims sometimes make innocent remarks that are quite explicit in their portrayal of sexual activities that should be unknown to a child. For example, when a 7-year-old girl spontaneously asks her father, in child's language, about details of erection and ejaculation, there can be little doubt that this child was sexually abused in some way. Yet this kind of

2. Gerald R. Miller, "The Effects of Videotaped Trial Materials on Juror Responses," in *Psychology and the Law*, ed. Gordon Bermant, Charles Nemeth, and Neil Vidmar (Lexington, MA: Lexington Books, 1976), 205.

3. This effect was reported to us in telephone interviews with prosecutors across the country. See also, Reinhardt Krause, "Videotape, CCTV Help Child Abuse Victims Tell Their Story but Legal Problems Remain," in *Law Enforcement Technology*, (November 1984), 16–18.

Exhibit 1

Statutory provisions relevant to child witnesses in sexual abuse cases*

	AL	AK	AZ	AR	CA	CO	CT	DE	DC	FL	GA	HI	ID	IL	IN	IA	KS	KY	LA	ME	MD	MA	MI	MN	MS	MO	MT	NE	NV	NH	NJ	NM	NY	NC	ND	OH	OK	OR	PA	RI	SC	SD	TN	TX	UT	VT	VA	WA	WV	WI	WY
LIVE TESTIMONY																																																			
Competency																																																				
• child <14, court determines																														C,1										C,1	C,1					C,1		C,1		
• child <10, court determines			S			S,2							S		S				S,3				S	S,4		S,2						S,3			S,R								S,2			S			S
• child competent if understands oath	S,R	R							C		S	S																																R						
• competent if understands oath					R		C							C		S,R	S	S		R		S					R				R			R									S			R				
• every person competent			R	S		R		R		S											S		R		S			S	S		S	R		R		S	S	S			S				R		S	R
Abused child hearsay exception																																																	
• child's age (in years)			<10			<15								<13	<10		M							<10																		<10		M			<10			
• court finds reliable																	S							S																		S		S			S			
• child testifies			S			S								S	S									S																		S		S			S			
• child unavailable, statement corroborated			S			S									S		S							S																		S		S			S			
• notice of introduction			S			S									S									S																		S					S			
Exclusion of spectators from courtroom																																																		
• victim/witness age (in years)	any	<16	any		any					<16	any			<13					<15			<18	any	<18	any		any			<16		any	any	any						M				any			any	
• during testimony only		S			S					S				S					S				9							10			S							S							S	
• public transcript provided		S	S		S																									S											S								
• media exception			S							S				S					S																						S								
• family, guardian, moral support exceptions		S			S					S									S																													S		
MECHANICAL TESTIMONY																																																		
Videotaped testimony admissible																																																		
• child's age (in years)		<16	<15	<17	<15	<15				<16								<12		<14												<13	<12								<15		<12				<16	
• defendant's presence specified		S	S	S		S				S								9		S							S					S				S					S						S	
• opportunity for cross-examination specified		S		S		10														S							10					S				S					S						S	
• court findings required (footnote)				11	12	13				14										15												16	17								16							19	
• court findings include unavailability					S	S																																				S								
• government may call child to testify				S														NO														NO					NO					NO					S		
• other (footnote)		20			21															22								23					24	25				NO					21								
Closed circuit testimony available																																																		
• child's age (in years)																		<12	<14																		<12						<12							
• defendant present, but child cannot hear or see																		S	S																		S						S							
• attorneys present																		S	S																		S						S							
Abused child videotape/film hearsay exception																																																		
• child's age (in years)																		<12	<14																								<12							
• no attorneys present at taping																		S	S																								S							
• interviewer/child available to testify																		S	S																								S							

SOURCE: Statutes were provided by State governments in the fall of 1984.

*Except for age limits, all numbers refer to footnotes on following page.

See Exhibit 2 for statutory citations and a brief description of related laws *not* included on the chart.

KEY S = Statute (includes codified rules) C = Case law *only*
R = Rule of evidence (not codified) M = Minor; child

1. State most likely uses "14-year-old" common law standard.

2. Exception: A child victim of a sexual offense is a competent witness and shall be allowed to testify without prior qualification in any judicial proceeding involving the alleged offense. Trier of fact is to determine the weight and credibility to be given to the testimony.

3. Child under 12 years may not testify under oath unless court is satisfied that child understands the nature of an oath.

4. Exception for sexual abuse cases repealed. New language reads: "A child describing any act of sexual contact or penetration performed on or with the child by another may use language appropriate for a child of that age."

5. Corroboration is *not* required.

6. This provision applies to the preliminary hearing.

7. This provision provides for in-camera testimony.

8. Exception for a reasonable but limited number of members of the public.

9. Defendant present, but the court to ensure child cannot hear or see defendant.

10. Testimony to be taken under the Rules of Evidence.

11. Court order "for good cause shown."

12. Court finding "that further testimony would cause the victim emotional trauma so that the victim is medically unavailable or otherwise unavailable . . ."

13. Upon application, court to make preliminary finding whether "the victim is likely to be medically unavailable or otherwise unavailable..."; at trial, court to find whether, "further testimony would cause the victim emotional trauma so that the victim is medically unavailable or otherwise unavailable . . ."

14. Court finding that, "there is substantial likelihood that such victim or witness would suffer severe emotional or mental distress if required to testify in open court."

15. Court "expressly finds that the emotional or psychological well-being of the person would be substantially impaired if the person were to testify at trial."

16. Court Rule. Court order upon, "Showing that the child may be unable to testify without suffering unreasonable and unnecessary mental or emotional harm." (Statute. Court order "for good cause shown.")

17. For a child witness 12 years old or under, testimony may be videotaped *without* court findings. For a witness greater than 12 years old, court must find the witness "is likely to suffer severe emotional or mental distress if required to testify in person . . ."

18. Court finding that "further testimony would cause the victim emotional trauma, or that the victim is otherwise unavailable...or that such testimony would...be substantially detrimental to the well-being of the victim . . ."

19. Court order where "there is a substantial likelihood that the child will otherwise suffer emotional or mental strain."

20. The videotapes are listed as an exception to hearsay in R. Evid. R. 804.

21. Testimony to be videotaped at preliminary hearing.

22. Stenographical testimony or other court approved means also available. Videotapes are specified in the videotape law as an exception to hearsay.

23. Victim in prosecutions for sexual intercourse without consent if victim is less than 16 years; deviate sexual conduct, incest (no age specified).

24. Videotapes are specified in the videotape law as an exception to hearsay.

25. Videotape law applies to testimony presented to the Grand Jury.

statement does not fit into traditional hearsay exceptions and would be inadmissible in most States. The new laws would admit such a statement, provided that certain indicia of reliability are met, even when the child is unavailable as a witness.

Many effective innovations do not require statutory reform at all. These include the following:

- enhancing the child's communication skills through dolls, artwork, and simplified vocabulary;
- modifying the physical environment—providing a small chair for the child, having the judge sit on a level with the child or wear business clothes instead of a judicial robe; and
- preparing child victims before their courtroom appearances—briefing them on the roles of people in the courtroom, introducing them to the judge, taking them for a tour of the courtroom, and allowing them to sit in the witness chair and speak into the microphone.

By demystifying the courtroom, these techniques help to alleviate children's fear of the unknown, thereby enhancing the accuracy and efficiency of their recall abilities.[4]

Most of the legislative reforms address only the trial experience, and therefore benefit only those children whose cases go to trial. However, the trial is only the culmination of a long series of stressful events that the child endures as the case is adjudicated. Some States have adopted laws intended to ease the child's anxiety throughout the criminal justice process. Such legislation includes the following:

- laws permitting child witnesses to have a supportive person present during court proceedings, and offering the services of the court to explain the proceedings to the child, assist the

4. Helen E. Dent and Geoffrey M. Stephenson, "An Experimental Study of the Effectiveness of Different Techniques of Questioning Child Witnesses," in *British Journal of Social and Clinical Psychology*, (1979): 41; citing W. Stern, "The Psychology of Testimony," in *Journal of Abnormal and Social Psychology*, Vol. 34 (1939): 3–20; E. Lord, "Experimentally Induced Variations in Rorschach Performance," in *Psychological Monograph*, Vol. 64 (1950): 10; and C. Zimmerman and R.A. Bauer, "Effect of an Audience on What Is Remembered," in *Public Opinion Quarterly*, Vol. 20 (1956): 238–248.

Exhibit 2

Statutory Citations for Selected Issues in Child Witness Testimony

Competency

Ala. Code § 12–21–165;
Ariz. Rev. Stat. Ann. § 12–2202 (controlling);
Ark. Rev. Stat. Ann. § 28–1001;
Cal. R. Evid. R. 701;
Colo. Rev. Stat. § 13–90–106(1)(b) (controlling);
Fla. Stat. § 90.601;
Ga. Code §§ 38–1607, 1610;
Hawaii Rev. Stat. § 621–16;
Idaho Code § 9–202;
Ind. Code § 34–1–14–5 (applied to criminal matters via § 35–37–4–1; § 35–1–31–3);
Iowa Code § 622.1;
Kan. Stat. Ann. § 60–417;
Ky. Rev. Stat. § 421.200;
La. Rev. Stat. Ann. § 15:469;
Md. Cts. & Jud. Proc. Code Ann. § 9–101;
Mass. Gen. Laws. Ann. ch. 233, § 20;
Mich. Stat. Ann. § 27A.2163;
Minn. Stat. § 595.02(1)(f);
Miss. Code Ann. § 13–1–3;
Mo. Rev. Stat. § 491.060(2);
Neb. Rev. Stat. § 27–601;
Nev. Rev. Stat. § 50.015;
N.J. Rev. Stat. § 2A:81–1 and R. Evid. R. 17;
N.Y. Crim. Proc. Law § 60.20 (Consol.);
Ohio Rev. Code Ann. § 2317.01;
Okla. Stat. tit. 12, § 2601;
Or. Rev. Stat. § 40.310;
Pa. Stat. Ann tit. 42, § 5911 (Purdon);
S.D. Codified Laws Ann. § 19–14–1;
Tenn. Code Ann. § 24–1–101;
Utah Code Ann. §§ 78–24–2, 76–5–410;
Wash. Rev. Code 5.60.050;
Wis. Stat. § 906.01;
Wyo. Stat. § 1–138.

Some of the above are codified versions of R.EVID.R.601. In addition, R.EVID.R.601 is found separately for the following States: Alabama, Alaska, Arizona, Colorado, Delaware, Iowa, Maine, Michigan, Montana, New Mexico, North Carolina, North Dakota, Ohio, Texas, Vermont, Washington, Wyoming.

Abused child hearsay exceptions

Ariz. Rev. Stat. § 13–1416 (1984);
Colo. Rev. Stat. § 18–3–411 (3);
Ill. Rev. Stat. ch. 38, para. 115–10 (1983);
Ind. Code § 35–37–4–6 (1984);
Kan. Stat. Ann. § 60–460(dd) (1982);
Minn. Stat. § 595.02(3) (1984);
S.D. Codified Laws Ann. § 19–16–38 (1984);
Utah Code Ann. § 76–5–411 (1983);
Wash. Rev. Code § 9A.44.120 (1982)

Related provisions: Some States permit the use of certain out-of-court statements in a criminal prosecution if the witness is available to testify. See, for example, Del. Code Ann. tit. 11, § 3507 (1953) (statement can be consistent or inconsistent).

Exclusion of spectators from courtroom

Ala. Code § 12–21–202 (1940);
Alaska Stat. § 12.45–048 (1982);
Ariz. R. Cr. P.R. 9.3(c) (1973);
Cal. Penal Code § 868.7(a) (1983);
Fla. Stat. § 918.16 (1977);
Ga. Code § 17–8–53 (1933);
Ill. Rev. Stat. ch. 38, para. 115–11 (1983);
La. Rev. Stat. Ann. § 15:469.1 (1981);
Mass. Gen. Laws Ann. ch. 278 §§ 16A (1923), 16C (1978);
Mich. Comp. Laws § 750.520;
Minn. Stat. § 631.045 (1982);
Miss. Const. art. III, § 26;
Mont. Code Ann. § 3–1–313 (1977);
N.H. Rev. Stat. Ann. § 632–A: 8 (1979);
N.Y. Jud. Law § 4 (1968);
N.C. Gen. Stat. § 15–166 (1981);
N.D. Gen. Code § 27–01–02 (1974);
S.D. Codified Laws Ann. § 23A–24–6 (1983);
Vt. Stat. Ann. tit. 12, § 1901 (1947);
Wis. Stat. § 970.03(4) (1979).

Related provision: Utah Code Ann. § 78–74 (1953). Utah's law authorizing the closure of the courtroom in an action of ". . ., seduction, . . ., rape, or assault with intent to commit rape," has been construed to apply only in *civil* actions to avoid conflict with the Constitution.

Videotaped testimony admissible

Alaska Stat. § 12.45.047 (1982);
Ariz. Rev. Stat. Ann. § 12–2311 (1978);
Ark. Stat. Ann. §§ 43–2035 to 43–2037 (1981, 1983);
Cal. Penal Code 1346 (1983);
Colo. Rev. Stat. § 18–3–413;
Fla. Stat. § 918.17 (1984);
Ky. Rev. Stat. § 421.350 (1984);
Me. Rev. Stat. Ann. tit. 15, § 1205 (1983);
Mont. Code Ann. §§ 46–15–401 to 46–15–403 (1977);
N.M. R. Cr. P.R. 29.1 (1980) (based on N.M. Stat. Ann. § 30–9–17 (1978));
S.D. Codified Laws Ann. § 23A–12–9 (1983);
Tex. Code Crim. Proc. Ann. art. 38.071 (1983);
Wis Stat. § 967.04(7) (1983).

Related provision: Iowa Code § 232.96 applies to petition alleging a child in "need of assistance" in juvenile proceedings, *not* criminal prosecutions.

Related provisions: State law sometimes permits a deposition in sexual assault cases to be used in lieu of live testimony *if* the accused consents. See, for example, Va. Code § 18.2–67 (law does *not* specify videotape).

Closed circuit testimony available

Ky. Rev. Stat. § 421.350(3) (1984);
La. Rev. Stat. Ann. § 15:260 (1984);
Tex. Code Crim. Proc. Ann. art 38.071(3) (1983).

Abused child videotape film hearsay exception

Ky. Rev. Stat. § 421.350(1) and (2) (1984);
La. Rev. Stat. Ann. §§ 15:440.1 to 15:440.6 (1984);
Tex. Code Crim. Proc. Ann. art 38.071(1) and (2) (1983).

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The Rights of the Child Victim/Witness vs. the Defendant's Right to Confrontation

One of the most visible rights of criminal defendants in the United States is the right to confront their accusers. This right is provided by the Sixth Amendment to the U.S. Constitution. The right to confrontation helps to ensure that the accuser will contemplate the seriousness of the allegations and will be more likely to tell the truth.

With few exceptions, the right to confrontation has been routinely protected by the U.S. Supreme Court. However, during the prosecution of alleged communist sympathizers in the 1950s, the U.S. Supreme Court upheld employment firings and passport denials based on secret information and unidentified witnesses. This practice led Justice Douglas to author a dissent in Jay v. Boyd [351 U.S. 345 (1956)] in which he wrote, "A hearing is not a hearing in the American sense if faceless informers or confidential information may be used to deprive a man of his liberty."

Thirty-two years later, Justice Douglas's dissenting opinion found new light in Coy v. Iowa [487 U.S. 1012, 108 S.Ct. 2798 (1988)]. This decision marks one of the most recent declarations by the Supreme Court on the confrontation issue and has a direct impact on crime victims.

The Coy decision focused on Iowa's attempt to minimize the emotional impact on child witnesses testifying in sexual assault cases. In Coy, the defendant was charged with committing lascivious acts with two 13-year-old girls who were camping out in a neighbor's back yard. In order to encourage the testimony of the two victims, the prosecutor asked for permission, pursuant to an Iowa statute, to alter the courtroom to shield the child witnesses from the sight of the defendant. The courtroom lighting was adjusted and a screen was placed between the defendant and the child witness. The screen enabled the defendant to see the witness dimly but the witness could not see the defendant. The defendant strenuously objected to this barrier as a violation of his right to confrontation. The Supreme Court agreed, emphasizing the lengthy history of the right to confrontation and announced that it had never doubted that the Sixth Amendment guaranteed the defendant the right to confront the witness face-to-face. The Court did indicate, however, that this confrontation did not compel the witness to fix his eyes upon the defendant, and recognized that the witness could "studiously" look elsewhere. However, the Court itself realized the effect that a witness's failure to look at the defendant could have on the judge and jury.

Balancing the rights of the accused with the rights of the victim

The dilemma faced by courts subsequent to the Coy decision is how to protect the defendant's right to confrontation while at the same time easing the impact of testifying on child witnesses.

As of 1990, 41 states have laws protecting child witnesses.

- 34 states have enacted statutes that allow for the child's testimony to be videotaped.
- 22 states allow for exceptions to a rule of evidence that excludes out-of-court statements.
- 26 states have enacted statutes that allow the child witness to testify via closed-circuit television.

Those states that allow videotaped testimony generally record the testimony in advance and then show it to the jury during the trial. The videotape is usually made in an empty courtroom with only the judge, witness, prosecutor, defendant and defense counsel present. This technique is intended to reduce the number of strangers present when the child witness must disclose the particular intimate details of the crime. Those states that employ this method argue that the defendant's right to confrontation is preserved, since the defendant and defense counsel are present and can object to any part of the child's testimony and have the opportunity to cross-examine the witness. California provides for testimony in this manner under Penal Code §1346. If the child is 15 or younger, his/her testimony is taken during a preliminary hearing. If, at trial, the court finds that further testimony would cause emotional trauma and essentially render the witness unable to testify, the videotaped preliminary testimony may be admitted.

States that allow out-of-court testimony to be admitted risk running afoul of a long-standing legal rule against admission of hearsay evidence, which is evidence based on the reports of others rather than on the personal knowledge of a witness. Hearsay statements are potentially dangerous because they are second-hand in nature and the accused is denied the opportunity to confront the originator of the statement. Under certain circumstances, hearsay statements may be admitted, but there are no specific exceptions for statements of child witnesses. The Supreme Court has indicated its position to some extent in Ohio v.

See Child Witness, page 3

Child Witness continued

Roberts [448 U.S. 56, 100 S.Ct. 2531 (1980)]. In Roberts, the court indicated that certain hearsay statements would be allowed if the witness were "unavailable" to testify and the statements indicated they were reasonably reliable.

California enacted Evidence Code §1228 to address this particular issue. Under §1228, statements made by a child sexual assault victim 12-years-old or younger may be admitted provided the statements meet the following criteria: the statements must be included in a written official; the statements must be made prior to a defendant's confession; the child must be "unavailable" or must refuse to testify; and the statement must be taken in a trustworthy fashion by a law enforcement official.

"Technological barriers"

Lawmakers have also attempted to provide a technological barrier between the child victim and the defendant by allowing courts to provide for testimony via two-way closed-circuit television. In California, Penal Code §1347 permits child witnesses 10 years old and younger to testify from another room. The only people allowed in the room with the witness are a support person, a video technician, and a bailiff. A television monitor allows the witness to be seen in the courtroom. At the same time, via another monitor, the witness can see the defendant.

Closed-circuit television procedures vary widely from state to state. For example, some states utilize a one-way television hook-up, which allows the witness to be viewed in the courtroom, but the witness cannot view the defendant. California has attempted to avoid any possible problems linked to the confrontation clause. Penal Code §1347 provides a detailed list of preliminary findings that must be made before permitting two-way television testimony, thus preserving the rights of both the defendant and the child witness.

The Supreme Court's decision in Coy may leave some protective measures in doubt. However, the Court has expressed some interest in addressing the issue once again. This year the Court will decide two more cases involving protective procedures for child witnesses in Craig v. Maryland [316 Md. 551, 560 A.2d 1120 (1989)] and Wright v. Idaho [116 Idaho 382, 775 P.2d 1224 (1989)].

The Craig case involved Maryland's attempt to employ closed-circuit television. A Maryland court used a one-way closed-circuit television system that allowed the judge, jury and defendant to remain in the courtroom and placed the witness and attorneys in another room. The trial court authorized this procedure without interviewing the child and without requiring the prosecution to show the emotional impact upon the child. Because California's method is different in many respects, it is possible the Supreme Court may disallow the Maryland procedure without doing severe damage to California's approach.

In Wright v. Idaho, the questioned procedure involved the use of an exception to the hearsay rule. The Idaho court was faced with the testimony of a pediatrician who relayed a conversation he had with the child victim. The court allowed the testimony even though the pediatrician did not follow an accepted interrogation procedure and did not record the conversation. In addition, the pediatrician asked questions that seemed to suggest the desired answer. Since California's method is quite different, it may survive even if the Supreme Court strikes down the Idaho procedure.

In order to obtain some insight into how the Supreme Court might rule on these two cases, it may be helpful to examine those cases that the Court declined to consider and returned to the trial courts to be examined in light of Coy.

In State v. Tafoya [105 N.M. 91, 729 P. 2d 1371 (1986)], the defendant was convicted after the child was allowed to testify by use of videotape. The New Mexico procedure allowed for the defendant to be present at the time of the testimony but to be seated in the control studio out of the witness' line of sight.

In Conley v. Wisconsin [141 Wis. 2d 384, 416 N.W. 2d 69 (1987)], the defendant objected to the prosecution's intentional use of a blackboard that blocked the child witness's view of the defendant. Also, the judge had made no preliminary finding of a necessity for the procedure. In a similar case U.S. v. Iron Moccasin [878 F.2d 226 (8th Cir. 1989)], the prosecutor placed a demonstration easel between the child witness and the defendant. The lower court determined that the strategically placed easel had not been used to shield the witness from the defendant's gaze and did not violate the defendant's confrontation rights.

The approach used in Kansas was questioned in State v. Chisolm [245 Kansas 145, 777 P.2d 753 (1989)]. In Chisolm, the court used closed-circuit television. The attorneys, cameraman and defendant were in the same room as the child witness, but the defendant was hidden from the witness's view.

These cases vary widely in their approach to a common problem and none is identical to the California provisions. It is also possible that the various procedures might ultimately prevail since the Supreme Court has merely requested that the trial courts reconsider their use in light of Coy v. Iowa. Many of the current approaches, however, are certain to fall within the Court's decisions this term when Wright and Craig are decided.

Will Coy be changed?

The U.S. Supreme Court may consider limiting the effect of Coy or, though it is less likely, may even overturn the decision altogether. Justices O'Conner and White, in a separate concurring opinion in Coy, indicated that there may be situations in which they would be willing to provide some protection for child witnesses. Their opinion specifically mentioned some of California's provisions as examples of procedures that might be allowed. The newest member of the Court, Justice Kennedy, did not participate in the Coy decision. Therefore, if the right test case reached the Court, Justices White, O'Connor, and Kennedy may join with the dissenting justices in Coy to change the law in this area.

—*Scott Harper*

was the victim of sexual abuse; (2) evidence that she had been in the custody of the suspect at the time the injuries occurred; (3) testimony of the older daughter that their father abused the younger daughter, thus corroborating the younger daughter's statement; and (4) the testimony of the older daughter that she herself was abused by their father, thus corroborating the younger daughter's statement that her sister had also been abused. These facts, coupled with the circumstances surrounding the making of the statements acknowledged by the Court as suggesting that the statements are reliable, give rise to a legitimate argument that admission of the statements did not violate the Confrontation Clause. Because the Idaho Supreme Court did not consider these factors, I would vacate its judgment reversing respondent's conviction and remand for it to consider in the first instance whether the child's statements bore "particularized guarantees of trustworthiness" under the analysis set forth in this separate opinion.

For these reasons, I respectfully dissent.

JAMES T. JONES, Idaho Attorney General (JOHN J. MCMAHON, Chief Dpty. Atty. Gen., and MYRNA A.I. STAHMAN, Dpty. Atty. Gen., on the briefs) for petitioners; WILLIAM C. BRYSON, Deputy Solicitor General (KENNETH W. STARR, Sol. Gen., EDWARD S.G. DENNIS JR., Asst. Atty. Gen., and MICHAEL R. DREEBEN, Asst. to the Sol. Gen., on the briefs) for U.S., as amicus curiae; ROLF MICHAEL KEHNE, Boise, Idaho, for respondent.

No. 89-478

MARYLAND, PETITIONER *v.* SANDRA ANN CRAIG

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

Syllabus

No. 89-478. Argued April 18, 1990—Decided June 27, 1990

Respondent Craig was tried in a Maryland court on several charges related to her alleged sexual abuse of a six-year-old child. Before the trial began, the State sought to invoke a state statutory procedure permitting a judge to receive, by one-way closed circuit television, the testimony of an alleged child abuse victim upon determining that the child's courtroom testimony would result in the child suffering serious emotional distress, such that he or she could not reasonably communicate. If the procedure is invoked, the child, prosecutor, and defense counsel withdraw to another room, where the child is examined and cross-examined; the judge, jury, and defendant remain in the courtroom, where the testimony is displayed. Although the child cannot see the defendant, the defendant remains in electronic communication with counsel, and objections may be made and ruled on as if the witness were in the courtroom. The court rejected Craig's objection that the procedure's use violates the Confrontation Clause of the Sixth Amendment, ruling that Craig retained the essence of the right to confrontation. Based on expert testimony, the court also found that the alleged victim and other allegedly abused children who were witnesses would suffer serious emotional distress if they were required to testify in the courtroom, such that each would be unable to communicate. Finding that the children were competent to testify, the court permitted testimony under the procedure, and Craig was convicted. The State Court of Special Appeals affirmed, but the State Court of Appeals reversed. Although it rejected Craig's argument that the Clause requires in all cases a face-to-face courtroom encounter between the accused and accusers, it found that the State's showing was insufficient to reach the high threshold required by *Coy* v. *Iowa*, 487 U. S. 1012, before the procedure could be invoked. The court held that the procedure usually cannot be invoked unless the child initially is questioned in the defendant's presence and that, before using the one-way television procedure, the trial court must determine whether a child would suffer severe emotional distress if he or she were to testify by two-way television.

Held:

1. The Confrontation Clause does not guarantee criminal defendants an *absolute* right to a face-to-face meeting with the witnesses against them at trial. The Clause's central purpose, to ensure the reliability of the evidence against a defendant by subjecting it to rigorous testing in an adversary proceeding before the trier of fact, is served by the combined effects of the elements of confrontation: physical presence, oath, cross-examination, and observation of demeanor by the trier of fact. Although face-to-face confrontation forms the core of the Clause's values, it is not an indispensable element of the confrontation right. If it were, the Clause would abrogate virtually every hearsay exception, a result long rejected as unintended and too extreme, *Ohio* v. *Roberts*, 448 U. S. 56, 63. Accordingly, the Clause must be interpreted in a manner sensitive to its purpose and to the necessities of trial and the adversary process. See, *e. g.*, *Kirby* v. *United States*, 174 U. S. 47. Nonetheless, the right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the testimony's reliability is otherwise assured. *Coy*, *supra*, at 1021.

2. Maryland's interest in protecting child witnesses from the trauma of testifying in a child abuse case is sufficiently important to justify the use of its special procedure, provided that the State makes an adequate showing of necessity in an individual case.

(a) While Maryland's procedure prevents the child from seeing the defendant, it preserves the other elements of confrontation and, thus, adequately ensures that the testimony is both reliable and subject to rigorous adversarial testing in a manner functionally equivalent to that accorded live, in-person testimony. These assurances are far greater than those required for the admission of hearsay statements. Thus, the use of the one-way closed circuit television procedure, where it is necessary to further an important state interest, does not impinge upon the Confrontation Clause's truth-seeking or symbolic purposes.

(b) A State's interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her accusers in court. The fact that most States have enacted similar statutes attests to widespread belief in such a public policy's importance, and this Court has previously recognized that States have a compelling interest in protecting minor victims of sex crimes from further trauma and embarrassment, see, *e. g.*, *Globe Newspaper Co.* v. *Superior Court*, 457 U. S. 596, 607. The Maryland Legislature's considered judgment regarding the importance of its interest will not be second-guessed, given the State's traditional and transcendent interest in protecting the welfare of children and the growing body of academic literature documenting the psychological trauma suffered by child abuse victims who must testify in court.

(c) The requisite necessity finding must be case specific. The trial court must hear evidence and determine whether the procedure's use is necessary to protect the particular child witness' welfare; find that the child would be traumatized, not by the courtroom generally, but by the defendant's presence; and find that the emotional distress suffered by the child in the defendant's presence is more than *de minimis*. Without determining the minimum showing of emotional trauma required for the use of a special procedure, the Maryland statute, which requires a determination that the child will suffer serious emotional distress such that the child cannot reasonably communicate, clearly suffices to meet constitutional standards.

(d) Since there is no dispute that, here, the children testified under oath, were subject to full cross-examination, and were able to be observed by the judge, jury, and defendant as they testified, admitting their testimony is consonant with the Confrontation Clause, provided that a proper necessity finding has been made.

3. The Court of Appeals erred to the extent that it may have rested its conclusion that the trial court did not make the requisite necessity finding on the lower court's failure to observe the children's behavior in the defendant's presence and its failure to explore less restrictive alternatives to the one-way television procedure. While such evidentiary requirements could strengthen the grounds for the use of protective measures, only a case-specific necessity finding is required. This Court will not establish, as a matter of federal constitutional law, such categorical evidentiary prerequisites for the use of the one-way procedure.

316 Md. 551, 560 A. 2d 1120, vacated and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, BLACKMUN, and KENNEDY, JJ., joined. SCALIA, J., filed a dissenting opinion, in which BRENNAN, MARSHALL, and STEVENS, JJ., joined.

JUSTICE O'CONNOR delivered the opinion of the Court.

This case requires us to decide whether the Confrontation Clause of the Sixth Amendment categorically prohibits a child witness in a child abuse case from testifying against a

construction if that phrase was construed as including a single slap. However the challenge was framed, though, the habeas court could not limit itself to the question whether a rational factfinder could conclude that the slap fell within *some* plausible definition of "physical abuse."

III

The majority's discussion of the way in which a federal habeas court should review the application of a valid aggravating circumstance to the facts of a particular case seems to me to be flawed in significant respects. My principal disagreement, however, is with the Court's insistence on addressing the issue. The majority makes no effort to justify its holding that the Arizona Supreme Court has placed constitutionally sufficient limitations on its "especially heinous . . . or depraved" aggravating circumstance. Instead the Court relies entirely on a sentence of dictum from today's opinion in *Walton*—an opinion which itself offers no rationale in support of the Court's conclusion. The dissenting opinion in *Walton* notes the Court's increasing tendency to review the constitutional claims of capital defendants in a perfunctory manner, but the Court's action in this case goes far beyond anything that is there observed.

I dissent.

GERALD R. GRANT, Arizona Assistant Attorney General (ROBERT K. CORBIN, Atty. Gen. and JESSICA GIFFORD FUNKHOUSER, Chief Counsel, on the briefs) for petitioners; JAMES S. LIEBMAN, New York, N.Y. (SUSAN A. KETTLEWELL, Pub. Defender, DONALD S. KLEIN, and FRANK P. LETO, Asst. Pub. Defenders, on the briefs) for respondent.

No. 89-260

IDAHO, PETITIONER *v.* LAURA LEE WRIGHT

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF IDAHO

Syllabus

No. 89-260. Argued April 18, 1990—Decided June 27, 1990

Respondent Wright was charged under Idaho law with two counts of lewd conduct with a minor, specifically her 5½ and 2½ year old daughters. At the trial, it was agreed that the younger daughter was not "capable of communicating to the jury." However, the court admitted, under Idaho's residual hearsay exception, certain statements she had made to a pediatrician having extensive experience in child abuse cases. The doctor testified that she had reluctantly answered questions about her own abuse, but had spontaneously volunteered information about her sister's abuse. Wright was convicted on both counts, but appealed only from the conviction involving the younger child. The State Supreme Court reversed, finding that the admission of the doctor's testimony under the residual hearsay exception violated Wright's rights under the Confrontation Clause. The court noted that the child's statements did not fall within a traditional hearsay exception and lacked "particularized guarantees of trustworthiness" because the doctor had conducted the interview without procedural safeguards: he failed to videotape the interview, asked leading questions, and had a preconceived idea of what the child should be disclosing. This error, the court found, was not harmless beyond a reasonable doubt.

Held: The admission of the child's hearsay statements violated Wright's Confrontation Clause rights.

(a) Incriminating statements admissible under an exception to the hearsay rule are not admissible under the Confrontation Clause unless the prosecution produces, or demonstrates the unavailability of, the declarant whose statement it wishes to use and unless the statement bears adequate indicia of reliability. The reliability requirement can be met where the statement either falls within a firmly rooted hearsay exception or is supported by a showing of "particularized guarantees of trustworthiness." *Ohio v. Roberts*, 448 U. S. 56. Although it is presumed here that the child was unavailable within the meaning of the Clause, the evidence will be barred unless the reliability requirement is met.

(b) Idaho's residual hearsay exception is not a firmly rooted hearsay exception for Confrontation Clause purposes. It accommodates *ad hoc* instances in which statements not otherwise falling within a recognized hearsay exception might be sufficiently reliable to be admissible at trial, and thus does not share the same tradition of reliability supporting the admissibility of statements under a firmly rooted hearsay exception. To rule otherwise would require that virtually all codified hearsay exceptions be found to assume constitutional stature, something which this Court has declined to do. *California v. Green*, 399 U. S. 149, 155–156.

(c) In determining that "particularized guarantees of trustworthiness" were not shown, the State Supreme Court erred in placing dispositive weight on the lack of procedural safeguards at the interview, since such safeguards may in many instances be inappropriate or unnecessary to a determination whether a given statement is sufficiently trustworthy for Confrontation Clause purposes. Rather, such trustworthiness guarantees must be shown from the totality of those circumstances that surround the making of the statement and render the declarant particularly worthy of belief. As is the case with statements admitted under a firmly rooted hearsay exception, see, *e. g.*, *Green*, *supra*, at 161, evidence possessing "particularized guarantees of trustworthiness" must be so trustworthy that adversarial testing would add little to its reliability. In child abuse cases, factors used to determine trustworthiness guarantees—such as the declarant's mental state and the use of terminology unexpected of a child of similar age—must relate to whether the child was particularly likely to be telling the truth when the statement was made. The State's contention that evidence corroborating a hearsay statement may properly support a finding that the statement bears such trustworthiness guarantees is rejected, since this would permit admission of presumptively unreliable statements, such as those made under duress, by bootstrapping on the trustworthiness of other evidence at trial. That result is at odds with the requirement that hearsay evidence admitted under the Clause be so trustworthy that cross-examination of the declarant would be of marginal utility. Also rejected is Wright's contention that the child's statements are *per se* or presumptively unreliable on the ground that the trial court found the child incompetent to testify at trial. The court found only that she was not capable of communicating to the jury and implicitly found that at the time she made the statements she was capable of receiving just impressions of the facts and of relating them truly. Moreover, the Clause does not erect a *per se* rule barring the admission of prior statements of a declarant who is unable to communicate to the jury at the time of trial. See, *e. g.*, *Mattox v. United States*, 156 U. S. 237, 243–244.

(d) In admitting the evidence, the trial court identified only two factors—whether the child had a motive to make up her story and whether, given her age, the statements were of the type that one would expect a child to fabricate—relating to circumstances surrounding the making of the statements. The State Supreme Court properly focused on the presumptive unreliability of the out-of-court statements and on the suggestive manner in which the doctor conducted his interview. Viewing the totality of the circumstances, there is no special reason for supposing that the incriminating statements about the child's own abuse were particularly trustworthy. Her statement about her sister presents a closer question. Although its spontaneity and the change in her demeanor suggest that she may have been telling the truth, spontaneity may be an inaccurate indicator of trustworthiness where there has been prior interrogation, prompting, or manipulation by adults. Moreover, the statement was not made under circumstances of reliability comparable to those required, for example, for the admission of excited utterances or statements made for purposes of medical diagnosis or treatment. Because the State does not challenge the State Supreme Court's determination that the Confrontation Clause error was not harmless beyond a reasonable doubt, this Court will not revisit the issue.

116 Idaho 382, 775 P. 2d 1224, affirmed.

O'CONNOR, J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, STEVENS, and SCALIA, JJ., joined. KENNEDY, J., filed a dissenting opinion, in which REHNQUIST, C. J., and WHITE and BLACKMUN, JJ., joined.

JUSTICE O'CONNOR delivered the opinion of the Court.

This case requires us to decide whether the admission at trial of certain hearsay statements made by a child declarant to an examining pediatrician violates a defendant's rights under the Confrontation Clause of the Sixth Amendment.

No. 86-6757

JOHN AVERY COY, APPELLANT *v.* IOWA

ON APPEAL FROM THE SUPREME COURT OF IOWA

Syllabus

No. 86-6757. Argued January 13, 1988—Decided June 29, 1988

Appellant was charged with sexually assaulting two 13-year-old girls. At appellant's jury trial, the court granted the State's motion, pursuant to a 1985 state statute intended to protect child victims of sexual abuse, to place a screen between appellant and the girls during their testimony, which blocked him from their sight but allowed him to see them dimly and to hear them. The court rejected appellant's argument that this procedure violated the Confrontation Clause of the Sixth Amendment, which gives a defendant the right "to be confronted with the witnesses against him." Appellant was convicted of two counts of lascivious acts with a child, and the Iowa Supreme Court affirmed.

Held:

1. The Confrontation Clause by its words provides a criminal defendant the right to "confront" face-to-face the witnesses giving evidence against him at trial. That core guarantee serves the general perception that confrontation is essential to fairness, and helps to ensure the integrity of the factfinding process by making it more difficult for witnesses to lie.

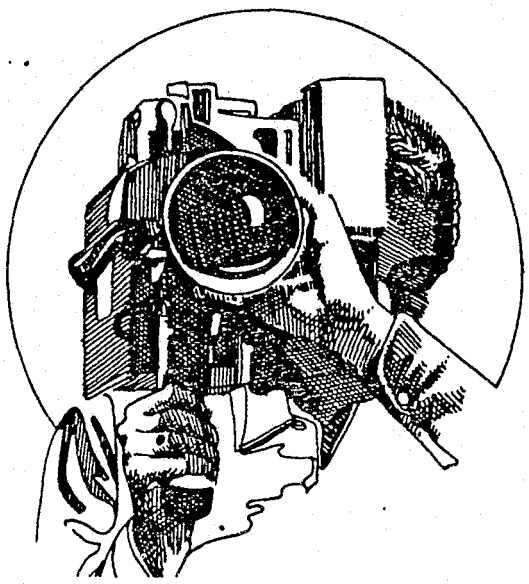
2. Appellant's right to face-to-face confrontation was violated since the screen at issue enabled the complaining witnesses to avoid viewing appellant as they gave their testimony. There is no merit to the State's assertion that its statute creates a presumption of trauma to victims of sexual abuse that outweighs appellant's right to confrontation. Even if an exception to this core right can be made, it would have to be based on something more than the type of generalized finding asserted here, unless it were "firmly . . . rooted in our jurisprudence." *Bourjaily v. United States*, 483 U. S. ——, ——. An exception created by a 1985 statute can hardly be viewed as "firmly rooted," and there have been no individualized findings that these particular witnesses needed special protection.

3. Since the State Supreme Court did not address the question whether the Confrontation Clause error was harmless beyond a reasonable doubt under *Chapman v. California*, 386 U. S. 18, 24, the case must be remanded.

397 N. W. 2d 730, reversed and remanded.

SCALIA, J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, STEVENS, and O'CONNOR, JJ., joined. O'CONNOR, J., filed a concurring opinion, in which WHITE, J., joined. BLACKMUN, J., filed a dissenting opinion, in which REHNQUIST, C. J., joined. KENNEDY, J., took no part in the consideration or decision of the case.

Videotaping Interviews with Child Sex Offense Victims



by Ross Eatman

Child protective and law enforcement personnel are increasingly using videotape to preserve a child victim's account of sexual victimization. The videotapes serve several purposes. They are an adjunct to investigations and may, under certain circumstances, be used as evidence in later legal proceedings. They can also reduce the child's protracted and often traumatic contact with the legal system. First, videotaping one in-depth interview can spare the child repeated questioning by protective services workers, law enforcement personnel, prosecutors and other professionals. Second, alleged offenders often plead guilty to criminal charges when confronted with a child witness' videotaped statement, thereby preventing further proceedings. Third, a child's videotaped statement might be shown to a grand jury, obviating the child's testimony at that proceeding. Potential therapeutic uses of videotaped interviews have been discussed elsewhere.[1]

If the videotaped statement is used as evidence in court, the roles of interview participants, and the child's statement may be scrutinized and possibly challenged. Defense attorneys may even use it to undermine a child's live testimony. The ability to introduce videotaped interviews in court, therefore, may dictate a change in current interviewing procedures and reexamination of the wisdom of videotaping such interviews.

This article will help agencies examine their policies regarding videotaped interviews. It recommends protocols for the videotaping of interviews, discusses some of its in-court uses, and identifies legal and constitutional issues raised when videotapes are offered as evidence. The article does not deal with videotaped depositions, which may substitute for the child's in-court testimony if certain requirements are satisfied.

Developing a Protocol

Recent developments in child sexual abuse case management have emphasized an interdisciplinary approach,[2] since it is generally recognized that children may be harmed by a fragmented and prolonged legal response to abuse. Development of a protocol for videotaping interviews is one method of ensuring the child victim is not subjected to unnecessary or repeated interrogations. If the protocol carefully delineates the responsibilities of those participating in the investigation, the process will be streamlined, fewer cases will be mishandled, and the videotape will be used more effectively in any resulting criminal proceedings. Most important, a decision must be made that the videotape will replace all other in-depth interviews, or its primary purpose will be undermined.

Review State Laws

It is essential that local prosecutors, child protective services agency representatives, and affiliated professionals first determine the impact of state discovery, privilege, confidentiality, and evidentiary rules on the videotaping of interviews. State laws may require that agencies maintain the confidentiality of information procured in their investigations. This may pose questions pertaining to the prosecution's access to videotapes of a child's statement. Social workers and other professionals involved in interviews may have to seek waivers of confidentiality from parents or children to disclose information contained in the videotape. Finally, the complex interaction of state laws (along with mandatory child abuse reporting laws) may actually impose *conflicting* mandates on an agency or individual. A careful study of state laws is thus an indispensable first step to the development of protocols.

Identify Appropriate Cases and Timing

Participating agencies should then establish a means for identifying cases in which an interview is desired. If local experience demonstrates, for instance, that regular videotaping minimizes the child victim's contact with the system and results in a high proportion of guilty pleas, broad use of the procedure may be considered. A different experience, on the other hand, may dictate that a case-by-case approach be utilized. The videotaping of a child who is interviewed prematurely or is uncommunicative may prove more costly than constructive since further interviews will be required, investigators may doubt the veracity of the victim, and the videotape may be used on the accused's behalf. It is important that agencies monitor the disposition of cases in which videotaping is used to determine the extent to which the videotapes are fulfilling their function.

Interviewers and investigators must also determine the appropriate stage at which to videotape a child victim's statement. Even skilled interviewers of sexually abused children may need several interviews to elicit the child's account. It is common for some sexually abused children to disclose details of the abuse gradually over several sessions.[3] A statement prematurely videotaped may be ineffective and even jeopardize a subsequent criminal prosecution. If, on the other hand, the videotaping follows numerous interviews, the procedure will have failed to minimize the victim's involvement. The statement may also lack spontaneity, thereby undermining its effectiveness and fostering defense allegations that the child was coached or encouraged by adult participants.

Assume Later Scrutiny

The interview itself should be conducted under the assumption that the videotape will later be scrutinized by defense attorneys, prosecutors, judges, grand jurors, and jurors. If a state statute governs the videotaping and subsequent use of a child victim's statement, the statutory requirements should be incorporated in any protocol. These statutes generally establish procedural requirements for conducting the videotaped proceeding to ensure admissibility of videotaped statements in criminal proceedings. In almost all of the statutory schemes, for example, the presence of an attorney for either party in the interview room would probably preclude the prosecution from presenting the tape as evidence in a criminal proceeding. Statutes authorizing videotaped depositions, on the other hand, require that the child be subject to direct and cross-examination, usually in the presence or view of the defendant. The taped deposition may then substitute for the child's in-court testimony. Under all the statutes, the interviewer must be available to testify at the proceeding in which the videotape is offered.

Use Trained Interviewers

Videotaping guidelines should require that a trained professional elicit the child victim's

statement, using questioning techniques and props appropriate in child sexual abuse inquiries. The interviewer's skill and professional conduct are critical to the interview's effectiveness and to its later impact as evidence. The interviewer must not only extract accurate and persuasive information, but must do so in a legally acceptable way if the videotape is to be offered in court. Under both traditional rules of evidence and new statutes allowing for the use of videotaped interviews in court, the interviewer must avoid unduly leading questions. An interviewing technique that is overly suggestive may persuade a court that the child was coached or his or her responses are unreliable. Some mental health professionals believe that "leading questions may sometimes be necessary in order to enable frightened young children to respond and talk about particular subjects."[4] A therapist who decides to videotape an interview designed to help children disclose the abuse, however, must accept the fact the tape may be used by defense counsel and ultimately may jeopardize a criminal prosecution. If the videotape is subsequently used in court, the defense attorney will use any weaknesses in the child's account or the interviewer's technique to discredit the reliability of the statement.

Prosecution and Defense Uses of Videotaped Statements

Videotaped statements can help prosecutors at trial by providing evidence of the abuse that supplements the child's testimony. A pretrial videotaped interview may show a more relaxed, natural account of the abuse since it generally occurs in an environment less likely to intimidate a child than the formal courtroom. A properly timed interview also may capture spontaneity of expression and attention to detail absent in the child's later live testimony. Further, the prosecutor could use the videotape to rebut defense claims that the child recently fabricated the account. On the other hand, some prosecutors question the persuasiveness of videotaped statements or testimony, believing that a live witness is much more effective. They also may be reluctant to present two versions of the child's account — the videotaped statement and live testimony — if they contain inconsistencies.

Hearsay Exceptions

If the prosecutor decides to offer the videotaped statement at a criminal proceeding as evidence of abuse, he or she must first satisfy the legal requirements of the hearsay rule and the sixth amendment confrontation clause. Although judicial decisions and statutes have noted a number of exceptions to the hearsay rule, videotaped interviews do not generally fall within a traditional exception. Thus, eight states have passed (and others are considering) statutes creating a special hearsay exception for videotaped statements of child victims of sexual assault, in order to permit the prosecution to offer them as evidence that the child was abused.[5]

> *". . . videotaped interviews do not generally fall within a traditional exception."*

These statutes prescribe conditions for the admission of videotaped interviews at a criminal proceeding. The statutes all require that competent technicians operate the recording equipment, the recording be accurate and unaltered, and every voice on the recording be identified. Under the statutes, the child's account cannot be elicited by questioning designed to elicit a particular statement. Further, the interviewer must attend and be available to testify at the criminal proceeding. Most of the statutes preclude attorneys for either party from attending the interview. Most statutes have provisions governing the child's availability at the criminal proceedings and a criminal defendant's opportunity to view the videotape before the proceeding.

Confrontation Rights

Even if a statement is admissible under one of these statutes governing the admission of videotaped statements, it still must satisfy requirements of the confrontation clause of the Sixth Amendment. If the child testifies at trial and the videotaped statement is offered into evidence, no confrontation issue is presented. However, if the child does not testify at trial and the videotape is offered into evidence, the defendant's "right to be confronted with the witnesses against him"[6] probably is violated.

Indeed, several existing videotape interview statutes are probably unconstitutional since they do not require the child to testify at trial or require proof of the child's unavailability and the statement's reliability.[7] A Texas court of appeals recently held that the state's videotaped interview statute was unconstitutional on this ground. In *Long v. State*,[8] the prosecution offered as evidence the videotaped interview of the child victim but did not call the child to testify in its case-in-chief, although the child was an available witness. The court held that by allowing the child's videotaped statement to be admitted without requiring the prosecution to produce the child, the statute did not afford the defendant protections guaranteed by the confrontation clause.

Negative Uses

Although videotaped statements are designed to give prosecutors additional evidence, the videotapes may be used in court for other purposes. When the child's videotaped story shows the child's reluctance to talk, provides little detail or includes initial denials of the abuse, and later interviews and testimony present a more complete account, the defense attorney will seek to use the previous statement to impeach the child's trial testimony, thus casting serious doubt on the child's credibility and veracity.

Discovery Rules

In order for a defense attorney to use a videotaped statement, however, he or she must have access to it. The principle of discovery determines whether or when the prosecutor must provide such evidence to the defense. State statutes, judicial decisions and court rules govern discovery, and they vary widely from state to state. In seven of the states that have videotaped interview statutes, the statutes specifically give the defendant or his attorney the opportunity to view the videotape before the prosecution offers it into evidence in a criminal proceeding. If the prosecution does not plan to use a videotaped interview — usually because it is ineffective or inconsistent with the child's probable trial testimony — the defense would still want access to the tape. His or her right of access in this situation would be controlled by the state's general discovery rules. Similarly, in states without special videotape statutes regular discovery rules apply.

One significant constitutional limitation has been imposed on a prosecutor's ability to shield relevant materials from the defendant. Due process requires that upon defense request, the prosecutor must disclose any evidence favorable to the defendant, often called exculpatory evidence, when the evidence is material to guilt or punishment.[9] The decision as to the *materiality* and *exculpatory* value of the evidence is, in the first instance, the prosecutor's. The United States Supreme Court has held that the prosecutor violates constitutional duty of disclosure only when nondisclosure denies the defendant right to a fair trial.[10] The prosecutor would therefore have a duty to disclose an exculpatory videotaped statement of the victim, independent of the state's discovery rule and videotaping statute.

The Videotape's Quality

Discussion of discovery practices has focused so far on the defendant's access to the videotaped statements and the timing of such access. The content and quality of the child's videotaped account, however, may have a profound influence on both pretrial and trial proceedings, depending upon the state's discovery rules. If the videotape demonstrates the child

may be an effective witness and his or her account is credible, the prosecutor will probably offer the videotape to the defendant before trial in the hope of inducing a guilty plea. In both states having pretrial disclosure and states having delayed disclosure, the prosecutor would probably pursue the same course with an effective videotape. When the defendant has a pretrial right of access, the prosecutor would have to disclose the tape; when there is no such obligation he would disclose it voluntarily.

The course of events may be very different when the prosecutor has an ineffective videotape. Although an ineffective videotape might discourage the prosecutor from pursuing the prosecution, he or she might nonetheless seek a conviction if there is other corroborative evidence of the abuse and if the child is likely to be a good witness at trial. If the defendant has a pretrial right of access to the statement, the prosecutor would have to disclose it and suffer the consequences. In a state that delays discovery of a witness' statement, the prosecutor is likely to resist disclosure of an ineffective videotape. Thus, the defendant who knows the prosecutor has a videotaped statement might presume that his or her refusal to produce it before trial is an indication of the tape's ineffectiveness. Without pretrial access to the videotape the defendant does not have the benefit of time to prepare possible defenses based on the videotape. However, as noted earlier, if a trial ensues and the child testifies, the defendant will be able to use an ineffective videotape to impeach the child's in-court testimony, since even those states barring pretrial access generally require the prosecutor to disclose the statement after the witness testifies.

Be Aware

Although videotaping a child victim's statement has many benefits, jurisdictions considering the use of this technique must be aware of the potential detrimental legal consequences. Some of the dangers may be avoided if highly trained interviewers are aware of the pitfalls discussed in this article. Greater experimentation with this innovative technique is probably necessary to truly evaluate its effectiveness.

Ross Eastman is an attorney and the Assistant Project Director of the Child Sexual Abuse Law Reform Project, National Legal Resource Center for Child Advocacy and Protection, American Bar Association.

Footnotes

1 For a thorough discussion of the therapeutic and legal uses of videotape, *see* MacFarlane, "Diagnostic Evaluations and the Uses of Videotapes in Child Sexual Abuse Cases," in *Papers from a National Policy Conference on Legal Reforms in Child Sexual Abuse Cases* (J. Bulkley ed. 1985). Other practical and legal implications of using videotape in sexual abuse cases are discussed in Lloyd, "Practical Issues in Avoiding Confrontation of a Child Witness and the Defendant in a Criminal Trial," in *Papers from a National Policy Conference on Legal Reforms in Child Sexual Abuse Cases. See also* Haas, "Use of Videotape in Child Abuse Cases," 8 Nova L.J. 373 (1984).

2 J. Bulkley, *Recommendations for Improving Legal Intervention in Child Sexual Abuse Cases*, American Bar Association, Washington, D.C. (1982); *Innovations in the Prosecution of Child Sexual Abuse Cases*, American Bar Association (J. Bulkley ed. 1981).

3 MacFarlane, "Diagnostic Evaluations and the Uses of Videotapes in Child Sexual Abuse Cases," *supra* note 1.

4 *Id.* at 136.

5 Hawaii, Kansas, Kentucky, Louisiana, Missouri, Rhode Island, Texas and Utah have such statutes. Tennessee has a statute that allows the introduction of a videotaped interview into evidence only at a preliminary hearing.

6 *See Ohio v. Roberts*, 448 U.S. 55 (1980); *California v. Green*, 399 U.S. 149, 158 (1970). *See generally* Graham, "Child Sex Abuse Prosecutions: Hearsay and Confrontation Clause Issues," in *Papers from a National Policy Conference on Legal Reforms in Child Sexual Abuse Cases* (J. Bulkley ed. 1985); J. Bulkley, *Evidentiary and Procedural Trends in State Legislation and Other Emerging Legal Issues*

in Child Sexual Abuse Cases (American Bar Association Monograph 1985).

7 The U.S. Supreme Court recently held in *Ohio v. Roberts* that when an out-of-court statement is offered into evidence and the person who made the statement does not testify at trial, the confrontation clause imposes two conditions for admission of this statement. First, the person who made the statement must be shown to be unavailable as a witness. Death, testimonial privilege, physical or mental disability, absence from the jurisdiction, and likelihood the child will suffer severe trauma from testifying may constitute grounds of unavailability. Second, the hearsay statement must possess "indicia of reliability." The Court stated that reliability of a hearsay statement may be presumed when the statement falls within a firmly rooted hearsay exception. However, if the statement does not fall within one of these exceptions, it must be excluded unless it possesses "particularized guarantees of trustworthiness."

8 *Long v. State*, 694 S.W. 2d 185 (Tex. Ct. App. 1985).

9 *Brady v. Maryland*, 373 U.S. 83 (1963).

10 *United States v. Agurs*, 427 U.S. 97, 108 (1976). Of eight statutes that allow the admission of a videotaped statement at trial, only one, the Kansas statute, does not address the child's availability to testify at trial. The statute is probably unconstitutional since it satisfies none of the confrontation concerns. The Utah statute requires that the child be available or be found by a court to be unavailable, and imposes on all videotaped statements a reliability requirement. The six remaining statutes require that the child be "available to testify" at trial. Four of these six statutes provide additionally that "either party *may* call the child to testify, and the opposing party may cross-examine the child." (emphasis added) This provision suggests that the prosecution is not mandated to produce the child for direct and cross-examination. These statutes are probably unconstitutional because the confrontation clause requires that the prosecution "produce, or demonstrate the unavailability, of the declarant whose statement it wishes to use against the defendant." *Ohio v. Roberts*, 448 U.S. at 65.

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APPENDIX L

CHILD VICTIM WITNESS PROTECTION CODE PROVISIONS

Protecting Child Victim/Witnesses

Sample Laws and Materials

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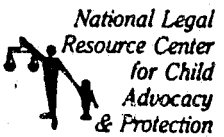

Prepared under a Cooperative Agreement to the National Center for Missing and Exploited Children, Number 86-MC-CX-K003, from the Office of Juvenile Justice and Delinquency Prevention, Office of Justice Programs, U.S. Department of Justice.

Preface

Over the last several years, there has been a tremendous amount of media and professional attention directed at the special vulnerability of very young children who, as both victims of crime and witnesses in the judicial process, have faced a double ordeal. The trauma induced by their involvement in the legal system, which some have referred to as a "second victimization," has for some time been a concern of this program. Since 1979, the National Legal Resource Center for Child Advocacy and Protection has been focusing on the child who has been criminally victimized within their own family. However, what we have learned through seven years of technical assistance throughout the country is that many of the statutory reforms originally devised to protect the victim of intrafamily abuse are applicable to all young sensitive children who are called upon to function in the courtroom environment.

After we published five books (between 1980 and 1985) which spotlighted some of these issues, and the ABA's Criminal Justice Section began to focus on this area, the American Bar Association's policymaking body, the House of Delegates, approved a resolution setting forth a set of "Guidelines for the Fair Treatment of Child Witnesses in Cases Where Child Abuse is Alleged." These guidelines (contained herein) now represent the official policy of the ABA. However, our technical support responsibilities have continued unabated, and to assist those who are trying to craft legislation on some of the most vexing and complex aspects of the child witness issue, we have been commissioned under a contract with the National Center for Missing and Exploited Children to develop this publication.

Let me first be clear about what this publication is <u>not</u>. The sample statutes are not intended to serve as model laws or uniform legislation. Rather, they are offered as approaches states may want to consider in pursuing legislative reform. Nor have we tried to develop statutes that track the specific positions taken in the ABA "Guidelines." In no way are we suggesting that the sample legislative approaches contained herein will not be controversial; indeed, as the limited, cautious positions taken in the "Guidelines" point out, there is clearly disagreement within the ABA about how far these child witness reforms should go. We also recognize that the difference in the states' constitutional provisions and court decisions make any single national approach to these child protective reforms unrealistic.

We therefore encourage people who are working on reforms at the state level to be cautious, to draft laws in these areas as carefully and methodically as possible, and with the broadest range of multidisciplinary input and study. Our seven years of research and consulting tells us that states must be flexible

in both adopting and using these reforms, and that alternative approaches should be available for dealing with the child in the courtroom. Without the utmost care in legal drafting and reform implementation, there is great risk of case reversals and the need for retrials, thus causing the child even more trauma. It is also vital to carefully evaluate the use of any new procedures to protect children by using a case-by-case analysis, rather than a blanket approach, and to only use the reforms when necessary. This is consistent with the U.S. Supreme Court's decision in the Globe Newspaper Co. case which is referred to herein.

The major part of the following material is in some way both a crystalization of the writings previously published by us (see the complete list enclosed), as well as an expansion upon one part of a previous publication of the National Center for Missing and Exploited Children, entitled Selected State Legislation: A Guide for Effective State Laws to Protect Children. Our program was pleased to have assisted in the preparation of that guide.

The sample laws which follow take a comprehensive approach to the issues addressed, and each area has been carefully analyzed by our staff, and is fully discussed in the commentary which accompanies the statutory language. In certain places we have bracketed certain words (such as the suggested ages of children) to indicate that these are places where the legal drafters may especially want to consider alternatives.

Of course, drafting, enacting, and even using new legal protections for child victim/witnesses will not be enough. There must be a concomitant effort to educate county and local professionals in the need for these reforms and where they can most appropriately be used. Our program will continue to be available to assist in these efforts.

Howard A. Davidson, Esquire
Director
National Legal Resource Center for
Child Advocacy and Protection

Introduction

This publication offers sample statutes and accompanying commentaries for four legislative reforms: a special hearsay exception for a child victim's out-of-court statement of abuse; videotaped depositions of a child victim's testimony; closed-circuit televising of a child victim's trial testimony; and revision of the testimonial competency standard for children. These reforms all have a common objective -- to facilitate or allow the admission into evidence at trial of a child victim's account of abuse. Although the concern for a child abuse victim's welfare is no less significant in civil proceedings, the commentary may place a greater emphasis on criminal trial issues than on civil issues. This emphasis reflects the more stringent constitutional requirements in criminal proceedings. For example, the defendant's sixth amendment right of confrontation and the public's and press' rights of access to certain judicial proceedings may be more strictly applied in criminal cases.

The reforms selected for this publication are among many that have been adopted by state legislatures and local jurisdictions throughout the country since the early 1980's. As state child protection agencies received more reports of sexual abuse of children and as more cases were prosecuted in the criminal justice system, it became evident that child sexual abuse cases were extremely difficult to prove, that the legal system often further traumatized the victim, and that treatment was rarely available. A sweeping law reform movement developed to respond to these problems with numerous proposals for improving the legal response in child sexual abuse cases. Sources of these reform proposals include the ABA's Guidelines for the Fair Treatment of Child Witnesses in Cases Where Child Abuse is Alleged (included in this publication), the Recommendations of the ABA National Legal Resource Center for Child Advocacy and Protection (also included in this publication), the NIJ study report When the Victim is a Child and many law journal and social science articles. By 1986, 22 states had adopted a special hearsay exception, 27 states had enacted videotaped deposition statutes, 20 states had passed closed-circuit television statutes, and 32 states had accorded children presumptive competency.

A comprehensive interdisciplinary response to child abuse involves a wide range of reforms, some of which require state legislation, others of which do not. Many reforms implemented without legislation (some trial reforms do not require legislation) can significantly reduce a child victim/witness' trauma and result in more successful prosecution or disposition of child abuse cases, and innovative prosecution programs have recognized that these non-legislative reforms are indispensable. Legislative authority is not needed to convene interdisciplinary child abuse teams, to coordinate court proceedings, to appoint special advocates for child victims, or

to reduce interviews with children through joint interviews or videotaping of interviews. Training and education of law enforcement personnel in interviewing and investigative techniques can also be accomplished at a local level. Some progressive local prosecutorial programs have instituted vertical prosecution policies, allowing the same prosecutor to handle all stages of a child abuse case, and some jurisdictions have formed special prosecution units to handle all abuse cases. Finally, treatment programs for child victims, families, and (where appropriate) offenders also have been created without legislative authorization.

However, reforms that involve the revision of evidentiary and procedural rules at trials generally require legislative authorization. Further, courts may be reluctant to permit innovative procedures to protect the child victim/witness in the absence of legislative authority, especially when important constitutional rights of the defendant are at stake. Thus, the California court of appeals, in Hochheiser v. Superior Court, 161 Cal. App. 3d 777, 208 Cal. Rptr. 273 (1984), held that a trial court had exceeded its authority in allowing the use of closed-circuit television equipment to transmit a child victim's trial testimony from another room into the courtroom. On the other hand, a New Jersey trial court validated the same procedure despite the absence of statutory authority, but set forth elaborate conditions for its implementation. Legislation therefore may be appropriate and sometimes necessary when a desired reform involves a significant departure from traditional court procedures or judicial doctrine, or when detailed procedures will be required for its implementation. Finally, legislation encourages the use of reforms, whether or not it is necessary to achieve them.

Some of the legislative reforms -- such as the admission into evidence at trial of a child victim's videotaped deposition, closed-circuit testimony, or out-of-court statement about abuse-- offer child victim/witnesses special protections to accommodate their unique needs. Statutory revision of the testimonial competency standard, on the other hand, is intended to treat children as other witnesses are treated, and is needed to supplant a practice which has traditionally worked to the special disadvantage of child witnesses.

States have already addressed through legislation a number of ameliorative reforms for the benefit of child victim/witnesses. Most states provide for the exclusion of spectators from the courtroom during the testimony of a minor victim of specified offenses if it can be shown that the victim would be traumatized (see Summary of Other Legislative Reforms). Since 1983, eleven states have passed statutes which authorize the admission into evidence at trial of a child victim's videotaped statement or interview about abuse (see Summary of Other Legislative Reforms). These statutes should not be confused with the videotaped deposition laws (discussed

in Videotaped Deposition and Closed-Circuit Television Testimony) that contemplate full cross-examination of the child victim/witness. The videotaping of a child victim's statement may serve useful purposes apart from its evidentiary value, since, for example, an effective and persuasive statement may reduce the number of interviews or induce a guilty plea. Use of a vidotaped statement as evidence in a criminal trial in lieu of the child's trial testimony, however, may violate the defendant's sixth amendment right of confrontation, as appellate courts in Texas have held.

A number of states have enacted statutory provisions which direct courts to expedite proceedings, give docket priority, or ensure a speedy trial in cases involving child victim/witnesses (see Summary of Other Legislative Reforms). It is generally believed that protracted proceedings may exacerbate the child's trauma, and these special provisions are designed to limit the child's unnecessary exposure to the legal system. Several states have also extended the statute of limitations for certain criminal offenses against children, recognizing that the circumstances of child abuse, especially in an intrafamily context, may delay discovery or disclosure of the abuse. Various state statutes now permit a guardian or support person to remain with a child victim during different stages of legal proceedings, while other statutory provisions require courts to protect a child victim's privacy in court proceedings.

At least three states--Rhode Island, Washington, and Wisconsin-- have enacted into law a "bill of rights" for child victims and witnesses during their involvement with the legal system. These statutory schemes contain broad language stating that efforts should be made to ensure that law enforcement personnel, prosecutors, or judges explain the nature of various proceedings to the children and that input of a child's guardian or support person be considered during the proceedings. All three states also require that child victims and their families be provided information or referrals to social service agencies to help them cope with the emotional impact of the crime, investigation, and subsequent judicial proceedings.

Many of the issues raised by these new reforms have not yet been carefully addressed by courts and commentators. The reforms contained in the sample statutes have received more scholarly attention, however, and though issues remain unresolved, sample statutes can be offered with greater assurance.

Hearsay Exception for Child Victim's Out-of-Court Statement of Abuse

(A) An out-of-court statement made by a child under [eleven] years of age at the time of the proceeding concerning an act that is a material element of the offense[s] of [sexual abuse], [physical abuse or battery], [other specified offenses] that is not otherwise admissible in evidence is admissible in any judicial proceeding if the requirements of sections B through F are met.

(B) An out-of-court statement may be admitted as provided in section A if:

(1) the child testifies at the proceeding, or testifies by means of videotaped deposition (in accordance with [_____]) or closed-circuit television (in accordance with [_____]), and at the time of such testimony is subject to cross-examination about the out-of-court statement; or

(2) (a) the child is found by the court to be unavailable to testify on any of these grounds:

i) the child's death;

ii) the child's absence from the jurisdiction;

iii) the child's total failure of memory;

iv) the child's persistent refusal to testify despite judicial requests to do so;

v) the child's physical or mental disability;

vi) the existence of a privilege involving the child;

vii) the child's incompetency, including the child's inability to communicate about the offense because of fear or a similar reason; or

viii) substantial likelihood that the child would suffer severe emotional trauma from testifying at the proceeding or by means of videotaped deposition or closed-circuit television;

and

(b) the child's out-of-court statement is shown to possess particularized guarantees of trustworthiness.

(C) A finding of unavailability under section B(2)(a)(viii) must be supported by expert testimony.

(D) The proponent of the statement must inform the adverse party of the proponent's intention to offer the statement and the content of the statement sufficiently in advance of the proceeding to provide the defendant with a fair opportunity to prepare a response to the statement before the proceeding at which it is offered.

(E) In determining whether a statement possesses particularized guarantees of trustworthiness under section B(2), the court may consider, but is not limited to, the following factors:

(1) the child's personal knowledge of the event;
(2) the age and maturity of the child;
(3) certainty that the statement was made, including the credibility of the person testifying about the statement;
(4) any apparent motive the child may have to falsify or distort the event, including bias, corruption, or coercion;
(5) the timing of the child's statement;
(6) whether more than one person heard the statement;
(7) whether the child was suffering pain or distress when making the statement;
(8) the nature and duration of any alleged abuse;
(9) whether the child's young age makes it unlikely that the child fabricated a statement that represents a graphic, detailed account beyond the child's knowledge and experience;
(10) whether the statement has a "ring of verity," has internal consistency or coherence, and uses terminology appropriate to the child's age;
(11) whether the statement is spontaneous or directly responsive to questions;
(12) whether the statement is suggestive due to improperly leading questions;
(13) whether extrinsic evidence exists to show the defendant's opportunity to commit the act complained of in the child's statement.

(F) The court shall support with findings on the record any rulings pertaining to the child's unavailability and the trustworthiness of the out-of-court statement.

Commentary

This sample statute creates a special exception to the hearsay rule to allow a child victim's out-of-court statement about abuse [or other offense] to be admitted at a judicial proceeding as substantive evidence that the abuse [offense] occurred. A special exception to the hearsay rule for a child's out-of-court statements is necessitated both by practical and legal considerations. In child sexual abuse cases, especially, these statements often provide crucial evidence, since physical evidence is often lacking and there are seldom other witnesses to the abuse. A child's out-of-court statement also may contain details and spontaneity absent in the child's later testimony about the events. Further, the child victim may be unavailable to testify at trial, in which case the out-of-court statement may provide the victim's only account of the incident. Finally, more cases may proceed without a live witness if a child's statement is available to supplement other evidence.

The hearsay rule generally excludes from evidence any out-of-court statement offered to prove the truth of the matter contained in the statement. The value of such statements rests on the credibility of the out-of-court declarant, and the hearsay rule is designed to ensure that statements be made under oath, by a witness who is present at trial and subject to cross-examination. However, numerous exceptions to the rule have been established because certain statements, while lacking these elements, have nevertheless been deemed to be inherently trustworthy or reliable. The hearsay exceptions most commonly utilized to admit a child's out-of-court statement are: (1) excited utterances, spontaneous exclamations, or res gestae; (2) statements made to physicians in the course of treatment; (3) prior consistent statements (if the child testifies); (4) statements of present bodily symptoms or present sense impressions; and (5) the residual hearsay exception.

However, states have not uniformly adopted all of these exceptions, and a child victim's out-of-court statement often does not fall within the strict requirements of traditional hearsay exceptions. As a result, twenty-two states have now passed statutes which, like the proposed sample statute, create a special hearsay exception as a vehicle for the admission of a child victim's out-of-court statements.

In a criminal trial, a child victim's out-of-court statement must also satisfy a defendant's sixth amendment "right to be confronted with the witnesses against him." Decisions of the United States Supreme Court have indicated that the confrontation clause poses no obstacles to the admission of an out-of-court statement when the person who made the statement testifies at trial, since the witness is under oath, the defendant has the opportunity to cross-examine the witness about the out-of-court statement, and the jury can

assess the demeanor of the witness. Section B(1) incorporates by reference sample provisions pertaining to videotaped depositions and closed-circuit broadcasts of a child victim's testimony. The proper use of these alternative means for obtaining a child victim's testimony should also satisfy the confrontation clause prerequisites for the admission of the child's out-of-court statement.

Under the Supreme Court decision Ohio v. Roberts, the confrontation clause imposes additional conditions on the admission of a hearsay statement if the person who made the statement does not testify at a criminal trial. First, the proponent of the statement must show that the person who made the statement is unavailable as a witness. Section B(2)(a) lists the various grounds of unavailability, most of which are recognized by the Federal Rules of Evidence and state statutes, decisions, or court rules. Two grounds of unavailability deserve special comment. Section B(2)(a)(vii) allows into evidence the statement of a child victim who is adjudged an incompetent witness at the time of trial. A child's testimonial incompetence does not preclude the admission of the child's hearsay statement since the statement of an incompetent witness might still satisfy the elements of a hearsay exception. Decisions have held, however, that there must be a hearing and a trial court finding that the child is incompetent before admitting such hearsay testimony. That a competency hearing may be required under this section should not be read to contradict the view, expressed elsewhere in these sample statutes, that competency hearings should be avoided. In this context, it is the prosecutor who asserts the child's incompetence, and the procedure is intended to facilitate, rather than preclude, the child's testimony.

Expert testimony is required to establish the child victim's unavailability only when the prospective psychological trauma from testifying is asserted as the grounds of unavailability under section B(2)(a)(viii). Some courts have required expert testimony on psychological unavailability, and have held that a parent's testimony alone cannot establish the child's unavailability. Warren v. United States, 436 A. 2d 821 (D.C. App. 1981), discussed in the commentary accompanying the sample videotaped deposition and closed-circuit testimony statutes, suggests useful criteria for assessing a witness' psychological unavailability.

When the hearsay declarant does not testify at trial, the proponent must also show that the out-of-court statement bears "indicia of reliability." A statement which falls under a firmly rooted hearsay exception may be presumed reliable; any other statement, however, must be excluded unless it possesses "particularized guarantees of trustworthiness." Since the special hearsay exception applies only when a statement is not admissible under an established exception, section B(2)(b) requires that the the statement of an unavailable witness possess "particularized guarantees of trustworthiness."

The first two special hearsay exception statutes, in Washington and Kansas, recently were challenged as unconstitutional violations of the confrontation clause. These statutes, which incorporate the Ohio v. Roberts requirements, were upheld by the highest courts of both states.

Section E provides a court with criteria for assessing the trustworthiness of out-of-court statements for confrontation clause purposes. This list of trustworthiness factors, drawn from judicial decisions, is intended to provide guidance for a trial court and should not be construed as exhaustive of all indicia of trustworthiness. Under section F, however, a court should support its ruling on the admissibility of the statement with findings on the record as to the child's unavailability and the trustworthiness of the statement.

Of the twenty-two states that have created special statutory hearsay exceptions for child victims' out-of-court statements, nine require that there be corroborative evidence (either of the alleged act or of the statement itself) before the statement of an unavailable child witness can be admitted. The corroboration requirement reflects a legislative judgment that a criminal conviction should not rest solely on evidence consisting of the out-of-court statement of an unavailable witness. The accused's due process right to a fair trial requires that a conviction rest upon evidence sufficient to support the conviction. Although some courts have referred to "corroboration" of a hearsay statement as an indication of the statement's reliability, corroboration is not required under the confrontation clause. This sample statutory exception does not include a corroboration requirement, since corroboration should not be a prerequisite to the admissibility of the statement. It is, in fact, unusual for cases of child abuse to proceed with no witness and no other evidence besides the statement.

Videotaped Depositions of Child Victims

(1) Application

In any civil or criminal proceeding involving an alleged offense against a child under the age of [thirteen] the state's attorney, the child's attorney, or the child's guardian ad litem may apply for an order from the court that a deposition be taken of the victim's testimony and that the deposition be recorded and preserved on videotape.

(2) Procedure

(a) Upon timely receipt of an application as provided in section 1, the court shall make a preliminary finding regarding whether at the time of trial the child victim is likely to be unavailable to testify in open court in the physical presence of the defendant, public, jury, and judge for any of the following reasons:

(i) the child's persistent refusal to testify despite judicial requests to do so;

(ii) the child's inability to communicate about the offense because of extreme fear, total failure of memory, or other similar reason; or

(iii) the substantial likelihood that the child will suffer severe emotional trauma from so testifying.

(b) A finding of unavailability under section 2(a)(iii) must be supported by expert testimony. If the court finds that the child is unavailable for any of the reasons in 2(a), it shall order that the deposition be taken and preserved by videotape.

(c) The trial judge shall preside at the videotaping proceeding and shall rule on all questions as if at trial. Subject to the provisions of section 2(d), the only other persons who may be present at the proceeding are the operator(s) of the recording equipment, the attorney for the state, the defendant, the defendant's attorney, the attorney or guardian ad litem for the child, and any other person whose presence is determined by the court to be necessary to the welfare and well-being of the child during his or her testimony. The defendant shall be afforded the rights applicable to defendants during trial, including the right to an attorney, the right to be

confronted with the witness against him, and the right to cross-examine the child.

(d) If the preliminary finding of unavailability under section 2(a) is based upon evidence that the child is unable to testify in the physical presence of the defendant, the court may order that the defendant be excluded from the room in which the deposition is being conducted. If the court orders that the defendant be excluded from the deposition room, it shall order that two-way closed circuit television equipment relay the defendant's image into the room in which the child is testifying, and the child's testimony into the room in which the defendant is viewing the proceeding. The defendant shall also be provided with a means of private, contemporaneous communication with his attorney during the deposition.

(3) Admissibility at Trial

If at the time of trial the court finds that the child is unavailable to testify as provided in section 2(a), the court may admit into evidence the child's videotaped deposition in lieu of the child's testifying at trial. The court shall support any ruling under this section with findings on the record as to the child's unavailability at the time of trial.

(4) Newly Discovered Evidence

Upon timely receipt of a notice that new evidence has been discovered after the original videotaping and before or during trial, the court, for good cause shown, may order an additional proceeding to videotape the child's testimony. The testimony of the child shall be restricted to the matters specified by the court as the basis for granting such order.

(5) Protective Order

Any videotape which is taken pursuant to this statute is subject to a protective order of the court for the purpose of protecting the privacy of the child.

Child Victim's Live Testimony By Two-Way Closed-Circuit Television

(1) In any civil or criminal proceeding involving an alleged offense against a child under the age of [thirteen], the state's attorney, the child's attorney, or the child's guardian ad litem may apply for an order from the court that the child's testimony be taken in a room outside the courtroom and be televised by two-way closed-circuit television. The person seeking such order shall apply for such an order at least [five] days before the trial date.

(2) The court may order that the testimony of the child be taken by closed-circuit television as provided in section 1 if it finds that the child is unavailable to testify in open court in the presence of the defendant, the jury, the judge, and the public, for any of the following reasons:

(a) the child's persistent refusal to testify despite judicial requests to do so;

(b) the child's total inability to communicate about the offense because of extreme fear, total failure of memory, or other similar reason; or

(c) the substantial likelihood that the child will suffer severe emotional trauma from so testifying.

(3) The court shall support any ruling on the child's unavailability under section 2 with findings on the record. Expert testimony is required to support a finding of unavailability under section 2(c).

(4) The state's attorney and the defendant's attorney shall be present in the room with the child and the child shall be subject to direct and cross-examination. The only other persons allowed to be present in the room with the child during his or her testimony are the child's attorney or guardian ad litem, those persons necessary to operate the closed-circuit equipment, and any other person whose presence is determined by the court to be necessary to the welfare and well-being of the child.

(5) The child's testimony shall be transmitted by closed-circuit television into the courtroom for the defendant, jury, judge and public to view. The defendant shall be provided with a means of private, contemporaneous communication with his attorney during the testimony. The courtroom setting shall simultaneously be transmitted by closed-circuit television into the room where the child is testifying, to permit the child to view the courtroom participants, including the defendant, jury, judge, and public.

Commentary

It is commonly believed that a child victim may be intimidated or traumatized by having to testify in open court before the defendant, judge, jury, public, press and court personnel. The formal and unfamiliar courtroom setting may compound the stress upon a child who must endure the rigors of direct and cross-examination. For these reasons, many states have adopted reforms which allow a child victim's testimony to be taken outside of the courtroom setting.

The sample statutes outline two alternative methods for taking a child victim's trial testimony. One method contemplates the videotaping of a child victim's deposition testimony for later admission at trial; closed-circuit television may be used during the deposition if the child is traumatized by facing the defendant. The second method allows the child victim's testimony to be taken outside of the courtroom during the trial while closed-circuit facilities transmit the child's live testimony into the courtroom. Although court decisions have not resolved all of the constitutional issues pertaining to the use of videotaped and closed-circuit testimony at a criminal trial, the sample statutes have been drafted with particular attention to a defendant's rights.

The alternative method chosen will depend on the needs of a particular child, and a prosecutor seeking to utilize one of them should carefully assess the alternatives before proceeding. A pretrial deposition can provide a useful means of recording and preserving a young child's testimony closer in time to the event than the trial. Even if the defendant is present, a videotaped deposition also affords the prosecution the opportunity to elicit the child's testimony in a less formal setting than the courtroom, outside of the presence of the press, public, and jury.

It has been suggested, however, that a child victim may have more trouble testifying at a deposition in closer proximity to the defendant than while in open court in the defendant's presence. Thus, section 2(d) allows the court to physically isolate the defendant from the room in which the child's testimony is taken, and provides for two-way monitors that televise both the defendant's image into the testimony room, and the child's testimony into the room in which the defendant views the proceeding. The closed-circuit deposition procedure has the added benefit of reducing any anxiety the child may suffer from testifying in physical proximity to the defendant.

Two-way closed-circuit television equipment to facilitate a child victim's live trial testimony may provide the best alternative method for taking a child's testimony. Since the testimony is live and not pre-recorded, it represents less of a

departure from traditional trial practice than a deposition. Whereas the use of pre-recorded testimony might raise denial of fair trial or jury trial concerns because the jury is not present at the time the testimony is taken, there is less concern when the victim's testimony is broadcast live over closed-circuit television. Further, the closed-circuit procedure also permits the exclusion of spectators during a minor victim's testimony, but still makes it possible for the public to view the live testimony.

The use of videotaped or closed-circuit testimony in a criminal trial raises a variety of constitutional issues. Commentators have suggested that various rights of the defendant might be abridged by the use of videotaped evidence at trial, including: the sixth amendment rights to a public trial and jury trial; the sixth amendment right to compulsory process of witnesses; the fourteenth amendment due process right to a fair trial; and the sixth amendment right to confront the witnesses against him. The use of video technologies may distort or fail to convey certain evidence, affecting the jury's perception of demeanor and credibility, thus having an impact on the defendant's right to a fair trial and trial by jury. The defendant's right to a public trial, which is thought to restrain abuse of judicial authority and encourage public confidence in the judicial process, may be implicated in the public's exclusion from the deposition procedure. The press' and public's first amendment rights of access to criminal trials may be adversely affected by the use of either a videotaped deposition or closed-circuit procedure. These objections, however, can be minimized by careful and responsible use of videotape or closed-circuit technology and selection of the least restrictive alternative justified in a particular case.

The right of confrontation poses the most substantial obstacle to the use of alternatives for taking a child witness' testimony. Before a videotaped deposition or closed-circuit television can be used as a substitute for the child victim's in-court testimony, the prosecution must satisfy certain conditions designed to protect the defendant's confrontation right. The prosecution must demonstrate both that the the child is unavailable to testify in a traditional trial setting and that the proffered testimony bears sufficient indicia of reliability to justify its admission. Under section 2(a), a showing must be made prior to the taking of the deposition that the child is likely to be unavailable to testify in open court at the trial. The child also must be shown to be unavailable to testify in open court at the time of trial under section 3.

The prosecution has a heavy burden if it seeks to establish the child's unavailability under section 2(a)(iii) of the sample deposition statute or the parallel provision in the closed-circuit testimony statute. In Warren v. United States, the District of Columbia Court of Appeals suggested the

following criteria for courts to consider in determining psychological unavailability:

> [W]e think that the following matters are relevant to the question of psychological unavailability: (1) the probability of psychological injury as a result of testifying; (2) the degree of anticipated injury; (3) the expected duration of the injury; and (4) whether the expected psychological injury is substantially greater than the reaction of the average victim of a rape, kidnapping or terrorist act. Just as in the case of physical infirmity, it is difficult to state the precise quantum of evidence required to meet the standard of unavailability. The factors should be weighed in the context of the nature of the crime and the pre-existing psychological history of the witness.

Warren v. United States, 436 A.2d 821, 830 (D.C. App. 1981).

Both the videotaped deposition and closed-circuit statutes require the use of expert testimony to establish a child victim's unavailability due to psychological trauma. A physician, psychiatrist, psychologist, licensed clinical social worker, or licensed marriage, family, or child counselor could provide the requisite expert testimony under section 2(a)(iii) of the videotaped deposition statute and section 2(c) of the closed-circuit statute. Efforts should be made to avoid the child's participation in any hearings on the child's unavailability. Remedial legislation may be necessary if a mental health professional's testimony in an unavailability hearing is construed under state law to abrogate the child's privilege of confidential communication with his or her therapist.

The "indicia of reliability" requirement of the confrontation clause should be satisfied in videotaping or closed-circuit sessions conducted in accordance with the sample statutes. At the deposition, a criminal defendant has the same protections available to him at trial, including the right to an attorney and to cross-examination of the child under oath. The videotape also preserves the demeanor of the testifying witness for the jury's later scrutiny. With closed-circuit television, the jury observes the witness on a television monitor rather than in person, but the testimony is live and not pre-recorded. However, these procedures may be challenged under the right of confrontation and the right to a jury trial if the witness is not required to testify in the jury's presence. The right of confrontation also generally has been interpreted to include physical confrontation between the jury and witness, giving the jury the opportunity to view the witness' demeanor while testifying before the defendant. These concerns, however, should not render the alternative approaches unconstitutional, since the child's unavailability to testify has been established, the child may be cross-examined, and the child's view of the defendant has not been obstructed.

It is still not resolved, however, whether the confrontation clause requires that the defendant have the opportunity to confront a witness "face-to-face" during the witness' testimony. One court suggested that face-to-face confrontation influences the witness' "recollection, veracity, and communication" and hence serves as a further guarantee of trustworthiness. Indeed, many state constitutions explicitly grant to a criminal defendant the right to a face-to-face confrontation, and a literal interpretation of these clauses might entitle the defendant to a physical confrontation even if it is not required under the U.S. Constitution. Other courts and commentators have concluded that once unavailability is proven, cross-examination of the witness is sufficient to satisfy the trustworthiness component even if the child testifies outside the defendant's presence. Some state statutes either require or allow exclusion of the defendant during a videotaped deposition of the victim. In such "one-way" schemes, the defendant typically can observe the victim and hear the victim's testimony, but the victim can neither see nor hear the defendant. However, a federal appeals court and several state courts have held that such a procedure violates the defendant's right of confrontation, even if the witness was cross-examined fully.

These sections provide for a "two-way" television approach, representing a compromise position that permits the victim and the defendant to view one another on closed-circuit television monitors during the victim's testimony. The two-way approach, which has been incorporated in several state reform statutes, seems to satisfy the confrontation objection that has hampered one-way approaches, since the victim testifies with a view of the defendant. Indeed, some courts have noted that this two-way approach may satisfy the confrontation clause, where a one-way approach would not. Even the use of two-way closed-circuit television, however, might be disallowed on confrontation grounds were a court to construe the right of confrontation to require a physical encounter between the witness and the defendant.

It should be noted that the confrontation principles outlined by the U.S. Supreme Court have been elaborated in cases involving the use of hearsay evidence at trial. Closed-circuit testimony may not be considered hearsay and thus the existing confrontation cases may not be strictly applicable. The recent U.S. Supreme Court case of Globe Newspaper Co. v. Superior Court. 457 U.S. 596 (1982), described below, delineates another constitutional standard by which special protections for child victims may be measured. Globe and its progeny weighed a special victim protection (courtroom closure) against the public's and press' rights of access to criminal proceedings and against the defendant's sixth amendment right to a public trial, concluding that a case-by-case determination of necessity is required before these rights can be compromised. Although these cases did not

deal with the defendant's right of confrontation, they shared with the confrontation clause cases a concern that such a showing of necessity be made. A California court of appeals, in Hochheiser v. Superior Court, discussed both the Globe standard and the hearsay/confrontation cases in analyzing the validity of a closed-circuit procedure designed to transmit the testimony of a child victim/witness. A final assessment of the applicable standard for closed-circuit televised testimony will have to await further judicial decisions.

Other sixth amendment rights of the defendant may be affected by use of these alternative procedures. Some commentators have discussed the defendant's right to be present at certain proceedings, his or her right to compulsory process of favorable witnesses, and his right to represent himself. The impact of these rights on the videotaping or closed-circuit transmission of testimony has not been addressed in court decisions. For example, by asserting the right to represent himself, a defendant can seek to prevent the use of closed-circuit procedures which keep the defendant and child in separate rooms during the direct and cross-examination of the child. After making a finding of unavailability, however, the court might require the pro se defendant to question the child from another room by means of closed-circuit equipment. The California two-way closed-circuit television procedure, which situates the child in a room other than the courtroom, permits such an approach by requiring that the attorneys (who are located in the courtroom) question the child over closed-circuit television monitors. In reality, assertion of the right to pro se representation in this context is no different than assertion of the right of confrontation, since in both instances the defendant is seeking the right to physically confront the witness.

Section 4 of the sample videotaped deposition statute provides for an additional proceeding to take further testimony of the child victim when new evidence is discovered after the original deposition. This provision ensures that the defendant has an opportunity to cross-examine the child fully about new evidence. Use of closed-circuit television to transmit a child victim's live trial testimony obviates any concern about newly discovered evidence, since the defense has the same opportunities for cross-examination as at trial.

The use of closed-circuit equipment at trial also may solve a problem that states have addressed through statutes authorizing courtroom closure during a minor victim's testimony. These statutes generally give the judge the authority to exclude spectators or to spare a young victim the embarrassment of testifying about sexual matters in front of the press and public. By the use of closed-circuit television, the child need not testify in the physical presence of the public, yet the public may still see the child's testimony. The United States Supreme Court has held that both the press

and public have constitutionally protected rights of access to criminal trials, and in Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982), invalidated a Massachusetts statute which mandated the exclusion of the press and public during the testimony of a minor victim of sexual assault. Although recognizing that protection of minor victims from trauma in the legal process is a compelling state interest, the Supreme Court nonetheless held that closure of the courtroom could be justified only with a case-by-case determination of necessity for such a procedure and a further showing that the closure of the proceeding was narrowly tailored to serve the state's interest in protecting the victim. Recently, the Court has interpreted a criminal defendant's sixth amendment right to a public trial to require the same showings before certain criminal proceedings may be closed.

Victims of Child Abuse Act of 1990
Courts
Legal services
42 USC 13001 note

TITLE II—VICTIMS OF CHILD ABUSE ACT OF 1990

SEC. 201. SHORT TITLE.

This title may be cited as the "Victims of Child Abuse Act of 1990".

Rights

SEC. 225. CHILD VICTIMS' RIGHTS.

(a) IN GENERAL.—Chapter 223 of title 18, United States Code, is amended by adding at the end the following new rule:

"§ 3509. Child victims' and child witnesses' rights

"(a) DEFINITIONS.—For purposes of this section—

"(1) the term 'adult attendant' means an adult described in subsection (i) who accompanies a child throughout the judicial process for the purpose of providing emotional support;

"(2) the term 'child' means a person who is under the age of 18, who is or is alleged to be—

"(A) a victim of a crime of physical abuse, sexual abuse, or exploitation; or

"(B) a witness to a crime committed against another person;

"(3) the term 'child abuse' means the physical or mental injury, sexual abuse or exploitation, or negligent treatment of a child;

"(4) the term 'physical injury' includes lacerations, fractured bones, burns, internal injuries, severe bruising or serious bodily harm;

"(5) the term 'mental injury' means harm to a child's psychological or intellectual functioning which may be exhibited by severe anxiety, depression, withdrawal or outward aggressive behavior, or a combination of those behaviors, which may be demonstrated by a change in behavior, emotional response, or cognition;

"(6) the term 'exploitation' means child pornography or child prostitution;

"(7) the term 'multidisciplinary child abuse team' means a professional unit composed of representatives from health, social service, law enforcement, and legal service agencies to coordinate the assistance needed to handle cases of child abuse;

"(8) the term 'sexual abuse' includes the employment, use, persuasion, inducement, enticement, or coercion of a child to engage in, or assist another person to engage in, sexually explicit conduct or the rape, molestation, prostitution, or other form of sexual exploitation of children, or incest with children;

"(9) the term 'sexually explicit conduct' means actual or simulated—

"(A) sexual intercourse, including sexual contact in the manner of genital-genital, oral-genital, anal-genital, or oral-anal contact, whether between persons of the same or of opposite sex; sexual contact means the intentional touching, either directly or through clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify sexual desire of any person;

"(B) bestiality;

"(C) masturbation;

"(D) lascivious exhibition of the genitals or pubic area of a person or animal; or

"(E) sadistic or masochistic abuse;

"(10) the term 'sex crime' means an act of sexual abuse that is a criminal act;

"(11) the term 'exploitation' means child pornography or child prostitution;

"(12) the term 'negligent treatment' means the failure to provide, for reasons other than poverty, adequate food, clothing, shelter, or medical care so as to seriously endanger the physical health of the child; and

"(13) the term 'child abuse' does not include discipline administered by a parent or legal guardian to his or her child provided it is reasonable in manner and moderate in degree and otherwise does not constitute cruelty.

"(b) ALTERNATIVES TO LIVE IN-COURT TESTIMONY.—

"(1) CHILD'S LIVE TESTIMONY BY 2-WAY CLOSED CIRCUIT TELEVISION.—

"(A) In a proceeding involving an alleged offense against a child, the attorney for the government, the child's attorney, or a guardian ad litem appointed under subdivision (h) may apply for an order that the child's testimony be taken in a room outside the courtroom and be televised by 2-way closed circuit television. The person seeking such an order shall apply for such an order at least 5 days before the trial date, unless the court finds on the record that the need for such an order was not reasonably foreseeable.

"(B) The court may order that the testimony of the child be taken by closed-circuit television as provided in subparagraph (A) if the court finds that the child is unable to testify in open court in the presence of the defendant, for any of the following reasons:

"(i) The child is unable to testify because of fear.

"(ii) There is a substantial likelihood, established by expert testimony, that the child would suffer emotional trauma from testifying.

"(iii) The child suffers a mental or other infirmity.

"(iv) Conduct by defendant or defense counsel causes the child to be unable to continue testifying.

"(C) The court shall support a ruling on the child's inability to testify with findings on the record. In determining whether the impact on an individual child of one or more of the factors described in subparagraph (B) is so substantial

as to justify an order under subparagraph (A), the court may question the minor in chambers, or at some other comfortable place other than the courtroom, on the record for a reasonable period of time with the child attendant, the prosecutor, the child's attorney, the guardian ad litem, and the defense counsel present.

"(D) If the court orders the taking of testimony by television, the attorney for the government and the attorney for the defendant not including an attorney pro se for a party shall be present in a room outside the courtroom with the child and the child shall be subjected to direct and cross-examination. The only other persons who may be permitted in the room with the child during the child's testimony are—

"(i) the child's attorney or guardian ad litem appointed under subdivision (h);

"(ii) persons necessary to operate the closed-circuit television equipment;

"(iii) a judicial officer, appointed by the court; and

"(iv) other persons whose presence is determined by the court to be necessary to the welfare and well-being of the child, including an adult attendant.

The child's testimony shall be transmitted by closed circuit television into the courtroom for viewing and hearing by the defendant, jury, judge, and public. The defendant shall be provided with the means of private, contemporaneous communication with the defendant's attorney during the testimony. The closed circuit television transmission shall relay into the room in which the child is testifying the defendant's image, and the voice of the judge.

"(2) VIDEOTAPED DEPOSITION OF CHILD.—(A) In a proceeding involving an alleged offense against a child, the attorney for the government, the child's attorney, the child's parent or legal guardian, or the guardian ad litem appointed under subdivision (h) may apply for an order that a deposition be taken of the child's testimony and that the deposition be recorded and preserved on videotape.

"(B)(i) Upon timely receipt of an application described in subparagraph (A), the court shall make a preliminary finding regarding whether at the time of trial the child is likely to be unable to testify in open court in the physical presence of the defendant, jury, judge, and public for any of the following reasons:

"(I) The child will be unable to testify because of fear.

"(II) There is a substantial likelihood, established by expert testimony, that the child would suffer emotional trauma from testifying in open court.

"(III) The child suffers a mental or other infirmity.

"(IV) Conduct by defendant or defense counsel causes the child to be unable to continue testifying.

"(ii) If the court finds that the child is likely to be unable to testify in open court for any of the reasons stated in clause (i), the court shall order that the child's deposition be taken and preserved by videotape.

"(iii) The trial judge shall preside at the videotape deposition of a child and shall rule on all questions as if at trial. The only other persons who may be permitted to be present at the proceeding are—

"(I) the attorney for the Government;

"(II) the attorney for the defendant;

"(III) the child's attorney or guardian ad litem appointed under subdivision (h);

"(IV) persons necessary to operate the videotape equipment;

"(V) subject to clause (iv), the defendant; and

"(VI) other persons whose presence is determined by the court to be necessary to the welfare and well-being of the child.

The defendant shall be afforded the rights applicable to defendants during trial, including the right to an attorney, the right to be confronted with the witness against the defendant, and the right to cross-examine the child.

"(iv) If the preliminary finding of inability under clause (i) is based on evidence that the child is unable to testify in the physical presence of the defendant, the court may order that the defendant, including a defendant represented pro se, be excluded from the room in which the deposition is conducted. If the court orders that the defendant be excluded from the deposition room, the court shall order that 2-way closed circuit television equipment relay the defendant's image into the room in which the child is testifying, and the child's testimony into the room in which the defendant is viewing the proceeding, and that the defendant be provided with a means of private, contemporaneous communication with the defendant's attorney during the deposition.

"(v) HANDLING OF VIDEOTAPE.—The complete record of the examination of the child, including the image and voices of all persons who in any way participate in the examination, shall be made and preserved on video tape in addition to being stenographically recorded. The videotape shall be transmitted to the clerk of the court in which the action is pending and shall be made available for viewing to the prosecuting attorney, the defendant, and the defendant's attorney during ordinary business hours. Records

"(C) If at the time of trial the court finds that the child is unable to testify as for a reason described in subparagraph (B)(i), the court may admit into evidence the child's videotaped deposition in lieu of the child's testifying at the trial. The court shall support a ruling under this subparagraph with findings on the record.

"(D) Upon timely receipt of notice that new evidence has been discovered after the original videotaping and before or during trial, the court, for good cause shown, may order an additional videotaped deposition. The testimony of the child shall be restricted to the matters specified by the court as the basis for granting the order.

"(E) In connection with the taking of a videotaped deposition under this paragraph, the court may enter a protective order for the purpose of protecting the privacy of the child.

"(F) The videotape of a deposition taken under this paragraph shall be destroyed 5 years after the date on which the trial court entered its judgment, but not before a final judgment is entered on appeal including Supreme Court review. The videotape shall Records

become part of the court record and be kept by the court until it is destroyed.

"(c) COMPETENCY EXAMINATIONS.—

"(1) EFFECT OF FEDERAL RULES OF EVIDENCE.—Nothing in this subdivision shall be construed to abrogate rule 601 of the Federal Rules of Evidence.

"(2) PRESUMPTION.—A child is presumed to be competent.

"(3) REQUIREMENT OF WRITTEN MOTION.—A competency examination regarding a child witness may be conducted by the court only upon written motion and offer of proof of incompetency by a party.

"(4) REQUIREMENT OF COMPELLING REASONS.—A competency examination regarding a child may be conducted only if the court determines, on the record, that compelling reasons exist. A child's age alone is not a compelling reason.

"(5) PERSONS PERMITTED TO BE PRESENT.—The only persons who may be permitted to be present at a competency examination are—

"(A) the judge;

"(B) the attorney for the government;

"(C) the attorney for the defendant;

"(D) a court reporter; and

"(E) persons whose presence, in the opinion of the court, is necessary to the welfare and well-being of the child, including the child's attorney, guardian ad litem, or adult attendant.

"(6) NOT BEFORE JURY.—A competency examination regarding a child witness shall be conducted out of the sight and hearing of a jury.

"(7) DIRECT EXAMINATION OF CHILD.—Examination of a child related to competency shall normally be conducted by the court on the basis of questions submitted by the attorney for the Government and the attorney for the defendant including a party acting as an attorney pro se. The court may permit an attorney but not a party acting as an attorney pro se to examine a child directly on competency if the court is satisfied that the child will not suffer emotional trauma as a result of the examination.

"(8) APPROPRIATE QUESTIONS.—The questions asked at the competency examination of a child shall be appropriate to the age and developmental level of the child, shall not be related to the issues at trial, and shall focus on determining the child's ability to understand and answer simple questions.

"(9) PSYCHOLOGICAL AND PSYCHIATRIC EXAMINATIONS.—Psychological and psychiatric examinations to assess the competency of a child witness shall not be ordered without a showing of compelling need.

"(d) PRIVACY PROTECTION.—

"(1) CONFIDENTIALITY OF INFORMATION.—(A) A person acting in a capacity described in subparagraph (B) in connection with a criminal proceeding shall—

"(i) keep all documents that disclose the name or any other information concerning a child in a secure place to which no person who does not have reason to know their contents has access; and

"(ii) disclose documents described in clause (i) or the information in them that concerns a child only to persons who, by reason of their participation in the proceeding, have reason to know such information.

"(B) Subparagraph (A) applies to—

"(i) all employees of the Government connected with the case, including employees of the Department of Justice, any law enforcement agency involved in the case, and any person hired by the government to provide assistance in the proceeding;

"(ii) employees of the court;

"(iii) the defendant and employees of the defendant, including the attorney for the defendant and persons hired by the defendant or the attorney for the defendant to provide assistance in the proceeding; and

"(iv) members of the jury.

"(2) FILING UNDER SEAL.—All papers to be filed in court that disclose the name of or any other information concerning a child shall be filed under seal without necessity of obtaining a court order. The person who makes the filing shall submit to the clerk of the court—

"(A) the complete paper to be kept under seal; and

"(B) the paper with the portions of it that disclose the name of or other information concerning a child redacted, to be placed in the public record. Public information

"(3) PROTECTIVE ORDERS.—(A) On motion by any person the court may issue an order protecting a child from public disclosure of the name of or any other information concerning the child in the course of the proceedings, if the court determines that there is a significant possibility that such disclosure would be detrimental to the child.

"(B) A protective order issued under subparagraph (A) may—

"(i) provide that the testimony of a child witness, and the testimony of any other witness, when the attorney who calls the witness has reason to anticipate that the name of or any other information concerning a child may be divulged in the testimony, be taken in a closed courtroom; and

"(ii) provide for any other measures that may be necessary to protect the privacy of the child.

"(4) DISCLOSURE OF INFORMATION.—This subdivision does not prohibit disclosure of the name of or other information concerning a child to the defendant, the attorney for the defendant, a multidisciplinary child abuse team, a guardian ad litem, or an adult attendant, or to anyone to whom, in the opinion of the court, disclosure is necessary to the welfare and well-being of the child.

"(e) CLOSING THE COURTROOM.—When a child testifies the court may order the exclusion from the courtroom of all persons, including members of the press, who do not have a direct interest in the case. Such an order may be made if the court determines on the record that requiring the child to testify in open court would cause substantial psychological harm to the child or would result in the child's inability to effectively communicate. Such an order shall be narrowly tailored to serve the government's specific compelling interest.

"(f) VICTIM IMPACT STATEMENT.—In preparing the presentence report pursuant to rule 32(c) of the Federal Rules of Criminal Procedure, the probation officer shall request information from the

multidisciplinary child abuse team and other appropriate sources to determine the impact of the offense on the child victim and any other children who may have been affected. A guardian ad litem appointed under subdivision (h) shall make every effort to obtain and report information that accurately expresses the child's and the family's views concerning the child's victimization. A guardian ad litem shall use forms that permit the child to express the child's views concerning the personal consequences of the child's victimization, at a level and in a form of communication commensurate with the child's age and ability.

Intergovernmental relations

"(g) USE OF MULTIDISCIPLINARY CHILD ABUSE TEAMS.—

"(1) IN GENERAL.—A multidisciplinary child abuse team shall be used when it is feasible to do so. The court shall work with State and local governments that have established multidisciplinary child abuse teams designed to assist child victims and child witnesses, and the court and the attorney for the government shall consult with the multidisciplinary child abuse team as appropriate.

"(2) ROLE OF MULTIDISCIPLINARY CHILD ABUSE TEAMS.—The role of the multidisciplinary child abuse team shall be to provide for a child services that the members of the team in their professional roles are capable of providing, including—

"(A) medical diagnoses and evaluation services, including provision or interpretation of x-rays, laboratory tests, and related services, as needed, and documentation of findings;

"(B) telephone consultation services in emergencies and in other situations;

"(C) medical evaluations related to abuse or neglect;

"(D) psychological and psychiatric diagnoses and evaluation services for the child, parent or parents, guardian or guardians, or other caregivers, or any other individual involved in a child victim or child witness case;

"(E) expert medical, psychological, and related professional testimony;

"(F) case service coordination and assistance, including the location of services available from public and private agencies in the community; and

"(G) training services for judges, litigators, court officers and others that are involved in child victim and child witness cases, in handling child victims and child witnesses.

"(h) GUARDIAN AD LITEM.—

"(1) IN GENERAL.—The court may appoint a guardian ad litem for a child who was a victim of, or a witness to, a crime involving abuse or exploitation to protect the best interests of the child. In making the appointment, the court shall consider a prospective guardian's background in, and familiarity with, the judicial process, social service programs, and child abuse issues. The guardian ad litem shall not be a person who is or may be a witness in a proceeding involving the child for whom the guardian is appointed.

"(2) DUTIES OF GUARDIAN AD LITEM.—A guardian ad litem may attend all the depositions, hearings, and trial proceedings in which a child participates, and make recommendations to the court concerning the welfare of the child. The guardian ad litem may have access to all reports, evaluations and records, except attorney's work product, necessary to effectively advocate for the child. (The extent of access to grand jury materials is limited to the access routinely provided to victims and their representatives.) A guardian ad litem shall marshal and coordinate the delivery of resources and special services to the child. A guardian ad litem shall not be compelled to testify in any court action or proceeding concerning any information or opinion received from the child in the course of serving as a guardian ad litem.

"(3) IMMUNITIES.—A guardian ad litem shall be presumed to be acting in good faith and shall be immune from civil and criminal liability for complying with the guardian's lawful duties described in subpart (2).

"(i) ADULT ATTENDANT.—A child testifying at or attending a judicial proceeding shall have the right to be accompanied by an adult attendant to provide emotional support to the child. The court, at its discretion, may allow the adult attendant to remain in close physical proximity to or in contact with the child while the child testifies. The court may allow the adult attendant to hold the child's hand or allow the child to sit on the adult attendant's lap throughout the course of the proceeding. An adult attendant shall not provide the child with an answer to any question directed to the child during the course of the child's testimony or otherwise prompt the child. The image of the child attendant, for the time the child is testifying or being deposed, shall be recorded on videotape.

"(j) SPEEDY TRIAL.—In a proceeding in which a child is called to give testimony, on motion by the attorney for the Government or a guardian ad litem, or on its own motion, the court may designate the case as being of special public importance. In cases so designated, the court shall, consistent with these rules, expedite the proceeding and ensure that it takes precedence over any other. The court shall ensure a speedy trial in order to minimize the length of time the child must endure the stress of involvement with the criminal process. When deciding whether to grant a continuance, the court shall take into consideration the age of the child and the potential adverse impact the delay may have on the child's well-being. The court shall make written findings of fact and conclusions of law when granting a continuance in cases involving a child.

"(k) EXTENSION OF CHILD STATUTE OF LIMITATIONS.—No statute of limitation that would otherwise preclude prosecution for an offense involving the sexual or physical abuse of a child under the age of 18 years shall preclude such prosecution before the child reaches the age of 25 years. If, at any time that a cause of action for recovery of compensation for damage or injury to the person of a child exists, a criminal action is pending which arises out of the same occurrence and in which the child is the victim, the civil action shall be stayed until the end of all phases of the criminal action and any mention of the civil action during the criminal proceeding is prohibited. As used in this subsection, a criminal action is pending until its final adjudication in the trial court.

"(l) TESTIMONIAL AIDS.—The court may permit a child to use anatomical dolls, puppets, drawings, mannequins, or any other demonstrative device the court deems appropriate for the purpose of assisting a child in testifying.".

(b) VIOLATION OF RULE REGARDING DISCLOSURE.—

(1) PUNISHMENT AS CONTEMPT.—Chapter 21 of title 18, United States Code, is amended by adding at the end thereof the following new section:

"§ 403. Protection of the privacy of child victims and child witnesses

"A knowing or intentional violation of the privacy protection accorded by section 3509 of this title is a criminal contempt punishable by not more than one year's imprisonment, or a fine under this title, or both.".

(2) TECHNICAL AMENDMENT.—The table of sections at the beginning of chapter 21 of title 18, United States Code, is amended by adding at the end thereof the following new item:

"403. Protection of the privacy of child victims and child witnesses.".

42 USC 13031

SEC. 226. CHILD ABUSE REPORTING.

(a) IN GENERAL.—A person who, while engaged in a professional capacity or activity described in subsection (b) on Federal land or in a federally operated (or contracted) facility, learns of facts that give reason to suspect that a child has suffered an incident of child abuse, shall as soon as possible make a report of the suspected abuse to the agency designated under subsection (d).

(b) COVERED PROFESSIONALS.—Persons engaged in the following professions and activities are subject to the requirements of subsection (a):

(1) Physicians, dentists, medical residents or interns, hospital personnel and administrators, nurses, health care practitioners, chiropractors, osteopaths, pharmacists, optometrists, podiatrists, emergency medical technicians, ambulance drivers, undertakers, coroners, medical examiners, alcohol or drug treatment personnel, and persons performing a healing role or practicing the healing arts.

(2) Psychologists, psychiatrists, and mental health professionals.

(3) Social workers, licensed or unlicensed marriage, family, and individual counselors.

(4) Teachers, teacher's aides or assistants, school counselors and guidance personnel, school officials, and school administrators.

(5) Child care workers and administrators.

(6) Law enforcement personnel, probation officers, criminal prosecutors, and juvenile rehabilitation or detention facility employees.

(7) Foster parents.

(8) Commercial film and photo processors.

(c) DEFINITIONS.—For the purposes of this section—

(1) the term "child abuse" means the physical or mental injury, sexual abuse or exploitation, or negligent treatment of a child;

(2) the term "physical injury" includes but is not limited to lacerations, fractured bones, burns, internal injuries, severe bruising or serious bodily harm;

(3) the term "mental injury" means harm to a child's psychological or intellectual functioning which may be exhibited by severe anxiety, depression, withdrawal or outward aggressive behavior, or a combination of those behaviors, which may be demonstrated by a change in behavior, emotional response or cognition;

(4) the term "sexual abuse" includes the employment, use, persuasion, inducement, enticement, or coercion of a child to engage in, or assist another person to engage in, sexually explicit conduct or the rape, molestation, prostitution, or other form of sexual exploitation of children, or incest with children;

(5) the term "sexually explicit conduct" means actual or simulated—

(A) sexual intercourse, including sexual contact in the manner of genital-genital, oral-genital, anal-genital, or oral-anal contact, whether between persons of the same or of opposite sex; sexual contact means the intentional touching, either directly or through clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify sexual desire of any person;

(B) bestiality;

(C) masturbation;

(D) lascivious exhibition of the genitals or pubic area of a person or animal; or

(E) sadistic or masochistic abuse;

(6) the term "exploitation" means child pornography or child prostitution;

(7) the term "negligent treatment" means the failure to provide, for reasons other than poverty, adequate food, clothing, shelter, or medical care so as to seriously endanger the physical health of the child; and

(8) the term "child abuse" shall not include discipline administered by a parent or legal guardian to his or her child provided it is reasonable in manner and moderate in degree and otherwise does not constitute cruelty.

(d) AGENCY DESIGNATED TO RECEIVE REPORT AND ACTION TO BE TAKEN.—For all Federal lands and all federally operated (or contracted) facilities in which children are cared for or reside, the Attorney General shall designate an agency to receive and investigate the reports described in subsection (a). By formal written agreement, the designated agency may be a non-Federal agency. When such reports are received by social services or health care agencies, and involve allegations of sexual abuse, serious physical injury, or life-threatening neglect of a child, there shall be an immediate referral of the report to a law enforcement agency with authority to take emergency action to protect the child. All reports received shall be promptly investigated, and whenever appropriate, investigations shall be conducted jointly by social services and law enforcement personnel, with a view toward avoiding unnecessary multiple interviews with the child.

Federal buildings and facilities

(e) REPORTING FORM.—In every federally operated (or contracted) facility, and on all Federal lands, a standard written reporting form, with instructions, shall be disseminated to all mandated reporter groups. Use of the form shall be encouraged, but its use shall not take the place of the immediate making of oral reports, telephonically or otherwise, when circumstances dictate.

Federal buildings and facilities.

(f) IMMUNITY FOR GOOD FAITH REPORTING AND ASSOCIATED ACTIONS.—All persons who, acting in good faith, make a report by subsection (a), or otherwise provide information or assistance in connection with a report, investigation, or legal intervention pursuant to a report, shall be immune from civil and criminal liability arising out of such actions. There shall be a presumption that any such persons acted in good faith. If a person is sued because of the person's performance of one of the above functions, and the defend-

ant prevails in the litigation, the court may order that the plaintiff pay the defendant's legal expenses. Immunity shall not be accorded to persons acting in bad faith.

(g) CRIMINAL PENALTY FOR FAILURE TO REPORT.—(1) Chapter 110 of title 18, United States Code, is amended by adding at the end thereof the following new section:

"§ 2258. Failure to report child abuse

"A person who, while engaged in a professional capacity or activity described in subsection (b) of section 226 of the Victims of Child Abuse Act of 1990 on Federal land or in a federally operated (or contracted) facility, learns of facts that give reason to suspect that a child has suffered an incident of child abuse, as defined in subsection (c) of that section, and fails to make a timely report as required by subsection (a) of that section, shall be guilty of a Class B misdemeanor.".

(2) The chapter analysis for chapter 110, United States Code, is amended—

(A) by amending the catchline to read as follows:

"CHAPTER 110—SEXUAL EXPLOITATION AND OTHER ABUSE OF CHILDREN";

and

(B) by adding at the end thereof the following new item:

"2258. Failure to report child abuse.".

(3) The item relating to chapter 110 in the part analysis for part 1 of title 18, United States Code, is amended to read as follows:

"110. Sexual exploitation and other abuse of children ..... 2251".

(h) TRAINING OF PROSPECTIVE REPORTERS.—All individuals in the occupations listed in subsection (b)(1) who work on Federal lands, or are employed in federally operated (or contracted) facilities, shall receive periodic training in the obligation to report, as well as in the identification of abused and neglected children.

Subtitle E—Child Care Worker Employee Background Checks

42 USC 13041

SEC. 231. REQUIREMENT FOR BACKGROUND CHECKS.

(a) IN GENERAL.—(1) Each agency of the Federal Government, and every facility operated by the Federal Government (or operated under contract with the Federal Government), that hires (or contracts for hire) individuals involved with the provision to children under the age of 18 of child care services shall assure that all existing and newly-hired employees undergo a criminal history background check. All existing staff shall receive such checks not later than 6 months after the date of enactment of this chapter, and no additional staff shall be hired without a check having been completed.

(2) For the purposes of this section, the term "child care services" means child protective services (including the investigation of child abuse and neglect reports), social services, health and mental health care, child (day) care, education (whether or not directly involved in teaching), foster care, residential care, recreational or rehabilitative programs, and detention, correctional, or treatment services.

(b) CRIMINAL HISTORY CHECK.—(1) A background check required by subsection (a) shall be—

(A) based on a set of the employee's fingerprints obtained by a law enforcement officer and on other identifying information;

(B) conducted through the Identification Division of the Federal Bureau of Investigation and through the State criminal history repositories of all States that an employee or prospective employee lists as current and former residences in an employment application; and

(C) initiated through the personnel programs of the applicable Federal agencies.

(2) The results of the background check shall be communicated to the employing agency.

(c) APPLICABLE CRIMINAL HISTORIES.—Any conviction for a sex crime, an offense involving a child victim, or a drug felony, may be ground for denying employment or for dismissal of an employee in any of the positions listed in subsection (a)(2). In the case of an incident in which an individual has been charged with one of those offenses, when the charge has not yet been disposed of, an employer may suspend an employee from having any contact with children while on the job until the case is resolved. Conviction of a crime other than a sex crime may be considered if it bears on an individual's fitness to have responsibility for the safety and well-being of children.

(d) EMPLOYMENT APPLICATIONS.—(1) Employment applications for individuals who are seeking work for an agency of the Federal Government, or for a facility or program operated by (or through contract with) the Federal Government, in any of the positions listed in subsection (a)(1), shall contain a question asking whether the individual has ever been arrested for or charged with a crime involving a child, and if so requiring a description of the disposition of the arrest or charge. An application shall state that it is being signed under penalty of perjury, with the applicable Federal punishment for perjury stated on the application.

(2) A Federal agency seeking a criminal history record check shall first obtain the signature of the employee or prospective employee indicating that the employee or prospective employee has been notified of the employer's obligation to require a record check as a condition of employment and the employee's right to obtain a copy of the criminal history report made available to the employing Federal agency and the right to challenge the accuracy and completeness of any information contained in the report.

(e) ENCOURAGEMENT OF VOLUNTARY CRIMINAL HISTORY CHECKS FOR OTHERS WHO MAY HAVE CONTACT WITH CHILDREN.—Federal agencies and facilities are encouraged to submit identifying information for criminal history checks on volunteers working in any of the positions listed in subsection (a) and on adult household members in places where child care or foster care services are being provided in a home.

CHILDREN'S BILL OF RIGHTS
PREAMBLE

The Salt River Pima-Maricopa Indian Community Council is concerned with the general welfare of all of its members. That concern is particularly strong for children who cannot provide for or protect themselves. In this document the Salt River Pima-Maricopa Indian Community reflects this special concern by recognizing that its children have certain legal rights that the Community will respect and defend.

In enumerating these rights and thereby proclaiming the Community's special responsibility to its children, the Community Council continues to recognize and affirm that:

(1) The Family is the societal unit that first has primary care and protective responsibility for children;

(2) The interests of the Community's children are best served within the environment of the Community's
(3) cultural values and heritage;

(4) Every child has the right to a permanent home that affords affection, love and guidance through nurturing, caring family members;

(5) All children have the right to be a useful member of their Community and their specific tribe and to be involved in its culture;

(6) Every child has the right to be a unique person and to individual expression of choice;

(7) Every child has the right to competent health and medical care and the promotion of a healthy, wholesome lifestyle;

(8) Every child has the right to a safe, protective environment which provides an adequate standard of living;

(9) Every child has the right to be protected against all forms of neglect, cruelty, abuse and exploitation;

(10) Every child has the right to an education with maximum opportunity for preparation for earning a livelihood, family life and citizenship; and

(11) Every child has the right to enjoy these rights in a spirit of peace, maintained by meaningful relationships with all those people who are important to him or her.

CHILD CARE PERSONNEL, FINGERPRINTING FOR SCREENING OF CRIMINAL HISTORY BY THE DEPARTMENT OF PUBLIC SAFETY

A. Child care personnel shall be fingerprinted prior to employment in any Day Care Center including Child Protective Services, Social Services, Health and Mental Health Care, Education (whether or not directly involved in teaching), Foster Care, Residential Care, Recreational or Rehabilitative, Detention or Treatment Services.

B. Employment Applications - All employment applications for individuals who are seeking work for any position listed in subsection A. shall contain the following questions:

1. Whether the individual has ever been arrested for or charged with a crime involving a child, and if so, the disposition of that arrest or charge;

2. Whether the individual is a parent or guardian of a child adjudicated to be a dependent child as defined in Chapter 11, Article II of the Salt River Indian Community Code of Ordinances; and

3. Whether the individual has ever been denied a license to operate a facility for the care of children in this state or another state of jurisdiction or had a license or certificate to operate such a facility revoked, and if so, the reason for such denial or revocation.

C. The Department of Health and Human Services shall make documented, good faith efforts to contact previous employers of the applicants to obtain information or recommendations which may be relevant to an individual's fitness for work in any position involving contact with children.

D. The employment application, background inquiries and fingerprint criminal history check shall be confidential.

E. For the purpose of screening child care personnel, the Salt River Department of Public Safety shall provide background information based on a set of the applicant's fingerprints to be obtained by a law enforcement officer to the Department of Health and Human Services.

The criminal history check shall be:

1. Based on such fingerprints and other identifying information.

2. Conducted through the identification division of the Federal Bureau of Investigation, as well as through all state criminal history repositories, and tribal jurisdictions that the employee or applicant lists as residences on their employment applications.

SALT RIVER PIMA-MARICOPA
INDIAN COMMUNITY
Route 1, Box 216
Scottsdale, Arizona 85256

ORDINANCE NO. SRO-136-91

In order to establish a bill of rights for children who are victims or witnesses of crime:

BE IT ENACTED BY:

Section 1. The Salt River Pima-Maricopa Indian Community recognizes that it is important that child victims and child witnesses of crime cooperate with law enforcement and prosecutorial agencies and that their assistance contributes to Community enforcement efforts and the general effectiveness of the criminal justice system of this Community. Therefore, it is the intent of the Community Council by means of this act, to ensure that all child victims and witnesses of crime are treated with sensitivity, courtesy and special care in order that their rights may be protected by law enforcement agencies, social agencies, protection afforded the adult victim, witness or criminal defendant.

Section 2. Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

(1) "Crime" means an act punishable under the laws of this Community or equivalent federal or State law.

(2) "Child" means any person under the age of eighteen years.

(3) "Victim" means any person against whom a crime has been committed.

(4) "Witness" means a person who has been or is expected to be summoned to testify for the prosecution in a criminal action, or a person who is subject to call or likely to be called as a witness for the prosecution by reason of having relevant information, whether or not an action or proceeding has been commenced.

(5) "Family member" means child, parent, legal guardian, or extended family member.

(6) "Advocate" means any person, including a family member not accused of a crime, who provides support to a child victim or child witness during any legal proceeding.

Section 3. There shall be every reasonable effort made by law enforcement agencies, prosecutors and judges to assure that child victims and witnesses are afforded the rights enumerated in this section. The enumeration of these rights shall be construed to create substantive rights and duties, and the application of an enumerated right in an individual case is not subject to the discretion of the law enforcement agency, prosecutor or judge. Child victims and witnesses have the following rights:

(1) To have explained in language easily understood by the child, all legal proceedings and/or police investigations in which the child may be involved;

(2) To be provided, whenever possible, a secure waiting area during court proceedings and to have an advocate or support person remain with the child prior to and during any court proceedings;

(3) To prevent the disclosure of the names, addresses or photographs of the living child victim or witness by any law enforcement agency, prosecutor's office or state agency without the written permission of the child victim, child witness, parents or legal guardians to anyone except another law enforcement agency, prosecutor, defense counsel or tribal or private agency that provides services to the child victim or witness;

(4) To allow an advocate to make recommendations to the prosecuting attorney about the ability of the child to cooperate with prosecution and the potential effect of the proceedings on the child;

(5) To allow an advocate to provide information to the court concerning the child's ability to understand the nature of the proceedings;

(6) To be provided information or appropriate referrals to social service agencies to assist the child and/or the child's family with the emotional impact of the crime, the subsequent investigation and judicial proceedings in which the child is involved;

(7) To allow an advocate to be present in court while the child testifies in order to provide emotional support to the child;

(8) To provide information to the court as to the need for the presence of other supportive persons at the court proceeding while the child testifies in order to promote the child's feelings of security and safety;

(9) To allow law enforcement agencies the opportunity to enlist the assistance of other professional personnel such as child protection services, victim advocates or prosecutorial staff trained in the interviewing of child victims;

(10) To be provided with coordinated tribal services so as to decrease any duplication of services and to minimize the number of interviews with the child victim or witness;

(11) To be provided with the use of closed circuit television or other such similar recording device for the purposes of interviewing or court testimony when appropriate, and to have an advocate remain with the child prior to and during any recording sessions. The use of closed circuit television or other such similar recording device is appropriate when the trial court, after hearing evidence, determines this procedure is necessary to protect the particular child witness' welfare; and specifically finds the child would be traumatized, not by the courtroom generally, but by the defendant's presence and finds that the emotional distress suffered by the child in the defendant's presence is more than de minimus.

Section 4. The failure to provide notice to a child victim or witness under this chapter of the rights enumerated in Section 3 of this act shall not result in civil liability so long as the failure to notify was in good faith and without gross negligence. The failure to make a reasonable effort to assure that child victims and witnesses are afforded the rights enumerated in Section 3 of this act shall not result in civil liability so long as the failure to make a reasonable effort was in good faith and without gross negligence.

C_E_R_T_I_F_I_C_A_T_I_O_N

Pursuant to authority contained in Article VII, Section 1 (c) of the Constitution of the Salt River Pima-Maricopa Indian Community ratified by the Tribe, February 28, 1990, and approved by the Secretary of the Interior, March 19, 1990, the foregoing ordinance was adopted this 28th day of November, 1990 in a duly called meeting held by the Community Council in Salt River, Arizona at which a quorum of 7 members were present by a vote of 7 for; 0 opposed; 2 excused.

SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY COUNCIL

Ivan Makil

Ivan Makil, President

ATTEST:

Lonita Jim, Secretary