

DEFENDANTS' RIGHTS

Intertribal Technical-Assistance Working Group on
Special Domestic Violence Criminal Jurisdiction (**VAWA ITWG**)
Webinar Series


January 10, 2014


2:30 – 4:00 p.m. EST



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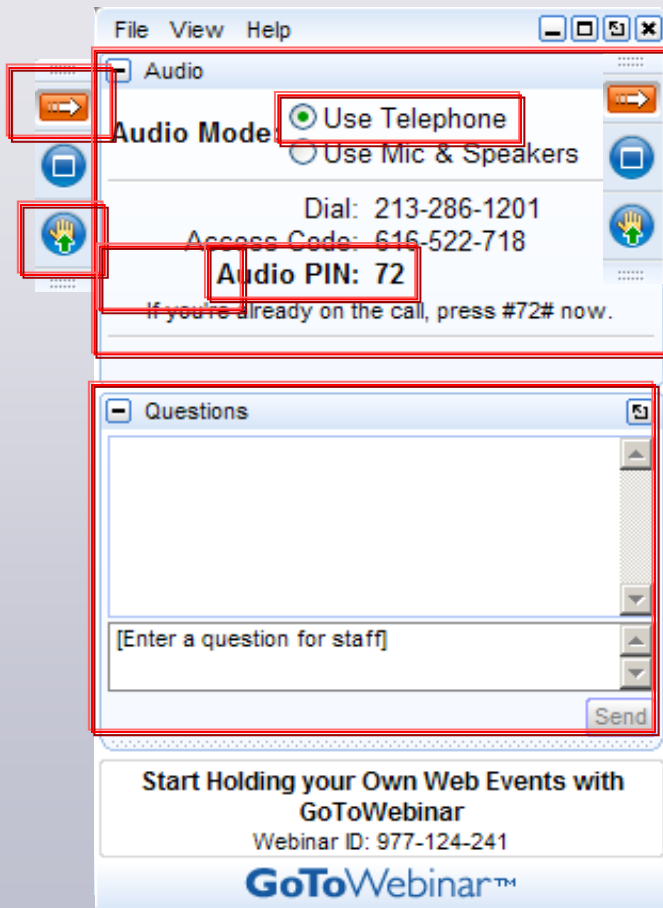
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How to Participate Today



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- Raise your hand
- Q&A throughout today's session
- Recorded webinar will be made available

Today's Roadmap

- Overview of remaining ITWG Webinar Series
- Introduction of Panelists and T/TA Facilitators
- Begin Webinar Series: Defendants' Rights Part III

Indigency Standards & Experiences of Tribes Implementing Public Defender Programs

- Selection
- Oversight
- Ethical Issues

Overview of VAWA ITWG Webinar Series on Defendants' Rights

- Webinar 1 - Overview: Competency, Standards for Defenders & Timing of Appointment ([September 27, 2013](#))
- Webinar 2 – Use of Contract Public Defenders: Models for Quality Assurance/Training; Ethics ([December 6, 2013](#))
- Webinar 3 – Who Qualifies: Indigency Standards and How to Define (*today*)
- Webinar 4 – Best Practices: Investigation Services and Caseload Standards ([January 31, 2014](#))

VAWA ITWG Webinar Series: Defendants' Rights (Part III)

- Today's PANELISTS:

Ron Whitener, Director of the Tribal Court Public Defense Clinic,
University of Washington School of Law

Lauren-Brooke Eisen, Counsel, Justice Program, Brennan Center for
Justice at NYU School of Law

Melanie Yazza, Defense Attorney II, Gila River Defense Services Office

Alfred Urbina, Chief Prosecutor, Pascua Yaqui

- FACILITATORS:

National Congress of American Indians

Tribal Law & Policy Institute

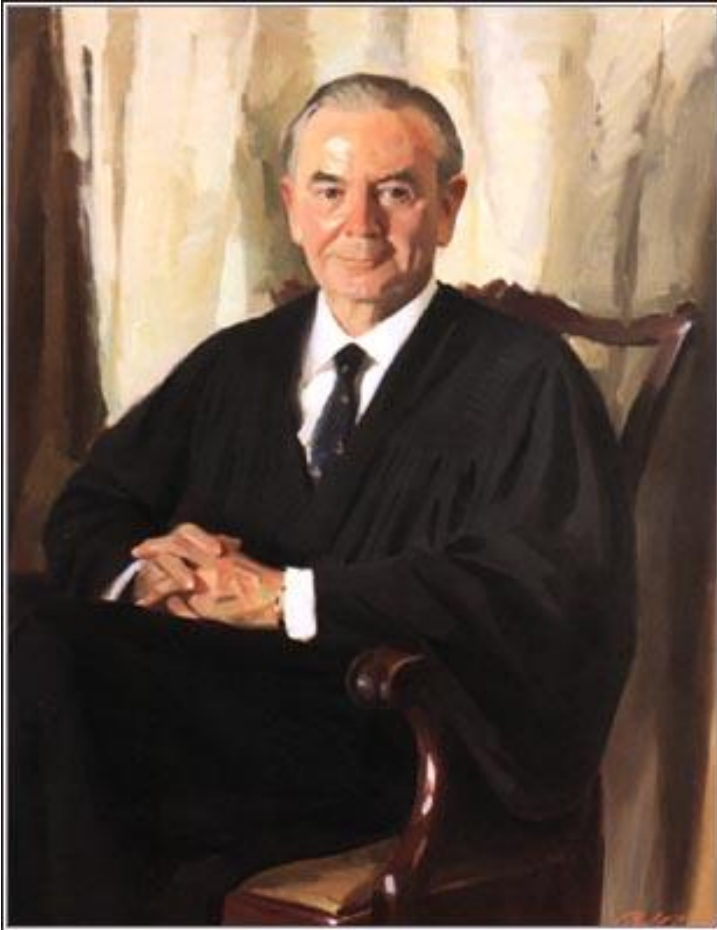
National Council of Juvenile and Family Court Judges

BRENNAN CENTER --- FOR JUSTICE

Lauren-Brooke Eisen, Counsel, Justice Program

Brennan Center for Justice *at New York University School of Law*

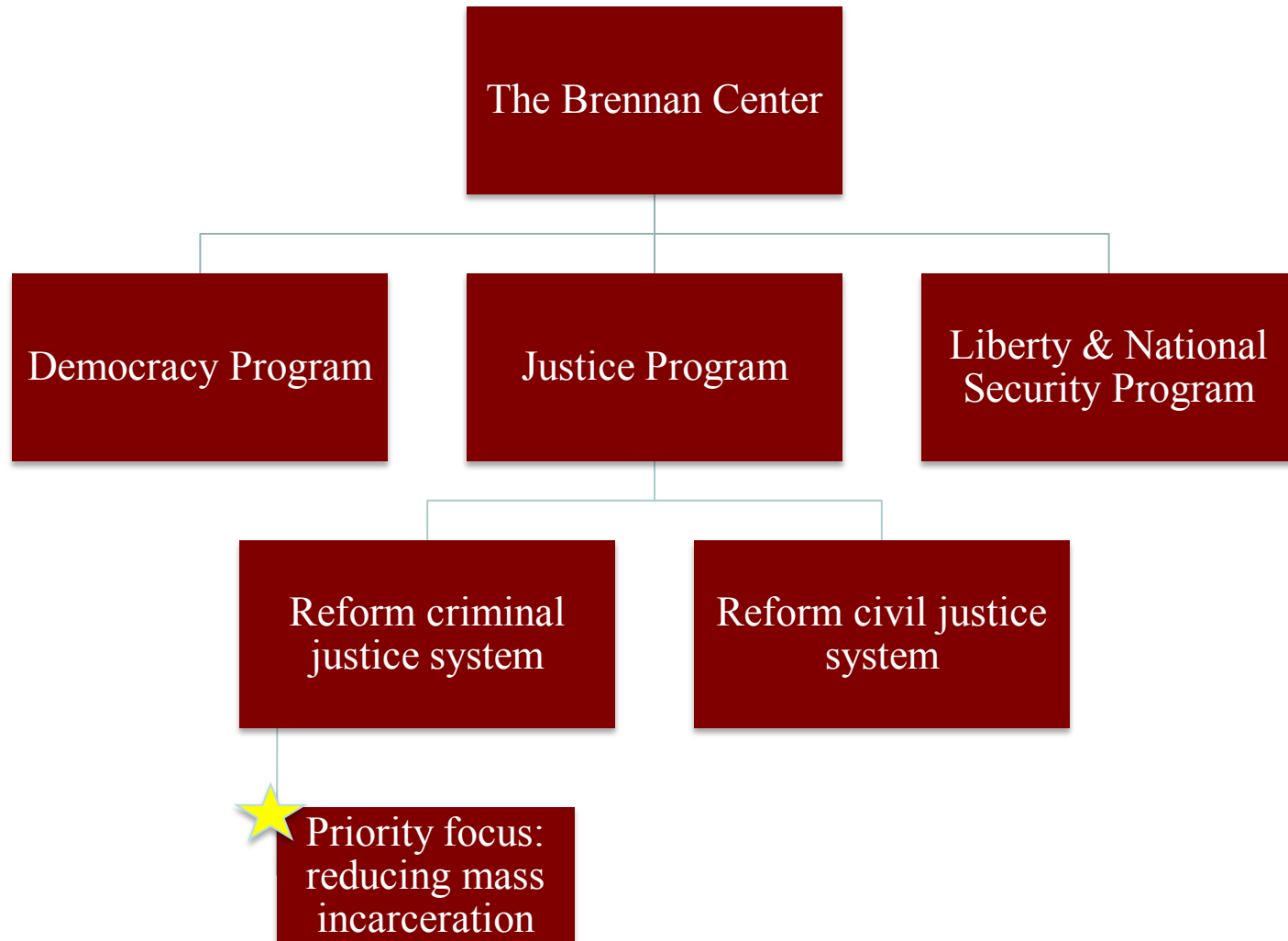
The Brennan Center for Justice at NYU Law



Justice William J. Brennan

- Mission: Improve our systems of democracy and justice
- Distinct Brennan Center Model:
 - Research
 - Report
 - Communicate/Publicize
 - Policy Proposal for Reform
 - Advocacy
 - Litigation

Brennan Center Programs

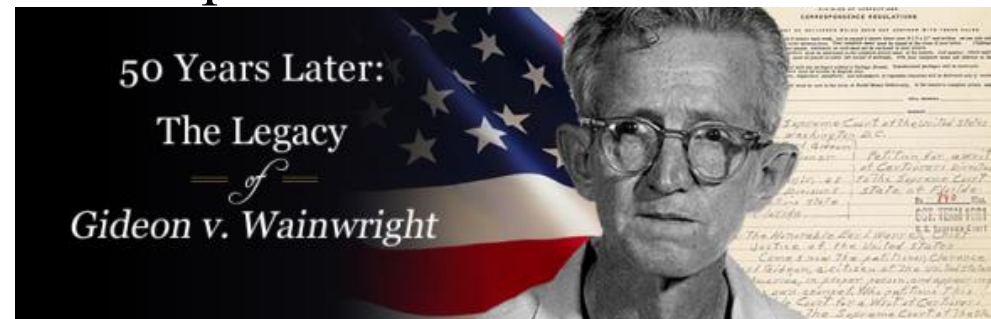


Eligible for Justice: Guidelines For Appointing Defense Counsel

The landmark Supreme Court case *Gideon v. Wainwright* requires states to provide counsel to all persons charged with felony crimes who are unable to afford private counsel without substantial hardship

Later cases extend the right to counsel to all persons facing a threat of incarceration for a period greater than six months

While the *Gideon* decision does not generally apply to tribal courts, its mandate that government pay for a lawyer when incarceration is possible is a requirement of the VAWA provisions for tribal courts



Eligible for Justice: Guidelines For Appointing Defense Counsel



The challenge for states and counties that must pay for such counsel is determining which individuals are genuinely unable to afford private counsel

Eligible for Justice: Guidelines For Appointing Defense Counsel

The Brennan Center seeks to provide guidelines that:

- Comply with the Sixth Amendment to the U.S. Constitution, as interpreted by *Gideon* and its progeny;
- can be adapted to different jurisdictions with their particular needs and resources, and
- conserves taxpayer dollars.

BRENNAN
CENTER
FOR JUSTICE

ELIGIBLE FOR JUSTICE:
GUIDELINES FOR
APPOINTING
DEFENSE COUNSEL

The Access to Justice Program

Brennan Center for Justice at New York University School of Law

Eligible for Justice: Guidelines For Appointing Defense Counsel

Why Are Guidelines Important?



Eligible for Justice: Guidelines For Appointing Defense Counsel

Without fair standards for assessing eligibility:

- some people who truly cannot afford counsel without undue hardship are turned away
- decisions whether to appoint counsel hang on the serendipity where an individual lives, the personal characteristics of the decision maker, institutional conflicts of interests, or any of the other improper factors that substitute for more reliable standards and procedures
- Some individuals could receive indigent counsel who should not



Eligible for Justice: Guidelines For Appointing Defense Counsel

Are These Guidelines Applicable to Tribal Communities? YES!!

- Although these guidelines were prepared for state and local jurisdictions, they are adaptable to tribal jurisdictions
- These are also “guidelines” and not “requirements”



Eligible for Justice: Guidelines For Appointing Defense Counsel

1. Screen people seeking the appointment of counsel to ensure that they are financially eligible.

Some tribal communities may feel strongly that all defendants who request a public defender receive one. If jurisdictions are hoping to save valuable resources, screening is a helpful tool



Eligible for Justice: Guidelines For Appointing Defense Counsel

2. Apply screening criteria and processes uniformly, and commit them to writing.



Eligible for Justice: Guidelines For Appointing Defense Counsel

3. Ensure that screening is performed by someone who does not have a conflict of interest.
 - A. Do not allow prosecuting attorneys to screen.
 - B. Do not allow individual defenders and public defender programs to screen their own clients.
 - C. Do not allow the presiding judge to screen, although screening by other judges or court employees is a good option.

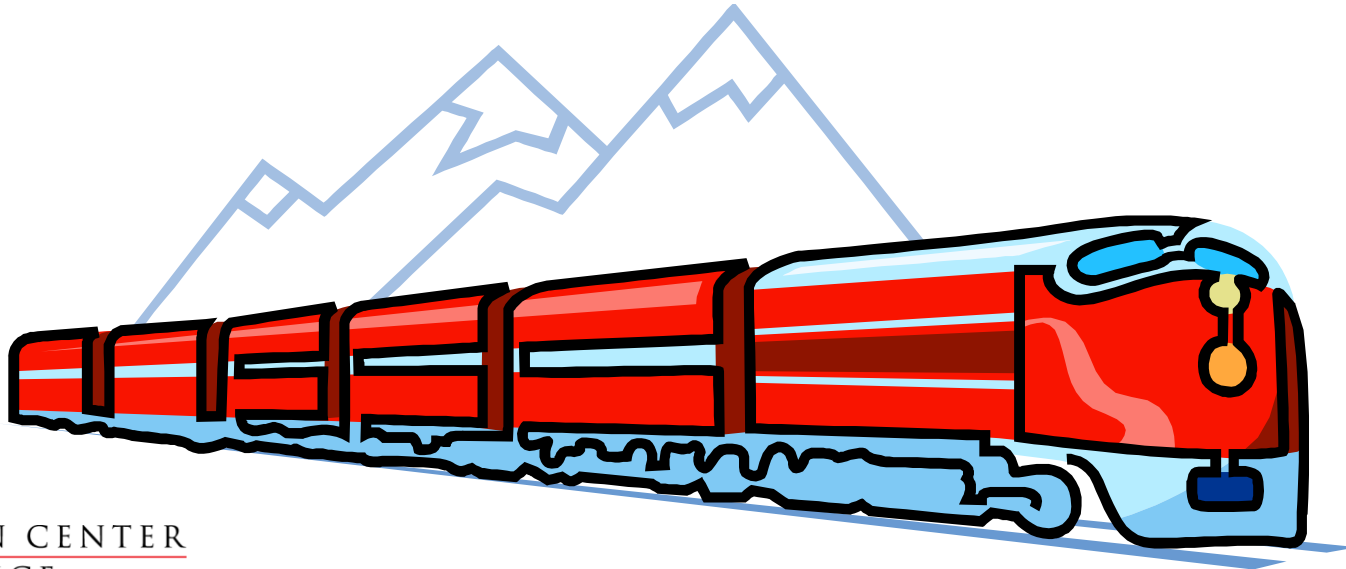


Eligible for Justice: Guidelines For Appointing Defense Counsel

4. Ensure that counsel is provided to those unable to afford it.
 - A. Consider price of retaining private counsel to handle the particular category of case.
 - B. Consider unavailable to pay for counsel:
 - income a defendant needs to pay for living and employment expenses and to maintain financial stability
 - assets a defendant needs to pay for living/employment expenses, and illiquid assets that cannot be quickly converted to cash
 - C. Do not deny counsel because a defendant has made bail.
 - D. Do not deny counsel based on the income or assets of the defendant's friends and family.
 - E. Err on the side of providing counsel, and avoid overly stringent screening criteria that chill the exercise of the right to counsel.

Eligible for Justice: Guidelines For Appointing Defense Counsel

5. Streamline screening to speed up the process and save money.
 - A. Use a multiple of the federal poverty guidelines to create a presumption of eligibility.
 - B. Presume eligibility for free counsel when an individual receives need-based public benefits, cannot post bond, or resides in a correctional or mental health facility.



Eligible for Justice: Guidelines For Appointing Defense Counsel

6. Ensure that required procedural protections are in place.
 - A. Maintain the confidentiality of information divulged during the screening process.
 - B. Do not re-examine eligibility determinations during the life of a case unless there is a compelling reason to do so.
 - C. Allow clients to appeal a determination of ineligibility to a judge or magistrate.



Eligible for Justice: Guidelines For Appointing Defense Counsel

These guidelines the Brennan Center for Justice developed present information about best practices for determining financial eligibility for free counsel.

None of these recommendations would be expensive to implement.

And, once in place, these recommended practices can: save money, improve the quality of public defense services, and promote compliance with the Constitution.

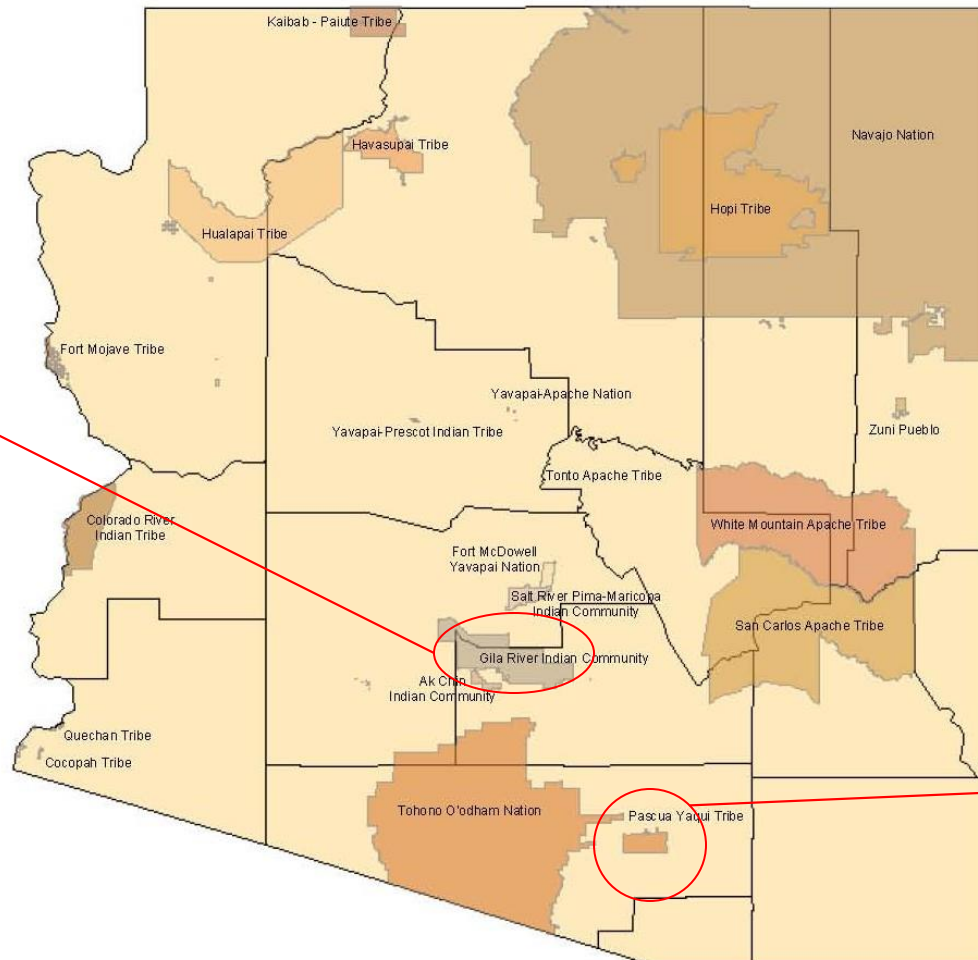


Resources

- “Eligible for Justice: Guidelines for Appointing Defense Counsel” by the Brennan Center <http://www.brennancenter.org/sites/default/files/legacy/publications/Eligibility.Report.pdf>
- “Gideon at 50: Three Reforms to Revive the Right to Counsel” by the Brennan Center http://www.brennancenter.org/sites/default/files/publications/Gideon_Report_040913.pdf
- Local public defender offices
- Sample forms can be found online



Tribal Experiences in Implementing Public Defender Programs



From the Perspective of a Public Defender



Melanie Yazza, Defense Attorney II, GRIC
Defense Services Office



Public Defense: Practical Considerations from a Prosecution Perspective



Alfred Urbina, Chief Prosecutor, Pascua Yaqui

Practicing in Tribal Court is difficult (it is not the state, it is not federal court, it is not city court). Practical matters may have a greater impact on your client's case than new black letter law or Constitutional issues. With that said, in my experience, a robust defense and the changes brought about through TLOA and VAWA represent a historical civil rights milestone, the likes of which we have not seen since the 1960s and the Indian Civil Rights Act (ICRA). An Indian's liberty is just as worthy of protection as a non-Indian's liberty. Our responsibility is to ensure that Indian Country Justice is fair.

Public Defense: Practical Considerations from a Prosecution Perspective

Critical:

- For starters, if attorneys are new to Indian Country, consider a basic block of Indian Law;
- Require a class on the culture and the history of the tribe;
- Attorneys should understand the concept of sovereignty, the difference between the U.S. Constitution and the ICRA, and when each might apply under VAWA; and
- They should know about the history of tribal courts and the court they are serving in.

Tip: *~Remember not to refer to the Tribe as “the State.” Cite Tribal law, the ICRA, and Tribal Appellate Law first.*

Public Defense: Practical Considerations from a Prosecution Perspective

Professionalism

- Conduct thorough background checks of applicants.
 - Ask about bar complaints, discipline, or disbarment.
 - Consider developing a Tribal bar, ethical rules, and a specific process to regulate attorney conduct.

~Is it ineffective assistance of counsel to not understand ICRA or how to practice in a multi-jurisdictional environment?

Public Defense: Practical Considerations from a Prosecution Perspective

Multi-jurisdictional Environment

- Know the interplay of Federal, Tribal, & State jurisdiction. (Major Crimes Act, Assimilative Crimes Act, Petit Policy, etc.) ~*Who is an Indian?*
- Is there any federal or state exposure? Is your client a State felon? Have habitual DV offenses?
- Is a tribal conviction better than a federal conviction? Is a Tribal Court jurisdictional challenge always right for your client? What is the alternative?
- Can we negotiate a consolidated plea?
- What implications does a tribal plea have in federal court?
- Tribal Statute of Limitations, Federal Statute of Limitations?
- Does the Tribe have a Special Assistant U.S. Attorney (SAUSA) program, are Tribal Police SLEC Certified? Does the Tribe have a Multi-Disciplinary Team (MDT) to consider federal charges?
- Is there a U.S. Attorney liaison? A federal “Community Prosecutor” assigned to the Tribe?

~All of this adds additional elements to the way defense attorneys should handle criminal cases and advise clients. It is an attorney's job to know these issues if they will be practicing in Indian Country.

Public Defense: Practical Considerations from a Prosecution Perspective

Practical Considerations & Things To Ponder

- How is the Tribal System structured?
- BIA or Tribal Law Enforcement? F.B.I.? Mix? (where is evidence kept?)
- B.I.A. contracted Detention Services or Tribal or State contracted? (on Rez or off?)
- Court structure? Appellate? Supreme?
- Branches of Government?
- Different forms for Indians and non-Indians? (depending on how you structure court)
- What is the crime rate like? Violence? Substance abuse? Major Crimes?
- What is the community view of the court system and law enforcement? Of law violators? How will that impact a bench trial or a jury trial?
- What is the racial composition of the “community?”
- What limitations exist on representation, scope, and what authority does the Public Defender have? Conflict Counsel? Direct Appeal? Habeas?

Tip: ~Never call a Tribal Police Officer B.I.A., even though the community might.

Public Defense: Practical Considerations from a Prosecution Perspective

Procedures: How and what do I have to do to see my client?

- Where the heck is my client? How the heck do I get there?
- Hours/weekends/bond posting/
- B.I.A. detention 6 hours away? Do you need an appointment? Video available?
- Phone #s, Warden? Who has to move for a court transport for a hearing?
- Cultural considerations at Tribal home? Male vs. Female? Head of household? Elder? Salutations? Expectations.
- Ceremonies: When do they occur? Cultural participation and practice in a jail setting or for release?

~Sometimes there will be no procedures, rules, or instructions, but you will be expected to know. If all else fails, ask the court clerk.

Public Defense: Practical Considerations from a Prosecution Perspective

TLOA/VAWA Costs: Depends on system, community composition, and caseload

- Crime Rate/caseload/complex cases
- Public Defender Office vs. Contract Attorneys (Tribal control)
- Contract Conflict Counsel will probably be needed (large families and clans)
- Population, racial composition, poverty rate, social ills (Use Tribal Census)
- Who qualifies for an attorney? Federal Poverty Guidelines.
- Charging policy? Arrests rate? Alternatives to incarceration?
- Who gets an attorney and when? (Non-Indians, Indians, TLOA, critical stage)
- More litigation, more discovery disputes, appeals, staffing needs
- Logistics: travel, phone costs, per diem, vehicle, building, administrative costs, geography.
- Waiver of right to attorney, How are they appointed?
- Training, bar fees, etc.(Basic Small Office + Conflict Attorneys: \$250,000-\$500,000)

Tip: “You catch more flies with honey on Frybread than you do with vinegar.” Respect Tribal Court practitioners and you will be respected in return. If it is broke, don’t complain, fix it.

~seek justice.

For More Information:

Maha Jweied
Senior Counsel
Access to Justice
Initiative
U.S. Department of
Justice
Maha.Jweied@usdoj.gov



Resources

- Federal Resources for Tribal Criminal Defense & Juvenile Delinquency Representation <http://turtletalk.files.wordpress.com/2013/12/final-tribal-defense-resource-guide.pdf>
- NCJA Webinar, Defender Initiatives in Indian Country (June 11, 2013): <http://www.ncja.org/webinars-events/state-tribal-collaboration-webinar-series>
- DOJ Courts and Indigent Defense Resource Guide <http://www.justice.gov/atj/resource-publication-4-17-12-rev.pdf>
- Bureau of Justice Assistance Overview of TCCLA Program https://www.bja.gov/Publications/TCCLA_Overview.pdf
- Grant Information from the Access to Justice Initiative <http://www.justice.gov/atj/grant-info.html>
- DOJ Funded Indigent Defense Publications <http://www.justice.gov/atj/idp/>
- Bureau of Justice Statistics: 2012 National Survey of Tribal Court Systems <https://www.tribalcourtsurvey.org/>

For More Information:

Additional Resources

- Bronx Defenders' Center for Holistic Defense
<http://www.bronxdefenders.org/our-work/center-holistic-defense>
- NIJ/ATJ Expert Working Group Report: International Perspectives on Indigent Defense <https://ncjrs.gov/pdffiles1/nij/236022.pdf>
- GAO Report on Indigent Defense (2012)
<http://www.gao.gov/assets/600/590736.pdf>
- GAO Report, Tribal Law and Order Act: None of the Surveyed Tribes Reported Exercising the New Sentencing Authority, and the Department of Justice Could Clarify Tribal Eligibility for Certain Grant Funds GAO-12-658R, May 30, 2012
<http://gao.gov/assets/600/591213.pdf>
- OJJDP Newsletter - Innovative Approaches to Juvenile Indigent Defense <https://www.ncjrs.gov/pdffiles/171151.pdf>
- Trial Advocacy Training for Tribal Court Judges, Prosecutors, and Defenders <http://www.gao.gov/assets/600/590736.pdf>

For More Information:

Access to Justice Initiative (ATJ) Selected Blogs:

- Bringing All Criminal Justice Stakeholders to the Table
<http://blogs.justice.gov/main/archives/2055>
- Addressing Juvenile Justice Concerns in Response to Shelby County
<http://blogs.justice.gov/main/archives/2423>
- Department of Justice Prioritizes Improving Legal Representation for Indigent Defense
<http://blogs.justice.gov/main/archives/1822>
- Public Service Careers & Student Loan Debt: What You Should Know
<http://blogs.justice.gov/main/archives/2189>
- Adoption of First International Principles and Guidelines on Indigent Defense
<http://blogs.justice.gov/main/archives/2236>
- Constructive Alternatives to Criminalization
<http://blogs.justice.gov/main/archives/1822>

Questions?

Don't forget the final webinar in the Defendants' Rights Series:

- Webinar 4 – Best Practices: Investigation Services and Caseload Standards tentatively scheduled for **January 31, 2014** at 2:30 p.m. EST

And as you are reviewing the VAWA Application Questionnaire and/or working on implementation steps, let us know if you'd like to see additional topics covered.

E-mail your ideas to nanderson@ncai.org.

Thank you for joining today's webinar.