

Applying for and Drafting Enforceable Tribal Protection Orders



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Disclaimer

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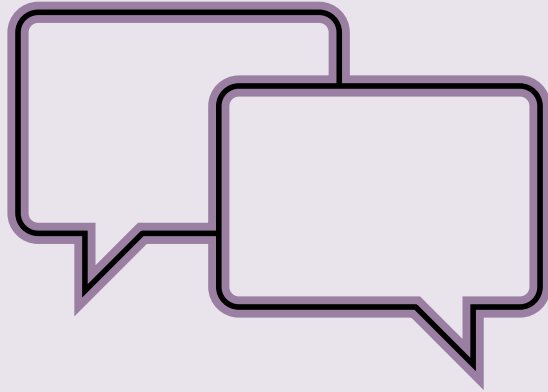
Objectives of Presentation

As a result of the training, participants will be better able to:

1. Discuss the importance of completing an application for a protection order that includes required tribal legal elements;
2. Discuss the importance of full faith and credit regarding protection orders;
3. Understand and discuss required elements in the protection order to activate VAWA full faith and credit; and
4. Understand the importance of drafting enforceable remedies tailored to meet the needs of the client.



Knowledge Check



IMPORTANCE OF DRAFTING A
SUCCESSFUL APPLICATION FOR A
PROTECTION ORDER



What are the elements the judge will need to see in the application?



Research Before Completing the Application



Review tribal statutes



Identify the tribal legal elements needed to obtain a Protection Order



Discuss the elements with the victim



Know how hearing dates for ex parte order/or protection orders are set



Note any tribal jurisdiction requirements for victim (eg: place of the domestic violence act, location of the perpetrator)



Know the length of time a protection order can be granted per tribal law



Tribal Example for Discussion

Quapaw Tribal Code Excerpts:

Quapaw Tribal Code Domestic Violence

4) "Domestic violence" means any act of physical harm, bodily injury, or sexual assault, or inflicting the fear of imminent physical harm, bodily injury or sexual assault which is committed by an adult, emancipated minor, or minor child thirteen (13) years of age or older against another adult, emancipated minor or minor child who are family or household members or who are or were in a dating relationship.



What Elements Do You See?

"Domestic violence" means any act of physical harm, bodily injury, or sexual assault, or inflicting the fear of imminent physical harm, bodily injury or sexual assault which is committed by an adult, emancipated minor, or minor child thirteen (13) years of age or older against another adult, emancipated minor or minor child who are family or household members or who are or were in a dating relationship.



KNOWLEDGE CHECK - ELEMENTS

Physical harm

Bodily injury

Sexual assault

Inflicting fear of
imminent physical
harm, bodily injury,
sexual assault

Committed by an
adult, emancipated
minor, child 13
years or older

Who is a family,
household
member or dating
relationship



Tribal Example for Discussion Quapaw Tribe (con't)

General Jurisdiction

- 1) Nothing in this Ordinance shall limit the jurisdiction of the Quapaw Nation, which shall extend to the furthest extent permitted under Federal law.
- 2) The District Court shall have the authority to perform actions under this Code, including issuing an emergency temporary order, ex parte order, final protective order or any other order the court sees fit provided therein, when:
 - a) Petitioner is a resident of or is employed within the Indian Country of the Quapaw Nation;
 - b) Petitioner is a spouse or intimate partner of, or otherwise engaged in a dating relationship with, a member of the Quapaw Nation or an Indian who resides within the Indian Country of the Nation;



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KNOWLEDGE CHECK - ELEMENTS

Petitioner is a resident or employed within the Indian Country of the Quapaw Nation

Petitioner is a spouse or intimate partner of, or otherwise engaged in a dating relationship with, a member of the Quapaw Nation or an Indian who resides within the Indian Country of the Nation





Discussion

Identify

- Identify the tribal legal elements

Refer

- Refer to the tribal petition for Protection Order

Check

- Run a check to see if all required legal elements are identified on the Petition for Protection Order, if not, what elements are missing

Connect

- Connect client's story segments to the elements. Be sure to explain this process to the client.

Hearing Dates

- Using tribal law, determine what hearing dates are applicable for ex parte order/permanent protection order

Timeframes

- Using tribal law, determine what length of protection order timeframes are available

Remedies

- Using tribal law, determine what remedies are available and tailor to client wishes. Make sure client story supports the request for each remedy (evidence/testimony)



State Example: Oklahoma

22 OSA 1090.2

-
1. “Domestic violence” means any act of physical harm or the threat of imminent physical harm which is committed by an adult, emancipated minor, or minor child thirteen (13) years of age or older against another adult, emancipated minor, or minor child who is currently or was previously an intimate partner or family or household member;



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KNOWLEDGE CHECK - ELEMENTS

Physical harm

Threat of imminent physical harm

Committed by an adult, emancipated minor, or minor child thirteen (13) years of age or older against another adult, emancipated minor, or minor child

Who is currently or was previously an intimate partner or family or household member





DISCUSSION

Identify	Identify the state legal elements
Refer	Refer to the state petition for Protection Order
Check	Run a check to see if all required legal elements are identified on the Petition for Protection Order, if not, what elements are missing
Connect	Connect client's story segments to the elements. Be sure to explain this process to the client.
Hearing Dates	Using state law, determine what hearing dates are applicable for ex parte Order/permanent protection order
Timeframes	Using state law, determine what length of protection order timeframes are available
Remedies	Using state law, determine what remedies are available and tailor to client wishes. Make sure client story supports the request for each remedy (evidence/testimony)



TIPS



VAWA

Full Faith & Credit



What Does Full Faith and Credit for Tribal Protection Orders Mean?

Legally, it means that when a protection order issued by any state, Indian tribe, or territory is violated in another jurisdiction, the enforcing jurisdiction must enforce the protection order as if it were its own.

Practically, it means that a victim can travel from one jurisdiction to another without having to secure a new protection order in each jurisdiction.



Why is Full Faith and Credit of a Tribal Protection Order Important?

Crucial means of providing safety to the victim as the victim travels across jurisdictional boundaries.

Provides reassurance to the victim that traveling across jurisdictional boundaries will not affect the terms of the Tribal protection order.

Sends message to the perpetrator that violations of a Tribal protection order outside of Indian country will have consequences.

Instrumental in recognizing Tribal sovereignty by recognizing and enforcing tribal protection orders.



18 U.S.C. 2265 (a)

Full Faith and Credit for Protection Orders

“Any protection order issued that is **consistent with subsection (b)** of this section by the court of one State, Indian tribe, or territory (the issuing State, Indian tribe, or territory) **shall be accorded full faith and credit** by the court of another State, Indian tribe or territory (the enforcing State, Indian tribe, or territory) **and enforced by the court and law enforcement personnel of the other State, Indian tribal government or Territory as if it were the order of the enforcing State or tribe.**”



18 U.S.C. 2265 (b)

Full Faith and Credit for Protection Orders

“(b) PROTECTION ORDER.—A protection order issued by a state, tribal, or territorial court is consistent with this subsection if—(1) such court has **jurisdiction** over the **parties** and **matter** under the law of such state, Indian tribe, or territory; and (2) *reasonable notice and opportunity to be heard* is given to the person against whom the order is sought sufficient to protect that person’s right to due process. *In the case of ex parte orders, notice and opportunity to be heard must be provided within the time required by state, tribal, or territorial law*, and in any event within a *reasonable time after the order is issued*, sufficient to protect the respondent’s due process rights.” (Emphasis added)



Full Faith And Credit Activating Language

- In order to be provided full faith and credit, the specific VAWA requirements in **18 U.S.C. 2265(b)** *need to be met and be in the Protection Order*:
 - The court has **jurisdiction over the parties and matter** under the law of such state, Indian tribe, or territory; and
 - **Reasonable notice and opportunity to be heard** is given to the person against whom the order is sought sufficient to protect that person's right to due process.
 - **In the case of ex parte orders**, notice and opportunity to be heard must be provided within the time required by state, tribal, or territorial law, and in any event within a reasonable time after the order is issued, sufficient to protect the respondent's due process rights.
 - **In the case of cross or counter petitions for a protection order**, a written pleading for a protection order has been filed by both parties and the court must make specific findings that each party is entitled to a protection order.



Points We'll be Discussing

Protection Order

Jurisdiction over the parties and matter

Reasonable notice and an opportunity to
be heard

In the case of an ex parte order

In the case of cross or counter petitions
for a protection order

Federal Definition of Protection Order

18 U.S.C. 2266(5)

(5) Protection order.—The term “protection order” includes—

(A) any injunction, restraining order, or any other order issued by a civil or criminal court for the purpose of preventing violent or threatening acts or harassment against, sexual violence, or contact or communication with or physical proximity to, another person, including any temporary or final order issued by a civil or criminal court whether obtained by filing an independent action or as a pendente lite order in another proceeding ***so long as any civil or criminal order was issued in response to a complaint, petition, or motion filed by or on behalf of a person seeking protection;*** and



Federal Definition of Protection Order (cont.)

18 U.S.C. 2266(5)

(B) any support, child custody or visitation provisions, orders, remedies or relief issued as part of a protection order, restraining order, or injunction pursuant to State, tribal, territorial, or local law authorizing the issuance of protection orders, restraining orders, or injunctions for the protection of victims of domestic violence, sexual assault, dating violence, or stalking.





Knowledge Check: Subject Matter Jurisdiction

Tribal Authority

What tribal constitutional provision states that this court may hear this types of case?

What tribal code provision(s) indicates that this court may hear this case?





Discussion: 18 USC 2265(e)

Federal Recognition of Tribal Jurisdiction

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



NOTE:

18 U.S.C. 2265 (e) seems to **overrule** *Montana* (U.S. Supreme Court Case) for cases involving a tribe's civil authority to issue and enforce protection orders in matters involving all persons arising inside of Indian country in accordance with tribal law.

[Montana v. United States, 450 U.S. 544 \(1981\)](#)





Discussion: Jurisdiction and *Montana*

The Montana test requires the tribal court to find that:

1. The parties entered into a consensual relationship with the Tribe or its members through commercial dealing, contracts, leases or “other arrangements” or
2. The conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

If neither of the two factors listed in the Montana test are present, the tribal courts may not exercise civil jurisdiction over non-members on non-Indian lands within the reservation/Indian country.





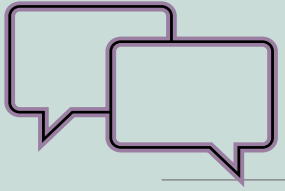
DISCUSSION



Did the domestic violence act occur in Indian country?

If the act occurred outside of Indian country and the protection order is requested in Indian country the legal analysis gets much more complex and is an untested question of law.





DISCUSSION

Who

- List any requirements in the statute regarding who may file a protection order

Contacts

- Identify any contacts the petitioner and defendant have to the Tribe (Examples: tribal members, work for tribe, child is a member)

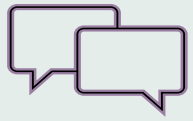
Requirements: Service

- Identify what the statute requires to serve a protection order

Emergency PO?

- Identify what the statute requires with respect to hearing dates if this is an emergency protection order





DISCUSSION: Submitting to the Tribe's Jurisdiction

Generally, unless prohibited by federal statutory law or tribal law: a person, including any entity, who is a **nonmember of the Tribe** residing **outside the Tribes' territorial jurisdiction** and/or **not present within such territory**, generally submits to the jurisdiction of the Tribal Court by doing any of the following acts:

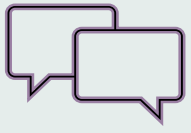
(a) Transacting any business with the Tribe its entities or instrumentalities, including, but not limited to, constructing or supplying services, tangible items or property transactions, or participation in any transaction or contract occurring in whole or in part within the reservation or off-reservation trust lands or restricted lands and conveying any interest in property located within such Tribal territory;

(b) Committing any tortious act within the Reservation or other Tribal territory;

(c) Owning, using, possessing, or having an interest in any property, whether real or personal, situated within Tribal territory;

(d) Contracting to insure any person, property, or risk located within the Reservation or other Tribal territory at the time of contracting;





DISCUSSION

Submitting to Tribe's Jurisdiction (con't)

(e) Living in a marital relationship (or similarly) subject to the Tribes' jurisdiction, notwithstanding subsequent departure from Tribal territory, so long as one continues to reside in Indian country;

(f) Is the parent, custodian, or other person with a legal interest in an Indian child subject to the jurisdiction of the Tribes;

(g) Accepting a privilege from the Tribe or entering a consensual relationship or commercial transaction with a member.



Discussion: Due Process

Identify whether the defendant has been served with a copy of the petition in compliance with the tribal statute (get this in the tribal court record)

Identify whether the court date has been scheduled according to any timelines set out in the tribal statute (get this in the tribal court record)

If the defendant appears and does not contest personal jurisdiction, in most jurisdictions the defendant has waived the argument of no notice

Was the defendant provided an opportunity to tell the defendant's side of the story or ask questions of the petitioner?



REMEDIES



REMEDIES

Review what type of remedies the tribal statute provides- a judge can only provide remedies within the statutory parameters unless there is a discretionary statement (such as 'or other remedies the court feels necessary to address the violence')



What remedies would the client like to request?

Make sure you put evidence in the record to show the client needs the remedy.



Tribal Victim Advocacy/Attorney Tips

- Safety planning should be ongoing before seeking and after obtaining a protection order.
- Note that respondents may be transient so working with law enforcement is critical to obtain service and for enforcement purposes.
- Prepare the client to hear the respondent's denials in court.



Enforcement of Tribal Protection Orders

How do you assess whether the states or other tribes are enforcing tribal protection orders that contain federal full and credit activation language?

- Tribal Coalitions
- Reports from advocates
- Reports from victims

BE AWARE OF THIS ENFORCEMENT ISSUE. THIS IS DIRECTLY CONNECTED TO VICTIM SAFETY.





Questions?

THANK YOU

Upcoming Webinars – Legal Assistance Providers

Privacy, Confidentiality, and Privilege Issues When Attorneys and Advocates Work Together



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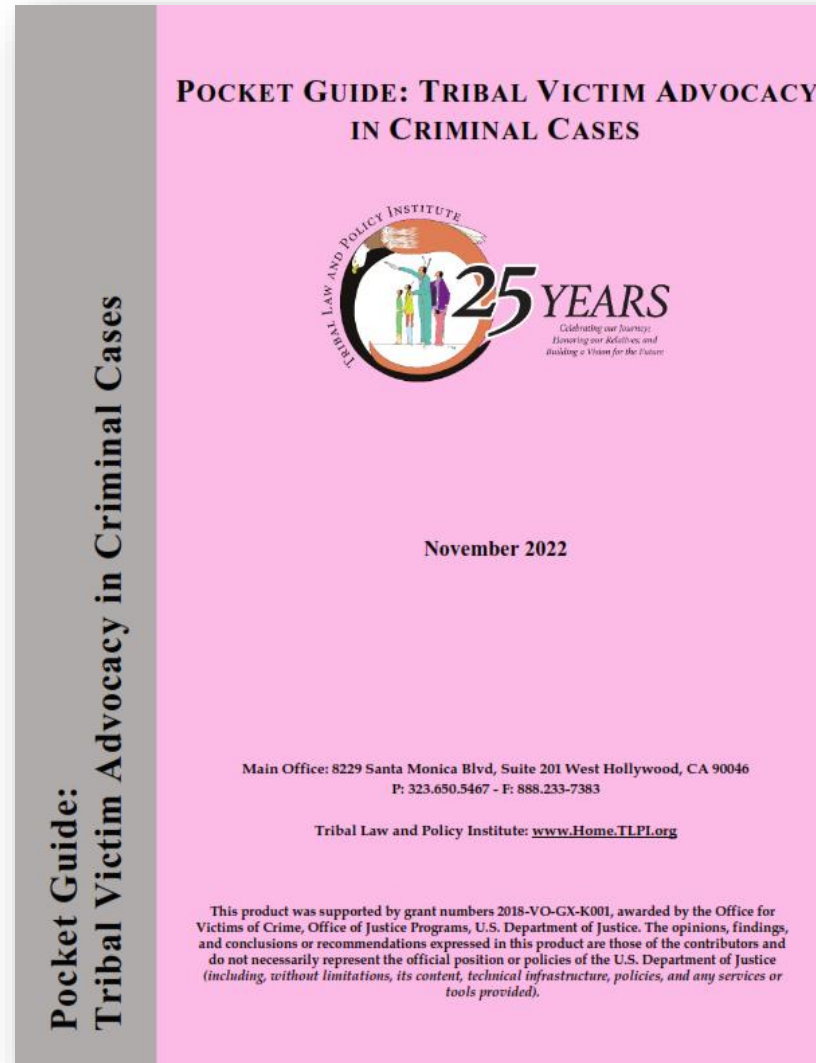
TLAPS website: TribalLegalServices.org

TLPI website www.Home.TLPI.org



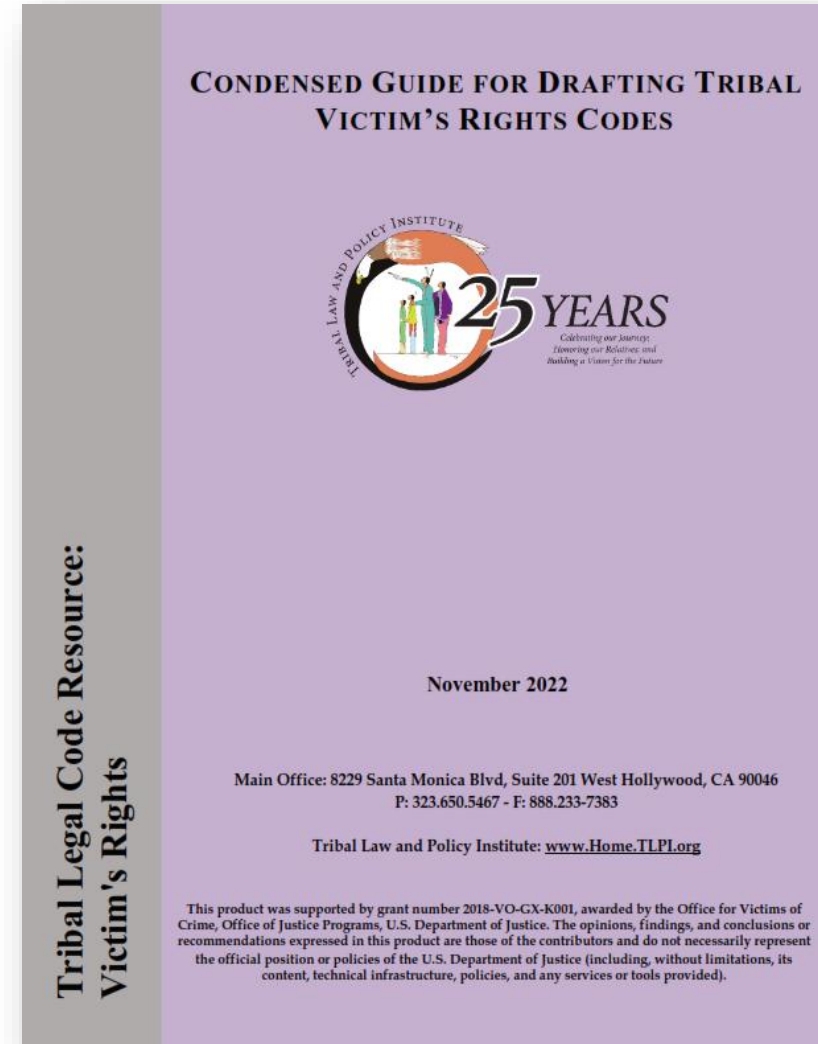
Pocket Guide: Tribal Victim Advocacy in Criminal Cases

Pocket Guide: Tribal Victim Advocacy in Criminal Cases is designed particularly for community-based advocates as a quick reference guide to better assist victims as they navigate the criminal legal process. This Pocket Guide contains things such as a quick review of the general criminal legal process and victim rights with an emphasis on safety planning at every juncture. While this Pocket Guide is designed primarily for community-based advocates, it may be useful for other professionals who work with victims.



Tribal Legal Code Resource: Victim's Rights, Condensed Guide For Drafting Tribal Victim's Rights Codes

[Tribal Legal Code Resource: Victim's Rights, Condensed Guide for Drafting Tribal Victim's Rights Codes](#) is designed to assist tribal governments with the development of victim right's codes. This resource was written with the belief that tribal governments have the ability to draft victim right's laws centered on their tribal beliefs that convey compassion for those harmed by crime and the importance of protecting the rights of victims, and to prevent revictimization.





Resources

Visit home.TLPI.org/publications to view all our available publications. All publications can be downloaded directly from our website for free.

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- Domestic Violence Courts/Dockets
- Healing To Wellness Courts
- LGBTQ2S
- Juvenile Justice
- Public Law 280
- Sexual Assault
- Sex Trafficking
- Tribal-State Collaboration
- Violence Against Native Women
- VAWA 2022 Tribal Criminal Jurisdiction

By Series:

- Child Welfare Series (Center for Tribes)
- Enhanced Tribal Authority Series
- Indian Nations Conference Video Series
- Healing To Wellness Courts
- Legal Code Development Series
- Promising Strategies Series
- Protocol Guide Series
- Reentry Series
- Tribal Legal Studies Textbook Series
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