

Victims' Rights

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

Webinar Series


October 3, 2013


2:30– 4:00 p.m. EDT



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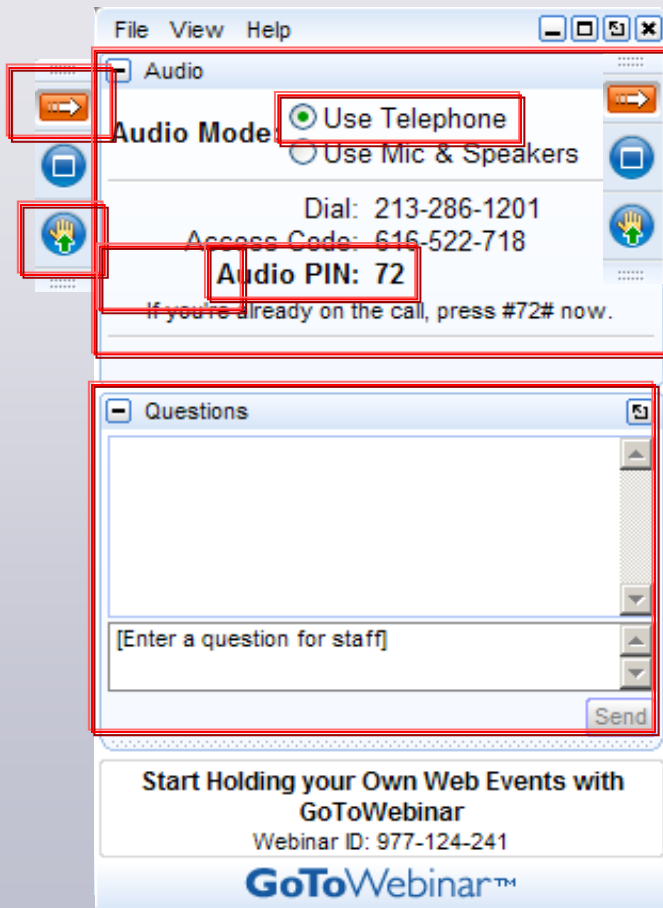
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- Q&A during 2nd half of today's session
- Everyone will receive an email within 24 hours with a link to a survey about today's session
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Today's Roadmap

- Introduction of Panelists and T/TA Facilitators
- Victims' rights and 25 U.S.C. 1304
- What are Victims' Rights?
- How are Victims' Rights Beneficial?
- Enforcement Issues and Victims' Rights
- Distinctions between types of Victim Service Providers
- Victims' Rights in Tribal Codes

VAWA ITWG Webinar Series: Victims' Rights

- **Today's PANELISTS:**

- *Leslie Hagen*, National Indian Country Training Coordinator, Executive Office for United States Attorneys & Senior Counsel, SMART Office
- *Kelly Gaines Stoner*, Judge, Seminole Nation of Oklahoma & Victim Advocacy Legal Specialist, TLPI

FACILITATORS:

National Congress of American Indians

Tribal Law & Policy Institute

National Council of Juvenile and Family Court Judges

Victims' Rights and VAWA 2013

- Tribes will be able to exercise their sovereign power to investigate, prosecute, convict and sentence both Indians and non-Indians who assault Indian spouses or dating partners or violate a protection order in Indian Country.
- Tribes will have to meet the mandates of 25 U.S.C. 1304 in order to exercise this jurisdiction.
- Tribes are greatly encouraged to provide victim's services and rights under tribal law to foster prevention and to promote cooperation with prosecutions.

How are Victims' Rights Beneficial?

- Forces the justice system to provide some protections for the victim to foster safety, prevention and support cooperation with prosecutions

NAVIGATING MULTIPLE JURISDICTIONS

- Victim Advocates must oftentimes navigate multiple jurisdictions
- Each jurisdiction may have different victim right statutes and definitions unique to that jurisdiction
- This powerpoint will provide a general overview of tribal and federal victim rights statutes
- The presentation will conclude with an online resource to check each state's victim rights statutes

Who Is a Victim? (non-federal)

- Will be defined by statute
- Could be victims of certain crimes (felonies, violent crimes, sexual assault, domestic assaults)
- Could be a category of victims (elders, children, disabled, domestic violence)
- Could include surviving family members of homicide victim
- Could require victim to report to law enforcement
- Could require criminal action to be filed

DEFINITION OF VICTIM (federal)

- Feds must identify the victims of a crime at the earliest opportunity after detection of a crime at which it can be done without interfering with the investigation – 42 USC 10607(b)(1)
- Attorney General Guidelines say this is the investigators' responsibility
- Must provide prosecutor with a list of names and contact information for known victims
- In large cases, try to provide in electronic format for easy entry into VNS (victim notification system)

DEFINITION OF VICTIM (federal)

- 10607: person that has suffered direct physical, emotional, or pecuniary harm as a result of the commission of a crime
- CVRA: person directly and proximately harmed as a result of the commission of a Federal offense
- Both allow for others to stand in shoes of victims who are minors, incapacitated, incompetent or deceased.

DEFINITION OF VICTIM

42 U.S.C. §10607

- Services
- Not enforceable
- Applies during investigation

18 U.S.C. §3771

- Rights
- Enforceable
- Goes into effect when charges are filed

DEFINITION OF VICTIM

- Corporate entities – can be victims
- Government entities – not victims except for purposes of restitution under MVRA
- Culpable victims –
 - Not a victim for rights and services if “culpable for or accused of the crime being investigated or prosecuted”

DEFINITION OF VICTIM

- Proximate Harm
 - Felon in possession / domestic violence
- Strong presumption in favor of providing rather than withholding assistance and services

What are Victims' Rights?

- Right to be treated with fairness, dignity, sensitivity and respect
- Right to attend and be present at criminal hearing
- Right to be heard in the criminal justice process to include conferring with prosecutor and submitting a victim impact statement
- Right to be informed of proceeding and events in criminal system (release or escape of offender, legal rights/remedies, available benefits and so on)

What are Victims' Rights (cont)

- Right to protection from intimidation and harassment
- Right to restitution from offender
- Right to privacy (including protection of address)
- Right to apply for victim compensation
- Right to expeditious return of property seized as evidence
- Right to speedy trial
- Right to enforcement of these rights

Attorney General Guidelines for Victim and Witness Assistance

- Victims' rights laws and policies are of particular importance to victims of DV, SA, or stalking.
- These crimes often cause emotional trauma in addition to physical injury.
- It may be more difficult for Vs to report these crimes because of on-going relationships with the offender.
- These victims **often are in great danger of future violence** after reporting a crime, during investigation and prosecution of cases, and after Ds are released from prison.

Attorney General Guidelines for Victim and Witness Assistance

- “Department personnel should be aware of the trauma that child victims and witnesses experience when they are asked to relive the crime during the investigation and prosecution of a criminal case, particularly when testifying in court.”
- “A **primary goal** of Department personnel, therefore, **shall be to reduce the potential trauma to child victims and witnesses that may result from their contact with the criminal justice system.** To that end, Department personnel are required to provide age-appropriate support services to these victims, and referrals for community-based services to parents and guardians as indicated.”

Victim Polygraphs

- DOJ personnel are strongly discouraged from asking SA victims to take polygraph examinations. The investigating agent may ask a sexual assault victim to take a polygraph examination only in extraordinary circumstances and only with the concurrence of a SAC or Supervising AUSA. All reasonable alternative investigative methods should be exhausted before requesting or administering a SA victim polygraph examination.

Payment for Forensic Sexual Assault Examinations

- The responsible official or the head of another department or agency that conducts an investigation into a sexual assault shall pay, either directly or by reimbursement to the victim, the cost of the physical examination of the victim and the costs of materials used to obtain evidence. 42 USC 10607(c)(7).
- In no case shall the victim be held responsible for payment for the examination or be required to seek reimbursement for the exam from his/her insurer.
- In no case shall a victim of SA be required to cooperate with police or prosecution in order to be provided with an exam free of charge.

Victim's right to be tested

- 42 USC 10607(c) – “the AG shall provide for the payment of the cost of up to 2 anonymous and confidential tests of the victim for sexually transmitted diseases, including HIV, gonorrhea, herpes, chlamydia, and syphilis, during the 12 months following sexual assaults that pose a risk of transmission.....of sexually transmitted diseases to the victim as the result of the assault.

Right to Make a Statement about Pretrial Release

- Victims of an interstate domestic violence, violation of a protection order, or stalking offense that he or she has the right to make a statement regarding the danger posed by the defendant for the purpose of determining pretrial release of the defendant or the conditions of such release. 18 USC 2263.

Motion to Test for HIV

- US v. Ward, 131 F.3d 335 (3rd Cir. 1997)
- 42 USC 14011(b)
 - Offense D is charged w/ must pose risk of transmission
 - PC determination that D committed assault
 - Victim requests the test
 - Test would provide info necessary for V's health
 - D must receive notice & opportunity to be heard
 - Test results must be confidential – may be disclosed only to V, D, V doctor or counselor, family member, or post-assault sexual partners
 - May not be used in any criminal trial against D

Plea Agreement Language.....

- The Defendant Agrees to Medical Testing. The Defendant agrees to be tested for the etiologic agent for acquired immune deficiency syndrome. The Defendant further agrees that if the initial test for the etiologic agent for acquired immune deficiency syndrome is negative, he will be retested six (6) months and again twelve (12) months following the initial test. Title 42, United States Code § 14011.

Restitution 18 USC § 2248

- Mandatory Restitution, “the court ***shall*** order
”
...
 - Full amount of victim losses including any costs incurred by victim for..
 - Medical services relating to physical, psychiatric, or psych care
 - Physical and occupational therapy or rehabilitation
 - Necessary transportation, temporary housing and child care
 - Lost income
 - Atty’s fees, plus any costs incurred in obtaining a protection order
 - Any other losses suffered by the victim as a proximate result of the offense

Sex Offender Registration

“The defendant agrees that prior to sentencing he will report to the appropriate local law enforcement agency and complete all paperwork necessary to become registered as a sexual offender under the laws of the State of Michigan.”

VICTIM SERVICES (federal)

- Name and contact information
- Emergency medical and social services
 - Crime Victims' Compensation
 - Services for victims of domestic violence
 - Sexual assault testing
- Reasonable protection from suspect and those acting in concert with or at the behest of suspect
 - Safety planning
 - EWAP, pretrial detention, Witness Security Program, state and local resources

VICTIM SERVICES (federal)

- Notice of the status of the investigation (to the extent it is appropriate and won't interfere with the investigation), including arrest of the accused
 - Talk to AUSA before sending out notices
- Upon request, notice to employers and creditors
- Preservation of property held as evidence
 - Ensure victim's property held as evidence is maintained in good condition and returned as soon as possible
 - If property will deteriorate or be damaged, consider advising victims
 - Contraband shall not be returned to victims

Enforcement Issues and Victims' Rights

- Through court proceedings
- Standing issues (prosecutor may bring court action or statute gives victim standing to bring court action)
- Some statutes allow victims to seek special writs from court to force agencies to comply with the VR statutes
- Some statutes allow designated entities to receive, investigate and attempt to solve VR violations
- Many statutes indicate that a violation of the VR does not give rise to a civil cause of action against any agency
- Many statutes indicate that a violation of VR cannot be raised by defendant as ground for appeal

Enforcement Mechanisms (federal)

- **Motion in District Court**
 - Filed by victim or Government on behalf of victim
 - Court must decide “forthwith”
 - Reasons for any denial must be stated on the record
- **Writ of Mandamus**
 - Can be issued on order of single judge
 - Must be decided within 72 hours
 - Proceedings in District Court cannot be delayed more than 5 days
 - If denying, must issue written opinion

Other Enforcement Mechanisms (federal)

- Administrative Complaint
 - Department of Justice Victims' Rights Ombudsman
 - Receives and investigates complaints
 - May require training for employees and offices
 - May impose sanctions, including suspension and termination, for “willful or wanton” failure to comply with victims' rights laws
 - Complainant has no judicial review
 - Point of Contact in each USAO to receive and investigate complaints; Ombudsman at EOUSA recommends sanction, if any

Enforcement Limitations (federal)

- No new cause of action for damages
- No motion for new trial
- Limited motion to reopen plea or sentence
Allowed only if:
 - Right to be heard asserted in district court and denied;
 - Petition for writ of mandamus filed within 10 days;
AND
 - If a plea, the defendant did NOT plead to the highest offense charged
- ❖ Victims' sole appellate route is the writ of mandamus, they may not file a direct appeal.
Aguirre-Gonzalez, 597 F.3d 46 (1st Cir. 2010)

A Cautionary Case

- *Ochran v. United States*, 117 F.3d 495 (11th Cir. 1997)
- Ochran was informant in drug case, threatened by D
- AUSA warned D not to do it again but took no other action
- D bonded out, kidnapped and seriously injured Ochran
- Ochran sued based on AUSA's negligence

- *Holding*: Tort Claims Act “discretionary function” exemption applied to AUSA's decision not to inform Marshals of threat, but did not apply to AUSA's decision not to inform Ochran of DOJ assistance available against intimidation and harassment provided for in AG Guidelines

A Crucial Distinction between types of Victim Service Providers

- Prosecutorial victim advocate service provider (state/tribal) (may be subject to discovery)
- Stand alone tribal victim advocate service provider (may be subject to discovery unless statute protects records)
- BIA Victim Specialist service provider (may be subject to discovery)
- Federal Victim Specialist service provider (may be subject to discovery)

Victims' Rights in Tribal Codes

- Tribal Statutory Protections (creates a body of basic rights and protections)
- Must follow your tribal codes to enact statutes
- May be quicker than a constitutional amendment
- Are subject to amendment or change with ebb and flow of tribal community/government

Victim's Rights in Tribal Codes

- Tribal Constitutional Protections (increases permanence, strength and enforceability)
- Must follow Tribal Constitutional Provisions for Constitutional Amendments
- May require tribal vote
- Violations usually give right to cause of action in tribal court



EXAMPLES OF TRIBAL CODES WITH VICTIMS' RIGHTS

Muscogee (Creek) Nation
Code Ann. Title 6, 3-308

- **Duty of Prosecutor or Advocate**

Notify the victim of the crime of domestic violence
when the prosecution decides:

- not to prosecute,
- to dismiss charges, or
- when entering a plea

Muscogee (Creek) Nation
Code Ann. Title 6, 3-306

Assistance to Victims by Law Enforcement

- **Notice to Victim**

Written Notice of Rights, resources, treatment, shelter, and other necessary assistance.

- **Protection**

Escort assistance to safety, medical treatment, and personal property

Orders of Protection where family or domestic violence has occurred, restraining abuser conduct.

Muscogee (Creek) Nation

Code Ann. Title 6, 3-307 Family Relations

- **Notification of Release**
- The District court must make reasonable efforts to immediately notify victims when there is a release of the abuser.
- Provide the victim with copies of the conditions of release.

New York Oneida Tribe Victims' Rights

CHAPTER 11 - Rule 1101. VICTIM RIGHTS

In all criminal prosecutions, a victim shall have the following rights:

- to be treated with fairness and respect throughout the criminal justice process;**
- timely disposition of the case following arrest of the accused, provided no right of the accused is abridged;**
- be reasonably protected from the accused throughout the criminal justice process;**
- to notification of court proceedings;**

- **to attend the trial and all other court proceedings that the accused has the right to attend, unless the victim is to testify and the court determines that the victim's testimony would be materially affected if they heard other testimony;**
- **to communicate with the prosecution;**
- **to object to or support any plea agreement entered into by the accused and the prosecution and to make a statement to the court prior to the acceptance by the court of the plea of guilty or nolo contendere by the accused;**
- **to make a statement to the court at sentencing;**
- **to restitution which shall be enforceable in the same manner as any other cause of action or as otherwise provided by law;**
and
- **to information about the arrest, conviction, sentence, imprisonment and release of the accused.**

Nothing in this section shall be construed as creating a basis for vacating a conviction or ground for appellate relief in any criminal case.

Muscogee (Creek) Nation
Code Ann. Title 6, 3-310

- **Rights of Victims**

To be:

- Informed of all hearing dates and continuances
- Present at sentencing and address the court
- Advised of probation and parole decisions (for victim safety)
- Awarded restitution for direct losses and consequences of the crime.

Muscogee (Creek) Nation

Code Ann. Title 14, section 1-606

- **Victim's Restitution**

In addition to fines, fees, imprisonment, and punishments, the defendant is responsible to the victims of his offenses for restitution.

- Restitution is reimbursement to a victim for actual losses and costs resulting from the defendant's crime.
- Restitution is not a penalty or fine imposed on the defendant for punishment.

Confederated Tribes of the Colville Reservation

General

31. [3-5-6 Civil actions authorized](#)

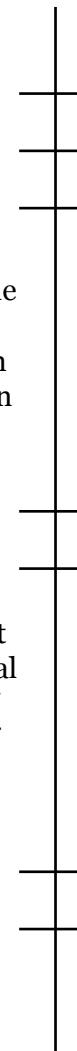
The tribal prosecuting attorney shall be authorized to file civil actions in Tribal Court in the name of the Tribes on behalf of **victims** of criminal acts. Such civil actions shall be filed against the perpetrators of said criminal acts for compensation for bodily injury, property damage, or death in accordance with this Chapter. Such civil actions shall be filed only with the written permission of the **victim**. The Tribes shall bear the expense of the litigation.

32. [3-5-7 Right of action for damages](#)

(a) The **victim** may elect to have the Tribes, as parents Patriae, to seek damages in Tribal Court from the person or persons liable for the claimed injury, damage or death resulting from criminal acts under this Chapter. (b) No right of action at law for damages incurred as a consequence of criminal act shall be lost as a consequence of an election under this Chapter. (c) Such a right of action shall not include the Tribes and this Chapter shall not be deemed a waiver of the Tribe's sovereign immunity.

33. [3-5-11 Statute of limitations](#)

No complaint shall be filed in a civil action arising under this Chapter unless the events shall have occurred within a one (1) year period prior to the date of filing of the complaint.



Questions?

- www.victimlaw.org
- www.tlpi.org
- chia@tlpi.org or nanderson@ncai.org