

DEFENDANTS' RIGHTS

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


December 6, 2013


2:30 – 4:00 p.m. EST



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Organizer: Nathaniel Scheidemen | Presenter: Nathaniel Scheidemen

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 **Nathaniel Scheidemen**
President & CEO
NS Sales Solutions

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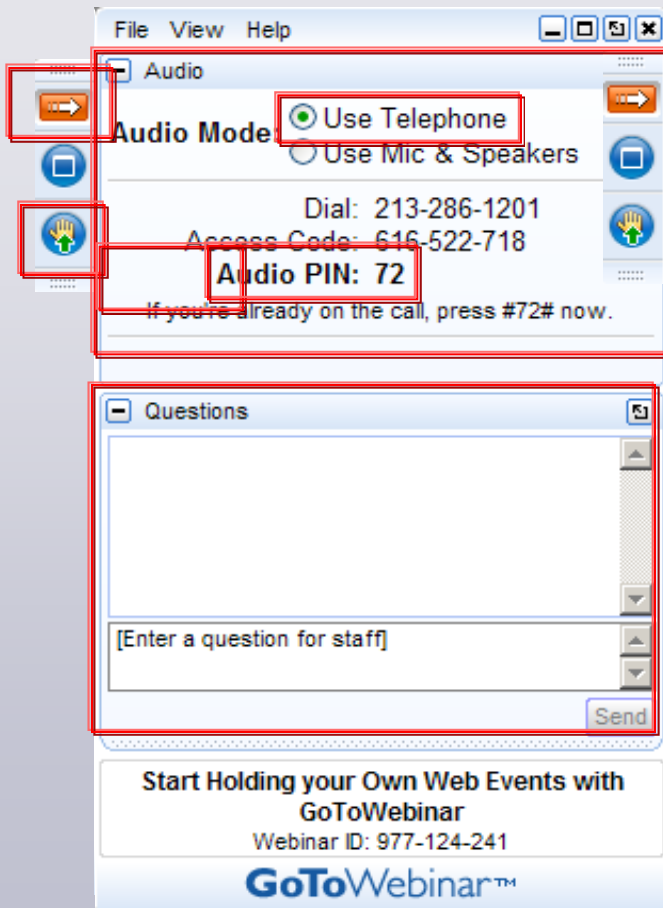
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How to Participate Today



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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 II

Use of Contract for Primary Public Defenders & Conflict Counsel

- 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 (*today*)
- Webinar 3 – Who Qualifies: Indigency Standards and How to Define ([January 10, 2014](#))
- Webinar 4 – Best Practices: Investigation Services and Caseload Standards ([January 31, 2014](#))

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

- Today's PANELISTS:

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

Wendy Church, Court Director, Tulalip Tribal Court

- FACILITATORS:

National Congress of American Indians

Tribal Law & Policy Institute

National Council of Juvenile and Family Court Judges

Tribal Public Defense Models

- Employees
 - Confederated Tribes of the Colville Reservation
http://www.colvilletribes.com/public_defense.php
 - Confederated Salish & Kootenai Tribes
<http://www.cskt.org/gov/defenders.htm>
 - Montana Public Defender
<http://publicdefender.mt.gov/>

Tribal Public Defense Models

- Contract Attorney
 - Lower Elwha Klallam
 - Suquamish
 - Squaxin Island
 - State of Washington
- UW Tribal Public Defense Clinic/Tribal Partnership
 - Funded by gift funding
 - Skokomish
 - Tulalip

Selection and Training

Selection

- Criminal defense attorneys
 - Local criminal defense bar associations
 - Phone book
 - Existing tribal bar members
- Non-criminal law attorneys
 - May be experienced litigators
 - Should start out with small, less complicated cases
 - Will get up to speed faster than new attorneys
- New attorneys
 - Need training and mentors
 - Simplest cases to start out

Training

- Criminal defense attorneys
 - Need training on application of tribal law
 - Consider a bar exam that forces reading of tribal code
- Non-criminal law attorneys
 - Need to see ways to access resources for criminal law procedure
 - Tribal law application
 - Bar exam
- New attorneys
 - Need training and mentors
 - Simplest cases to start out
 - Tend to be more accepting of a non-state system

Oversight

- Annual trainings
 - New procedures
 - New statutory/caselaw
 - Future planning
- Bench guidance
 - View Judge's role as part educator
 - Be observant of potential shoddy practice
 - Have early intervention/non-punitive corrective process
- Create a attorney discipline process for serious issues

Tulalip Conflict System

- **Historically**

- Conflict Counsel appointed by Judges / paid from Court budget

- **Currently**

- Obtained grant for Conflict Counsel
- Process/Qualifications: sent out RFP's to existing pool of attorneys admitted to practice at Tulalip
 1. Members in good standing of the Tulalip Tribal Bar
 2. Members in good standing of the Washington State Bar Association
 3. Or, demonstrate willingness to take Tulalip Bar within 1 month
 4. 5 years experience in criminal law / trial practice preferred
- Provide resume, references, and detailed written description of work experience (including experience & knowledge in Tribal courts, tribal communities, criminal law, tribal and related federal law, and criminal defense)
- \$75 an hour billable rate (with a cap of \$1,000) on one case
- (main topic, collateral consequences)

- **Proposed (2014)**

- Reduce rate to \$55 per hour

Ethical Issues

Arizona Rules of Professional Conduct

ER 1.7 Conflict of Interest: Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client; or
- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

Hypothetical – Current Clients

Billy and Max are under 21 years of age. They ask Johnny to buy them beer and go to Johnny's house to drink it. The police respond to a report of a party and possible underage drinking. Billy and Max are cited for underage drinking. Johnny is cited for contributing to the delinquency of a minor.

What potential conflicts exist for the public defender?

Arizona Rules of Professional Conduct

ER 1.9. Duties to Former Clients

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by ERs 1.6 and 1.9(c) that is material to the matter;

unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

Hypothetical – Past Clients

You are a contract conflict attorney. You have been asked to represent Johnny. The Prosecutor tells you at the first hearing that she is going to offer Johnny a dismissal if he testifies against Cal, who sold them the alcohol, that Cal regularly sells alcohol to underage buyers. You represented Cal several years ago in criminal case.

What potential conflicts exist?

Contract Terms

Scope of Representation

- All cases?
 - Only cases with the potential of incarceration/detention?
 - Only standard criminal cases (i.e. exclusion of fishing/hunting/gathering violations)
 - Exclusion?
 - Civil?
 - Caseload caps?
- When does representation end?
 - Acquittal/conviction?
 - Plea?
 - Diversion?
 - Post-appeal?
 - Post-probation?

Compensation?

- Flat fee per case?
- Hourly rate up to a case maximum?
- Flat fee per year to take all cases?

Qualifications?

- Member of the local state bar association?
- Member of any state bar association?
- Tribal bar exam?
- Maintenance of insurance?
- Notice of any bar complaints?
- Experience practicing criminal law?
- Felony defense experience?
- Juvenile defense experience?
- Experience practicing other types of law?
- Other unique experience? (e.g., sex crimes, mental health issues, etc.)
- Conflicts of interest management system?

Other services funded?

- Investigation funds?
- Travel costs?
- Expert witness fees?
- Social workers?

Reporting?

- Hours spent per case/charge?
- Total hours billed?
- Charges defended?
- Recommendations for future needs and surveys?
- Notice of significant legal issues raised?
- Types of cases defended?
 - Adult criminal?
 - DV
 - Substance abuse related?
 - Non-Indian?
 - Enhanced sentence charges?
- Caseload in all courts?

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 Upcoming Defendants' Rights Webinars:

- Webinar 3 – Who Qualifies: Indigency Standards and How to Define scheduled for **January 10, 2014** at 2:30 p.m. EST
- Webinar 4 – Best Practices: Investigation Services and Caseload Standards tentatively scheduled for **January 31, 2014** at 2:30 p.m. EST