



Family Justice Center Alliance Webinar

Federal Prosecution of Sexual Assault and Domestic Violence Crimes in Indian Country

Presented by Leslie A. Hagen

December 18, 2012, 10-11:30 AM PST

Leslie A. Hagen, National Indian Country Training Coordinator, will address specific substantive topics in the area of federal prosecution of sexual assault and domestic violence crimes occurring in Indian Country. Ms. Hagen will discuss jurisdictional issues, applicable federal criminal statutes, and best practices for working in a multijurisdictional federal/tribal case. Ms. Hagen is one of the leading authorities in the country on federal prosecution of crimes against women in Indian Country.

Continuing Education

This session is approved for .25 California Minimum Continuing Education (CEU) credit and 1 Minimum Continuing Legal Education (MCLE) credit. The Family Justice Center Alliance is a California approved provider of CEU for MFT, LCSW, LEP, LPCC (Provider # PCE 5095) and MCLE for attorneys (Provider #15493). Professionals in states outside of California should check with their own state board to determine whether these credits are approved in their jurisdiction. Information on how to obtain credit will be provided during the webinar and within the course materials.

Welcome!

While waiting for the presentation to begin, please read the following reminders:

- The presentation will begin promptly at 10:00 a.m. Pacific Time
- If you are experiencing technical difficulties, email Natalia@nfjca.org
- To LISTEN to the presentation on your phone, dial **+1 (702) 489-0008** Access Code: **881-514-045** or **listen on your computer speakers**
- Attendees will be muted throughout the presentation
- To send questions to the presenter during presentation:
 - Click on “Questions” in the toolbar (top right corner)
 - Type your comments & send to presenter
- There will be a Q & A session at the end of the presentation.
- The presentation will be recorded & posted on www.familyjusticecenter.org
- Please complete the evaluation at the end of the presentation. We value your input.



Your host today:



Gael Strack, J.D.
CEO

Family Justice Center Alliance





Thank You to Our Sponsor

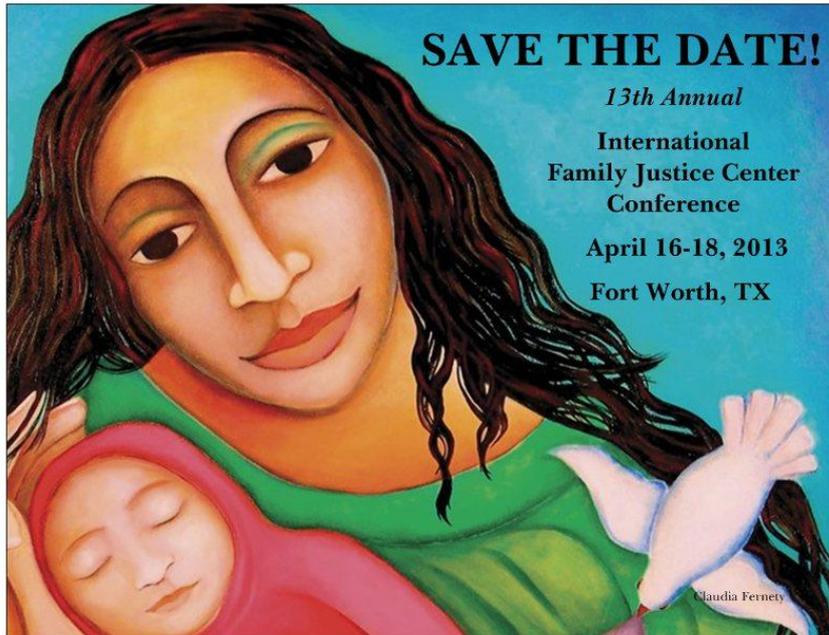
Thank you to the US Department of Justice,
Office on Violence Against Women
for making this training possible!

This project is supported all or in part by Grant No. 2007-TA-AX-K032 awarded by the Office on Violence Against Women, U.S. Department of Justice. The opinions, findings, conclusions, and recommendations expressed in this publication/program/exhibition are those of the author(s) and do not necessarily reflect the views of the Department of Justice, Office on Violence Against Women.



2013 International Family Justice Center Conference

April 16-18, 2013 in Fort Worth, TX



www.familyjusticecenter.org

The three-day conference will include discussions on issues related to the handling of domestic violence, child abuse, sexual assault, and elder abuse cases in the context of the Family Justice Center model.

The conference faculty includes nationally and internationally recognized subject matter experts, advocates, and survivors. During the conference participants will have the opportunity to meet with survivors and professionals who currently work in Family Justice Centers in the United States and internationally.

Registration is now open!



The FJC Alliance Team



Casey Gwinn, JD



Gael Strack, JD



Natalia Aguirre



Jennifer Anderson



Lori Gillam, CPA



Melissa Mack



Pam O'Leary,
MSW



Alexia Peters, JD



Jena Valles



Rachel Whiteside

Webinar Download Reminders

This webinar presentation is being recorded and will be posted on our website by close of business. We would like to remind you that you no longer need Membership in order to download webinar files and other materials from our Resource Library.

If you would like to access our new Resource Library, please visit our website at www.FamilyJusticeCenter.org and click on “**Resources**” tab → “**Resource Library**”.



California Continuing Education

- This session is approved for .25 California Minimum Continuing Education (CEU) credit for MFT and LCSW (Provider # PCE 5095) and for 1 California credit for attorneys (Provider # 15493) . Professionals in states outside of California should check with their own state board/bar to determine whether these credits are approved in their jurisdiction.
- A checklist detailing how to obtain the credit will be included in the course materials and available for download.
- The checklist will also be emailed after the webinar training.

Today's Presenter:



Leslie A. Hagen, JD
National Indian Country Training Coordinator
US Department of Justice

Federal Prosecution of Sexual Assault and Domestic Violence Crimes in Indian Country



December 18, 2012

Leslie A. Hagen

National Indian Country Training Coordinator

US Department of Justice

Leslie.Hagen3@usdoj.gov

VAWA 2005 Title IX – Safety for Indian Women

- 1 of 3 Indian (including Alaska Native) women are raped in their lifetimes
- Indian women experience 7 sexual assaults per 1000, compared with 4 per 1000 among Black Americans, 3 per 1000 among Caucasians, 2 per 1000 among Hispanic women, and 1 per 1000 among Asian women
- Indian women experience the violent crime of battering at a rate of 23.2 per 1000, compared with 8 per 1000 among Caucasian women

Congressional findings continued.....

- ◉ During the period 1979 – 1992, homicide was the third leading cause of death of Indian females aged 15 to 34, and 75% were killed by family members or acquaintances
- ◉ Indian tribes require additional criminal justice and victim services resources to respond to violent assaults against women
- ◉ The unique relationship of the U.S. to Indian tribes creates a Federal trust responsibility to assist tribal governments in safeguarding the lives of Indian women

Deputy Attorney General (DAG) Memo

January 11, 2010

- “Public safety in tribal communities is a top priority for the Department of Justice.”
- “I direct every USAO with IC in its district to engage annually, in coordination with our law enforcement partners, in consultation with the tribes in that district.”
- “I direct all such USAOs to develop an operational plan addressing public safety in IC.”
 - Within 8 months of new USA taking office and review and update annually

More DAG Memo

- ⦿ “Addressing violence against women and children in IC is a Department of Justice priority.”
- ⦿ “The Department, through the USAOs, has a duty to investigate and prosecute serious crimes in IC, including crimes against women and children.”
- ⦿ “Reports of sexual assault or domestic violence in IC should be investigated wherever credible evidence of violations of federal law exists, and prosecuted when the Principles of Federal Prosecution are met.”

More DAG Memo

- “Where federal jurisdiction exists, the responsibility to investigate and prosecute violence against women in IC also extends to misdemeanor assaults committed by non-Indian offenders against Native American women on federally recognized reservations.”
- “Due care should be exercised to recognize ongoing risks to victims in sexual assault and domestic violence cases, and to expeditiously make charging decisions in high-risk cases to minimize or eliminate those risks.”

DAG Memo Concluded

- “In developing district-specific operational plans for public safety in tribal communities, I direct every U.S. Attorney to pay particular attention to violence against women, and to work closely with law enforcement to make these crimes a priority.”
- “The Department has a responsibility to build a successful and sustainable response to the scourge of violent crime on reservations.”

Indian Country Basics

- 566 federally recognized tribes
 - Over 200 are non-PL 280 (feds have concurrent jurisdiction with the tribes)
 - Approx 350 tribes are PL 280 (states have prosecution responsibility)
 - Pre-TLOA, Indian Civil Rights Act limited tribes' sentencing authority to 1 yr jail and \$5000 fine
 - USSC Decision in Oliphant case – tribes have no criminal jurisdiction over non-Indians
 - Problematic for Domestic Violence cases

Federal Jurisdictional Statutes

- 18 USC 1153 – Major Crimes Act – gives feds jurisdiction to prosecute certain enumerated serious offenses:
 - Murder, manslaughter, rape, aggravated assault, child sexual abuse, felony child abuse and neglect, when they are committed by Indians in Indian Country
- 18 USC 1152 – General Crimes Act – feds have exclusive jurisdiction over all crimes committed by non-Indians against Indians
- Section 1152 – also grants feds jurisdiction to prosecute minor crimes by Indians against non-Indians , but is shared with tribes and D cannot already have been punished by the tribe

More on Jurisdiction....

- Feds have jurisdiction to prosecute crimes of general application, such as drug and financial crimes, when they occur in IC, unless specific treaty or statutory provision exempts tribal members.
- So to determine who has jurisdiction must know location of offense (on reservation?), is D Indian or not, and is the victim an Indian or not?
- If two non-Indians, even if crime committed on reservation, jurisdiction falls to the state.

Tribal Law and Order Act of 2010

⦿ Subtitle C §234—TRIBAL COURT SENTENCING AUTHORITY

⦿ Amends the Indian Civil Rights Act §1302.

- 1.(a) In General---No Indian tribe;
- (7) (A) require excessive bail, impose excessive fines etc.

(B) except as provided for (C) impose sentence greater than 1 yrs. and \$5,000 fine.

(C) except as provided for under (b) impose a sentence greater than 3 yrs or a fine of \$15,00

(D) impose a total penalty greater than 9 yrs.

Tribal Law and Order Act of 2010

- (b) Offenses Subject to Greater Than 1-year or fine of \$5,000 only if:
 - (1) previous conviction of same or comparable offense by any jurisdiction in U.S.; or
 - (2) is being prosecuted for an offense comparable to an offense that would be punishable by more than 1 yr. of imprisonment if prosecuted by the U.S. or any of the States

Tribal Law and Order Act of 2010

- (c) Rights of the Defendant—in any criminal proceeding in which an Indian Tribe in exercising power of self-government imposes a total term of more than 1 yr shall:
 - (1) provide the right to effective assistance of counsel at least equal to that guaranteed by the U.S. Constitution;
 - (2) at the expense of the tribal government, provide an indigent defendant assistance of a defense attorney licensed to practice law by any jurisdiction in the U.S. that applies appropriate licensing standards and effectively ensures the competence and professional responsibilities of its licensed attorneys.

Tribal Law and Order Act of 2010

- (3) require that each judge presiding over the applicable criminal case---
 - (i) have sufficient legal training; and
 - (ii) be licensed to practice law in any jurisdiction in the United States (state, federal or tribal); and
- (4) prior to charging the defendant make publicly available the criminal laws, rules of evidence, criminal rules ...of the tribal government
- (5) maintain a record of the criminal proceeding (audio or other recording)

Relevant Federal Statutes for Crimes of VAW in Indian Country

- ◉ Sexual Abuse Statutes
- ◉ Violence Against Women Act
- ◉ Indian Country Jurisdiction Statutes – Major Crimes Act and General Crimes Act
- ◉ Assault Crimes (18 USC 113)
- ◉ Assimilative Crimes Act
- ◉ Gun Control Act

18 USC §113 Federal Assault Statutes

- (1) Assault w/ intent to commit murder – 20 yrs
- (2) Assault w/ intent to commit any felony – 10 yrs/fine
- (3) **Assault w/ dangerous weapon**, w/ intent to do bodily harm, and without just cause or excuse – 10 yrs/fine
- (4) **Assault by striking, beating, or wounding** – 6 mo./fine
- (5) Simple assault – 6 mo./fine
- (6) **Assault resulting in serious bodily injury** – 10 yrs/fine
- (7) Assault resulting in substantial bodily injury to someone under 16 – 5 yrs/fine

Injury definitions for 18 USC §113

- “Substantial bodily injury” means bodily injury involving
 - (A) a temporary but substantial disfigurement; or
 - (B) a temporary but substantial loss or impairment of the function of any bodily member, organ, or mental faculty; and
- “Serious bodily injury” (18 USC § 1365)
 - (A) a substantial risk of death;
 - (B) extreme physical pain;
 - (C) protracted and obvious disfigurement; or
 - (D) protracted loss or impairment of the function of a bodily member, organ, or mental faculty

Charging Option for Non-Indian Defendants in Misdemeanor Domestic Violence Case

- 18 USC § 113(a)(4) – Assault by striking, beating, or wounding (6 month misdemeanor)

Sentencing Options - *US v Chavez* 204 F.3d 1305 (11th Cir. 2000)

- Defendant convicted of assault 18 U.S.C. §113(a)(4)
 - \$1400 restitution for wife's counseling
 - Five years probation with conditions
 - prohibition against possessing firearm
 - attend program for domestic violence offenders
 - required to reside in halfway house for six months
 - payment of subsistence fee to halfway house to defray costs
 - mental health evaluation and treatment as recommended
 - prohibition on dispersing assets without court permission
 - pay wife \$1200 per month for living expenses

Assimilative Crimes Act

- Assimilative Crimes Act 18 USC § 13

- Michigan case example

- MCL 750.540 Interference with a communications carrier

Domestic Assault by an Habitual Offender 18 USC 117

- Is a federal offense when D commits a domestic assault in IC and he has two prior federal, state or tribal court convictions for offenses that would be, if subject to federal jurisdiction, an assault, a sexual abuse offense, an offense under Chapter 110A, or a serious violent felony against a spouse or intimate partner.
- 5 year statutory maximum sentence unless substantial bodily injury to victim – then is increased to a statutory maximum of 10 years.

US v. Roman Cavanaugh, Jr.

- ◉ 1/19/09 D indicted in ND
- ◉ D a member of the Spirit Lake Tribe
- ◉ D had 3 previous DV convictions in the Spirit Lake Tribal Court
- ◉ D was indigent and was not provided a law trained, licensed atty in the tribal court
- ◉ District court judge quashed the indictment
- ◉ US appeals and wins

Constitutional Challenges

Issue: Can uncounseled tribal court convictions be used as predicate offenses for a 18 USC 117 prosecution?

Yes.

- *United States v. Cavanaugh*, 643 F.3d 592 (8th Cir. 2011)
- *United States v. Shavanaux*, 647 F.3d 993 (10th Cir. 2011)

Important point – victims in earlier cases can be different than current victim(s)

VAWA

Enacted 1994, amended 1996, 2000, and
2006

- ⦿ Interstate Domestic Violence – Section 2261
- ⦿ Interstate Stalking – Section 2261A
- ⦿ Interstate Violation of a Protection Order –
Section 2262

Interstate Domestic Violence

**18 U.S.C. 2261(a)(1),
Amended January 5, 2006**

- **It is a federal crime to cross state, foreign or tribal lines or within the SMTJ to commit or attempt to commit a crime of violence against an “intimate partner.”**

Crime of Violence - Section 16

- **An offense that has as an element the use, attempted use or threatened use of physical force against a person**
- **An offense that is a felony and that, by its nature, involves a substantial risk that physical force against a person may be used.**

Interstate Domestic Violence

18 U.S.C. 2261(a)(1),

- Statute now covers “dating partners” – a person who is or has been in a social relationship of a romantic or intimate nature with the abuser. Factors to consider are the length of the relationship, the type of relationship and the frequency of interaction.
- The defendant must have intended to kill, injure, harass or intimidate when crossing the line.

Interstate Domestic Violence

18 U.S.C. 2261(a)(2)

- It is a federal crime to force or coerce an “intimate partner” to cross state, foreign or tribal lines if the conduct or travel leads to the commission or the attempted commission of a crime of violence against the victim.

Interstate Stalking

18 U.S.C. 2261A(1), amended January 5, 2006

- It is a federal crime to cross state, foreign or tribal lines or within SMTJ to stalk another person. There must be proof that the stalking placed the victim in reasonable fear of death or serious bodily injury or that the stalking caused substantial emotional distress.

Interstate Stalking

18 U.S.C. 2261A(1), amended January 5, 2006

- The defendant must have intended to kill, injure, harass, or place under surveillance with intent to kill, injure, or harass, or intimidate when crossing the line.

Cyberstalking

18 U.S.C. 2261A(2), amended January 5, 2006

- It is a federal crime to use the mail or an interactive computer service or any facility of interstate or foreign commerce to engage in a course of conduct that causes substantial emotional distress or places a person in reasonable fear of death or serious bodily injury.

Cyberstalking

- The defendant must have intended to kill, injure, harass or place under surveillance with intent to kill, injure or harass or intimidate, or cause substantial emotional distress to a person in another jurisdiction in reasonable fear of death or serious bodily injury.

Interstate Violation of a Protection Order

18 U.S.C. 2262(a)(1), amended January 5, 2006

- It is a federal crime to cross state, foreign or tribal lines or within SMTJ and violate a Protection Order that protects the victim against violence, threats, harassment against contact or communication with, or physical proximity.

Interstate Violation of a Protection Order

18 U.S.C. 2262(a)(1), amended October 28, 2000

- The defendant must have intended to violate the Protection Order when crossing the line.

Interstate Violation of a Protection Order

18 U.S.C. 2262(a)(2)

- It is a federal crime to force or coerce a person to cross state or foreign lines or enter or leave Indian country if the force or coercion leads to a violation of the portion of the Protection Order that...

Interstate Violation of a Protection Order

18 U.S.C. 2262(a)(2)

- ⦿ ...prohibits or provides protection against violence, threats or harassment against, contact or communication with, or physical proximity to the protected person.

Penalties

- Sections 2261, 2261A and 2262
 - 5 years to life depending upon the seriousness of the bodily injury inflicted
- Section 922(g)
 - 10 year maximum sentence

Gun Control Act – Domestic Violence Offenses

- Possession of a firearm and/or ammunition while subject to a protection order – Section 922(g)(8)
- Possession of a firearm and/or ammunition after conviction of a domestic violence misdemeanor – Section 922(g)(9)

Firearm Offenses

18 U.S.C. 922(g)(8)

- It is a federal crime to possess a firearm and/or ammunition while subject to a valid qualifying Protection Order.
- Law enforcement officers are not subject to this law.

922(g)(8) Restrictions

Protection Order will qualify if it meets these requirements:

1. Order was issued by a court after a hearing of which the defendant had actual notice and an opportunity to participate;
 - What satisfies the “hearing” requirement?

922(g)(8) Restrictions (Continued)

2. Order restrained the defendant from harassing, stalking, or threatening an intimate partner, or from engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury.

922(g)(8) Restrictions (Continued)

3. Order included a finding that the defendant posed a credible threat to the physical safety of an intimate partner; OR
4. Order explicitly prohibited the use, attempted use or threatened use of physical force that would reasonably be expected to cause bodily injury.

Firearm Offenses

18 U.S.C. 922(g)(9), enacted September 30, 1996

- ◉ It is a federal crime to possess a firearm and/or ammunition after conviction of a qualifying state misdemeanor crime of domestic violence.
- ◉ Must be a misdemeanor under federal or state law. Can tribal misdemeanors qualify?
- ◉ Due process restrictions
- ◉ This statute applies to law enforcement.

922(g)(9) Restrictions

- Must be a “qualifying” misdemeanor:
 - Misdemeanor under federal or state or tribal law.
 - Misdemeanor has as an element the use or attempted use of physical force or threatened use of a deadly weapon.

922(g)(9) Restrictions

- ⦿ Must be a “qualifying” misdemeanor:
 - Misdemeanor committed by current or former spouse, parent or guardian, by current or former cohabitant as a spouse, parent or guardian, or by parent with the victim of a child in common or by person “similarly situated” as a spouse, parent, or guardian of the victim.
- ⦿ Dating relation NOT included

922(g)(9) Restrictions

- Not considered to be convicted unless:
 - Represented by counsel or waived right to counsel
 - If entitled to jury, had a jury trial or waived right to jury trial
 - If conviction expunged, set aside or civil rights have been restored (if the offense provides for loss of civil rights)

August 2006 ATF Memo

- ⦿ “Open Letter to Tribal Law Enforcement”
- ⦿ States that a person is not considered convicted unless they were represented by counsel in the proceeding for the underlying offense, or knowingly and intelligently waived the right to counsel.
- ⦿ “if a person has no constitutional or statutory right to appointed counsel for a particular offense, then he or she cannot knowingly and intelligently waive that right.”

Transfer of Firearm to Prohibited Person

- It is illegal to transfer a firearm and/or ammunition to a person subject to a court order that meets the same qualifying criteria found in 922(g)(8). A violation must be knowing.
- It is illegal to transfer a firearm and/or ammunition to a person convicted of a misdemeanor crime of domestic violence. A violation must be knowing.

Notice to prohibited persons

- ◉ It is preferable, although not legally required, for defendants to receive notice of a prohibition under 922(g)(8) or 922(g)(9).

Advantages to Firearm Prosecutions

- May be able to prosecute without the Victim
 - D in possession of controlled substances and a firearm:
US. V. Rattler case/WDNC
- No need to establish interstate or interjurisdictional travel by the defendant-instead prove travel of the firearm
- No need to establish defendant's intent at the time the boundary was crossed.

Penalties

- ◎ Section 922(g) Offense
 - 10 year maximum sentence

VAWA and BIA Arrest Authority

- Section 908(a) of VAWA 2005 amended 25 USC 2803(3) to provide warrantless arrest authority to BIA law enforcement officers for misdemeanor crimes of domestic violence, dating violence, stalking or violation of a qualifying protection order.
- BIA must have probable cause to believe that the person to be arrested has committed, or is committing a crime

VAWA Provision: 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(a)

Sexual Abuse Statutes

Chapter 109A

- Aggravated Sexual Abuse – 18 USC 2241
- Sexual Abuse – 18 USC 2242
- Sexual Abuse of a Minor or Ward – 18 USC 2243
- Abusive Sexual Contact -- 18 USC 2244
- Sexual Abuse Resulting in Death – 18 USC 2245

Sexual Abuse Definitions

- Sexual act =

- Penis/vulva, penis/anus – penetration however slight
- Mouth/penis, mouth/vulva, mouth/anus
- Anal or genital opening by hand or finger or any object, penetration however slight, with intent to abuse humiliate, harass, degrade or arouse or gratify the sexual desire of any person

- Sexual Contact =

- Intentional touching, either directly or through the clothing of genitalia, anus, groin, breast, inner thigh or buttocks of any person with an intent to abuse, humiliate, harass, degrade or arouse or gratify the sexual desire of any person

Aggravated Sexual Abuse - Section 2241(a)

- It is a federal crime to knowingly (or attempt) cause another person to engage in a sexual act:
 - By using force against that other person; or
 - By threatening or placing that person in fear that any person will be subjected to death, serious bodily injury or kidnapping
- Sentence = any term of years or life

Aggravated Sexual Abuse - Section 2241(b)

- It is a federal crime to knowingly (or attempt):
 - Render another person unconscious and thereby engage in a sexual act with that other person; or
 - Administer to another person by force or threat of force, or without the knowledge or permission of that person, a drug, intoxicant, or other similar substance and thereby –
 - (A) substantially impairs the ability of that other person to appraise or control conduct; and
 - (B) engages in a sexual act with that other person;
 - or attempts to do so
- Sentence: any term of years or life

Aggravated Sexual Abuse - Section 2241(c) and (d)

- It is a federal crime to cross State lines with intent to engage in a sexual act with a person under 12 y.o. or engages or attempts to engage in a sexual act with a person under 12 y.o. within the SMTJ or in federal prison.
- It is a federal crime to engage or attempt to engage in a sexual act in violation of §§ 2241(a) or 2241(b) with a person between the ages of 12 and 16 (and the defendant is at least 4 years older)
- The Government need not prove that the defendant knew that the person was not yet 12 y.o.
- Sentence = mandatory minimum 30 years or for life.

Sexual Abuse - Section 2242

- It is a federal crime to knowingly (or attempt) to:
 - Cause another person to engage in a sexual act by threatening or placing that other person in fear (other than by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping); or
 - Engages in a sexual act with another person if that other person is –
 - Incapable of appraising the nature of the conduct; or
 - Physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act;
- Sentence = any terms of years or for life

Sexual Abuse of a Minor or Ward - Section 2243(a) and (b)

- It is a federal crime to engage or attempt to engage in a sexual act with a person between the ages of 12 – 16 (and the victim is at least 4 years younger than the defendant)
- It is a federal crime within the SMTJ or in a federal prison to engage or attempt to engage in a sexual act with a person in official detention or under the custodial, supervisory or disciplinary authority of the defendant.
- Sentence = maximum of 15 years

Sexual Abuse of a Minor or Ward - Section 2243(c) and (d)

- It is a defense under § 2243, which the defendant must establish by a preponderance of the evidence, that the defendant reasonably believed that the victim was 16 years old
- It is also a defense that the persons were married at the time of the sexual act.
- The Government need not prove that the defendant knew the age of the victim or that the requisite age difference existed.

Abusive Sexual Contact - Section 2244

- It is a federal crime knowingly engage in or cause sexual contact with or by another person, if to do so would violate:
 - 2241(a) or (b)/not more than 10 years imprisonment
 - 2242/not more than 3 years imprisonment
 - 2243(a)/not more than 2 years imprisonment
 - 2243(b)/not more than 2 years imprisonment
 - 2241(c)/any term of years or for life

18 USC 2245 - Offenses resulting in Death

- Any person who, in the course of an offense under Chapter 109A, murders an individual, shall be punished by death or imprisoned for any term of years or for life.

Incest

- ◉ Listed in the Major Crimes Act
 - Not defined in federal code
- ◉ Assimilate state elements of the crime
- ◉ Use state definitions of family relationships

FRE 412 – Rape Shield

- Generally excludes evidence of a rape victim's past sexual behavior
 - “to protect rape victims from the degrading and embarrassing disclosure of intimate details about their private lives” Rep. Mann
 - to encourage the reporting of sexual assaults
 - to prevent the wasting of time on distractive collateral and irrelevant matters.
 - *Jeffries v. Nix*, 912 F.2d 982, 986 (8th Cir. 1990)

Three Exceptions to General Rule of Exclusion Under 412

1. Evidence of past sexual behavior with persons other than D where concerns source of semen, injury or other physical evidence
 2. Specific instances of sexual behavior by the V with the D offered by the D to prove consent or by the prosecutor to rebut; and
 3. Evidence the exclusion of which would violate the constitutional rights of the D
- ⦿ Court to weigh probative value versus prejudicial effect

Rules for Admissibility

- ⦿ Party intending to offer must file a written motion with the court at least 14 days before trial describing the evidence and stating the purpose for which it is offered
- ⦿ Before admitting evidence, court must conduct in camera hearing and afford V and parties a right to be heard
- ⦿ Motion, related papers and record of the hearing to be sealed

Case Examples – 412 Evidence

- Source of semen, injury or other physical evidence – US v. Eagle Thunder, 893 F.2d 950 (8th Cir. 1990) – injury must be “reasonably close in time to the alleged rape – existence of non-recent tear was not relevant to the source of the tears that were hours old
- Prior consensual relationship – US v. Saunders, 943 F.2d 388 (4th Cir. 1991) – D and friend to testify – only D could testify to his own prior sexual relations with V

FRE 413/414 – Evidence of Similar Crimes in Sexual Assault Cases

- Evidence of the D's commission of another offense(s) of sexual assault is admissible and may be considered for its bearing on any matter to which it is relevant
- Gov shall disclose the evidence to the D, including statements of W or a summary of their expected testimony, at least 15 days before trial or at a later date as the court may allow for good cause

Rationale behind these rules....

- “SA cases, where adults are the victims, often turn on difficult credibility determinations. Alleged consent by the victim is rarely as in issue in prosecutions for other violent crimes- the accused mugger does not claim that the victim freely handed over his wallet as a gift – but the D in a rape case often contends that the V engaged in consensual sex and then falsely accused him. **Knowledge that the defendant has committed rapes on other occasions is frequently critical in assessing the relative plausibility of these claims and accurately deciding cases that would otherwise become unresolvable swearing matches**” – Sen Robert Dole

Rationale behind these rules....

- “In child molestation cases, for example, a **history of similar acts tends to be exceptionally probative because it shows an unusual disposition of defendant – a sexual or sadosexual interest in children – that simply does not exist in ordinary people.** Moreover, such cases require reliance on child victims whose credibility can readily be attacked in the absence of substantial corroboration. In such cases, there is compelling public interest in admitting all significant evidence that will illumine the credibility of the charge and any denial by the defense.”
- US v. Charley, 189 F.3d 1251, 1260 (10th Cir. 1999)(quoting Rep. Molinari)

Admissibility

- There is a lesser standard for admitting “propensity evidence in sex offense cases” US v. Mound, 149 F.3d 799, 802 (8th Cir. 1998)
- “these rules were explicitly designed to allow the introduction of evidence of prior sexual crimes in order to prove propensity” US v. LeMay, 260 F.3d 1018, 1032 (9th Cir. 2001)(concurring opinion)
- Uncharged offenses are included – Johnson v. Elk Lake School Dist, 283 F.3d 138, 151-152 (3rd Cir. 2002)
- Huddleston standard – the judge should ask whether “a jury could reasonably” make such a finding
- 403 balancing analysis

Factors for Admissibility

- Similarity of the prior acts to the acts charged
- The elapse of time between the acts
- The frequency of the prior acts
- Intervening circumstances
- The need for the evidence at trial, beyond evidence already offered
 - US v. LeMay, 260 F.3d 1018, 1028 (9th Cir. 2001)
 - US v. Enjady, 134 F.3d 1427, 1433 (10th Cir. 1998)

Are these rules time sensitive?

- Congress expressly rejected imposing any time limit on prior sex offense evidence
 - US v. Gabe, 237 F.3d 954, 960 (8th Cir. 2001)
 - US v. Meacham, 115 F.3d 1488, 1495 (10th Cir. 1997)
 - US v. Larson, 112 F.3d 600, 605 (2nd Cir. 1997)

How similar does the prior act have to be to the current offense?

- US v. Tyndall, 263 F. 3d 848, 850 (8th Cir. 2001)
 - “The fact that there was a wide age difference between Mr. Tyndall’s alleged victims is not, by itself, sufficient to show that the two incidents were dissimilar. The district court noted that both offenses charged were impulsive crimes of opportunity where it was alleged that Mr. Tyndall had managed to isolate his intended victims, and we agree that this is an entirely sufficient basis for concluding that the offenses were ‘similar’”

What if we can't prove the Sexual Assault?

Might another type of crime fit the facts?
If so, what?

Does Sexual Assault occur in the context of
another type of crime?
If so, what?

“Fearless Justice” Initiative USAO MT

- Launched in November 2010 and is designed to suppress intimidation and coercion of victims and witnesses to crime.
 - False statements to a Criminal Investigator (18/1001)
 - Aiding and Abetting (18/2)
 - Obstruction of Justice (18/1503)
 - Witness Tampering (18/1512(b))
 - Retaliation Against a Witness (18/1513)
 - Suborning Perjury (18/1622)

Questions?

Leslie A. Hagen

National Indian Country Training Coordinator

US Department of Justice

Leslie.Hagen3@usdoj.gov

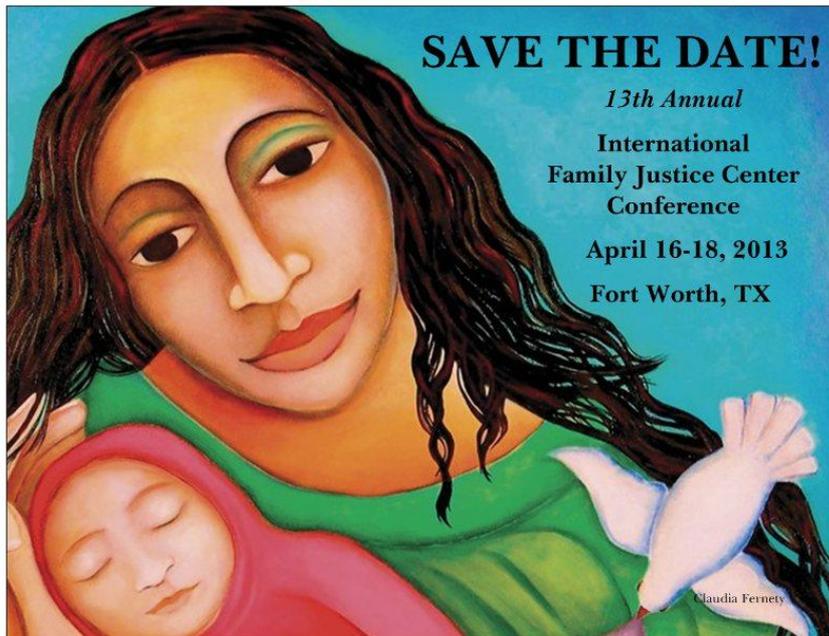
Family Justice Center Alliance

www.familyjusticecenter.org

1888-511-3522

2013 International Family Justice Center Conference

April 16-18, 2013 in Fort Worth, TX



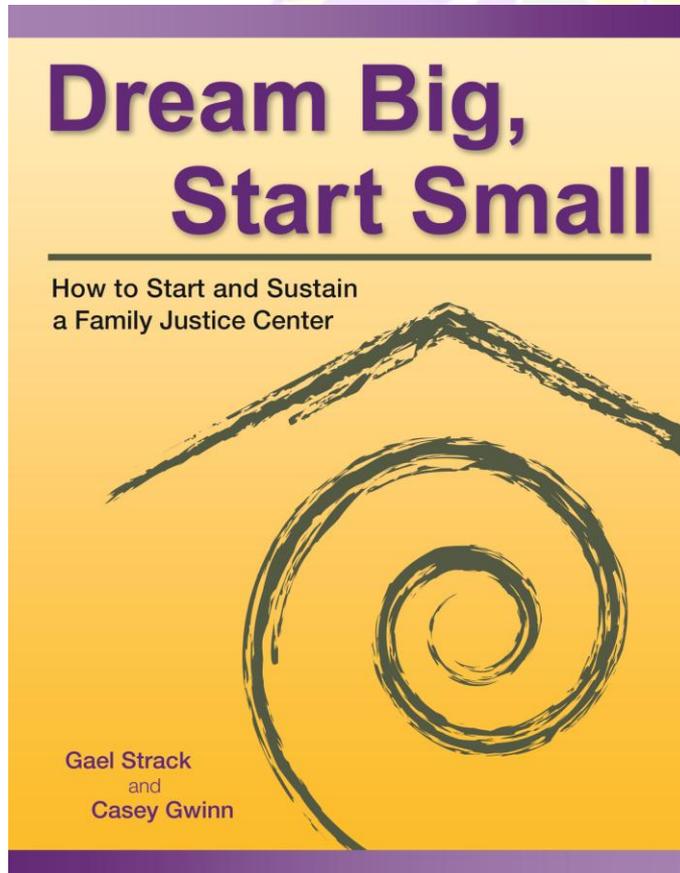
www.familyjusticecenter.org

The three-day conference will include discussions on issues related to the handling of domestic violence, child abuse, sexual assault, and elder abuse cases in the context of the Family Justice Center model.

The conference faculty includes nationally and internationally recognized subject matter experts, advocates, and survivors. During the conference participants will have the opportunity to meet with survivors and professionals who currently work in Family Justice Centers in the United States and internationally.



Dream Big, Start Small: How to Start and Sustain a Family Justice Center



In *Dream Big, Start Small* the visionaries behind the Family Justice Center movement use the outcomes and lessons learned from a decade of starting Centers in the United States and around the world to show the road to a better way to help victims of violence and abuse- by bringing all the community services for family violence, elder abuse, stalking, and sexual assault under one roof. Any community can do it. *Dream Big, Start Small* will show you the way.

Go to the “Store” at www.familyjusticecenter.org to purchase *Dream Big, Start Small*



Thank You

Thank you for joining today's presentation

Family Justice Center Alliance

707 Broadway, Suite 700

San Diego, CA 92101

888-511-3522

www.familyjusticecenter.org

**Reminder: This presentation will be available for download on the Online Resource Library within one business day*



Questions for Tribal Prosecution Webinar

1. Can you talk about the findings of the 2010 DOJ report that GAO found that there is an unusually high rate of refusals to prosecute by U.S. attorneys, who “declined to prosecute 46 percent of assault matters and 67 percent of sexual abuse and related matters.” The report noted that violent crimes actually had a higher rate of declination, possibly because the evidence was harder to come by.

A declination is a decision by a US Attorney’s Office (USAO) not to pursue criminal prosecution of a referral from a law enforcement agency. Declination data for USAOs is found in our LIONS (Legal Information Office Network System). Declination data is frequently misunderstood. The fact that a USAO has received a referral does not mean that a prosecutable case exists. The vast majority of declinations involve cases where the USAOs lack a legal and/or evidentiary basis to prosecute. A USAO may decline to prosecute a referral for a number of reasons. Most commonly, USAOs decline to prosecute matters because there is not sufficient evidence to prove the case beyond a reasonable doubt or to otherwise meet the legal and ethical standards of the Principles of Federal Prosecution. In addition, USAOs often decline to prosecute because the USAOs do not have jurisdiction or venue over a matter. In other cases, USAOs decline to prosecute because no federal crime has been committed or, if a tribal, state, and federal crime has been committed, the suspect is being prosecuted by another federal, state, or tribal prosecutor. And, cases that are originally declined may be reopened at a later date and successfully prosecuted.

Very soon there should be more recent Indian Country declination statistics available. The Tribal Law and Order Act was signed into law by President Obama on July 29, 2010. In part, TLOA is intended to establish accountability measures for Federal agencies responsible for investigating and prosecuting violent crime occurring in Indian Country. To that end, Section 212 of TLOA (amending the Indian Law Enforcement Reform Act, 25 U.S.C. § 2809) requires the Attorney General to submit annual reports to Congress detailing investigative efforts and prosecutive disposition reports.

The FBI is required to report “by Field Division, information regarding decisions not to refer to an appropriate prosecuting authority cases in which investigations had been opened into an alleged crime in Indian Country.” And, the USAOs are to submit to the Native American Issues Coordinator, located within EOUSA, information by Federal judicial district regarding “all declinations of alleged violations of Federal criminal law that occurred in Indian country that were referred for prosecution by law enforcement agencies.” The FBI and the USAOs’ reporting obligations are as follows:

- The type of crime(s) alleged;
- The status of the accused as Indian or non-Indian;
- The status of the victim as Indian or non-Indian; and
- The reason for deciding against referring the investigation for prosecution (FBI) or the reason for deciding to decline or terminate the prosecution (USAOs).

Declination rates generated by LIONS data are not an appropriate measure of all the ongoing efforts by United States Attorneys to be actively engaged with their partners in tribal law enforcement. Over the past four years, the Attorney General launched a Department-wide initiative on public safety in tribal communities. A component of that initiative is that every USAO with Indian Country in its district engages annually in consultation with the tribes in that district, in coordination with the FBI, the Bureau of Indian Affairs, the U.S. Marshals Service, the Drug Enforcement Agency, and the Bureau of Alcohol, Tobacco, Firearms and Explosives, and, where appropriate, state and local law enforcement. In addition USAOs have implemented operational plans designed to foster ongoing government-to-government relationships with the tribes; to improve communications with tribal law enforcement regarding charging decisions; to initiate cross-deputization and Special Assistant United States Attorney agreements where appropriate; and to establish training for all relevant criminal justice personnel on issues related to Indian Country criminal jurisdiction and legal issues.

2. Hi Natalia: I would love if these questions were asked: 1. How successful are IPV strangulation cases using 18 USC section 1365. 2. If VAWA is reauthorized, what degree of difference do you see the amended assault statute making on Indian land?

The statute currently used for prosecuting some Indian Country strangulation cases is Assault Resulting in Serious Bodily Injury. The statute cite for that crime is 18 USC 113(6). The definition for serious bodily injury is found at 18 USC 1365. One of the four ways to establish serious bodily injury is “a substantial risk of death.” If a prosecutor charged a strangulation case as an Assault Resulting in Serious Bodily Injury, it is likely that they would argue that the act of strangulation presents “a substantial risk of death”. Prosecutors often need to call a medical doctor or other expert witness to explain that strangulation does present a substantial risk of death. If the federal assault statute is amended to provide for a specific strangulation/suffocation offense, it is hoped that these crimes may be easier to prosecute and that expert testimony would not always be required. In addition, having a specific strangulation and suffocation offense will increase awareness for first responders, typically tribal or BIA law enforcement, to be on the lookout for signs or symptoms of strangulation or suffocation. Many states have a specific strangulation statute and a federal statute would be one additional tool for prosecutors in their efforts to assist victims of intimate partner violence.

3. If someone commits a crime in a city and goes back to the reservation, are the local police able to make an arrest on the reservation?

In Indian Country there are few areas where there is a straight forward easy answer; this question is a complex one. In order to completely answer the question, many issues would need

to be considered. In 2001 the US Supreme Court held that a tribe may not exercise jurisdiction over state officers investigating alleged off-reservation crime by an Indian when those officers execute a search warrant at the Indian's residence on trust land within the reservation. See, *Nevada v. Hicks*, 533 U.S. 353 (2001). One question that arises after *Hicks* is whether its reasoning applies equally to an arrest by a state officer of an Indian in Indian country for an off-reservation crime. Some states and tribes have negotiated cross deputization agreements or mutual aid agreements that would factor into the analysis. Also, some tribes have an extradition law or code and state or local law enforcement officials may need to go through the formal extradition process with the tribe. And, we would also need to look at if the case is one of "hot pursuit" of a suspect into Indian Country. Some courts have allowed arrests of Indians by state officers when the crime was committed off the reservation and a "fresh pursuit" ended on the reservation.

4. In regards to tribal protective orders and full faith and credit - whose responsibility is it to register that tribal protective order in LEADS or NCIC? The local county sheriff?

If the tribe has direct NCIC access and the ability to enter orders into NCIC, then the tribe would be responsible for entering the order into the FBI's National Protection Order Registry. However, not all tribes have NCIC access or they may not have the ability to enter orders into NCIC. In these cases, the tribe would need to work collaboratively with the county sheriff or a local police department who has the ability to enter orders into NCIC. General information about the FBI's National Crime Information Center (NCIC) can be found at <http://www.fbi.gov/about-us/cjis/ncic> And, a resource document titled "NCIC Protection Order File Toolkit for Control Terminal Operators" can be found online at <http://www.bwjp.org/files/bwjp/articles/NCICToolkitFinal11%2014.pdf>

5. I was curious if you can re-state how the laws apply to non Indian and Indian differ when the crime is off Indian country?

If an Indian commits a crime off-reservation, they are subject to state and local laws just like any other person. For example, if an Indian commits a crime in the city of Detroit, the offense will be investigated by Detroit PD and the defendant would be prosecuted in the City of Detroit. The Indian law analysis discussed during the webinar would not be relevant.



Leslie A. Hagen, JD

National Indian Country Training Coordinator

Department of Justice

Phone: (803) 705-5061

leslie.hagen3@usddoj.gov

Leslie A. Hagen serves as the Department of Justice's first National Indian Country Training Coordinator. In this position, she is responsible for planning, developing and coordinating training in a broad range of matters relating to the administration of justice in Indian Country.

Previously, Hagen served as the Native American Issues Coordinator in the Executive Office for United States Attorneys. In that capacity, she served as EOUSA's principal legal advisor on all matters pertaining to Native American issues, among other law enforcement program areas; provides management support to the United States Attorneys' Offices (USAOs); and coordinates and resolves legal issues.

Hagen is also a liaison and technical assistance provider to Justice Department components and the Attorney General's Advisory Committee on Native American Issues. Hagen started with the Department of Justice as an Assistant United States Attorney (AUSA) in the Western District of Michigan. As an AUSA, she was assigned to Violent Crime in Indian Country handling federal prosecutions and training on issues of domestic violence, sexual assault and child abuse affecting the eleven federally recognized tribes in the Western District of Michigan. Ms. Hagen has worked on criminal justice issues related to child abuse, domestic violence and sexual assault for over 20 years.

Prior to joining the Department of Justice, she served as the staff attorney with the Civil Legal Justice Project for the Michigan Coalition Against Domestic and Sexual Violence and as a specialist in Michigan State University's School of Criminal Justice. From 1997-2001, Ms. Hagen served as the Violence Against Women Training Attorney for the Prosecuting Attorneys Association of Michigan. During her 4.5 years in that position, Ms. Hagen developed a program that was recognized as *one of the best state-level training programs on violence against women in the country* by the Institute for Law and Justice in Washington, DC through an evaluation conducted for the Department of Justice. Ms. Hagen was the elected Prosecuting Attorney for Huron County, Michigan for two terms, an Assistant Prosecuting Attorney for Midland County, Michigan and a Prehearing Division Attorney for the Michigan Court of Appeals.

Ms. Hagen has extensive teaching and training experience. She has served as faculty at numerous seminars and has given hundreds of presentations to legal, law enforcement, service provider and other audiences. She has served as faculty or a guest lecturer at several universities.



National Family Justice Center Alliance
Webinar Training

**Federal Prosecution of Sexual Assault and Domestic Violence Crimes in Indian
Country**

Presented by Leslie A. Hagen

December 18, 2012

Certificate of Attendance

1.5 Hours

Gael Strack, JD
Co-Founder and CEO
Family Justice Center Alliance

Natalia Aguirre
Director of Technical Assistance
Family Justice Center Alliance

Date of Issue: December 18, 2012

This Certificate does not apply to MCLE or CEU credit. To obtain MCLE or CEU credit, visit <http://www.familyjusticecenter.com/training-main/continuing-education-credits.html>