

Addressing Mental Health and Substance Misuse In Tribal Courts: Civil Commitments & Competency Hearings/Orders

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Overview

- ▶ Discuss civil commitments, when it might become an issue, and process that generally applies in civil commitment proceedings
- ▶ Discuss competency, when it might become an issue and the process that generally applies in competency proceedings
- ▶ Discuss some of the obstacles and challenges that might arise in these cases
- ▶ Discuss other issues such as professional services, transport and costs



Mental Health and Substance Misuse

- ▶ “The high rates of alcohol, substance misuse and mental health disorders, suicide, violence, and behavior-related morbidity and mortality in American Indian and Alaska Native communities continue to be disproportionately higher than the rest of the U.S. population.”

See

www.ihs.gov/newsroom/factsheets/behavioralhealth/

What the Data Shows...



Highest rates of [suicide](#) of any minority group within the U.S. and rates are increasing since 2003, as well as [high rates of substance misuse disorder](#) of both illicit drugs and alcohol misuse



From 2016 to 2020, they experienced alcohol-related deaths at significantly higher rates (51.9/100,000) than the rest of the U.S. population (11.7/100,000) ¹



Highest prevalence of methamphetamine use, as well as methamphetamine misuse disorder, methamphetamine injection, and with significant increases in methamphetamine overdose ²



In 2019 and 2020, [drug overdose death](#) rates were highest for non-Hispanic American Indian and Alaska Native people at 30.5 and 42.5 per 100,000, respectively



From 2019-2020, the American Indian and Alaska Native [overdose death rates](#) increased by 39%

See www.ihs.gov/newsroom/factsheets/behavioralhealth/

Tribal Justice System Responses to Substance Misuse and Mental Health Issues

Development of Evaluation, Treatment and Counselling Services

Development of Tribal laws to support Civil Commitments

Development of Tribal laws to address Criminal Competency





CIVIL COMMITMENTS

What Are Civil Commitments?

Civil commitments may be pursued when an individual's mental health or substance misuse may warrant commitment to a treatment facility, and they do not want to go voluntarily

Evaluations for civil commitment generally occur at a mental health facility and often completed by a court appointed mental health professional

What Are Issues That Can Give Rise to Civil Commitments?

Look to the language of your Tribal code to know for sure

Often the court will be looking at:

- whether the individual who is subject of the petition is a danger to themselves or others as a result of a mental health issue;
- is a danger to themselves or others due to a substance misuse issue; or
- Whether the individual is a danger to themselves of others due to both.

Who May Request Civil Commitment?

Look at the applicable law in your jurisdiction

Generally speaking, commitment hearing can be requested by:

- Individual's family & possibly friends
- Professional service providers (possibly)
- Individual's legal counsel (possibly)
- Prosecutor/Attorney for the government

Procedure in Civil Commitment

Step One: Petition for Civil Commitment is filed by a person who has standing under Tribal law to do so

Step Two: the Court will review the petition and either issue an emergency apprehend and hold order or hold a preliminary hearing to determine whether to order evaluations or assessments

Step Three: Evaluations or assessments will be ordered from a qualified professional

Step Four: the Court will order the person to follow through with recommended treatment plan, if any

Note: procedures may vary from tribe to tribe so be sure to look to your Tribal code for guidance on procedures that apply in your jurisdiction

Due Process Considerations

- ▶ In White v. Califano, the court ruled that individuals could not be civilly committed without a hearing in accordance with due process. 437 F.Supp. 543. While this is under the federal Constitution, the Indian Civil Rights Act has a similar due process clause.
- ▶ Under the Indian Civil Rights Act (ICRA), individuals are allowed the writ of habeas corpus to test the legality of their detention by order of an Indian Tribe. Myrick v. Gillette, 2010 U.S. Dist. LEXIS 92243 (D.N.D. Sep. 2, 2010). In Myrick, the petitioner challenged a civil commitment by the Tribal court due to not receiving proper notice of the civil commitment proceedings. Id.



Due Process (cont'd)

- ▶ There are some tribes that have specific provisions in their constitution about due process rights for civil commitments.
- ▶ **Turtle Mountain Band of Chippewa** [Title 53.04](#) has a due process provision for individuals subject to civil commitments. These rights include:
 - ▶ the right to counsel at the individual's expense
 - ▶ the right to notice of any proceedings under the title through being served
 - ▶ the right to a closed hearing
 - ▶ the right to request an open hearing
 - ▶ the right to present and cross-examine witnesses.

Note: The [Prairie Island Indian Community](#) has the same provision.



Tribal Laws: Examples of Civil Commitment Codes

- ▶ **Tribal Civil Commitment laws will vary be sure to look to your Tribal code. Examples (not exhaustive)**
 - ▶ **Bois Forte Band of Chippewa**
 - ▶ Civil commitment code includes references to criminal defense based mental health evals
 - ▶ **Red Lake Band of Chippewa Nation**
 - ▶ Includes provisions that address cost of care relevant to civil commitments
 - ▶ **Sisseton Wahpeton Sioux Tribe (Chapter 37)**
 - ▶ 37-02-01 broad standing for any person acting in good faith to make application for civil commitment
 - ▶ Includes an appointment of indigent counsel
 - ▶ 37-15-01 Clear and convincing evidence standard applies to civil commitment
 - ▶ 37-23-01 permits treatment by spiritual means
 - ▶ 37-27-01 records of civil commitment are confidential



Recognition of Tribal Orders for Civil Commitment

- ▶ **Many states have laws that support the recognition of Tribal orders. For Example (not exhaustive):**
 - ▶ **Minnesota** (Rule 10.02- Enforcement of Civil Commitment Orders)
 - ▶ **North Dakota** (rule 7.2)
 - ▶ **Wisconsin** (806.254)
 - ▶ **South Dakota** (1-1-25)
 - ▶ **Oklahoma** (12 OK Stat Section 12-728 (2016))
 - ▶ **Arizona** (A.R.S. 12-136- Indian Tribal Courts; involuntary commitment orders; recognition)
 - ▶ **Michigan** (Mich.Ct.R. 2.615)



COMPETENCY

What Makes a Competency Proceeding Different Than a Civil Commitment Proceeding?



Civil Commitments are civil causes of action and require no underlying crime. These cases will originate in civil court



Competency proceedings may be civil causes of action but only arise when an individual has been charged with a crime. These cases will originate in criminal court

What Are Competency Hearings?

May be necessary when an individual is charged with a crime but their mental health draws questions about their competency to stand trial

Competency can be raised at any time during an adjudication of a crime when it is discovered or when there are concerns that a criminal defendant may be suffering from a mental illness

Competency hearings are civil hearings BUT may impact criminal adjudication

Competency to stand trial involves an evaluation that is completed by a mental health professional (in the jail if detained or at a mental health facility)

Who May Request a Competency Hearing?

Look at the applicable law in your jurisdiction

Generally speaking, competency hearing can be requested by:

- Defendant
- Defendant's legal counsel
- Prosecutor/Attorney for the government

When MIGHT Competency Arise in Tribal Court Cases?

May arise at any stage of the adjudicatory process when an individual's mental health comes into question

Generally, any issues or concerns can be brought to the court's attention by the Defendant, the Defendant's attorney or the attorney for the government

Generally, the mental health issues in questions must raise concerns about:

- The defendant's ability to understand the nature and consequences of the proceedings against them.
- The defendant's ability to assist properly in their defense

Federal Laws

18 U.S.C. 4241

- The conviction of a defendant while mentally incompetent violates due process. See *Pate v. Robinson*, 383 U.S. 375, 378 (1966). Under 18 U.S.C. § 4241 (a), the court must order a competency hearing
 - ...if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense.
 - 18 U.S.C. § 4241 (a). A hearing may be ordered on motion by the defendant or the attorney for the Government, or by the court.



Additional Federal Laws

18 U.S.C. 4247

- ▶ The hearing itself is conducted according to the procedures set forth at Section 4247(d).
 - ▶ These provide that the defendant shall be represented by counsel, and shall have the opportunity to testify, to present evidence, to subpoena witnesses on his or her behalf, and to confront and cross-examine witnesses who appear at the hearing.
 - ▶ In determining whether the defendant is competent to stand trial, the court must determine "whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding -- and whether he has a rational as well as factual understanding of the proceedings against him." *Dusky v. United States*, 362 U.S. 402 (1960).



Additional Federal Laws (cont'd)

18 U.S.C. 4247 generally requires:

(b) Psychiatric or Psychological Examination

(c) Psychiatric or Psychological Reports.—

A psychiatric or psychological report ordered pursuant to this chapter shall be prepared by the examiner designated to conduct the psychiatric or psychological examination, shall be filed with the court with copies provided to the counsel for the person examined and to the attorney for the Government, and shall include— (1) the person's history and present symptoms;

Tribal Laws: Example of Competency Code Provisions

- ▶ **Several Tribes do have competency provisions in Tribal Codes. Examples (not exhaustive list):**
 - ▶ **Turtle Mountain Band of Chippewa**
 - ▶ Board of Competency Reviews
 - ▶ **Confederated Salish and Kootenai Tribes of the Flathead Reservation**
 - ▶ Court makes competency inquiry prior to accepting any plea
 - ▶ **Fort McDowell Yavapai Nation**
 - ▶ includes factors the court can consider to determine if a competency hearing is necessary
 - ▶ **Gila River Indian Community**
 - ▶ competency can be adjudicated at anytime prior to sentencing or after commencement of probation or before completion of sentence

State Laws



State laws are fairly consistent when it comes to determining competency



Vary somewhat in time constraints for holding competency hearings, completion of evaluations, submission of reports etc.



Generally, leave the decision to Judge after completion of psychiatric evaluation

Civil Liberties: Competency Proceedings

Federally, individuals who are subject to criminal competency hearings have the right to a separate hearing to determine if they are not competent to stand trial. Drope v. Missouri, 420 U.S. 162, 172 (1975).

Additionally, individuals facing a criminal competency hearing have the right to counsel, the opportunity to testify, to present evidence, subpoena witnesses, and confront and cross-examine witnesses. 16 Bender's Federal Practice Forms (2024).

- This might extend to Tribal courts through the Indian Civil Rights Act since individuals are entitled to the right to a competency hearing through due process.



Issues, Obstacles & Challenges

Obstacles
and
Challenges
to
Enforcement
of Tribal
orders

Tribal Codes to Support Competency Evals/ Hearings or Civil Commitments

- Are there existing code provisions?
- What does Tribal Code require?
- Do Tribal code requirements vary from state/ federal requirements? Does that matter?

Obstacles and Challenges (cont'd)

- ▶ **Enforcement of Tribal Court Orders**
 - ▶ Testimony by experts on the need for commitment to justify issuance of the order
 - ▶ Recognition by non-Tribal service providers/ institutions

Obstacles and Challenge: Enforcement of Competency Evaluation Orders

- ▶ **Enforcement of Competency Evaluation Orders**
 - ▶ Recognition by non-Tribal service providers/ institutions for completion of evaluation
 - ▶ Return of findings from evaluations
 - ▶ Testimony by experts in Tribal court following completion of the evaluation

General Issues: Costs for Evaluations and Treatment

- ▶ **Costs:** Who is required to cover the costs associated with mental health services related to civil commitments & competency evaluations?
 - ▶ Individual?
 - ▶ Private Insurance?
 - ▶ Medicaid?
 - ▶ IHS?
 - ▶ Department of Justice?
 - ▶ Tribe?

General Issues: Professional Services

- ▶ **Professional services:**
 - ▶ Who is available to complete the evaluation?
 - ▶ Are providers willing to testify in Tribal Court if needed?
 - ▶ Who will compensate these service providers?

General Issues: Transportation

- ▶ **Travel/ Transport:** if professionals completing evaluations or rendering mental health services are off reservation who will be responsible for transportation to and from the facility?



Questions?

Thank You!

Please email us at
WOCG@TLPI.org if you
have more questions



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