

Chapter 10
Pokagon Band of Potawatomi Indians
Court Rules for Appointment of Counsel

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Chapter 10

Pokagon Band of Potawatomi Indians Court Rules for Appointment of Counsel

Section 1. Purpose and Definitions.

- A. **Purpose.** The purpose of this Chapter of Court Rules is to establish procedures by which counsel is appointed to parties in Tribal courts proceedings.
- B. **Definitions.** The following terms have the following meanings. The singular encompasses the plural and the plural encompasses the singular whenever appropriate.
1. “*Attorney*”, “*Counsel*” and “*Lawyer*” are synonymous and mean an individual who is admitted to practice before the courts of any state and is admitted to practice before the Pokagon Band Tribal courts.
 2. “*Band*” and “*Tribe*” are synonymous and mean the Pokagon Band of Potawatomi Indians.
 3. “*Child Protection Action*” means an action brought by the Pokagon Band of Potawatomi Indians or one of its governmental entities or departments against a parent or guardian of an Indian child relating to the welfare of the child. These actions include, without limitation, actions to remove Indian children from their homes.
 4. “*Court*” and “*Tribal Court*” are synonymous and mean the trial level court of the Band.
 5. “*Court of Appeals*” means the appellate level court of the Band.
 6. “*Guardian Ad Litem*” means a lawyer or other person appointed by the Tribal Court to appear in a lawsuit on behalf of an incompetent or minor party.
 7. “*Judge*” means a judge appointed to the trial level court of the Band.
 8. “*Juvenile*” means a person under the age of eighteen (18) years of age who is alleged or found to be a juvenile offender or juvenile in need of supervision.
 9. “*Juvenile in Need of Supervision*” means any juvenile who commits the following acts:

- a. A juvenile who repeatedly absents himself or herself from school or other learning program intended to meet the juvenile's educational needs, or repeatedly violates rules and regulations of the school or learning program;
- b. A juvenile who repeatedly disobeys reasonable and lawful commands or directives of his or her parent, legal guardian, other custodian; or
- c. A juvenile who willfully and voluntarily absents himself or herself from his or her home without the consent of his or her parent, legal guardian, or other legal custodian.

10. "*Juvenile Offender*" means any juvenile who commits the following acts:

- a. An act or offense that violates a provision under the Constitution, codes or ordinances of the Pokagon Band of Potawatomi Indians; or
- b. Possession or consumption of alcohol or tobacco. This does not include the use of tobacco for traditional purposes.

11. "*Minor*" and "*Child*" are synonymous and mean an unmarried person who is less than eighteen (18) years of age, and has not been emancipated by order of a court of competent jurisdiction, or a person who is eighteen (18) years of age, but remains under the continuing jurisdiction of the Tribal Court.

12. "*Tribal courts*" means the trial level court and the appellate level of the Band.

Section 2. Appointment of Counsel for Indigent Criminal Defendants.

The Tribal Court must appoint counsel for a criminal defendant who is determined by the Tribal Court to be indigent and when a potential penalty includes incarceration.

- A. **Certification of Prosecution Recommendation.** The Tribal Prosecutor shall certify to the Tribal Court on the record at arraignment whether, if in the event of conviction, the Band will recommend a sentence of incarceration, whether or not suspended. If the Tribal Prosecutor is unable to make the required certification at arraignment, the time allowed for requesting court-appointed counsel as provided by these *Rules* shall be tolled until certification is filed with the Tribal Court.
- B. **Judicial Discretion.** If in the pretrial opinion of the Judge, a sentence of incarceration upon conviction may be appropriate, despite the certification

of the Tribal Prosecutor to the contrary, the Judge shall appoint counsel to an indigent defendant.

C. **Advice to Criminal Defendant.** At the arraignment on a warrant or complaint, the Tribal Court must advise the Defendant that:

1. he/she has a right to a lawyer's assistance at all subsequent court proceedings at his or her own expense; and
2. the Tribal Court will appoint a lawyer at public expense if the Defendant wants one and it is determined by the Tribal Court that the Defendant is financially unable to retain one and where a potential penalty includes incarceration.

D. **Request for Court-Appointed Attorney.** All requests for court-appointed counsel must be made by written sworn affidavit of the criminal Defendant's financial condition and filed with the Tribal Court Clerk as soon as practical, in no event later than 72 hours after arraignment or first appearance, unless the interests of justice dictate later appointment.

E. **Determination of Indigency.** The Tribal Court must question the criminal Defendant whether the Defendant wants a lawyer and, if so, whether the Defendant is financially unable to retain one. If the Defendant requests a lawyer and claims financial inability to retain one, the Tribal Court must determine whether the Defendant is indigent. The ability to post bond for pretrial release does not make the Defendant ineligible for appointment of a lawyer. The determination of indigency must be guided by the following factors:

1. Whether the party is a person who is an individual and not an entity, corporation, partnership or any other form of profit or non-profit organization; and
2. If a party demonstrates by notarized affidavit that he/she is primarily supported by public assistance, the reimbursement of the cost of court-appointed counsel as to the party must be waived; or
3. If a party demonstrates by notarized affidavit that he/she is unable to reimburse the Tribe for the cost of court-appointed counsel, the Tribal Court may order reimbursement waived.

F. **Partial Indigency.** If a Defendant is able to pay part of the cost of court-appointed counsel, the Tribal Court may require contribution to the cost of providing appointed counsel and may establish a plan for collecting the contribution.

- G. Failure to Reimburse the Tribe.** If a Defendant has failed to reimburse the Tribe for the services of appointed counsel and/or costs of defense as ordered by the Tribal Court, the Tribal Court may subject said Defendant to contempt proceedings.
- H. Appointment or Waiver of a Lawyer.** If the Tribal Court determines that the Defendant is financially unable to retain a lawyer, it must promptly appoint a lawyer and promptly notify the lawyer of the appointment. The Tribal Court may not permit the Defendant to make an initial waiver of the right to be represented by a lawyer without first:
1. advising the Defendant of the charge, the maximum possible prison sentence for the offense, any mandatory minimum sentence required by law, and the risk involved in self-representation; and
 2. offering the Defendant the opportunity to consult with a retained lawyer or, if the Defendant is indigent, the opportunity to consult with an appointed lawyer.
- I. Unanticipated Conflict of Interest.** If in a case of joint representation, a conflict of interest arises at any time, including trial, the lawyer must immediately inform the Tribal Court. If the Tribal Court agrees that a conflict has arisen, it must afford one or more of the Defendants the opportunity to retain separate lawyers. The Tribal Court should on its own initiative inquire into any potential conflict that becomes apparent, and take such action as the interests of justice require.
- J. Scope of Trial Lawyer's Responsibilities.** The responsibilities of the trial lawyer appointed to represent the Defendant include:
1. representation of the Defendant in all Tribal Court proceedings including sentencing;
 2. interlocutory appeals the lawyer deems appropriate to file in the Court of Appeals;
 3. responses to any pre-conviction appeals filed by the Prosecutor in the Court of Appeals; and
 4. post-conviction motions the lawyer deems appropriate, including but not limited to, motions for new trial, for a directed verdict of acquittal, to withdraw a plea, or for resentencing filed in the Tribal Court.

Section 3. Appointment of Counsel for Criminal Appellate Review

Where a criminal Defendant, who is in jail, requests an appeal, the Tribal Court must appoint counsel for the Defendant who is determined to be financially unable to retain a lawyer.

- A. **Request for Court-Appointed Attorney for Appellate Review.** All requests for court-appointed appellate counsel must be made by written sworn affidavit of the criminal Defendant's financial condition and filed with the Tribal Court Clerk as soon as practical, in no event later than 28 days after entry of the final Tribal Court judgment, unless the interests of justice dictate later appointment.
- B. **Advice Concerning the Right to Appeal; Appointment of Counsel.** In a case involving a conviction, immediately after imposing sentence, the Tribal Court must advise the Defendant, on the record, that:
1. the Defendant may request appellate review of the conviction or sentence;
 2. if the Defendant is in jail and is financially unable to retain a lawyer, the Tribal Court will appoint a lawyer to represent the Defendant on appeal; and
 3. the request for a lawyer must be made no later than 28 days after entry of the final Tribal Court judgment, unless otherwise provided by leave of the Tribal Court.
- C. **Partial Indigency.** If a Defendant is able to pay part of the cost of court-appointed counsel, the Tribal Court may require contribution to the cost of providing appointed counsel and may establish a plan for collecting the contribution.
- D. **Failure to Reimburse the Tribe.** If a Defendant has failed to reimburse the Tribe for the services of appointed counsel and/or costs of defense as ordered by the Tribal Court, the Tribal Court may subject said Defendant to contempt proceedings.
- E. **Scope of the Appellate Lawyer's Responsibilities.** The responsibilities of the appellate lawyer appointed to represent the Defendant include representing the Defendant:
1. in post-conviction proceedings in the Tribal Court the lawyer deems appropriate;
 2. in post-conviction proceedings in the Court of Appeals; and
 3. as appellee in relation to any post-conviction appeal taken by the Prosecutor.

Section 4. Appointment of Counsel for Juveniles.

- A. **General.** The Tribal Court may appoint counsel for a Juvenile if it is determined

by the Judge that the Juvenile is in need of representation.

- B. **Costs.** The Tribal Court may assess the cost of providing appointed counsel and/or defense costs against the Juvenile or a person responsible for the support of the Juvenile and may enforce the order of reimbursement as provided by law.
- C. **Failure to Reimburse the Tribe.** If a Juvenile or a person responsible for support of the Juvenile has failed to reimburse the Tribe for the services of appointed counsel and/or costs of defense as ordered by the Tribal Court, the Tribal Court may subject said Juvenile or person to contempt proceedings.

Section 5. Appointment of Guardian *Ad Litem* for Incompetent or Minor Parties.

- A. **General.** The Tribal Court may appoint a Guardian *Ad Litem*, who must be a lawyer, for an incompetent or minor party if the Tribal Court finds that the welfare of the party requires it.
- B. **Costs.** The Tribal Court may assess the cost of providing a Guardian *Ad Litem* against the party or a person responsible for the support of the party and may enforce the order of reimbursement as provided by law.
- C. **Failure to Reimburse the Tribe.** If a party or a person responsible for support of the party has failed to reimburse the Tribe for the services of appointed counsel and/or costs of defense as ordered by the Tribal Court, the Tribal Court may subject said party or person to contempt proceedings.

Section 6. Appointment of Counsel for Respondents in Child Protection Actions.

- A. **General.** The Tribal Court may appoint counsel for a Respondent in child protection actions if it is determined by the Judge that the party is in need of representation.
- B. **Costs.** The Tribal Court may assess the cost of providing appointed counsel against the party and may enforce the order of reimbursement as provided by law.
- C. **Failure to Reimburse the Tribe.** If a Respondent has failed to reimburse the Tribe for the services of appointed counsel and/or costs of defense as ordered by the Tribal Court, the Tribal Court may subject said Respondent to contempt proceedings.

Section 7. Maintenance of Roster of Candidates for Appointment.

The Tribal Court Clerk shall maintain a roster of candidates available for appointment as counsel for criminal defendants, juveniles, Guardians *Ad Litem*, respondents in child

protection actions, and criminal appeals. These rosters must include State Bar information and current contact information.

Section 8. Compensation for Appointed Counsel.

- A. **Compensation.** Counsel appointed under these procedures will be compensated for actual work or time at a pre-determined rate. Other expenses related to the appointment are subject to the approval of the presiding judge at the trial court level or by the Chief Justice at the appellate level on a case-by-case basis.
- B. **Billing Tribal Court Statements and Receipts.** At the close of each case, all court-appointed counsel shall submit to the Tribal Court a written, itemized statement with original receipts attached.

Section 9. Short Title, Effective Date, Citation Format and Certificate of Adoption.

- A. **Short Title.** These *Rules* are titled “Rules for Appointment of Counsel.”
- B. **Effective Date.** These *Rules* become effective when adopted by the members of the Court of Appeals of the Pokagon Band of Potawatomi Indians.
- C. **Citation.** The official abbreviated citation form to these *Rules* is: PBCR Chapter 10.
- D. **Certificate of Adoption.** The Justices of the Court of Appeals unanimously adopted the above *Rules* on December 19, 2005.

JUDICIAL HISTORY

On December 19, 2005: The *Court Rules for the Appointment of Counsel* were unanimously adopted by the Justices of the Court of Appeals.

On July 27, 2006: Technical revisions were made to this Chapter of Court Rules to provide uniformity in formatting and nomenclature for all Chapters of Court Rules pursuant to Administrative Order 06-001-CA.

On August 29, 2012: Technical revisions were made to the *Judicial History* to provide uniformity in formatting for all Chapters of Court Rules. Revisions were made to Section 9 to: (1) incorporate the *Certificate of Adoption* provision into Section 9; (2) eliminate the signature lines under the *Certificate of Adoption*; and (3) add the words “Certificate of Adoption” to the title of Section 9. Technical revisions were made to the following Sections: Section 1(B)(5) to add the word “court”; Section 1(B)(11) and (12) to correct numbering; Sections 2(E) to add the words “and” and “or”; Section 3(E) to add the word “and”; and the title of Section 5 by deleting the word “and” and inserting “or”.