

**HO-CHUNK NATION CODE (HCC)**

**TITLE 9 – CRIMINAL CODE**

**SECTION 978 – TRIBAL PROSECUTOR**

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**978.001 Definitions.** In this chapter:

**(1g)** "Law firm" means a private firm of attorneys, the legal department of a governmental unit or agency, a corporation or another organization or a legal services organization.

**978.03 Tribal prosecutor and assistants.**

**(3)** Any tribal prosecutor or assistant tribal prosecutor must be an attorney admitted to practice law in this Nation and may perform any duty required by law to be performed by the tribal prosecutor.

**978.045 Special prosecutors.**

**(1g)** The Department of Justice may appoint a special prosecutor under sub. (1r) or a tribal prosecutor may request that the Department of Justice appoint a special prosecutor under that subsection. The Department of Justice shall first consider appointing an attorney already within the Ho-Chunk Nation Department of Justice for a special prosecution. If no attorney is available the Department of Justice shall consider any government attorney from another tribe who is knowledgeable of criminal law and P.L. 280 or a private attorney licensed in the Ho-Chunk Nation Bar Association.

**(1r)** The Department of Justice may appoint an attorney as a special prosecutor to perform, for the time being, or for the trial of the accused person, the duties of the tribal prosecutor. An attorney appointed under this subsection shall have all of the powers of the tribal prosecutor. The Department of Justice may appoint an attorney as a special prosecutor at the request of a tribal prosecutor to assist the tribal prosecutor in the prosecution of persons charged with a crime, in

grand jury proceedings or John Doe proceedings, or in investigations. The Department of Justice may appoint an attorney as a special prosecutor if any of the following conditions exists:

- (a) There is no tribal prosecutor for the Nation.
- (b) The tribal prosecutor is absent from the Nation.
- (c) The tribal prosecutor has acted as the attorney for a party accused in relation to the matter of which the accused stands charged and for which the accused is to be tried.
- (d) The tribal prosecutor is near of kin to the party to be tried on a criminal charge.
- (e) The tribal prosecutor is physically unable to attend to his or her duties or has a mental incapacity that impairs his or her ability to substantially perform his or her duties.
- (f) The tribal prosecutor is serving in the U.S. armed forces.
- (g) The tribal prosecutor stands charged with a crime and the president or attorney general has not suspended the prosecutor.
- (h) The tribal prosecutor determines that a conflict of interest exists regarding the tribal prosecutor or the tribal prosecutor staff.
- (i) A judge determines that a complaint relates to the conduct of the tribal prosecutor to whom the judge otherwise would refer the complaint.

(2)(a) The Department of Justice shall fix the amount of compensation for any attorney appointed as a special prosecutor under sub. (1r).

- (b) The Department of Justice shall pay the compensation under the appropriate line item.
- (c) The Department of Justice, tribal prosecutor and the special prosecutor shall provide any information regarding a payment under par. (b) that the department requests.

(3)(a) If an attorney is available and willing to serve as a special prosecutor without compensation, the tribal prosecutor may recommend the attorney as a public service special prosecutor to the Attorney General to serve at the pleasure of the tribal prosecutor. The public service special prosecutor may perform the duties and has the powers of the tribal prosecutor while acting under such an appointment, but is not subject to the compensation under sub. (2). A full-time public service special prosecutor may not engage in a private practice of law while serving under this paragraph, if such practice has the potential to cause a conflict of interest for the special prosecutor. A part-time public service special prosecutor may engage in a private practice of law while serving under this paragraph.

(b) A law firm or other employer employing an attorney who is appointed as a public service special prosecutor may continue to pay, for a period of not more than 4 months, the salary and fringe benefits of the attorney while he or she serves under par. (a). If the public service special prosecutor receives any such payments, the prosecutor's law firm and the prosecutor are subject to the following restrictions:

1. The law firm may not participate in any of the cases in which the public service special prosecutor participates.
  2. The public service special prosecutor may not consult with any attorney in or employee of the law firm about any criminal case in which the public service special prosecutor participates except as necessary to ensure compliance with this subsection.
- (c) An attorney serving as a public service special prosecutor under par. (a) is considered to be a public official for purposes of the Code of Ethics Act, 2 HCC § 1. A law firm or employer described under par. (b) is not liable for any acts or omissions of a public service

special prosecutor while acting in his or her official capacity or performing duties or exercising powers under par. (a).

**978.05 Duties of the tribal prosecutor.** The tribal prosecutor shall:

**(1) CRIMINAL ACTIONS.** Except as otherwise provided by law, prosecute criminal actions before any court within his or her jurisdiction and have sole responsibility for prosecution of criminal actions arising from violations of HCC § 939 ó 961 and from violations of other laws arising from or in relation to the official functions of the subject of the investigation or any matter as assigned by the attorney general and criminal in nature, that are alleged to be committed by an individual within his or her jurisdiction, or if alleged to be committed by a nonresident of this Nation, that are alleged to occur in his or her jurisdiction.

**(2) FORFEITURES.** Except as otherwise provided by law, prosecute forfeiture actions, traffic actions and actions concerning violations of ordinances which are in conformity with Nation criminal laws in the courts within his or her jurisdiction **(3) JOHN DOE PROCEEDINGS.** Participate in investigatory proceedings as may be established by the Ho-Chunk Nation Rules of Criminal Procedures. .

**(5) CRIMINAL APPEALS.** Upon the request and under the supervision and direction of the attorney general, brief and argue all criminal cases brought by appeal or writ of error or certified from the trial court to the supreme court or federal court if applicable. The tribal prosecutor or his or her designee shall represent the Nation in any appeal or other proceeding if the case is decided by a single court of appeals judge.

**(6) CIVIL ACTIONS OR SPECIAL PROCEEDINGS.**

**(a)** Institute, commence or appear in civil actions or special proceedings under and perform the duties set forth for the tribal prosecutor under ss. 946.86, 946.87, 961.55 (5) or Ho-Chunk Nation Rules of Criminal Procedure, perform any duties in connection with court proceedings in a court assigned to exercise jurisdiction as the judge may request and perform all appropriate duties and appear if the tribal prosecutor is designated in specific statutes. Nothing in this paragraph limits the authority of the attorney general to designate, that the tribal attorneyø provide representation as specified in 5 HCC § 5 or any other civil enforcement action assigned by the attorney general, and the tribal prosecutor as an appropriate person to represent the interests of the public in criminal type matters.

**(8) ADMINISTRATION.**

**(a)** In collaboration with the attorney general, establish such offices throughout the jurisdiction of the Ho-Chunk Nation as are necessary to carry out the duties of the office of tribal prosecutor.

**(b)** In collaboration with the attorney general, employ, and supervise his or her staff and make appropriate assignments of the staff. . The tribal prosecutor may request the assistance of assistant tribal prosecutors who then may appear and assist in the investigation and prosecution of any matter for which a tribal prosecutor is responsible under this chapter in like manner as assistants in the prosecutorial unit and with the same authority as the tribal prosecutor in the unit in which the action is brought. Nothing in this paragraph limits the authority of the Nation to regulate the hiring, employment, and supervision of Nation employees.

(c) In collaboration with the attorney general, supervise all expenditures of the prosecutor's office.

(9) BUDGET. In collaboration with the attorney general, prepare a budget request for submission to the legislature, as required by 2 HCC §4.

**978.06 Restriction on tribal prosecutor.**

(1) No tribal prosecutor or assistant tribal prosecutor may receive any fee or monetary reward from or on behalf of any prosecutor or any other individual for services in any prosecution or business to which it is the tribal prosecutor's official duty to attend.

(2) No tribal prosecutor or assistant tribal prosecutor may be concerned as attorney or counsel for either party, other than for the Nation, in any civil action depending upon the same state of facts upon which any criminal prosecution commenced but undetermined depends.

(3) (a) No tribal prosecutor or assistant tribal prosecutor while in office may hold any judicial office within the Nation.

(4) No person who acted as tribal prosecutor or assistant tribal prosecutor, or special prosecutor under s. 978.045, for the Nation at the time of an arrest, examination or indictment of any person charged with a crime in Nation may thereafter appear for, or defend that person against the crime charged in the complaint, information or indictment.

(5) (a) No full-time tribal prosecutor or assistant tribal prosecutor may engage in a private practice of law within the Ho-Chunk Nation, but he or she is authorized to engage in a private practice of all cases, not in conflict with the interest of the Nation which are outside the Nation's jurisdiction and, in which the attorney general has approved. A part-time tribal prosecutor or assistant tribal prosecutor may engage in a private practice of law.

**978.07 Obsolete tribal prosecutor records.**

(1) Whenever necessary to gain needed vault and filing space, a tribal prosecutor may destroy, subject to sub. (2), obsolete records in his or her custody as follows:

(a) Any tribal prosecutor record, after it has first been microfilmed or transferred to optical disk or electronic storage.

(b) Any case record of a traffic, misdemeanor, civil or related case, 3 years after commencement of the action.

(c) 1. Any case record of a felony punishable by maximum imprisonment of 3 years or a related case, or date of eligibility for release to extended supervision, or 50 years after the commencement of the action, whichever occurs later. If there is no parole eligibility date or no date for release to extended supervision, the tribal prosecutor may destroy the case record after the defendant's death.

2. Any case record of any other felony punishable by imprisonment of up to 1 year, but less than 3 years, after the mandatory release date or the presumptive mandatory release date, if applicable, of any person convicted of that felony or 20 years after commencement of the action, whichever is later.

(d) Any other tribal prosecutor record not included under pars. (a) to (c) made or received in connection with a transaction as evidence of a tribal prosecutor's activities or functions, after 6 years.

(2) Prior to destruction of records under sub. (1), the tribal prosecutor, shall make a written offer to the historic preservation department. If the offer is accepted by the department within 60 days after the day the offer is made, the tribal prosecutor shall transfer the title to those records to the historic preservation department. If the offer is not accepted within 60 days after the day the offer is made, the tribal prosecutor may destroy the records.

### **978.08 Preservation of certain evidence.**

(1) In this section:

(a) "Custody" means actual custody of a person under a sentence of imprisonment, custody of a probationer, parolee, or person on extended supervision by the department of corrections, actual or constructive custody of a person pursuant to a dispositional order under 4 HCC § 3, supervision of a person, whether in institutional care or on conditional release, pursuant to a commitment order, whether in detention before trial or while in institutional care or on supervised release pursuant to a commitment order..

(b) "Discharge date" means the date on which a person is released or discharged from custody that resulted from a criminal action, a juvenile delinquency proceeding, or a commitment proceeding or, if the person is serving consecutive sentences of imprisonment, the date on which the person is released or discharged from custody under all of the sentences..

(2) Except as provided in sub. (3), if physical evidence that is in the possession of a tribal prosecutor includes any biological material that was collected in connection with a criminal investigation that resulted in a criminal conviction, delinquency adjudication, or commitment and the biological material is from a victim of the offense that was the subject of the criminal investigation or may reasonably be used to incriminate or exculpate any person for the offense, the tribal prosecutor shall preserve the physical evidence until every person in custody as a result of the conviction, adjudication, or commitment has reached his or her discharge date.

(2m) The department of justice shall retain evidence to which sub. (2) applies in an amount and manner sufficient to develop a deoxyribonucleic acid profile, as defined in 9 HCC § 939.74 (2d) (a), from the biological material contained in or included on the evidence.

(3) Subject to sub. (5), a tribal prosecutor may destroy evidence that includes biological material before the expiration of the time period specified in sub. (2) if all of the following apply:

(a) The prosecutor sends a notice of its intent to destroy the evidence to all persons who remain in custody as a result of the criminal conviction, delinquency adjudication, or commitment and to either the attorney of record for each person in custody or the public defender.

(b) No person who is notified under par. (a) does either of the following within 90 days after the date on which the person received the notice:

1. Files a motion for testing of the evidence pursuant to applicable Ho-Chunk Nation Rules of Criminal Procedure.

2. Submits a written request for retention of the evidence to the prosecutor

(c) No other provision of federal or tribal law requires the prosecutor to retain the evidence.

(4) A notice provided under sub. (3) (a) shall clearly inform the recipient that the evidence will be destroyed unless, within 90 days after the date on which the person receives the notice, either a motion for testing of the evidence is filed pursuant to applicable Ho-Chunk Nation Rules of Criminal Procedure or a written request for retention of the evidence is submitted to the prosecutor.

(5) If, after providing notice under sub. (3) (a) of its intent to destroy evidence, a prosecutor receives a written request for retention of the evidence, the prosecutor shall retain the evidence until the discharge date of the person who made the request or on whose behalf the request was made, subject to a court order.

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Legislative History:

05/23/17      Legislature places the draft Tribal Prosecutor Code out for 45 day public comment through Resolution 02-21-17S.

05/23/17      Legislature enacts the Tribal Prosecutor Code through Resolution 05/23/17J.