

Amending the definition of criminal proceeding to remove the exclusion of misdemeanors is an appropriate action. Individuals being tried for misdemeanors should be eligible for representation in criminal proceedings where they can have their freedom taken away. While the LSC's primary focus is providing civil representation, LSC funding recipients should be able to also provide criminal representation. The right to counsel in a criminal case is equally important, if not more important, than providing counsel in civil cases. If the LSC is one of the only options for providing this representation to criminal defendants in tribal courts, then this change is certainly appropriate.

One concern expressed in the panel presentation was in reference to representation for non-Indian defendants. If non-Indian individuals are being tried in a tribal court, they also need to have representation. One of the views expressed is that the Native American funds will be used to fund representation for non-Indians. Those individuals need to be represented by counsel as well. The allowable representation should include all criminal defendants in tribal courts.

Another concern expressed relates to the impairment that these appointments could create for LSC funded counsel. However, this rule still allows those attorneys to consider a wide range of factors in determining whether or not they will represent the defendant. I would require that the attorney represent defendants they are appointed to represent unless they are excused under the Model Rules of Professional Conduct. However, this rule allows flexibility in considering the attorney's civil workload, the program priorities, and distance to the court among other factors. Allowing the option of representing defendants, rather than requiring it, will likely result in a large number of criminal defendants being unrepresented in tribal court, but this may be acceptable in this context because these programs are receiving funds in support of civil representation rather than criminal.