

GUIDANCE FOR LAWYERS HANDLING COMPLEX TRIBAL CLIENT CHALLENGES

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OVERVIEW

- What is the lawyer's role in protecting and defending Native people and tribal sovereignty?
- Are the lawyer's training and tools adequate for the challenges faced by Native people?
- What should tribal lawyers do when faced with complex problems involving litigation, lobbying, economics, and media not taught in law school?

MY 30 YEARS OF TRIBAL ADVOCACY EXPERIMENTATION

- **Lawyering—**
 - 30 years as a lawyer, with 25 representing Indian nations and tribes
 - 10 years as chief legal counsel for the Seneca Nation

- **Academia—**
 - 15 years as a Professor of American Indian Law at Kansas, Iowa & Syracuse

- **Politics—**
 - 1 term as elected President of the Seneca Nation

- **Lobbying—**
 - 6 years in Washington, D.C. representing Indian nations and Alaska Natives

TRIBAL ADVOCACY OPTIONS

- **Diplomacy**
- **Lobbying**
- **Agreements**
- **Litigation**
- **Disobedience**
- **War**
- **A few hypothetical case studies to illustrate. . .**

CASE STUDY NO. 1 – STATE TAX BATTLE

- Your tribal government client asserts its treaty right to import and sell cigarettes and gasoline in its territory without collecting state tax on sales to non-Indians in conflict with the *Moe, Colville & Attea Bros.* cases. In protest, tribal citizens block interstate highways crossing the tribal nation's territory with tire fires. 1000 state police surround the entire territory and conflict with tribal citizens escalates, resulting in many injuries. The media shows up *en masse*. The governor sends his emissary to meet with the tribal president.

What advice do you give the president?

CASE STUDY NO. 2 – IRS TAX BATTLE

- You represent a tribal government with a tax problem, even though tribes don't pay taxes. For many years, the Internal Revenue Service implements a covert plan to audit tribes and individual Indians to collect income tax on the value of tribal government benefits. Tribal leaders start comparing notes – “you're being audited too?” The Treasury Inspector General issues a report that exposes the IRS activity. IRS responds by opening dialogue to develop a rule to provide partial tax relief, but refuses to stop auditing activity.

What advice do you give to the tribe's leaders?

CASE STUDY NO. 3 – MJ BATTLE

- You represent a tribal government that wants to grow and sell marijuana. The state has fully legalized and licensed marijuana, but it remains illegal under Federal law. The tribal council signs a development agreement to start a marijuana resort and cultivation begins. The U.S. attorney meets with the tribal officials to express his concerns, which is ignored. A few weeks later, you get a call from the DEA that federal agents are 5 minutes from the reservation notifying you that a raid is imminent and, also, that they have notified the media.

What advice do you give the tribal chairman?

CASE STUDY NO. 4 – LAND CLAIM BATTLE

- You represent a tribal government with a small land base and a growing population. The tribe lost its land because the state government sold most of the tribe's lands in the early 19th century in violation of the Nonintercourse Act. The Federal government clearly breached its trust responsibility, but has never acted to help or provide compensation for the taking. Tribal citizens want more land for housing, but home prices and property taxes are excessive, inhibiting expansion.

What's the best path forward to restore the tribe's land base?

STRATEGIC ADVISING CONSIDERATIONS

- What does “victory” look like to the client?
- How committed is the client to achieving “victory”?
 - What kind of “fight” is actually possible?
 - Is the tribal leadership unified in goals and tactics?
- Does the law provide any viable line of attack or reasonable defense?
 - And, if so, can the law actually be invoked to “work” under the circumstances?

STRATEGIC ADVISING CONSIDERATIONS

- Does the client have resources?
 - Time?
 - Money?
 - Allies?
 - Support from tribal citizens?
- Can media attention be directed to promoting the client's cause?
 - Are tribal officials comfortable giving interviews?

ADVICE & OUTCOMES

- **No. 1 (State tax battle) – Lawyer gets out of the way of client. Indians and tribal officials dig in hard to oppose state tax collections and pushes conflict to the brink. Media mobilized to support tribe and treaty rights. State capitulates. Tribe never collects a cent of state tax.**
- **No. 2 (IRS tax battle) – Tribal client opposes deal on IRS rulemaking and leads effort to get Congress to act. Lawyer advises legislative strategy to pursue federal legislation and client builds national coalition. Congress passes Tribal General Welfare Exclusion Act of 2014 to permanently stop IRS taxation of tribal benefits and freeze audits indefinitely.**

ADVICE & OUTCOMES

- No. 3 (MJ battle)– Lawyer advises client that Federal agents and media are en route to reservation and that legal options are limited. Advises potential outcomes associated with disobedience, including going to prison, but says “its up to you”. Client fires lawyer for giving unattractive advice. Tribal officials get new lawyer. Crop burned. White guys go to jail.
- No. 4 (Land claim battle) -- Lawyer advises that litigation routes are unlikely to generate success, but can help frame legal conflict. Client pursues lobbying path to secure federal legislation to address historic land problem. Media educated on tribe’s justice agenda. Client directly lobbies Congress, which responds by passing settlement act.

CONCLUDING OBSERVATIONS

- Most tribal challenges affecting tribes involve money – what can you do to help neutralize economic considerations?
- Tribal justice considerations sound appealing – but rarely are dispositive, especially in disputes against states, corporations and haters.
- Poor outcomes are heavily influenced by client discomfort with aggressive strategies – what can you do to build client confidence?
- Watch out for the other lawyers! Turf wars undermine client interests.

QUESTIONS OR COMMENTS?
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