

ETHICAL CONSIDERATIONS IN REPRESENTING TRIBAL CLIENTS

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GOALS

1. Review several ABA Model Rules of Professional Conduct and their application to tribal clients.
2. Consider possible points of departure from the Model Rules standards when representing tribal clients.



WHICH PROFESSIONAL RESPONSIBILITY STANDARDS APPLY?

■ ABA Model Rules of Professional Conduct

- *E.g.* Seminole Nation of Oklahoma requires all members of its bar to follow the ABA Model Rules

■ State Rules of Professional Conduct

- Typically related to the ABA Model Rules (as in California), but do they apply when working in Indian Country?

■ Tribal Rules of Professional Conduct

- Sometimes adopting the ABA Model Rules *E.g.* A-CV-41-92, Order of the Supreme Court of the Navajo Nation (Adopting the ABA Model Rules with amendments)
- Sometimes utilize independent Rules

■ Today focuses on ABA Model Rules



PART A: WHO'S YOUR CLIENT?





RULE 1.13 - ORGANIZATION AS THE CLIENT

- (a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.
- (b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a manner related to the representation that is a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization . . .
- Be sure you know who is "the Tribe" and who you are legally representing



RULE 1.13 - REPRESENTATION OF GROUP

- Potential Adversity Between Tribe and Tribal Members
- (f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.



RULE 1.13 - REPRESENTATION OF GROUP

- Representing Both Tribe and Tribal Members/Officers/Employees
- (g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders

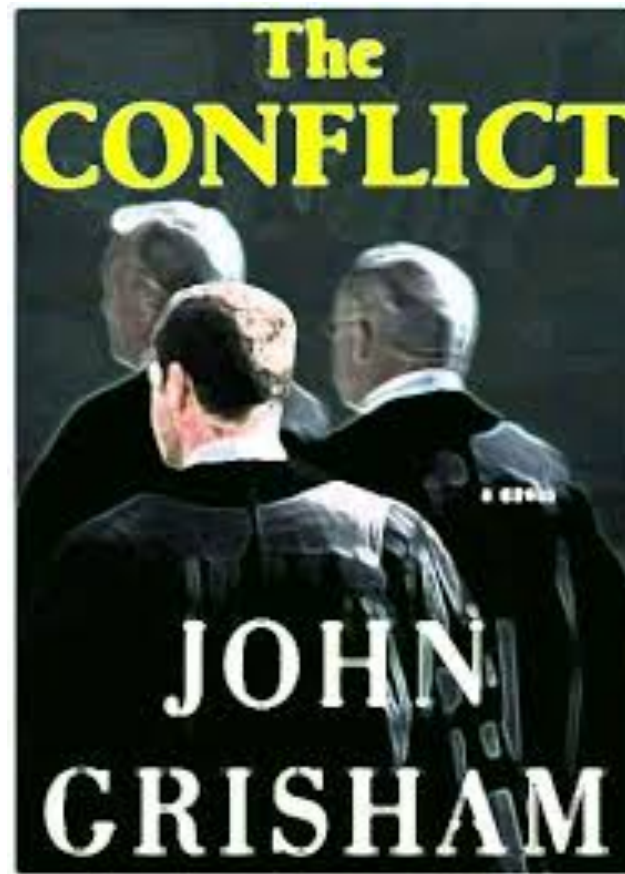


RULE 1.13 - AN IMPERFECT FIT

- Who gives directions?
- Competing interests unique to Indian Country.



PART B: NAVIGATING POTENTIAL CONFLICTS





RULE 1.7 - CONFLICT OF INTEREST

- (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
 - (1) the representation of one client will be ***directly adverse*** to another client; or
 - (2) there is a significant risk that the representation of one or more clients will be ***materially limited*** by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer



RULE 1.9 - CONFLICTS VIA FORMER CLIENTS

- (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.
- (b) A lawyer shall not knowingly represent a person **in the same or a substantially related** matter in which a firm with which the lawyer formerly was associated had previously represented a client (1) whose interests are materially adverse . . .



WHAT IS DIRECTLY ADVERSE IN INDIAN COUNTRY?

- Legal interests?
- Business interests?
- Treaty interests?
- Rule 1.7, Comment 24: Relevant factors include: "where the cases are pending, whether the issue is substantive or procedural, the temporal relationship between the matters, the significance of the issue to the immediate and long-term interests of the clients involved and the clients' reasonable expectations in retaining the lawyer."



HOW FAR DOES MATERIALLY LIMITED GO?

- What if one tribe wants to take a position in a lawsuit that potentially adversely affects the rights of all other federally recognized tribes, some of them also clients?
- Rule 1.7, Comment 24: “Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. **A conflict of interest exists, however, if there is a significant risk that a lawyer’s action on behalf of one client will materially limit the lawyer’s effectiveness in representing another client in a different case . . .**”

NNABA FORMAL ETHICS OPINION No. 1

National Native American Bar Association
Formal Ethics Opinion No. 1
June 26, 2015



NATIONAL
NATIVE AMERICAN
BAR ASSOCIATION

*National Native American Bar Association
Formal Ethics Opinion No. 1
Adopted June 26, 2015*

*Duties of Tribal Court Advocates to Ensure Due Process Afforded to All Individuals
Targeted for Disenrollment*

- "The responsibility of a tribal advocate differs from that of the usual advocate; his or her duty is to further justice in the greater Native American community, not merely to win his or her case."



ADVISING CLIENTS AGAINST THIS BACKDROP

- Best Practices for Counselors
 - Candor about risks
 - Consider broader impacts on Indian Country
- Best Practices for Consumers of Legal Services
 - Think critically (*i.e.*, expect the worst) about outcomes
 - Don't be afraid to ask for second opinions



QUESTIONS?



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