Legal Ethics and the Representation of Clients With a Tribal Affiliation

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LEGAL ETHICS AND THE REPRESENTATION OF 
CLIENTS WITH A TRIBAL AFFILIATION:
A Brief Case Review for the Sovereignty Symposium
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1. INTRODUCTION

This paper provides a brief overview of ethical issues which an 
attorney may well encounter when representing a client with 
affiliations to a Native American tribe, or the tribe itself. Many of the 
issues raised are quite familiar to any attorney accustomed to 
practicing under the American Bar Association’s Model Rules of 
Professional Conduct (MRPC), as adopted in their jurisdiction.1 
Nevertheless, it may be helpful to review how these fairly standard 
matters of professional conduct can alter slightly, but significantly, 
when the client has a tribal affiliation.

We shall review some of the principal doctrines of legal ethics 
which all attorneys learn in their mandatory law school course on 
professional responsibility and in workshops on continuing legal 
education. Then we shall examine these doctrines in the light of 
cases gathered from throughout the United States which illustrate 
how these standards have been applied in cases involving Native 
American clients and their attorneys, the judges hearing their cases, 
and the tribes. Some principles will take on a new light as we 
examine them from the perspective of the tribal lawyer who 
experiences possibly unique pressures.

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1The ABA Model Rules of Professional Conduct have been 
adopted in more than 35 states, including Oklahoma.
II. KEY DOCTRINES OF PROFESSIONAL RESPONSIBILITY

The doctrines of professional responsibility we shall review here bear upon some of the most critical issues in representing any client. What creates the attorney-client relationship? Who is the client? When is the attorney in a conflict of interest? What fee arrangements are acceptable? What are the proper roles for the attorney in handling client funds? What is the proper balance between client autonomy in decision-making and attorney control over the implementation of those decisions?

While any attorney probably confronts these matters on a weekly basis, the attorney involved in tribal representation may find herself especially at risk. Indian law is a complex and difficult area to construe, and yet she must guide her client through an ever-changing legal landscape. Thus, in addition to concerns about disciplinary action before the state bar, she may also need to be concerned about possible a legal malpractice action based upon insufficient research, or a bad professional guess about the outcome of a case. As we shall see, sometimes the risk of legal malpractice actions increase due also to the emotional nature of the case -- such as an adoption involving the Indian Child Welfare Act -- and due to the financial exigencies of the client -- which may seem to limit choices of action.

A. What Creates the Attorney-Client Relationship?

In a fast-paced legal practice it is all too easy for confusion to arise concerning who has undertaken what representation and when. Further, there can be confusion about what the attorney promised to do for the client, if anything. What may have been a mere matter of distraction can erupt as a legal malpractice action when the client -- or the person who believed he was the attorney's client -- discovers his cause of action has expired due to the attorney's failure to file a claim within the statute of limitations. Then the client -- or purported client -- can challenge the attorney's conduct as having failed to comport with the standards of the community, as those standards may be reflected in the rules of professional conduct adopted by the state bar. One of the most critical standards is represented in MRPC 1.3, which requires a lawyer to "act with reasonable diligence and promptness in representing a client." Further, the Comment to MRPC 1.16 (Declining or Terminating Representation) makes clear that a lawyer "should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion."

The classic case on this matter is Togstad v. Vasely, Otto, Miller & Keele, 291 N.W.2d 868 (Minn. 1980), where Mrs. Togstad met once with an attorney to request that he bring a medical malpractice action against the hospital and doctors who had left her husband in a chronic vegetative state. Mrs. Togstad was quite distraught during the interview, and left with the avowed understanding that the attorney would handle the matter on her behalf. The attorney's understanding of how the interview ended differed significantly. Namely, he believed that he had told Mrs. Togstad she should seek other counsel, and promptly, before the statute of limitations ran out. However, the attorney never followed up with a letter to that effect. The court heard testimony from experts on legal ethics, who testified as to the standards of the Minnesota code of professional conduct concerning diligence and communication with the client. The court also heard testimony as to how those standards were reflected in the practice of the legal community. The court then placed upon the attorney the burden of clarifying the nature of the relationship, and doing so in a timely manner.

A more challenging example of the Togstad confusion is found in George v. Caton, 800 P.2d 822 (Ct. App. N.M. 1979), for it pits the attorney's alleged norms of practice in the Anglo legal community against the customs of the Navajo Nation. Caton and White were attorneys practicing together in Farmington, New Mexico. Over the course of three years, sometimes one sometimes the other would make in-person and by telephone contact with Pearl George, a Navajo Indian who could neither speak nor understand English. George had survived a gas explosion in her trailer which killed her sister. Caton and White had approached George about representing their interests in a lawsuit against the seller of the trailer. Several times during the intermittent visits they assured George that they were her attorneys, and that the case was proceeding well. Eventually, Caton and White informed George that her claim had expired due to failure to file within the statute of limitations.

In their defense, Caton and White claimed that the custom among lawyers in the Farmington area was to "obtain from a prospective client prior to, and as a condition of employment in contingent fee plaintiff's cases, a written employment agreement together with an advanced deposit of costs." 800 P.2d at 822. Since these written agreements did not exist, they argued, neither did the attorney-client relationship. In the alternative, they argued that even if a relationship had originally existed, George had such intermittent contact with them over the course of nearly three years that the
attorneys acted non-negligently when they assumed that George had abandoned her lawsuit or had sought other counsel.

The court made short shift of this defense: "Defendants had done business with Navajo Indians, were familiar with Indian tradition and the difficulties of translation of the Indian language; and orally or in writing, defendants had a duty to be precise, meticulous and definite so that no misunderstanding would arise as to the relationship of the parties." Id. at 827. Further, the court stressed that "No formal contract, arrangement or attorney fee is necessary to create the relationship of attorney and client .... The contract may be implied from the conduct of the parties.... All that is required is a statement by an attorney that he would 'handle' her matter." Id.

The language barrier between attorney and Native American client can be seen as shifting to the attorney an even heavier burden for clear communication. Consider: State v. McGivern, 38 O.B.A.J. 2253 (Ore. Cir. Ct., Nov. 7, 1967), where the court publicly censured an attorney who had solicited in person the surviving victims of an automobile-truck collision two days after the crash. The client was described as being "in a state of shock, grief and despair" over the death of their fellow passenger. Just as importantly, she was described as "a fullblood Cherokee Indian who did not speak English .... and that [had] never employed legal counsel prior to employment of ...." this attorney.

The language barriers placed the client in a disadvantage which the attorney was censured for having exploited.

B. Who Is The Client?

For attorneys representing organizations, the ethical obligations and lines of authority can unintentionally blur. MRPC 1.13 attempts to clarify the attorney's role when the client is an entity, rather than an individual. It states: "(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents" -- which could be the "positions equivalent to officers, directors, employees and shareholders." The entity could include unincorporated associations as well as corporations, partnerships, municipal corporations and tribes.

The case of Arctic Slope Native Association v. Paul, 609 P.2d 32 (Alaska 1980) illustrates the bind even a well-meaning, experienced lawyer can slip into if the lines of authority do not remain clear.

The court characterized Frederick Paul as "a prominent authority on the law pertaining to Native Alaskans." Id. Paul contracted with several Inuit communities to represent their aboriginal title claims against the United States government. Those communities were: Arctic Slope Native Association (ASNA), a non-profit, voluntary association; plus the native communities of the cities of Barrow, Kaktovik, Anaktuvuk Pass, and Wainwright. The municipal corporations of these cities did not enter into contract with Paul; rather, the signatories were the respective Community, "composed of Members, Bands, Clans, and Divisions of Inuit Natives." Id.

Paul won their claims before the U.S. Court of Claims and was awarded $274,000 in attorney's fees by the court.

Later Paul proposed to the ASNA and the communities that they create an incorporated borough for that region. He obtained oral encouragement from the executive director of ASNA and from Wainwright and Anaktuvuk Pass to pursue the proposal. That petition was approved by the Local Boundary Commission and ratified by the residents of the North Slope. Two years later, however, Paul filed a complaint seeking compensation for the services he had performed in organizing the North Slope Borough, which the trial court found amounted to $185,789. Not surprisingly, faced with joint and several liability for a substantial judgment, each of Paul's clients attempted to identify how and why they were not, in fact, clients of Paul.

The Borough sought to avoid liability on the theory that a municipal corporation could not be held liable for pre-incorporation expenses. The Alaska supreme court countered that "A corporation brought into existence -- given its life -- by the service of an attorney, may not be heard to say that the service was unauthorized because rendered prior to incorporation. When the benefit of such service is received and accepted by the corporation, it cannot be heard to question the authority through which the service was employed." Id. at 35. Therefore, the court affirmed the lower court's finding that the Borough was jointly liable with ANSA.

The cities of Barrow, Kaktovik, Point Hope, Wainwright and Anaktuvuk Pass attempted to distinguish themselves as a matter of law from the signatories to the contracts with Paul. The court noted that "considerable confusion appears to surround the use of the terms "community," "village," and "city."" Id. at 36. The court analyzed the language of the agreements included in the record developed below and found that the contracts were "undertaken for the advancement and protection of the rights and interests of the Tribe," a racially

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2 The creation of the incorporated borough brought about great social, political and economic benefits, as recognized by the court.
* Through tax revenues gained from the Prudhoe Bay oil development, borough residents are now served by a broad array of health, education and public safety services." 609 P.2d at 37.
discrete population group within each municipal corporation.

These were not "government organs in the sense of political bodies selected by all the citizens of voting age in a given area with regular government authority over all the inhabitants. Native regional corporations ... may have interests, ... contrary to those of other affected persons who are not corporation members."

After outlining the confusing status of entities operating not as tribal units, the court filled in the contours of the case at bar. Alaska's supreme court could "find no evidence of either an express or implied delegation of municipal authority to the respective native communities. The signatories of the attorney contracts (the secretary and president of the village council and representatives of the community, composed of Members, Bands, Clans and Divisions of Inuit Natives) were representing the interests of "the Tribe" and not necessarily those of the village municipal corporations as a whole." This was necessarily so, since all residents of the cities were not Inuits. Finally, the appellate court was unable to find any evidence that the village municipal corporations had adopted the attorney contracts. Therefore, the cities were held not liable for Paul's fees.

C. When is the Attorney in a Conflict of Interest?

The MRPC at 1.7 make very clear that a lawyer must not represent a client "if the representation of that client will be directly adverse to another client." The lawyer’s withdrawal in such a situation is mandatory unless "the lawyer reasonably believes the representation will not adversely affect the relationship with the other client" and the attorney has consulted with each client and each has consented, preferably in writing.

The general rule against conflict also bans representation where the conflict is indirect, where the representation "may be, materially limited by the lawyer’s responsibilities to another client or to a third person, or by the lawyer’s own interests." Again, this conflict is waivable if — and only if — the lawyer "reasonably believes" the indirect conflict will not have an adverse affect and the client gives informed consent after full disclosure of the risks involved.

An attorney with expertise in Indian law matters may easily find himself facing any number of indirect conflicts of interest, depending upon the various roles he may play as an attorney. For example, in the case of People v. Williams, 248 Cal. Rptr. 793 (Ct. App. Calif. 1988), Williams, an American Indian in Kern County, California was charged with murder. He requested a lawyer affiliated with the Bureau of Indian Affairs office in Coeur d'Alene, Idaho. Williams was appointed a public defender of "American Indian background," retired California Judge Fred Gabourie. Defendant agreed to the representation, but did not know until later, that Gabourie, a Seneca, was the Tribal Prosecutor for the Coeur d'Alene Tribe of Indians of the State of Idaho. The defendant then protested the appointment of his attorney on the basis that the appointment of a tribal prosecutor as public defender violated the rule of People v. Rhodes, 524 P.2d 363 (Calif. 1975).

In People v. Rhodes the California supreme court barred all active prosecutors from being appointed to represent indigent criminal defendants. The rationale of that prohibition did not apply with regard to Gabourie because he was a tribal, not city, prosecutor; in Idaho, not California.

... Mr. Gabourie ... clearly would never be involved with California law enforcement officers as a prosecutor because he lacked jurisdiction territorially and substantively. Mr. Gabourie could have challenged the constitutionality or applicability of any California statute or practice without having the problem presented in Rhodes where the city attorney might be called upon to defend that statute or practice the next day. Likewise, Mr. Gabourie would not have had any problem in vigorously cross-examining law enforcement officers because, as a tribal prosecutor in Idaho, he had no official relationship with local police as did the city attorney in Rhodes. Id. at 797.

The court's analysis in People v. Williams was reasonably clear regarding the situation of attorneys who "wear two hats" in jurisdictions that do not overlap. However, it leaves open the possibly troublesome status of attorneys who operate as tribal prosecutor in one court and public defender in another where the policies, officials, law enforcement personnel, etc. might indeed converge. This might present a particularly nettlesome situation for attorneys who work part-time, on contract with different tribes performing different law-related functions.

D. What Fee Arrangements are Acceptable?

MRPC 1.5 requires that a lawyer's fees "shall be reasonable" based upon "the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly." Contingent fees are permitted, except in a criminal case or divorce, and the contingent fee arrangement must be agreed to in writing. Fee splitting is permitted only with full knowledge of
the client and to the extent that attorneys sharing in the fees have actually done work on the case.

Several cases involving tribal representation illustrate the difficulties attorneys can encounter when they have failed to be clear about fee arrangements, and have failed to maintain contemporaneous documentation of the work performed to merit the fee. The need for supporting documentation can emerge as an especially important issue when the attorney seeks fees and costs from the losing party, such as the government.

Returning for example to the case of Frederick Paul, we find that in addition to losing the cases as payors, he also lost the large sums which had been awarded by the lower court in quantum meruit. Paul was unable to provide time records, billing records, case notes, briefs, or memoranda to support the hours alleged. Despite the ultimate social and economic value of his work to the clients served, the court provided for payment on the basis of billable hours. The supreme court upon reviewing the paucity of records to support the claimed hours reduced his award to less than half. See 609 P.2d at 37.

The case of Harrington v. Thomas, 700 P.2d (Ore. 1985) involved an attorney acting as counsel for the conservatorship of a member of the Klamath Indian tribe, whose share in the Klamath Indian Management Trust was $25,000 at the time of death. He never signed a contingent fee agreement and testified that the attorney’s “only disclosure regarding a fee was that the heirship determination would not cost too much.” That testimony plus the lack of written agreements detailing the fee arrangements between the attorney and the estate were sufficient to find the attorney liable for receiving more than $26,000 in attorney’s fees from the trust.

On a brighter note, the case of Disney v. Pitzker, 385 P.2d 572 (7th Cir. 1963) demonstrates that two attorneys can join forces in an effort to economize on behalf of their tribal clients (here, the Delaware Indians) without running afoul of the rule against fee splitting. Here, though, we see two attorneys who have agreed in full consultation with their clients, to work as a unit, sharing responsibility and fees.

E. What are the Proper Roles for the Attorney in Handling Client Funds?

We all are aware of the stern prohibition against commingling client funds with attorney’s funds. See MRPC 1.15, Safeguarding Property. One does not, however, have to be F. Lee Bailey in order to encounter difficulties in properly identifying and handling client funds. Neither does the attorney have to demonstrate a mens rea, that the commingling of funds stemmed from malevolence. The 1982 complaint against F. Darold Windsor, an Oregon attorney representing members of the Klamath Indian tribe, stemmed from beneficence. Windsor advanced his own money to former members of the tribe “in order to satisfy their demands for cash during the pendency of the distribution to them of their shares of the assets of the tribe” under federal law. Windsor, as attorney for several such persons, “mengled his own money with that of such clients while disbursing sums periodically to them in the form of unsecured loans.” 373 P.2d 612.

Windsor’s only saving grace appeared to be that the supreme court of Oregon saw his conduct as “incredible folly” but nothing that reflected “unfavorably upon his honesty.” Id. Notwithstanding this bit of prosecutorial commentary, the court confirmed Windsor’s suspension for two years and awarded the Oregon State Bar its costs.

On a darker note, we find the recent case of Joseph P. Preloznik, where the attorney for an Indian school in Milwaukee became deeply involved in the efforts of the school’s board to raise needed funds through Indian bingo or gaming. Since the school did not have the status of a tribe, they sought an affiliation with the Menominee tribe, which Preloznik had previously represented. Over the course of many months, Preloznik found himself in the midst of what some might describe as a “shell game” of cash advances and payouts between payments to and from the tribe, the school, and the Bureau of Indiana Affairs for expenses incurred in the process of obtaining approvals for the gaming operation. The deeper Preloznik became enmeshed in the business transactions involved in establishing the gaming operation, the more he acquired a financial interest in the underlying transaction, in contravention of MRPC 1.8. Further entangling himself, Preloznik raid to reveal to his several clients exactly what his relationships were among them and the terms of financial transactions between them. Not surprisingly, Preloznik found himself in the midst of a firestorm of angry clients and charges before the Wisconsin state bar. He was suspended from practice “until further order of the court” and required to repay $18,000 out

3 In re Complaint as to the conduct of F. Darold Windsor, 373 P.2d 612 (Ore. 1962).

F. What is the Proper Balance Between Client-Autonomy and Attorney Control, Especially Where Client Funds are Limited?

Under MRPC 1.2 the client has ultimate authority to determine the objectives of the representation, but the lawyer has responsibility to determine --- in consultation with the client --- the means for achieving those objectives. One of the most difficult tasks facing an attorney is how to balance these competing roles when the client cannot seemingly afford to pursue all legal avenues. As alluded to earlier in this case review, this can become an especially trying issue when the area of law is complex and emotional, such as the Indian Child Welfare Act.

The recent case of Doe v. Hughes, Thorsness, Gantz, Powell & Brundin, 838 P.2d 804 (Alaska 1992) illustrates these competing tensions. Doe and Doe sought counsel from the law firm of Hughes, Thorsness when Jane Doe’s sister, Mary Doe, agreed to be artificially inseminated by John Doe in order to permit Jane and John to adopt the child as their own. During the course of obtaining the biological mother’s consent to the adoption, the attorneys learned John Doe is a part Chickasaw Indian. This now implicated the Indian Child Welfare Act and its provisions about voluntary termination of parental rights. 25 U.S.C. § 1913(a). In order to make certain the mother’s consent was valid according to § 1913 it would be necessary to record her consent “before a judge of a court of competent jurisdiction and accompanied by the presiding judge’s certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian.” § 1913(a).

In the interest of saving money, Hughes, Thorsness recommended that although they obtained Roe’s consent in writing, they not take it to superior court unless the court determined that the act applied. The court at that time determined the ICWA did not apply. It probably would not surprise too many to learn that subsequently the biological mother changed her mind and sought to challenge the adoption. When she sought legal counsel for the purposes of attacking the adoption, her attorneys were able to fashion a reasonable and successful attack on the consent, arguing successfully that the superior court was wrong, the ICWA did indeed apply, and the consent procedures were invalid under that act’s standards.

Hughes, Thorsness argued that due to the unsettled nature of the law and their sincere desire to save their clients unnecessary expenses, they should not be held liable for legal malpractice. The Alaska supreme court handled this thusly:

[W]e are not impressed... Any uncertainty there might have been about the applicability of the Indian Child Welfare Act made Hughes Thorsness’ failure to obtain compliance with the Act more, rather than less, blameworthy. The cost of compliance with the act would be by all measures slight when compared to the potential cost of not complying with the Act. The decision to ignore the additional steps required for a “valid” consent was anything but the act of a reasonably prudent lawyer. Ud. at 807.

III. CONCLUSION

The attorney engaged in representing a person with tribal affiliations, or a tribe itself, confronts a number of fascinating professional challenges. We are all aware of the substantive law issues that create a minefield for the unwary attorney. Ethical issues also create a trap for the unwary --- oftentimes regardless of their good intentions.6

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6The author has highly valued the opportunity to learn about tribal representation through the efforts of OCU’s Native American Legal Resource Center, Oklahoma Indian Legal Services, and by working with students in OCU’s Native American Law Clinic. Although I have taught legal ethics for a number of years, the interface with tribal representation is new but fascinating. I thank my attorney and student guides who have intentionally or unintentionally opened my eyes to the nuanced differences between the Model Rules of Professional Conduct and common practice. The mistakes which remain are wholly my own, and I invite the students who have helped me to understand the issues involved.