

THE COUNCIL'S COUNSEL: THE ETHICS OF REPRESENTING TRIBAL COUNCILS

July 2006

By: Rob Roy Smith

MORISSET, SCHLOSSER, JOZWIAK & MCGAW

1115 Norton Building
801 Second Avenue
Seattle, WA 98104-1509
(206) 386-5200
r.smith@msaj.com

ROB ROY SMITH received his B.A. from the College of the Holy Cross (1997) and his J.D. *cum laude* from the Northwestern School of Law of Lewis & Clark College with a Certificate in Natural Resource and Environmental Law (2000). Mr. Smith is a senior associate with the law firm of Morisset, Schlosser, Jozwiak & McGaw. The firm exclusively represents Indian tribes and Indian businesses. Mr. Smith's practice emphasizes natural resource and cultural resource protection, taxation, and economic development. He is co-founder and Chair of the Idaho State Bar Indian Law Section and is licensed to practice before the state and federal courts of Washington, Oregon, and Idaho, the United States Tax Court, the United States Supreme Court, and various tribal courts.

I. Introduction

The recent growth in tribal economic development for the five federally-recognized tribes in Idaho, as well as for the numerous tribal governments in Washington and Oregon, has led to increased interaction between legal practitioners unfamiliar with tribal laws and the applicability of federal and state laws to Indian tribes. Indian law is no longer practiced exclusively by attorneys working as in-house counsel for tribes. And, tribal attorneys that previously provided limited legal advice to tribal clients on specific issues have now become general business law attorneys for tribes and tribal corporations.

As business and governmental interactions increase, so too does the potential for malpractice and ethical violations arising out of transactions involving attorneys ill-informed and ill-equipped to handle Indian law. The following paper briefly discusses some of the unique aspects of representing Indian tribes and provides various hypotheticals designed to explore the ethical dilemmas that practitioners might encounter during their representation of Indian tribes. At the conclusion of the paper, some selected tribal codes demonstrating various approaches to licensing and regulating attorneys are attached.

II. Ethical Considerations

A. Competence

1. Knowledge of Tribal Laws and Customs, and General Indian Law

Idaho RPC 1.1 defines “competent representation” as requiring “the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.” Accordingly, an Idaho attorney should not undertake representation of any client unless they can provide “competent representation.” In the context of Indian law, the question arises as to whether a license to practice law in the state of Idaho does or should qualify an attorney to represent tribal clients. The answer is: not necessarily.

An attorney will only be “competent” to undertake the representation of a tribal client if the attorney has, at minimum, a basic understanding and knowledge of tribal jurisdiction matters and general Indian law principles. The attorney should know, or become knowledgeable in, the particular tribe’s laws, tribal traditions and customs, and tribal procedural rules concerning admission to practice before tribal courts. In addition, the attorney should know, or become knowledgeable in, matters that may arise during the scope of representation. This could include tribal sovereign immunity, federal tax questions, the Indian Child Welfare Act, civil and criminal jurisdiction, Public Law 280, the Indian Civil Rights Act, and subject matter and personal jurisdiction. Since each Indian tribe and case is unique, it would be overly simplistic to assume that having handled a single matter for one tribal client makes the attorney competent to handle other matters on behalf of other tribes.

An Idaho attorney should decline representation of tribal clients unless the attorney is, or can become, “competent” to represent the tribal client.

2. Jurisdiction and Cultural issues

The role of the attorney will vary depending on the nature of the case and the tribal client he or she is representing. It is incumbent on the attorney to understand these cultural and legal differences as they can drastically affect litigation strategy and acceptable attorney conduct.

For example, each tribe has its own laws, procedures, and customs. Some tribes have their own bar exams. Some tribes simply require the attorney to be admitted to practice in any state in order to practice in tribal court. Other tribes require special oaths for admission to tribal court before an attorney can practice before the tribal court. Still other tribes have their own rules of professional conduct. Many tribes also offer traditional tribal forms of dispute resolution before panels of elders, a concept that is foreign to the Anglo legal tradition.

This multi-jurisdictional umbrella raises a number of difficult questions for attorneys representing tribal clients. When practicing in Indian Country and representing a tribal client, attorneys have another layer of professional responsibility with which to comply – in addition to upholding the laws of the United States and the laws of the state of Idaho, the attorney must also uphold the Constitution and laws of the Indian tribe. Applying all three layers of professional responsibility must be delicately balanced as cultural differences between the three forms of government may make some of the rules appear contradictory.

B. Scope of Representation – Who is the Client?

The preamble to the Idaho RPC suggests an understanding of the difficulties facing an attorney representing any government entity. Paragraph 18 of the preamble provides:

Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and the state's attorney in state government, and their federal counterparts, and the same may be true of other government law officers. Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. These Rules do not abrogate any such authority.

The difficulties inherent in representing a state or municipal governmental entity are equally present when representing an Indian tribe and raise difficult questions when determining the scope of representation under Idaho RPC 1.2.

Attorneys representing an Indian tribe must determine early on “who is the client.” This question can be difficult to determine, especially if the attorney faces competing demands within the client governing body. For instance, at any given time the tribal client could be construed to be one of the following: (1) the Indian tribe, *qua* tribe; (2) the Tribal Council as a whole; (3) the Chairman of the Tribal Council; (4) other members of the Tribal Council; (5) a Tribal Enterprise or other political subdivision; (6) tribal members; or (7) a political faction of the governing body. For example, if an action involves the head of the Tribe’s Health Clinic, either the Tribe’s Health Board (which oversees the clinic) or the Tribal Council (which oversees the Health Board) might be the client. Tribal law may also specify who directs the attorney. Thus, when the client is a governmental organization, a delicate balance must be struck between maintaining confidentiality and assuring that a potentially wrongful act is prevented or rectified.

To address these concerns, an Idaho attorney representing an Indian tribe should try to identify the client within the scope of the legal services agreement. As part of this process, the attorney can work to identify who will act as the speaking agent or point of contact between the tribe and the attorney. To narrow who the client is, the attorney should ask: (1) who will authorize letters and court filings?; (2) will the authorization come from different persons if the representation involves a political subdivision of the tribe?; and (3) during an intra-tribal dispute, who will direct attorney action? If these questions are not addressed at the outset, the attorney representing the tribe must rely on Idaho RPC 1.13.

Idaho RPC 1.13 provides as follows:

RULE 1.13: ORGANIZATION AS 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 matter related to the representation that is a violation of a legal obligation to the organization, or 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. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.
- (c) Except as provided in paragraph (d), if
 - (1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails

to address in a timely and appropriate manner an action or a refusal to act, that is clearly a violation of law, and

(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

(d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

(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.

(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.

The Idaho RPC likely apply to both in-house and outside attorneys that might be employed by an Indian tribe. In the absence of a specific legal services agreement or tribal law limiting the scope of representation, an attorney representing an Indian tribe must take care to apply Idaho RPC 1.13 in a manner consistent with the tribal government's structure, and rules and procedures.

C. Other Ethical Considerations

Other ethical rules may be implicated by representation of an Indian tribal government including, *inter alia*, confidentiality (Idaho RPC 1.6), conflicts of interest (Idaho RPC 1.7), business transactions with clients (Idaho RPC 1.8), the unauthorized practice of law (Idaho

RPC 5.5), and choice of law (Idaho RPC 8.5). For example, particularly interesting ethical considerations are raised by the question of whether tribal or state rules of professional conduct apply to attorney conduct on Indian lands.

Idaho RPC 8.5 provides that “a lawyer admitted to practice in this jurisdiction is subject to disciplinary authority of this jurisdiction, regardless where the lawyer’s conduct occurs.” The commentary to the rule notes that a lawyer may be “potentially subject to more than one set of rules for professional conduct” which impose different obligations. The RPC attempts to deal with this situation with a “choice of law” clause that provides that the conduct of a lawyer shall only be subject to one set of rules of professional conduct at any time. Idaho RPC 8.5(b) states that the rule of the jurisdiction in which a tribunal sits governs conduct in connection with a matter pending before a tribunal and, for any other conduct, the rules of the jurisdiction in which the lawyers conduct occurred shall apply. In other words, if a tribal RPC exists, the tribal RPC likely applies in lieu of the Idaho RPC for attorney conduct taking place within Indian Country.

It is unclear what rules might apply to attorney conduct within Indian Country if no tribal RPC exists. The safest course would be for the attorney to act in a manner consistent with the ethical obligations of the jurisdiction where he or she is licensed to practice at all times. Indian Country is not “an ethics-free zone.”

Which jurisdiction’s rules might apply is often an issue that arises in the representation of tribal governments. The State Bar of Arizona addressed whether a tribe’s or the state’s ethical rules applied to certain attorney conduct in Opinion 90-19. In that Opinion, the inquiring attorney was a member of both the Arizona Bar and the Navajo Nation Bar. The ethical rules of the two bars were in conflict on an issue concerning judicial appointments for indigent defendants. Under the Arizona rules, the attorney would have been obligated to decline an appointment due to conflict of interest. However, under the Navajo Nation’s rules, the attorney was obligated to accept the appointment. In answering the inquiring attorney’s dilemma, the Arizona State Bar concluded:

[A]n attorney who’s a member of both the Arizona and Navajo Nation Bars, and who was appointed by a Navajo Nation Court to represent an indigent Navajo citizen in a criminal proceeding before a Navajo Court, is not subject to disciplinary action by the State Bar of Arizona if the attorney complies with the Navajo Nation ethical rules and court directives.

In reaching that conclusion, the Arizona State Bar considered its version of Idaho RPC 8.5 and determined that the Navajo rules applied to the particular situation.

A similar conclusion was reached concerning the unauthorized practice of law in Arizona State Bar Opinion 99-13. There, the State Bar determined that an Arizona attorney may permit his non-lawyer paralegal, who was a licensed tribal advocate in the Salt River Pima Maricopa Tribal Court, to represent clients in tribal court if the court rules so permit because that court’s rules govern the conduct. The Arizona State Bar concluded that such

representation will not run afoul of the Arizona lawyer's duty to not assist in the unauthorized practice of law (Arizona RPC 5.3) as long as the paralegal's representation is limited to tribal court. Copies of Arizona State Bar Opinions 90-19 and 99-13 follow this paper. There do not appear to be any formal Idaho ethics opinions addressing these issues.

D. Conclusion - A Call for Comparative Ethics

As the number of cases concerning Indian legal interests continue to rise, it becomes increasingly important for all Idaho practitioners to be familiar with Indian law. In an effort to increase Idaho attorney knowledge of Indian law, in March 2004, the Indian Law Section presented the Idaho State Bar Board of Commissioners with a resolution urging the Commission to consider adding Indian law as a topic on the Idaho Bar Exam. On February 16, 2006, the Indian Law Section received a response from the Idaho State Bar. The State Bar had considered amending topics of subject areas for the Idaho State Bar Examination questions to include Indian law at both its November 2005 and January 2006 meetings. The Board of Commissioners voted not to add any additional new topics or subtopics to the Exam.

In his February 16, 2006 letter to the author, the Honorable Rick Carnaroli, President of the Idaho State Bar, recognized "the importance of lawyers being able to recognize when an Indian law issue is relevant to a case or legal problem" and indicated a commitment to considering other means of better educating all Idaho lawyers about Indian law issues without simply adding Indian law to the Bar Exam. I appreciate the Bar Commission's approach to this difficult issue. There is no one-size fits all approach for educating the legal community about Indian law.

More attention must be given to professional conduct in trans-jurisdictional practice. Idaho can look to the ethical considerations facing attorneys practicing in the European Union. There, as here, practicing within another sovereign nation requires attorneys interacting with tribal clients to determine which ethics rules apply and to identify cultural differences between those ethics rules. Whether it be as a topic on a bar exam, part of the practical skills training for all new lawyers, or done through more aggressive continuing legal education, Idaho attorneys must not only understand Indian law and its implications for their clients, we must be conscious of the nuanced ethical rules that might apply to attorney conduct on tribal lands.

III. Hypotheticals

Presented below are a number of hypotheticals designed to test the application of the Idaho RPC to the specific fact scenarios that may arise during the representation of Indian tribes.

Hypothetical No. 1

A new Tribal chair wins election in November, but is not sworn in until January. In the interim, the tribal attorney and the Chair-elect discuss whether the chair elect should resolve some criminal allegations made against the Chair-elect during the election campaign. The tribal attorney then reveals some of the details of that conversation during a public meeting of

tribal members. The Chair-elect claims that tribal attorney led him to believe that he was receiving protected advice from his attorney.

- Did tribal attorney violate an ethical rule at the public meeting? If so, which one?

Hypothetical No. 2

The current Tribal Chair discusses details of criminal charges filed against him in tribal court with the tribal attorney. The Tribal Chair passes away before deposition or trial. The tribal prosecutor wants the tribal attorney's notes from the conversation because it is the only way to gather the information. The tribal court is required to rule on whether the attorney-client privilege extends beyond the death of the client. The Tribe has not adopted professional conduct rules for attorneys within its jurisdiction. The Tribe's evidence code is silent on this issue.

- What is the outcome?
- Would Idaho's professional rules and evidence code apply?
- Would the answer change after considering the unique aspects of the Tribe's culture?

Hypothetical No. 3

Tribal attorney represents the tribal government. As part of that representation, the tribal attorney also represents tribe's enterprise agency. The tribe's enterprise agency has statutory authority from the tribe to hire its own independent legal counsel; however, the agency cannot buy or encumber land and cannot waive sovereign immunity with Tribal Council's permission. The tribal attorney, in discussions with enterprise agency officials, learns that the enterprise agency missed an important deadline for repayment of loan which may trigger default provisions allowing creditors to take over a tribal business project. The tribal attorney reveals this information to Tribal Council without disclosure to or consent from the enterprise agency.

- Did the tribal attorney violate an ethical rule? If so, which one?

Based on the information from the tribal attorney, the Tribal Council takes formal action to fire the officers of the tribe's enterprise agency. The tribe's enterprise agency wants to sue the Tribal Council for taking this action and asks the tribal attorney to represent them.

- What does the tribal attorney do?

Hypothetical No. 4

An attorney represents individual members of an Indian tribe. The attorney communicates with the Tribal Council and with tribal officers in their official capacity concerning federal legislation that the lawyer has proposed on behalf of his tribal member clients. The communication is made without consent of the lawyer who represents the tribe. The tribal attorney has proposed competing federal legislation on the same matter.

- Did the attorney representing the individual tribal members violate an ethical rule? If so, what one?

Hypothetical No. 5

An attorney represents the Tribal Council. The Tribal Council has nine members. One of the Tribal Council members approaches the tribal attorney and asks him to resolve a legal problem that arose outside of the scope of his employment as a member of the Tribal Council. While exercising his treaty fishing right, the Tribal Council member was cited for illegal parking. The tribal attorney knows that the Tribal Council member is going to be running for Chairman at the next election.

- Is the conversation covered by attorney-client privilege?
- Should the tribal attorney provide legal advice or undertake representation of the Tribal Council member?

The same nine member Tribal Council is sharply divided on a number of divisive political issues. Political factions have developed, dividing the Tribal Council 5 to 4. Because of this, the Tribal Council has been unable to obtain a quorum for a few months. One faction of the Council calls a special meeting of the tribe's membership where a vote is taken to fire certain tribal staff. The other faction of the Council wants to sue in tribal court to invalidate the meeting and all the actions taken therein. Each of the factions of the Tribal Council has asked the tribal attorney to represent them.

- What should the tribal attorney do?
- Does your answer change if the tribal attorney was fired by the faction that held the allegedly invalid meeting?

Hypothetical No. 6

You are an attorney working as in-house counsel for the tribe. Your contract is up and you want to renegotiate its terms. You present a new contract for your representation to your client, the Tribal Council. You proceed to negotiate the contract's terms with the Tribal Council. The Tribal Council approves the new contract and under the laws of the tribe, you also approve the new contract.

- Is this an inappropriate business transaction with a client?
- Should the tribal attorney have advised the Tribal Council to seek independent legal advice to review the contract?

Hypothetical No. 7

A tribal member employee discusses the details of an effort of state child protective services to terminate the parental rights of the tribal member parent of the employee's niece. The tribal member requests that the case be removed to tribal court for placement of the child with her aunt, the tribal member employee. The tribal attorney discusses matter with the tribal member and advises the aunt/employee that he will talk to tribal social services about removing case to tribal court. The tribal attorney then represents the tribe in the hearing before state court regarding removal. The case is successfully removed. Tribal social services places child with aunt/employee. Tribal social services later determines that child should be removed from aunt/employee. The same tribal attorney represents the tribe in the tribal court removal action and uses information gained about aunt/employee's behavior and household members to support removal action. The child is removed.

- Did the tribal attorney violate an ethical rule? If so, which one?
- What if the tribal attorney had warned the employee that he represents the tribe only and cannot represent her?

Hypothetical No. 8

An Indian tribe in Idaho hires a new in-house attorney to serve on the tribe's reservation. The attorney is licensed to practice law in Colorado. The attorney moves to Idaho and begins working on the Tribe's reservations providing legal advice only to the Tribal Council and practicing before the Tribal Court pursuant to the Tribe's Law and Order Code. The attorney does not sit for the Idaho State Bar.

- Is there any ethical violation?

EXCERPTS OF SELECTED TRIBAL CODES

NEZ PERCE TRIBAL CODE

ATTORNEYS; LEGAL INTERNS; PROSECUTOR

§ 1-1-36 Attorneys - Admission

- (a) Any person appearing as a party in any civil, criminal or juvenile action shall have the right to be represented by an attorney of his own choice at his own expense.
- (b) Any attorney who is licensed to practice in any state or the District of Columbia is eligible to be admitted to practice before the courts of the Nez Perce Tribe.
- (c) To practice before the courts of the Nez Perce Tribe, an attorney must pay a \$50.00 fee and certify:
- (1) that he is eligible to be admitted to the Court;
 - (2) that he will abide by the rules of the courts of the Nez Perce Tribe and any orders issued by such courts; and
 - (3) that he has never in the past been convicted of any crime.
- (d) Upon receipt of an application for admission to practice before the courts of the Nez Perce Tribe, the chief judge shall review the application and may investigate into the truth of the matters contained therein. If satisfied that the applicant meets the qualifications set forth herein, the chief judge shall notify the attorney that he has been admitted to practice.
- (e) The chief judge shall require any attorney admitted to practice before the courts of the Nez Perce Tribe to take the following oath either orally or in writing:
- "I do solemnly swear (or affirm) that I will support the Constitution and laws of the United States and support and defend the Nez Perce treaties, constitution and laws of the Nez Perce Tribe, and that I will maintain proper respect for the courts and judicial officers of the Nez Perce Tribe."
- (f) An attorney may appear in person to take the oath prescribed herein or may subscribe his signature to the oath and forward it to the chief judge. Upon administering the oath, the Court shall issue a certificate of admission to practice before the courts of the Nez Perce Tribe.

§ 1-1-37 Attorneys - Suspension

(a) The chief judge may suspend or disbar any attorney from practice before the courts of the Nez Perce Tribe after due notice and a hearing if such attorney shall be found guilty of the following:

- (1) a violation of his oath to the Court;
- (2) suspension or disbarment from practice before any state, federal or tribal court;
- (3) a violation of the rules of professional conduct of any state bar to which he is a member;
and
- (4) the conviction of a felonious act.

(b) All suspensions and disbarments from practicing before the Nez Perce Tribal Court shall be for a period as determined by the judge.

(c) The court clerk shall report all suspensions and disbarments from the Tribal Court to the licensing authority of each jurisdiction in which the affected attorney is licensed.

(d) Any attorney who has been suspended from the Nez Perce Tribal Court may appeal to the Nez Perce Tribal Court of Appeals.

SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS TRIBAL CODE

CHAPTER 87: ADMISSIONS TO PRACTICE

87.101 Purpose.

The purpose of this Chapter is to provide standards relating to the admission to practice before the Sault Ste. Marie Chippewa Tribal Court. The Tribe has a legitimate interest in protecting prospective parties and in the quality of justice within the tribal judicial system. Consequently, this Chapter imposes requirements relative to these interests on anyone seeking to represent clients/parties in the Sault Ste. Marie Chippewa Tribal Court.

* * *

87.106 Standards of Conduct and Obligations for Attorneys and Lay Advocates.

Every attorney and lay advocate admitted to practice before this Court, and every attorney or lay advocate employed or appointed to represent another by this Court, shall conform her conduct in every respect to the requirements of the Code of Ethics or Code of Professional Responsibility for the State in which said lawyer is currently licensed or authorized to practice law. Further, every attorney and lay advocate, who has been admitted to practice before this

Court, shall be deemed officers of the Court for purposes of their representation of a party and shall be subjected to the disciplinary and enforcement provisions of the Court.

87.107 Practice Before the Court.

A lawyer may represent any person in an action before this Court upon being duly admitted in accordance with § 87.108.

87.108 Admission Procedure.

A lawyer as defined in '87.102(3), who desires to practice before this Court shall submit to the Court:

- (1) An Application for Admission to Practice (as provided by the Court) accompanied by a Certificate of Good Standing or other appropriate documentation from the State Bar or Supreme Court of the State in which such lawyer is duly licensed to practice law; and further, such application must be signed and dated by the lawyer applicant in the presence of a Notary Public;
- (2) A Certification that she shall conform to the Code of Ethics or Code of Professional Responsibility for the State in which said lawyer is currently licensed as she performs her duties as a lawyer before this Court;
- (3) A sworn Oath of Admission (as provided by the Court), which must be signed and dated by the lawyer applicant in the presence of a Notary Public; and
- (4) An application fee for admission as set by the Chief Judge of the Court.

UTE INDIAN TRIBE LAW AND ORDER CODE

CHAPTER 5. COUNSELORS AND PROFESSIONAL ATTORNEYS

§1-5-2. Right to be Represented by a Professional Attorney.

Any person appearing as a party in any civil or criminal action shall have the right to be represented by a professional attorney of his own choice and at his own expense; provided, however, that the Ute Indian Tribe has no obligation to provide or pay for such an attorney; provided further, that any such attorney appearing before the Courts of the Ute Indian Tribe shall have first obtained admission to practice before such Courts in accordance with the procedures set forth herein.

§1-5-3. Eligibility for Admission.

Any attorney who is an active member in good standing of the Utah State Bar, or any attorney certified and eligible to practice before the highest court of any other state or of the Supreme

Court of the United States is eligible to be admitted to practice before the Courts of the Ute Indian Tribe.

§1-5-4. Procedure for Admission.

(1) Any professional attorney desiring to be admitted to practice before the courts of the Ute Indian Tribe shall apply for admission by certifying under oath, either verbally or in writing to the following:

(a) That he is an active member in good standing of the Utah State Bar or is certified and eligible to practice before the highest court of any other state or of the Supreme Court of the United States.

(b) That if admitted to practice before the Courts of the Ute Indian Tribe he will take the required oath as prescribed in the Law and Order Code for Attorneys and be bound thereby.

(c) That if admitted to practice he will accept and represent indigent clients without compensation or without full compensation when asked by a Judge of the Court to do so.

(2) The Admission Fee of \$50.00 shall be tendered with the application, subject to return if the application is denied.

(3) Upon receipt of an application for admission to practice before the Courts of the Ute Indian Tribe, the Chief Judge shall review the application and may, but need not, investigate into the truth of the matters contained therein. If satisfied that the applicant meets the qualifications set forth herein, the Chief Judge shall notify such person who may appear in person to take the oath prescribed herein or may subscribe his signature to such oath and forward it to the Chief Judge.

(4) Upon the taking of the oath, either orally or in writing, the Chief Judge shall cause a certificate to be issued evidencing the admission of the attorney to practice before the Courts of the Ute Indian Tribe.

§1-5-5. Disbarrment¹ and Discipline.

(1) Whenever it is made to appear to the Chief Judge that any attorney admitted to practice before the Courts of the Ute Indian Tribe has been disbarred or suspended from the practice of law in the State of Utah or other state to which reference for admission to practice was made as a condition to obtaining admission to practice before the Tribal Courts, he shall immediately be given notice at his last known address that he shall be suspended from practice before the Courts of the Ute Indian Tribe for an indefinite period unless he appears within five (5) days and shows good cause why such order should not be made.

(2) Any judge who finds an attorney admitted to practice before the Courts of the Ute Indian Tribe to be in contempt of Court may, in addition to any other sanction imposed, order the attorney to appear within ten (10) days and show cause why he should not be suspended from practicing before the Courts of the Ute Indian Tribe.

(3) The Chief Judge may, upon receiving a written, verified complaint which indicates that an attorney admitted to practice before the Courts of the Ute Indian Tribe has acted in an unethical or otherwise improper manner while functioning as an attorney, order such attorney to appear

¹ Misspelling in original. The word should be spelled "Disbarment."

and defend himself at a hearing to hear all evidence relevant to the matter, and may order the suspension of such an attorney if such appears reasonably necessary or appropriate.

(4) All suspensions from practicing before the Courts of the Ute Indian Tribe shall be for an indefinite period unless the Judge specifically orders otherwise. An attorney suspended for an indefinite period, or one suspended for a specific period, may petition the Tribal Court for permission to re-apply for permission to practice at the end of one year or the specific period of suspension, and such permission shall be granted if it is made to appear, at a hearing or otherwise as the Court shall direct that he has been adequately reprovved and now appears willing to conduct himself in a proper manner, and that the petitioner has been reinstated to practice if previously disbarred or suspended in another jurisdiction.

(5) Any person appearing as lay counsel for another may be suspended from further appearance as such for misconduct or improper behavior by any Judge upon the same conditions of notice and hearing provided professional attorneys.

§1-5-6. Standards of Conduct and Obligations for Attorneys and Lay Counsel.

(1) Every attorney admitted to practice before the Courts of the Ute Indian Tribe, and every lay counsel employed or appointed to represent another before such courts when acting in such capacity or in matters in any way related thereto, shall conform his conduct in every respect to the requirements and suggested behavior of the Code of Professional Responsibility as adopted by the American Bar Association.

(2) Both professional attorneys and lay counselors who hold themselves out as being available to act as such have a responsibility to accept as clients and represent without compensation or without full compensation, such persons as a Judge of a Tribal Court may feel have a particularly urgent need for such representation but are personally unable to afford or pay for such legal help.

OPINION NO. 90-19
December 28, 1990

FACTS:

The inquiring lawyer is a member of both the State Bar of Arizona and the Navajo Nation Bar Association. The Navajo Nation courts regularly appoint members of the Navajo Nation Bar Association to represent indigent criminal defendants. A significant number of Navajo lawyers have a connection with the Navajo Nation, either as employees of the Navajo Nation Department of Justice or as lawyers on contract with the Nation or its tribal enterprises. The Navajo Nation Department of Justice is comprised of (i) the Office of the Prosecutor, which prosecutes almost all criminal cases, (ii) the Navajo Legal Aid and Defender Service, which we are told provides some representation for criminal defendants, but is not a Public Defender's office in the broader sense, and (iii) various other offices which provide legal advice to the Navajo Nation on such matters as natural resources, human services and economic development.

The Navajo Nation Supreme Court has adopted the A.B.A. Model Code of Professional Responsibility ("the Model Code") to govern the conduct of lawyers admitted to practice before its courts. An order recently issued by the Navajo Nation Supreme Court provides that "[a]s a condition of membership in the Navajo Nation Bar Association all members not in positions exempted by Rule of the Supreme Court shall accept pro bono assignments to represent indigent criminal defendants, indigent parents who are subject to termination of parental rights proceedings under the Children's Code, and to serve as guardian ad litem or as legal representative for children, mentally handicapped or impaired and incompetents."

In its order, the Navajo Nation Supreme Court recognized that the majority of active members of the Navajo Nation Bar Association are employed in some manner by the Navajo Nation. Nevertheless, because of the large number of indigent persons under the jurisdiction of the Navajo courts, the Court imposed a

1. For example, at the time he submitted his inquiry, the inquiring lawyer was counsel for the Navajo's arts and crafts enterprise. Additionally, at other times, he has worked for the Navajo Nation on a contract basis.

2. In July, 1990, the Navajo Nation Bar Association recommended the adoption of the Model Rules of Professional Conduct ("the Model Rules"). As of the date of this opinion, however, the Navajo Nation Supreme Court has not yet adopted the Model Rules.

duty on bar members to represent indigents charged with crimes irrespective of such members' association with the Navajo Nation. The Rule exempts only the following persons from these pro bono appointments: (a) Judges and Justices; (b) Navajo Nation Council delegates; (c) the Attorney General and Deputy Attorney General of the Navajo Nation; (d) all prosecutors of the Navajo Nation; (e) certain officers of the Navajo Nation; (f) the Solicitor to the courts of the Navajo Nation and all attorneys in the office of the Solicitor; (g) court law clerks; (h) court paralegals and other court staff; and (i) Navajo Nation Bar Association members on other than active status.

QUESTION:

If an attorney who is a member of both the State Bar of Arizona and the Navajo Nation Bar Association accepts an appointment by the Navajo Nation courts to represent an indigent Navajo criminal defendant, is the attorney subject to disciplinary action by the State Bar of Arizona if Arizona's ethical rules would prohibit the representation?

ETHICAL RULES INVOLVED:

- ER 1.7(a). Conflict of Interest: General Rule
- ER 1.13(a). Organization As Client
- ER 6.2. Accepting Appointments
- ER 8.5. Jurisdiction

OPINION:

The inquiring lawyer poses a question that is of increasing importance for lawyers licensed to practice in two or more jurisdictions. Which jurisdiction's ethical rules should be followed when the rules impose conflicting obligations on the lawyer?

If the situation presented by the inquiring lawyer occurred in Arizona, but outside the Navajo Reservation, the attorney would most likely be excused from the appointment based on ER 1.13(a), ER 1.7(a) and ER 6.2 of the Arizona Rules of Professional Conduct. ER 1.13(a) provides that, when an attorney is retained or employed by a governmental organization, the attor-

3. For a discussion of some of the issues arising out of a multistate practice, see O'Brien, Multistate Practice and Conflicting Ethical Obligations, 16 Seton Hall Law Review 678-721 (1986); see also Risks of Violation of Rules of Professional Responsibility by Reason of the Increased Disparity Among the States, Vol. 45, No. 3, The Business Lawyer, pp. 1229-1237 (May 1990).

