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

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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 responsibly 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
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> (a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.
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> (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 Stat 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. Disbarrment[1] 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 reproved 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.

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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.[1] 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.[2] 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 appointments 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

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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?[3]

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-

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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).

attorney's client is that organization, in this instance, the Navajo Nation. If the lawyer then simultaneously undertook to represent a Navajo citizen being prosecuted by the Navajo Nation, that representation would be in direct conflict with the lawyer's representation of the Navajo Nation and would be prohibited under ER 1.7(a). ER 6.2 provides that "[a] lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as: (a) representing the client is likely to result in violation of the Rules of Professional Conduct or other law; . . ."

Under the Model Code, the Navajo courts' pro bono appointment of attorneys who are representing the Navajo Nation to simultaneously represent indigent criminal defendants facing prosecution by the Navajo Nation would also create a conflict of interest. See DR 5-105(A) and (B). It appears, however, that the Navajo Nation Supreme Court's order has, in effect, created an exception to the normal application of the Model Code in that jurisdiction. The Court has apparently determined that, in the unique circumstances existing in the Navajo Nation, policy concerns relating to the provision of adequate legal representation for indigents outweigh the policy concerns which underlie the conflict rules of the Model Code. Thus, it is assumed for purposes of this opinion that the Navajo Nation Supreme Court has expressly modified the ethical rules concerning conflicts of interest to require attorneys not exempted from the rule to undertake pro bono appointments under circumstances in which such appointments would otherwise be prohibited. The issue is whether a Navajo Nation lawyer (who is also a member of the State Bar of Arizona) who accepts such an appointment can be sanctioned for violating Arizona's ethical rules.

The jurisdictional scope of the Arizona Rules of Professional Conduct is relevant to our inquiry. ER 8.5 provides that: "[a] lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction although engaged in practice elsewhere." The Comment to that Rule, however, provides in pertinent part:

> "Where the lawyer is licensed to practice law in two jurisdictions which impose conflicting obligations, applicable rules of choice of law may govern the situation. . . ."

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4. Because the Navajo Nation Supreme Court's order requires Navajo Nation lawyers to accept the appointments, it could be argued that there is no conflict between the ethical obligations imposed by the Navajo and Arizona rules. Arizona Ethical Rule 1.16(c) provides that "[w]hen ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation."

Thus, although Arizona's Rules of Professional Conduct govern Arizona attorneys practicing outside this state, the Comment recognizes that there may be limitations on the binding force of the Arizona Rules on such a lawyer when the lawyer is licensed to practice in another jurisdiction whose ethical rules impose obligations which conflict with Arizona's Rules. In such situations, the Comment provides that "applicable" choice-of-law rules will determine which jurisdiction's ethical rules apply.

There are no sections of the Restatement (Second) of Conflicts of Law which specifically address this issue, and it appears that the applicable choice-of-law rule is § 6 of the Restatement (Second), "Choice-of-Law Principles."[5] Section 6(2) identifies the following factors which are to be considered when choosing the jurisdiction whose laws should apply:

> (2) "... the factors relevant to the choice of the applicable rule of law include
>
> (a) the needs of the interstate and international systems,
>
> (b) the relevant policies of the forum,
>
> (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
>
> (d) the protection of justified expectations,
>
> (e) the basic policies underlying the particular field of law,
>
> (f) certainty, predictability and uniformity of result, and

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5. Arizona courts follow the Restatement when analyzing conflict-of-laws problems. Wendelken v. Superior Court in and for the County of Pima, 137 Ariz. 455, 457, 671 P.2d 896, 898 (1983); Schwartz v. Schwartz, 103 Ariz. 562, 565, 447 P.2d 254, 257 (1968). This committee's determination that Restatement (Second) § 6 constitutes the "applicable" choice of law rule is based on the particular facts of this case. There may be instances where other choice-of-law rules would be applicable. Cf. Bernick v. Frost, 210 N.J. Super. 397, 510 A.2d 56 (N.J. Super. App. Div. 1986) (in an action brought by a former client against his attorney based on two states' conflicting rules concerning contingent fee contracts, the court applied Restatement (Second) § 188, "Law Governing in Absence of Effective Choice by the Parties" (contracts), and § 6).

(g) ease in the determination and application of the law to be applied."[6]

We believe that application of these factors to the facts presented here compels the conclusion that the Navajo Nation's ethical rules govern this situation rather than those of Arizona.

Cases which have considered the first factor -- the needs of the interstate and international systems -- have focused on the maintenance of a "harmonious relationship" between the competing jurisdictions. See, e.g., Bryant v. Silverman, 146 Ariz. 41, 46-47, 703 P.2d 1190, 1195-1196 (1985). In this instance, maintenance of the harmonious relationship between the State of Arizona and the Navajo Nation would be promoted by the application of the Navajo Nation's rules rather than those of Arizona. If Arizona were to discipline Navajo Nation lawyers (who were also members of the State Bar of Arizona) for following express orders of the Navajo Nation Supreme Court, this would constitute an affront to the Navajo Nation's exercise of its own inherent powers to regulate lawyer conduct, and would result in a disharmonious relationship between Arizona and the Navajo Nation.

The second and third factors, the relevant policies of the forum state and those of other interested states, also favor application of the Navajo Nation's ethical rules. The Navajo Nation is a separate sovereign, empowered to operate its own court system.[7] As a separate sovereign, the Navajo Nation has the power, as does the State of Arizona, to promulgate rules governing the practice of law in its court system.[8] See generally Handbook of Federal Indian Law, supra, at 250-251.

The State of Arizona has no direct interest in the representation of indigent Navajo citizens in Navajo Nation courts

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6. Section 6(1) of the Restatement (Second) states: "A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law." However, in this case, there is no applicable statutory directive relating to the resolution of conflicts between ethical rules.

7. This power is exclusive except where restricted by explicit United States legislation or where it is relinquished by the tribe. United States v. Wheeler, 435 U.S. 313, 98 S. Ct. 1079, 55 L. Ed. 2d 303 (1978). See also discussion in F. Cohen, Handbook of Federal Indian Law, 127-153, 250-252 and 666-670 (1982 ed.).

8. The only restraint on the Navajo Nation's plenary power to administer its court system is the Indian Civil Rights Act (1968, as amd. 1986), Title 25, United States Code, Sections 1301 et seq., which imposes various constitutional restrictions in the nature of due process limitations on the tribe's exercise of its right of self-government.

by lawyers authorized to practice law in those courts. To the extent that Arizona has an interest in the issue, it would seem that its interest is that of promoting and fostering such representation. By contrast, the Navajo Nation has a direct and significant interest in assuring that its citizens receive adequate legal representation. Indeed, it appears from the facts submitted by the inquiring lawyer that: (1) there are not enough Navajo lawyers available to represent the large number of indigent Navajo citizens in need of representation, and (2) the Navajo Nation has been unable or unwilling as yet to fund the creation of a separate public defender's office which would provide broad-based representation to those in need. It appears that the Navajo courts, which are closest to the problem, have adopted policies designed to alleviate an unfortunate situation. Moreover, the courts of the Navajo Nation are capable of policing any serious conflicts of interest that might arise as a result of these appointments. As far as we can determine, Arizona has no predominant interest in applying its own ethical rules to protect Navajo citizens from conflicts of interest in Navajo courts.

The fifth factor, the basic policies underlying the particular field of law (in this case, legal ethics), also suggests that the Navajo Nation's rules should govern. The rules governing lawyer conduct in general, and conflicts of interest in particular, are designed to maintain the integrity of the court system and protect clients from inadequate or improperly influenced representation. See, generally, Sellers v. Superior Court, 154 Ariz. 281, 742 P.2d 292 (App. 1987); Alexander v. Superior Court, 141 Ariz. 157, 685 P.2d 1309 (1984). In this case, if Arizona were to attempt to override the Navajo Nation's policies governing pro bono representation, not only would the Navajo Nation's citizens not be better protected but, as suggested in the Navajo Nation Supreme Court's order, they may in fact be substantially harmed by being deprived of any legal representation whatsoever.

The sixth and seventh factors, certainty, predictability and uniformity of result, and ease of determination, also suggest that the Navajo Nation's ethical rules should control. As the Arizona Supreme Court has noted, these factors "are of greatest importance when parties are likely to give advance thought to the legal consequences of their transactions, . . ." Bryant v. Silverman, 146 Ariz. 41, at 46, 703 P.2d 1190, at 1195 (1985). The fact that the inquiring lawyer has come to this committee is certainly evidence of the thought which he, and undoubtedly others in the same predicament, have given to this issue. Applying the rules of the Navajo Nation Supreme Court to the practice of law in that jurisdiction will promote all of the objectives stated.[9]

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9. Although an attempt is made in this opinion to give general guidance to those faced with conflicting ethical obligations, the committee cautions that, often, choice-of-law issues can only be resolved on a case-by-case basis.

Finally, protection of justified expectations also favors the application of the Navajo Nation's rules. As noted in Comment g to Restatement (Second) § 6, "it would be unfair and improper to hold a person liable under the local law of one state when he had justifiably molded his conduct to conform to the requirements of another state." This would appear to be particularly true in this case, where the lawyer is confronted with an express order requiring that Navajo Nation attorneys accept pro bono appointments made by Navajo Nation courts. Under the circumstances presented, this committee believes that an attorney would be fully justified in acting pursuant to a specific court order, especially when the court's order will have no impact on the practice of law in Arizona courts.

Our conclusion that the Navajo Nation's rules should be applied in this instance is consistent with opinions from ethics committees of other jurisdictions which have dealt with conflicting ethical rules. See Committee on Ethics of the Maryland State Bar Association, Opinion 86-28 (Oct. 7, 1985) (ABA/BNA Lawyers' Manual on Professional Conduct, p. 801:4365); and Committee on Professional and Judicial Ethics of the State Bar of Michigan, Informal Opinion CI-709 (Dec. 29, 1981) (ABA Lawyers' Manual, supra, p. 801:4834). Those committees concluded that, when an attorney licensed to practice in two jurisdictions acts in a manner that is consistent with the rules of professional conduct prescribed by the jurisdiction in which he or she is practicing law at the time, his or her conduct will not be found to be unethical under the ethical rules of the other state.

For example, the Michigan Bar Committee considered the case of a lawyer licensed in Michigan and California, who was practicing in California. The lawyer's inquiry arose out of the fact that "the California Rules of Professional Conduct differ[ed] from the Michigan Code of Professional Responsibility in various respects, including matters concerning contingent fees, legal advertising, and conflicts of interest." Although the lawyer's conduct technically violated the Michigan Code, the committee concluded that the attorney would not be subject to disciplinary action in Michigan if he conformed his conduct to the California standards:

> "We must assume that our Code of Professional Responsibility is intended to protect a legitimate interest of the State of Michigan and its judiciary. We, therefore, believe the Code assumes some relationship or contact between the lawyer's activities and the State of Michigan beyond the single fact of the lawyer's membership in the State Bar of Michigan. Exactly what that relationship or contact must be to render our Code applicable we are not now prepared to say, and for purposes of your inquiry we do not believe that issue needs to be resolved.
>
> "We understand your professional activities in California are carried on as a member of the California

Bar. We assume your clients are not Michigan residents, that you do not practice in Michigan, and that you do not hold yourself out or function as a Michigan lawyer, as for instance advising as to the law in Michigan. We assume you are engaging in no activities under or by virtue of your Michigan license. Under such facts, and where the California standards of ethics on a certain subject differ from the applicable Michigan standards, we believe your conduct, if it conformed to the applicable California standards, would not subject you to discipline under the conflicting Michigan provisions...."

Committee on Professional and Judicial Ethics of the State Bar of Michigan, Informal Opinion CI-709 (Dec. 29, 1981), at 2.

Similarly, the Committee on Ethics of the Maryland State Bar Association considered the case of an attorney licensed to practice in both Maryland and the District of Columbia. The attorney was representing a client in a case in the District of Columbia, when he discovered that his client had committed a fraud on the court. The District of Columbia Code provided that the lawyer should do no more than call on his client to rectify the fraud, while the stricter Maryland Code required the lawyer to reveal the fraud to the court if the client did not rectify it. Relying on the Comment to ER 8.5 and the Informal Opinion from Michigan discussed above, the Maryland committee concluded that the attorney would be deemed to have acted ethically if he conformed his behavior to the ethical rules of the District of Columbia, since that was the jurisdiction in which he was practicing law at the time:

"[t]he practice of law frequently requires lawyers to act in more than one jurisdiction. Obviously, each jurisdiction has the authority to determine what ethical conduct is required of its attorneys and what conduct is proscribed. Where a Maryland attorney is acting in a foreign jurisdiction in accordance with that jurisdiction's Code of Professional Responsibility, it is the opinion of this Committee that his conduct is ethical per se. While the Maryland Code of Professional Responsibility may impose different or more stringent requirements on its attorneys, it does not require its attorneys to behave in a manner that is inconsistent or at variance with the code of conduct prescribed by another jurisdiction when practicing law there."

Committee on Ethics of the Maryland State Bar Ass'n., Opinion 86-28 (Oct. 7, 1985), at 3-4.

This committee concludes that the conduct of an Arizona attorney who is also licensed to practice in the Navajo Nation courts, while representing an indigent criminal defendant in those courts, is governed by the conflict of interest rules of

the Navajo Nation if and to the extent that those rules conflict with the Arizona Rules of Professional Conduct.[10]

It is, accordingly, our conclusion that an attorney who is a member of both the Arizona and Navajo Nation Bars, and who is 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's ethical rules and court directives.

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10. It should be noted that a serious conflict of interest might give rise to a constitutional violation. See, e.g., Fitzpatrick v. McCormick, 869 F.2d 1247, 1251 (9th Cir. 1989), in which the Ninth Circuit held that counsel's representation of the defendant at trial, after having represented a co-defendant in a previous trial, denied the defendant the effective assistance of counsel. See also Wheat v. United States, 486 U.S. 153, ____, 108 S. Ct. 1692, 1698, 100 L. Ed. 2d 140, ____ (1988). Whether such a constitutional claim might arise in a particular case is beyond the jurisdictional limitations of this committee.

STATE BAR of ARIZONA

OPINION NO. 99-13
(December, 1999)

SUMMARY

An Arizona attorney may permit his non-lawyer paralegal, who is a licensed tribal advocate, to represent clients in tribal court if that court's rules so permit, because that court's rules govern the conduct. Such representations will not run afoul of the Arizona lawyer's duty to not assist unauthorized practice of law as long as the paralegal representation is limited to tribal court. [ER 5.3, 5.4, 5.5, 8.5]

FACTS[1]

Attorney is licensed to practice law in Arizona and in the Salt River Pima-Maricopa Tribal Court ("SRPM Court"). In SRPM Court, attorneys and non-attorneys may be licensed as "tribal advocates." Attorneys may represent tribal members in the criminal division of SRPM Court, but are not permitted to represent plaintiffs in the civil division. Attorney's paralegal ("Paralegal") is a licensed tribal advocate, and because she is not an attorney, under the rules of SRPM Court she may represent plaintiffs in the civil division of SRPM Court.

Attorney's practice includes representation of lenders in collection matters in SRPM Court. Attorney's client is aware of the restriction on representation in the civil division of SRPM Court, and consents to representation by Paralegal, under Attorney's supervision.

Question Presented

Given the fact that non-attorneys may represent clients as licensed tribal advocates in the civil division of SRPM Court, may an Arizona attorney's paralegal, under the attorney's supervision, so represent clients in the civil division of SRPM, with informed consent of the arrangement by clients?

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[1] **Formal Opinions of the Committee on the Rules of Professional Conduct are advisory in nature only and are not binding in any disciplinary or other legal proceedings.**

Applicable Ethical Rules

ER 5.3 Responsibilities Regarding Non-lawyer Assistants

With respect to a non-lawyer employed or retained by or associated with a lawyer:

(a) a partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the non-lawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the rules of professional conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

ER 5.4 Professional Independence of a Lawyer

(a) A lawyer or law firm shall not share legal fees with a non-lawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) a lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer; and

(3) a lawyer or law firm may include non-lawyer employees in a compensation or retirement plan, even though the plan in based in whole or in part on a profit-sharing arrangement.

(b) A lawyer shall not form a partnership with a non-lawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

(1) a non-lawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) a non-lawyer is a corporate director or officer thereof; or

(3) a non-lawyer has the right to direct or control the professional judgment of a lawyer.

ER 5.5 Unauthorized Practice of Law

A lawyer shall not:

(a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or

(b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

ER 8.5 Jurisdiction

A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction although engaged in practice elsewhere.

Opinion

These facts raise two questions.[2] First, which ethical rules govern the situation? Second, if the representation is governed by the SRPM Court rules, may the Attorney ethically supervise the Paralegal without "assisting the unauthorized practice of law"?

The Committee previously has issued a formal opinion regarding the jurisdictional question in the context of tribal court. In Opinion 90-19, the inquiring attorney was a member of both the

[2] This Opinion assumes that the inquiring attorney has accurately portrayed the practice and rules in SRPM Court, and no independent analysis of the SRPM Court or its rules has been done. This Opinion assumes that under the ethical rules of SRPM Court, the supervision of the Paralegal by the Attorney is ethically permissible.

Arizona bar and the Navajo 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. Under the Navajo rules, however, the attorney was obligated to accept the appointment.

In answering the inquiring attorney's seeming dilemma, the Committee concluded:

> [A]n attorney who is a member of both the Arizona and Navajo Nation Bars, and who is 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's ethical rules and court directives.

In reaching that conclusion, the Committee considered the comment to ER 8.5, which provides that "[w]here the lawyer is licensed to practice law in two jurisdictions which impose conflicting obligations, applicable rules of choice of law may govern the situation." This, the Committee reasoned, means that "there may be limitations on the binding force of the Arizona Rules on such a lawyer when the lawyer is licensed to practice in another jurisdiction whose ethical rules impose obligations which conflict with Arizona's rules." The Committee then analyzed the choice of law rules from the Restatement (Second) of Conflicts of Law, and concluded that the Navajo rules applied to the situation.

For the same reasons discussed in Opinion 90-19, in the instant case the SRPM Court rules should apply to this situation. This situation differs somewhat from that analyzed in 90-19. however, because the proposed behavior here (supervision of a paralegal who is representing clients) is an optional behavior, not one that is required by the court (as the appointment was required by the Navajo courts in Opinion 90-19). Non-lawyers are specifically authorized to represent clients in SRPM Court and non-lawyers clearly cannot represent clients in Arizona courts. This has the potential to create a conflict for an Arizona attorney who assists a non-lawyer in representing clients (in and outside of Court) on matters pending in SRPM Court. The conclusion that the tribal laws govern the representation in tribal court, however, remains the same.

Having concluded that the SRPM Court rules apply to the representation of clients in SRPM Court, even if they create a conflict with Arizona's Ethical Rules, the question remains whether the Attorney's supervision, which does not necessarily occur only in SRPM Court, is assisting the unauthorized practice of law in violation of ER 5.5. That rule provides that a lawyer shall not "assist a person who is not a member of the bar in performance of activity that constitutes the unauthorized practice of law." This Committee recently considered the meaning of that phrase in Opinion 99-07. That Opinion concerned activity by public adjusters that was specifically allowed by state statute. Nonetheless, the Committee found that the activity by the public adjusters constituted the unauthorized practice of law and that lawyers who negotiated with such public adjusters thereby were impermissibly assisting the unauthorized practice of law.

Under the reasoning of Opinion 99-07, it is clear that the activity in which the Paralegal is engaging (representing clients in court) constitutes the practice of law. *See also* Opinion 98-08 (paralegal may conduct interviews and meetings with clients under limited circumstances under attorney's supervision.) Under the same reasoning, it is equally clear that the Attorney's supervision of such activity is assisting the practice of law. The question is whether the practice is "unauthorized." This situation differs significantly from that in Opinion 99-07, because here we are dealing with the ethical rules of another jurisdiction (SRPM Court) that is outside the jurisdiction of the Arizona Supreme Court; we are not dealing with statutes that apply in our jurisdiction (as was the case in Opinion 99-07). For this reason, the Committee finds that Opinion 99-07 is not controlling of the instant situation. Rather, for the reasons discussed above, the Committee finds that because the SRPM Court rules allow the representation by the Paralegal and the supervision by the Attorney, the Attorney will not be assisting the unauthorized practice of law in violation of ER 5.5[3].

Conclusion

For all the reasons set forth above, the Committee concludes that when an Attorney and his non-attorney assistant represent clients in conformance with applicable rules of a Native American tribal court, the ethical rules of such court govern the conduct. If such rules conflict with Arizona rules, the Attorney will not be in violation of the Arizona rules if she follows the tribal court rules.

[3] The Committee cautions the Attorney and the Paralegal to limit the proposed arrangement to representation and supervision in the SRPM Court where it is permitted under the rules applicable thereto. In areas of Attorney's practice outside of SRPM Court, the arrangement would violate ER 5.5. *See* Opinion 98-08.