

# Ethics and Indian Country

by Hon. Elizabeth Ann Kronk Warner



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Practicing Indian law can be an immensely rewarding experience. Many lawyers who practice in the field gravitate toward Indian Country because of a strong desire to promote tribal sovereignty and to protect tribal customs and traditions. Furthermore, increasingly, lawyers who may have never otherwise dreamed that their practices would lead them to Indian Country are finding themselves working with tribes, as “Indian tribes and nations control 56 million acres of land in the continental United States plus another 44 million acres in Alaska, adding billions of dollars annually to the U.S. Gross National Product—everything from energy, water and natural resources to banking and financial services, real estate development, and entertainment, hospitality and tourism.”<sup>1</sup> Yet, such attorneys should keep a close eye on their ethical responsibilities. Because of the complexity of Indian law and the existence of 567 federally recognized tribes, in addition to numerous unrecognized indigenous groups, the practice of Indian law can present ethical quandaries for even the most sophisticated lawyer. To demonstrate this, this article focuses on some bedrock ethical responsibilities included in most, if not all, state rules of professional conduct: the duties of competence, confidentiality, and avoidance of conflicts of interest. This article, therefore, briefly introduces some ethical concerns that a lawyer may encounter and also offers some initial thoughts on how one could overcome such obstacles. This article does not purport to represent an exhaustive discussion of ethical issues that may arise for the attorney practicing in Indian Country; rather, it highlights where some issues may exist.

## Competence

The duty of competence is arguably the foundational ethical duty of any lawyer, as evidenced by the fact that it is often the first rule of professional duty listed by state bar associations. Rule 1.1 of the American Bar Association’s Model Rules of Professional Conduct states: “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”<sup>2</sup> As indicated by the use of the term “shall,” the duty of competence is mandatory and not aspirational.

As evidenced by the other articles in this edition of *The Federal Lawyer*, Indian law is a complicated field, and it can be particularly challenging for many lawyers, given it is not uncommon for someone to graduate from law school without taking a class on Indian law. Indian law broadly includes two types of law: tribal law and federal Indian law. Tribal law includes all of the intra- and intertribal law enacted by the 567 federally recognized tribes. This in and of itself is daunting. Federal Indian law covers the relationship between state, federal, and tribal governments. Overlay these two areas of law with the substantial historical relationship between Indians and non-Indians, and tribes and the federal government, and the legal landscape quickly becomes confusing, especially for a lawyer untrained in Indian law. In this way, lawyers who do not regularly practice Indian law may quickly find themselves running afoul of the ethical duty of competence.

Take, for example, the following hypothetical: A father, who is a citizen of a tribe that Attorney A works for as outside counsel, comes to Attorney A asking for assistance with the involuntary termination of his parental rights by the state court. The father would like to keep his parental rights and parent the child. The biological mother voluntarily terminated her rights. The father previously indicated his willingness to terminate his parental rights in a way that might meet the state’s requirements for voluntary termination, but he has subsequently rescinded his willingness to do so. The child is eligible for enrollment in the tribe and is currently placed with non-Indian parents. The non-Indian parents would now like to adopt the child. Attorney A’s expertise is in taxation, and she has only been working with the tribe to date on a potential tax compact with the state. Attorney A has no familiarity with child welfare matters.

Unless Attorney A is familiar with federal Indian law, she might not recognize that the facts of this hypothetical are similar to the facts leading to the U.S. Supreme Court’s decision in *Adoptive Couple v. Baby Girl*, 133 S.Ct. 2552 (2013). Nor would Attorney A know that following the Supreme Court’s decision contrary to the interests of the biological father (a tribal citizen) in that same case, numerous tribes have

been working on developing strategies to avoid similar developments moving forward. In other words, if Attorney A agrees to assist the biological father in the above hypothetical, she would likely be in violation of her duty of competence in the matter, unless she takes steps to meet her duty.

In addition to understanding the nuances of Indian law, some have argued that understanding tribal history and culture is also part of a lawyer's duty of competence if she intends to practice law within or affecting Indian Country. Former U.S. Attorney for Colorado Troy Eid explained, "Far from being an academic exercise, the quest for greater historical and cultural awareness by attorneys representing or dealing with tribes and tribal enterprises goes to the heart of every lawyer's basic obligation to provide competent representation to his or her client under Rule 1.1 of the Model Rules of Professional Conduct."<sup>3</sup> Given most public school curricula fail to include lessons on contemporary tribes and Indians,<sup>4</sup> such knowledge of tribal history and culture is not information many lawyers will acquire through their mainstream education.

### Confidentiality of Information

Another bedrock ethical obligation that might present unforeseen ethical obstacles for the lawyer not well versed in Indian law is the confidentiality requirement. The American Bar Association's Model Rule of Professional Conduct 1.6 specifies that: "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted."<sup>5</sup> The rule goes on to state that "[a] lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client." Like the duty of competence, the requirement of confidentiality is one that every lawyer learns in law school, but it is an obligation that may take on unique or unforeseen aspects when applied in Indian Country.

Take, for example, this second hypothetical: The federal government proposes to place a new highway through Attorney B's client's reservation. The proposed location of the highway would go through a sacred space, the location of which the tribe has specifically declined to share with anyone who is not a tribal citizen for fear that the location would be desecrated. Attorney B knows that if the location of the sacred site is disclosed, there is a very strong likelihood that the highway will be relocated. However, without this information, there is little to support the highway's relocation.

An attorney who does not regularly work in Indian Country may move forward with disclosing the location of the sacred site to the federal government in an effort to have the highway relocated. However, even if the disclosure is made directly to the relevant agency and not the public, there is still a possibility that the information could become public under the Freedom of Information Act (FOIA). If Attorney B has not specifically considered this or whether disclosure of the location is covered by one of the exceptions to FOIA, she may breach her ethical duty not to disclose confidential information.

### Conflict of Interest

Like the duty of competence and the requirement to keep information confidential, every law student learns of her duty to avoid conflicts of interest. The American Bar Association's Model Rule of Professional Conduct 1.7 states:

Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.<sup>6</sup>

Accordingly, unless certain exceptions apply, lawyers are barred from representing a client where a conflict exists.

But in Indian Country, it may be difficult to identify where conflicts exist. As one tribal attorney has noted, the Model Rules of Professional Responsibility "were drafted without much consideration of the unique circumstances typically faced by tribal attorneys and consequently provide little practical guidance to tribal attorneys in many situations."<sup>7</sup> For example, when working with one tribe, a lawyer will often be confronted with the issue of determining who the client is. A lawyer may be hired to represent the tribe itself, the tribal legislative body, the tribal executive, or all of the above. Given that not all tribal governments are structured similarly to state and federal governments, or to each other,<sup>8</sup> identifying who the client is can be difficult, and such difficulties may be exacerbated by tribal officials themselves. Also, as with any government, conflicts may arise between the different branches of the tribal government, thereby creating an ethical problem for the attorney. Further, when representing a tribe, there is also the question of whether the attorney's representation extends to individual citizens of the tribe, in addition to units of government and the tribe itself. Typically, representation is not inclusive of individual citizens, but it is something for an attorney to be aware of when negotiating her duties and scope of work with a tribe. In this regard, conflicts of interest can differ from "typical" conflicts, as conflicts facing an attorney working in Indian Country may involve conflicts with her tribal client.<sup>9</sup>

Such concerns associated with conflicts of interest are not limited to potential conflicts internal to a tribe. Conflicts may also exist between tribes. For example, Shelby Settles Harper notes that the model rules of professional conduct anticipate a "one-lawyer/one-client relationship" and do not take into consideration the potentially multifaceted relationship between a lawyer, a tribe, and Indian Country.<sup>10</sup> Further, Settles Harper explains that "[t]he rules regarding conflicts of interest also make it clear that there is no ethical duty beyond that owed to the tribal client."<sup>11</sup> She goes on to explain that, "[s]ince conflicts between tribes do arise, it would be impossible for an attorney to not disadvantage one tribe by acting in the best interest of another tribe."<sup>12</sup> For example, intertribal conflicts might arise in relation to: exclusivity provisions, off-reservation trust land acquisitions in another tribe's ancestral lands, opposing treaty fishing rights of another tribe, opposing federal recognition of another tribe, or appealing cases to the U.S. Supreme Court,<sup>13</sup> just to name a couple of examples. Accordingly, an attorney working in Indian Country will need to navigate both intra- and intertribal conflicts of interest to avoid running afoul of her ethical obligations.

### The Way Forward

While an attorney practicing Indian law should be aware of these potential ethical obstacles, such obstacles should not deter attorneys from practicing in this highly rewarding field. There are ways

forward when encountering such ethical obstacles. In terms of the duty of competence, attorneys can meet this duty in myriad ways. For example, an attorney may improve her knowledge of Indian law by attending conferences and CLEs on the topic. The FBA hosts two conferences on Indian law each year: one in the fall in Washington, D.C., and one in April at the Talking Stick Resort (the next conference will take place April 7-8). Alternatively, an attorney who is not familiar with Indian law may invite an Indian law expert to consult on a specific matter. Troy Eid recommends that attorneys spend time in the field with their tribal clients to avoid stereotyping and to learn about the tribe's history and culture.<sup>14</sup> Taking these steps will ensure that attorneys are meeting their minimum duty of competence when working with tribal clients. If all else fails, an attorney unfamiliar with this field of law may elect not to take on a client when the matter will involve questions of Indian law.

In terms of an attorney's duty of confidentiality, attorneys working with tribal clients should work diligently to communicate closely with their tribal clients. Because tribal clients may want to keep information, such as sacred sites, confidential that may not normally come out of attorney client discussions about a specific legal matter, attorneys must take the time to carefully discuss such matters with their clients. Relatedly, the disclosure of such sensitive information may require a high level of trust in the attorney, so the attorney must work diligently to cultivate confidence, trust, and respect.

Most attorneys and firms have developed mechanisms for overcoming conflicts of interest. Given that the Rules of Professional Conduct typically do not consider conflicts that an attorney may encounter when working with tribal clients, attorneys working in Indian Country may need to go a step further than their regular mechanisms require. Former tribal attorney William J. Brooks suggested three steps for dealing with some of the more unique conflict of interests challenges presented to attorneys working for tribal clients: 1) Tribes should take a larger role in establishing ethical standards by adopting tribal rules of professional conduct; 2) tribes determine the appropriate structure of their legal departments (so that it is clear who the client is in addition to establishing a chain of command); and 3) attorneys should establish a framework for communicating with tribal clients.<sup>15</sup>

This article by no means represents an exhaustive discussion of ethical issues affecting attorneys working in Indian Country. However, it does highlight the fact that ethical obligations may arise in different or more nuanced ways when working in Indian Country. With thoughtful consideration of these ethical issues and obligations, the practice of Indian law can be an immensely rewarding experience for all attorneys. ©

## Endnotes

<sup>1</sup>Troy A. Eid, *Ethics Issues in Doing Business with Native American and Alaska Native Tribes and Tribal Enterprises*, 2014 ROCKY MTN. MIN. L. INST. 16, 16-2 (2014).

<sup>2</sup>MODEL RULES OF PROF'L CONDUCT Rule 1.1, available at [www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/model\\_rules\\_of\\_professional\\_conduct\\_table\\_of\\_contents.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html) (last accessed Nov. 19, 2015).

<sup>3</sup>Eid, *supra* note 1, at 16-7.

<sup>4</sup>Connor K. Warner, *A Study of State Social Studies Standards for American Indian Education*, 17 MULTICULTURAL PERSPECTIVES 125 (2015).

<sup>5</sup>MODEL RULES OF PROF'L CONDUCT Rule 1.6. The rule goes on to provide some exceptions to this general rule, including "(1) to prevent reasonably certain death or substantial bodily harm; (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services; (3) to prevent, mitigate or rectify substantial injury to the financial interests of property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services; (4) to secure legal advice about the lawyer's compliance with these Rules; (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; (6) to comply with other law or a court order; or (7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client." *Id.*

<sup>6</sup>*Id.* at Rule 1.7. Paragraph b of the rule spells out the exceptions to this rule: "Notwithstanding the existence of a concurrent conflict of interest under paragraph (a) a lawyer may represent a client if: (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and (4) each affected client gives informed consent, confirmed in writing." *Id.*

<sup>7</sup>William J. Brooks, *Conflicted Out: Federal, Tribal, and Private Lawyers in the Real World of Indian Law: One (Former) Tribal Attorney's Perspective* in 32ND ANNUAL FEDERAL BAR ASSOCIATION INDIAN LAW CONFERENCE COURSE MATERIALS 281 (April 19-20, 2007) (on file with author).

<sup>8</sup>Unlike the states (with two exceptions) and the federal government, tribal governments are not "monopolitical." Shelby Settles Harper, *Ethical Considerations in Representing Tribal Clients: Respecting the Impact Our Representation Has on Indian Country* in FBA'S SIXTH ANNUAL WASHINGTON, D.C., INDIAN LAW CONFERENCE COURSE MATERIALS 3 (Sept. 23-24, 2004).

<sup>9</sup>Brooks, *supra* note 7, at 282 (explaining some of the conflicts of interest that may arise for an attorney representing tribal clients).

<sup>10</sup>Harper, *supra* note 8, at 2.

<sup>11</sup>*Id.*

<sup>12</sup>*Id.* at 3.

<sup>13</sup>*Id.* at 4-6.

<sup>14</sup>Eid, *supra* note 1, at 291-95..

<sup>15</sup>Brooks, *supra* note 7, at 291-295.